

IN THE HIGH COURT OF SINDH, KARACHI

Suits 90 & 443 of 2004

PRESENT:

Mr. Justice Arshad Hussain Khan.

Suit No.90/2004

Mrs. Anjum Ara Vs. Shabbir A. Halai,

&

Suit No.443/2004

Shabbir A. Halai Vs. Mrs. Anjum Ara

Mr. Badar Alam Advocate along with Mr. Kashif Badar Advocate appearing for the Plaintiff in Suit No.90/2004 and for Defendant in Suit No.443/2004.

Mr. Abdul Qadir Khan Advocate along with Syed Nauman Zahid Alvi Advocate appearing for the Plaintiff in Suit No.443/2004 and for Defendant in Suit No.90/2004.

Date of Hg:

30.10.2019, 20.11.2019, 05.12.2019, 12 .12.2019, 16.12.2019 & 23.12.2019.

JUDGMENT

ARSHAD HUSSAIN KHAN, J. These counter suits filed by the parties against each other have been consolidated, vide order dated 31.05.2004 on the ground of common facts, issues and evidence as well. Hence, they are taken up together for disposal of the same.

2. **Suit No.90/2004** was instituted by Mrs. Anjum Ara against Mr. Shabbir A. Halai on 23.12.2003 for Declaration & Cancellation of Sale Agreement Dated 02.04.2003, Possession, Damages and Permanent Injunction with the prayer to pass judgment and decree in favour of the Plaintiff against the Defendant as follows :-

- a) Declare the Sale Agreement dated 02.04.2003 as null & void in the eyes of law and same may be cancelled.
- b) Pass Judgment & Decree by directing the Defendant to hand over the physical / vacant possession of Bungalow No.54, First Street, Khy-e-Rahat, DHA, Karachi, to the Plaintiff.
- c) Restrain the Defendant, his Agents, Servants, Attorneys or whosoever claiming through or under him by granting permanent injunction, not to hand over the possession of Bungalow No.54, First Street, Khy-e-Rahat, DHA, Karachi to any other person.

- d) Direct the Defendant to pay damages to the Plaintiff @ Rs.50,000/- per month as rental of said Bungalow with effect from 17.07.2003 until final disposal of the matter.
- e) Award all cost(s) and consequences against the Defendant for the redress of Plaintiff's grievances.
- f) Grant any other relief(s) deemed fit and proper under the circumstances of the present case.

Whereas **Suit No.443/2004**, was filed by Mr. Shabbir A. Halai [defendant in suit No.90/2004], against Mrs. Anjum Ara [plaintiff in suit 90/2004], on 27.04.2004 for specific performance and injunction with the following prayers:-

- a. The Defendant and/or anyone else claiming through and/or under her, to specifically perform the sale agreement dated 2nd April 2003 and, inter alia, to do all acts deeds necessary to secure Form "B" Lease from Defence Housing Authority in respect of the Plot No.54, Ist Street, Phase-VI, Khayaban-e-Rahat, Defence Housing Authority, Karachi, admeasuring 600 Sq. Yds.' and transfer the same with construction thereon by execution and registration of a proper conveyance deed in favour of the Plaintiff against balance payment of Rs.52,50,0000/- by the Plaintiff to the Defendant in terms of the aforesaid sale agreement; and/or alternatively the Nazir of this Court or any other person be appointed to effectuate and do the afore-stated acts and deeds to specifically perform the sale agreement dated 2nd April 2003 and, inter alia, to also do all acts pursuant thereto as could and are required to be performed by the Defendant for Specific Performance of the said sale agreement in the manner afore-stated.
- b. Injunction restraining the Defendant, her agents and/or anyone else claiming through or under her from creating any encumbrance, charge or third party interest in and over the subject suit property in any manner whatsoever.
- c. Costs of the present suit proceedings throughout and
- d. any other, better or additional relief(s) to the Plaintiff as may be necessary or considered appropriate under the law and in equity by this Court in the events and circumstances of the present case.

3. Briefly, the facts of the cases, as narrated in the pleadings of Mrs. Anjum Ara, hereinafter referred to as the **Plaintiff**, are that she being the sole, exclusive & lawful owner of Bungalow No.54 admeasuring 600 Square Yards, First Street, Khayaban-e-Rahat, DHA, Karachi [**Suit Property**] entered into a sale transaction with Mr.

Shabbir A. Halai, hereinafter referred to as the **Defendant** to sell the suit property vide agreement dated 02.04.2003. It has been stated that as per terms of the subject sale agreement the transaction was to be completed by both the parties positively on or before 15.08.2003. It has been stated that under the terms of the contract the physical possession of the suit property was handed to the defendant solely to complete the remaining 20% of the construction work, however, the defendant illegally and without consent of the Plaintiff has occupied her bungalow and started living therein with his family after paying only the advance money of Rs.1.65 million and without releasing the huge balance sale consideration of Rs.52,50,000/-. It has been further stated that only after payment of the balance sale consideration the defendant is entitled to have legal possession of the suit property. It has been also stated that due to defendant's mala fide conduct and breach of contract, the plaintiff could not meet her obligations, under clause (3) of the sale agreement dated 04.04.2003, executed by her with one Muhammad Shamim for the purchase of a 600 Sq. Yds., an alternate accommodation bearing bungalow No.364, Defence Officers Housing Scheme No.1, Malir Cantonment, Karachi, by failing to pay the balance sale consideration amounting to Rs.5 million out of a total sale consideration of Rs.6.5 million and has suffered, vide clause (4) thereof, a heavy penalty @ 7.5 per month to the above vendor on the unpaid balance sale consideration. The defendant also deprived the plaintiff of substantial income / return on her huge investment blocked in the suit property and monthly rental @ Rs.50,000/- which at present stands at Rs.75,000/- per month prevailing in the subject location of DHA. It has been further stated that the defendant now has shown his willingness to pay to the plaintiff balance sale consideration of Rs.5.25 million whereas the prices of properties in DHA have tremendously appreciated and the present value of the suit property exceeds Rs.10 million, which would cause huge losses to the plaintiff in terms of equalization of money. It has been further stated that in view of the fraudulent conduct and breach of contract committed by the defendant, the sale agreement dated 02.04.2003 has lost its legal sanctity having become invalid, void and not enforceable against the plaintiff and as such the same is liable to be cancelled and the plaintiff is entitled to recover back the possession of the suit property besides damages.

4. Conversely, the stance of Shabbir A. Halai [**defendant**] in his plaint as well as written statement in the suit of Mrs. Anjum Ara [**plaintiff**] is that the agreement dated 02.04.2003 was lawfully executed between the parties in respect of the suit property. It has been stated that the defendant has fully performed his part of the sale agreement in letter and spirit, however, it is the plaintiff who instead of performing her part of obligation under the contract, preferred to indulge in endless chain of correspondence with ulterior motives and to wriggle out from her commitment under the aforesaid sale agreement and foist on the defendant consequences of her own breach and wrongs, acts of omission and/or commission. It has been further stated that the mortgage was redeemed and the loan encumbrances on the suit property was removed / discharged from the money paid by the defendant to the plaintiff in part performance of the sale agreement; thus after redemption of outstanding mortgage loan the value of the suit property appreciated for which the investment made by the defendant as its buyer under the aforesaid sale agreement and it has created legal and equitable rights, interest and entitlement in and over the suit property in favour of the defendant which cannot be denied under the law. It has been further stated that due to paucity of funds the plaintiff was not only unable to redeem her outstanding mortgage loan on the suit property but was also unable to complete construction work of the suit property so as to render it habitable. It has been stated that in part performance of the sale agreement the defendant paid substantial amount of money to the plaintiff towards part payment of sale price as advance for sale of the suit property out of which the plaintiff paid her outstanding mortgage loan on the suit property was redeemed and discharged to make it legally sale-worthy in favour of the defendant. It has been further stated that the plaintiff took possession from the defendant of her incomplete under construction suit property and subsequently under the terms of the sale agreement carried out and completed the construction with a total cost of Rs.20,00,000/- to render it in habitable and then after effectuating requisite documentation formalities and obtaining completion certificate from the Clifton Cantonment Board/DHA and to secure Form 'B' Lease from DHA to ultimately enable her to legally transfer the suit property by execution and registration of proper conveyance deed in favour of the Plaintiff as

its buyer. It has been further stated that the defendant not only specifically performed his part of the sale agreement and fulfilled all his obligations and commitments much prior to the stipulated period in the agreement which was also brought to the knowledge of the plaintiff. Furthermore, the defendant also shown his readiness and willingness to pay the balance sale consideration to the plaintiff in accordance with the terms and conditions of the sale agreement. It has also been stated that the defendant is still ready and willing to specifically perform the sale agreement on his part, however, it is the plaintiff who did not fulfill her part of the contract and with ulterior motives thus the defendant filed the suit for specific performance of the agreement. It has been also stated that the defendant caused a public notice issued by her in Daily News, contents whereof are preposterous and libelous and intended simply to defame the defendant and issuance of such a public notice demonstrates the mischief and mala fides. It has been prayed that defendant's suit may be decreed whereas the suit of the plaintiff is liable to be dismissed with compensatory costs to the Defendant under Section 35-A CPC.

5. On 05.09.2005, out of the pleadings following issues were framed by this Court:

1. Whether the Plaintiff or the Defendant committed breach of sale agreement dated 02.04.2003, if so, its effect ?
2. Whether due to acts and deeds of the Defendant, sale agreement dated 02.04.2003 has lost its legal sanctity and the same is no more valid and enforceable against the Plaintiff ?
3. Whether the Plaintiff is entitled to claim rental at the rate of Rs.50,000/-per month with effect from 17.07.2003 as compensation for illegal occupation and use of the suit property by the Defendant as his family's residence without consent of Plaintiff and without making payment of balance sale consideration of Rs.52,50,000- and for causing losses to the Plaintiff, till final disposal of the suit or possession of the suit property is handed over to the Plaintiff ?
4. Whether the Plaintiff entered into an agreement of sale dated 04.04.2003 with one Muhammad Shamim [Annexure Y at page 151 of Suit No.90/2004] for purchasing a fully constructed bungalow No.364, measuring 600 square yards, Scheme No.1, DHA, Malir Cantt., for a total sale consideration of Rs.65,00,000/- and

whether the Plaintiff could not fulfill her obligations under the said agreement due to Defendant's breach of sale agreement dated 02.04.2003 in respect of suit property, if so, its effect ?

5. Whether the agreement to sell dated 02.04.2003 between Plaintiff and the Defendant in respect of suit property is liable to be cancelled ?
6. Whether the Plaintiff is entitled to claim possession of the suit property ?
7. Whether suit No.443/2004 filed by Defendant Shabbir A. Halai against Plaintiff Mrs. Anjum Ara for specific performance of Agreement to sell dated 02.04.2003 is not maintainable ?
8. Whether the Defendant is not entitled to seek relief of specific performance of the contract / agreement 02.04.2003 in Suit No.443/2004 ?
9. Whether the Plaintiff in Suit No.90/2004 was unable to redeem her mortgage on the subject property due to paucity of funds with her and such redemption of the mortgage loan was done with money paid to her by the Defendant under the Sale Agreement ?
10. Whether the Defendant in Suit No.90/2004 as buyer has invested / incurred expenditure of Rs.20,00,000/- on the subject suit property to render it habitable and sale worthy ?
11. Whether in the part performance of the Sale Agreement dated 02.04.2003 the Defendant was put in possession of the property and whether the Defendant has indicated through evidence his willingness to comply with his obligations contained in the Agreement?
12. To what relief, if any, the Plaintiff is entitled ?
13. What should the decree be ?

Thereafter, the evidence was recorded through commission and after completion of the evidence, the Commissioner filed his report dated 18.09.2007, which was taken on the record on 24.11.2008 and the matter was directed to be fixed for final arguments.

From the report of the commissioner for recording evidence, it appears that the plaintiff, in support of her stance, has produced in all eight (8) witnesses viz. (i) Dr. Lateef Siddiqui as PW-1, (ii) Muhammad Anees Akhtar Engineer as PW-2, (iii) Syed Iftikhar Ahmed of Ghandhara Consultant as PW-3, (iv) Muhammad Shamim

Architect as PW-4, (v) Mr. Arifullah Khan Engineer as PW-5, (vi) Mr. Najeeb Iqbal Engineer as PW-6, (vii) Muhammad Farhan Builder as PW-7 and (viii) Syed Imran Ali as PW-8, whereas the defendant produced two (2) witness viz. (i) Shabbir A. Halai as DW-1 and (ii) Ali Asghar of Hashim Ali & Co. as DW-2.

6. Record also transpires that PW-1, Dr. Lateef Siddiqui, General Attorney / Husband of the Plaintiff, during his examination has produced the following documents :-

| DOCUMENTS | EXHIBITS |
|--|-----------------|
| Affidavit in evidence | P/1 |
| Original General Power of Attorney. | P/2 |
| Certified Copy of the Plaint of Suit No.90/2004. | P/3 |
| Certified copy of Written Statement of Suit No.443/2004. | P/4 |
| Photocopy of Sub-Lease Dated 03.01.1994 | P/5 |
| Photocopy of Agreement of Sale dated 02.04.2003. | P/6 |
| Receipt and Letter of Possession dated 01.04.2003. | P/7 |
| Photocopy of Letter dated 05.07.2003 | P/8 |
| Original Letter dated 15.07.2003 | P/9 |
| Office copy of Letter dated 18.07.2003 | P/10 |
| Office copy of Letter dated 28.07.2003 | P/11 |
| Office copy of Letter dated 04.08.2003 | P/12 |
| Photocopy of Letter dated 08.08.2003 | P/13 |
| Photocopy of Letter dated 11.08.2003 | P/14 |
| Photocopy of Letter dated 13.08.2003 | P/15 |
| Original Letter dated 11.08.2003 | P/16 |
| Copy of Letter dated 16.08.2003 | P/17 |
| Photocopy of Letter dated 13.08.2003 | P/18 |
| Copy of Letter dated 28.08.2003 | P/19 |
| Original Letter dated 28.08.2003 | P/20 |
| Photocopy of Letter dated 30.08.2003 | P/21 |
| Original Newspaper Cutting dated 07.09.2003 | P/22 |
| Photocopy of Letter dated 08.09.2003 | P/23 |
| Photocopy of Letter dated 08.09.2003 | P/24 |
| Photocopy of Letter dated 17.09.2003 | P/25 |
| Original Letter dated 18.09.2003 | P/26 |
| Photocopy of Letter dated 27.09.2003 | P/27 |
| Photocopy of Legal Notice dated 14.10.2003 | P/28 |

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|--|--------|
| Original Letter dated 22.10.2003 | P/29 |
| Photocopy of Letter dated 28.10.2003 | P/30 |
| Agreement of Sale [original] dated 04.04.2003 between Mr. Muhammad Shamim & Mrs. Anjum Ara | P/31 |
| Original Receipt dated 04.04.2003 | P/32 |
| Endorsement on the receipt dated 18.12.2003 | P/33 |
| Property Valuation Report dated 04.08.2001 | P/34 |
| Builder Certificate issued by National Builders & Developers dated 16.06.2002 | P/35 |
| Original Letter dated 18.10.2005 | P/36-A |
| Certificate dated 18.10.2005 | P/36-B |
| Original Letter dated 19.10.2005 of Pak Real Estate. | P/37-A |
| Survey Report dated 19.10.2005 of Sadiq & Sons Property Consultants | P/37-B |
| Summary Statement regarding proof of contents | P/37-C |

The above named Plaintiff's General Attorney was also cross-examined by the Defendant's counsel. Thereafter depositions were recorded of PW-2 as Exh.5, PW-3 as Exh.6, who also produced the documents viz. Authority Letter dated 22.06.2006 as Exh.6/1, and letter dated 02.08.2001 of IHFL, whereby M/s. Ghandhara Consultants were requested to carry out survey of the suit property as Exh.6/2. PW-4 as Exh.7, PW-5 as Exh.8 and lastly, deposition of PW-6 was recorded as Exh.9. The above said witnesses were duly cross-examined by learned counsel for the defendant.

7. After completion of evidence of the plaintiff, DW-1 came up for evidence and during his deposition, he has produced the following documents :-

| DOCUMENTS | MARKED |
|---|---------------|
| Affidavit in evidence | Exh. D/1 |
| Photocopy of Agreement of Sale dated 02.04.2003. | D/2 |
| Photocopy of Receipt of Aftab Brothers dated 11.02.2003 | D/3 |
| Photocopy of Receipt dated 21.04.2003 | D/4 |
| Photocopy of Letter of Possession dated 01.04.2003. | D/5 |
| Photocopy of NOC dated 07.04.2003 | D/6 |
| Receipt and Letter of Possession dated 01.04.2003. | D/7 |
| Photocopy of Letter dated 08.04.2003 | D/8 |

| | |
|---|------------------|
| Photocopy of Letter dated 23.04.2003 | D/9 |
| Photocopy of Letter dated 26.04.2003 | D/10 |
| Photocopy of Letter dated 20.06.2003 | D/11 |
| Office copy of Letter dated 05.07.2003 | D/12 |
| Photocopy of Legal Notice dated 15.07.2003 | D/13 |
| Photocopy of Letter dated 18.07.2003 | D/14 |
| Photocopy of Letter dated 28.03.2003 | D/15 |
| Photocopy of Minutes of Meeting dated 26.07.2003 | D/16 |
| Copy of Letter dated 04.08.2003 | D/17 |
| Photocopy of Letter dated 08.08.2003 | D/18 |
| Photocopy of Legal Notice dated 11.08.2003 | D/19 |
| Photocopy of Letter dated 13.08.2003 | D/20 |
| Photocopy of Letter dated 16.08.2003 | D/21 |
| Photocopy of Letter dated 25.08.2003 | D/22 |
| Photocopy of Letter dated 28.08.2003 | D/23 |
| Photocopy of Legal Notice dated 28.08.2003 | D/24 |
| Photocopy of Letter dated 30.08.2003 | D/25 |
| Photocopy of Letter dated 08.09.2003 | D/26 |
| Photocopy of Letter dated 11.09.2003 | D/27 |
| Photocopy of Letter dated 17.09.2003 | D/28 |
| Photocopy of Legal Notice dated 18.09.2003 | D/29 |
| Photocopy of Letter dated 27.09.2003 | D/30 |
| Photocopy of Legal Notice dated 14.10.2003 | D/31 |
| Photocopy of Reply to Legal Notice dated 22.10.2003 | D/32 |
| Photocopy of Letter dated 28.10.2003 | D/33 |
| Photocopy of Notice dated 06.12.2003 | D/34 |
| Photocopy of Pay Order dated 19.02.2003 | D/35 |
| Photocopy of Cheque dated 01.04.2003 | D/36 |
| Photocopy of Receipt dated 22.02.2003 from KUN Advertising Agency | D/37 |
| Photocopy of Public Notice published on 25.02.2003 | D/38 |
| Photocopy of Letter dated 06.04.303 of Hashim Ali & Co. | D/39 |
| Photocopies of Photographs | D/40-A to D/40-O |

The DW-1 was subsequently cross-examined by plaintiff's counsel and during his cross-examination he has produced the following documents:-

| DOCUMENTS | EXHIBIT |
|-----------|---------|
|-----------|---------|

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|---|------------------|
| Bank Statement [photocopy] in respect of A/C 1015-071-001042-50-9, Bank Al-Habib | D/41 |
| Bank Statement in respect of A/C 1015-081-000452-01-6, in the name of M/s. Lucky Trading | D/42 |
| Photocopy of Income Tax Return | D/43 |
| Copy of Approved plan of the suit property | D/44 |
| Photocopy of Letters dated 11.11.2000, 13.11.2000, 15.07.1996 and 30.11.1996 | D/45-1 to D/45-4 |
| Photocopy of Letters dated 15.7.1996, 15.7.1996, 8.4.2000, 29.4.2000, 13.5.2000, 29.5.2000 Certificate dated 29.5.2000, letter dated 11.11.2000 and letter 20.11.2000 | D/46-1 to D/46-9 |
| Notice published in Dawn Newspaper dated 29.10.2006. | D/47 |

Later, the evidence of DW-2 was recorded and during examination he filed his affidavit-in-evidence which has been brought on the record as Exh.14. He was also cross-examined by learned counsel for the Plaintiff.

8. During the course of arguments, learned counsel for the plaintiff while reiterating the contents of their pleadings has contended that the plaintiff vide agreement of sale dated 02.04.2003 has entered into the sale transaction with defendant to sell the suit property for a total sale consideration of Rs.6.9 million, out of which defendant paid to the plaintiff a sum of Rs.1.65 million as advance token money while the balance sale consideration was to be paid as per clause (3), and the agreement was to conclude as per clause (4) whereby transaction shall be completed by both the parties positively on or before 15.08.2003. It is further argued that physical possession of the suit property was given to the defendant as per clause (2) of the agreement to enable the defendant to carry out and complete the remaining construction work to its entirety. He has argued that the quantum of remaining construction work to its entirety was defined and qualified as per clause (22) of the agreement which states that total cost towards construction of said property shall be Rs.20,00,000/- and the defendant was bound to follow a very strict and precise time frame as per clause (18) of the agreement, which provides that vendee to complete the remaining construction work at his own cost and expense as soon as possible within the said stipulated period of five months or earlier. This clause also provides

that both the Vendor and the Vendee shall be entitled to employ their own chowkidar during the period of construction work going on the said property. It is argued that in flagrant violation of clause (18) of the agreement, the defendant had ousted plaintiff's chowkidar and taken over illegal possession of the suit property and started residing thereat with his family. Further argued that the defendant did not care to expedite work before 15.08.2003 and failed to release the balance sale consideration. It is also argued that after taking over physical possession of the suit property on 01.04.2003, the defendant failed to perform his part of contract per clauses 2,3,4,18 and 22, he also failed to make the premises habitable as per the requirements of the Clifton Cantonment Board /DHA rules and regulations, therefore, the Plaintiff was unable to submit the completion plan and then apply for B-Lease on or before 15.08.2003 as per clause (18) which provides: After the B-Lease is obtained by the Vendor from Pakistan Defence Officers Housing Authority, Karachi, the Vendor shall get the sale deed duly registered in favour of the vendee and handed over legal title of the suit property. It is argued that to find an alternate accommodation and for the impending marriage of her daughter, the plaintiff vide agreement 04.04.2003 had contracted to purchase a new house bearing No.364, measuring 600 Sq. Yds. DHA, Scheme No.1, Malir Cantonment, Karachi, for a sale consideration of Rs.6.5 million and in this regard she had also made an advance payment of Rs.1.5 million whereas the balance payment was made on or before 15.08.2003 assuming receipt of balance sale consideration from the Defendant. However, the plaintiff failed to make payment the balance sale consideration on the date stipulated in the agreement due to defendant's failure to release balance sale consideration amount on or before 15.08.2003, thus the plaintiff incurred a financial loss of Rs.1.5 million by way of penalty on the unpaid balance purchase price of the new house. It is also argued that the plaintiff's lawful property is in illegal possession of the defendant since 17.07.2003, the plaintiff continues to suffer financial losses. Insofar as the defendant's suit for specific performance of the agreement is concerned, the learned counsel has argued that the relief of specific performance of the contract is a discretionary and equitable relief which can be granted only to a party who has come to the Court with clean hands and to show his willingness to pay the balance sale

consideration, which is seriously lacking in the defendant's case. He further argued that the suit of the defendant even otherwise is liable to be dismissed as it is now well settled that a party seeking specific performance of an agreement to sell is essentially required to deposit the sale consideration in court and failure of a party to meet the said essential requirement disentitles him to the relief of specific performance whereas the defendant in his case neither deposited nor shown his willingness and readiness to deposit the balance sale consideration in the court. He has also argued that in view of the fraudulent conduct and breach of contract committed by the defendant, the agreement of sale has lost its legal sanctity and have become invalid, void and not enforceable. Learned counsel finally prayed that the Plaintiff's suit No.90/2004 may be decreed and Defendant's suit 443/2004 be dismissed with costs. Learned counsel in support of his stance has relied upon the following cases of ANWAR SAJJID v. ABDUL RASHID KHAN and another [2008 YLR 1239], SAEED NASEEM CHEEMA v. Mrs. RUKHSANA KHAN [2005 YLR 1905], Mst. BIDHAI v. MUHAMMAD SULEMAN through legal heirs [2006 YLR 1520], MUHAMMAD YAQUB v. MUHAMMAD NASRULLAH KHAN and others [PLD 1986 SC 497], RAJA NASIR KHAN v. ABDUL SATTAR KHAN and another [PLD 1998 Lahore 20], LAL KHAN through legal heirs v. MUHAMMAD YOUSAF through legal heirs [PLD 2011 SC 657], FAIZ AHMAD v. MUHAMMAD SHARIF and 6 others [2005 MLD 298], RAB NAWAZ and 13 others v. MUSTAQEEM KHAN and 14 others [1999 SCMR 1362], AYUB ALI KHAN and others v. BRIF. GUL SHER KHAN and others [1989 MLD 261], Dr. S. M. RAB v. NATIONAL REFINERY [PLD 2005 Karachi 478], ABDULLAH BHAI v. AHMED DIN [PLD 1964 SC 106], WEST PAKISTAN TANKS TERMINALS (Pvt.) LTD. v. COLLECTOR [Appraisement] [2007 SCMR 1318], HAMOOD MEHMOOD v. Mst. SHABANA ISHAQUE [2017 SCMR 2022], COMMISSIONER OF INCOME TAX, PESHAWAR v. Messrs SIEMEN A.G. [PLD 1991 SC 368] And BADRUDDIN H. MAVANI v. GOVERNMENT of PAKISTAN and another [1982 CLC 44].

9. On the other hand, during the course of the arguments, learned counsel for the defendant while reiterating the contents of their pleadings in the above suits has contended that in respect of the subject transaction the defendant, paid Rs.16,50,000/- as advance part payment to the plaintiff which payment was also acknowledged by the Defendant in the agreement of sale dated 02.04.2003 whereas the balance sale consideration of Rs.52,50,000/- was to be paid on or before 15.08.2003 upon the defendant's executing and registering a proper conveyance deed completing the sale in all respect in favour of the defendant with delivery of all original documents of title and other relevant papers. It is further contended that the defendant performed his part of contract and fulfilled all his obligations and commitments much prior to the stipulated period in the agreement and he has also informed the plaintiff that he was/is ready and willing to pay balance price of the suit property in accordance with the terms and conditions of the sale agreement. It is argued that the defendant, in terms of the agreement, had completed the construction on the said suit property as per sanctioned plan, so as to render it habitable and then after effectuating requisite documentation formalities, ultimately to enable the plaintiff to legally transfer the suit property by execution and registration of conveyance deed in favour of the defendant as its buyer. It is argued that the Plaintiff took no steps to cause inspection of the suit property by the Clifton Cantonment Board / DHA for obtaining requisite completion certificate nor obtained extension for completion of construction work from the concerned authorities for securing Form B Lease for the subject property. It is argued that the Plaintiff committed breach of the sale agreement intentionally to wriggle out from the same with ulterior motives. It is also argued that the plaintiff not only committed breach of the sale agreement but she became greedy to extort more money from the defendant owing to the suit property having become more valuable after huge investment of money by the defendant on it and also escalation of prices of the other properties in DHA. It is further argued that the plaintiff also caused a public notice issued in Daily News contents whereof are preposterous and libelous and intended simply to defame the defendant and issuance of such a public notice demonstrates the mala fide of the plaintiff. Learned counsel further argued that the suit of the Plaintiff is totally

misconceived, frivolous, and in the circumstances, pleaded by the defendant, is nothing an attempt to cover breach of the contract committed by the plaintiff and to wriggle out from her contractual obligations. Learned counsel also contended that the plaintiff has failed to establish his case through evidence and as such the suit of the plaintiff is liable to be dismissed whereas the defendant's suit may be decreed as prayed. Learned counsel in support of his contention has relied upon the following cases of Mst. BATUL and others v. Mst. RAZIA FAZAL and others [2005 SCMR 544], BASHIR AHMED v. Mst. SHAHZADI BEGUM [1985 SCMR 1335], PAKISTAN RAILWAYS through AGM [traffic] Lahore v. Messrs FOUR BROTHERS INTERNATIONAL (PVT.) LTD. and others [PLD 216 SC199], SETH ESSA BHOY v. SABOOR AHMED [PLD 1973 SC 39], NATHULAL v. PHOOLCHAND [AIR 1970 SC 546], SANT LAL v. SHYAM DHAWAN [AIR 1986 DELHI 275], SYED HAKEEM SHAH [deceased] through LRs and others v. MUHAMMAD IDREES and others [2017 SCMR 316], ABDUL KASMIR v. MUHAMMAD SHAFI and another [1973 SCMR 225], ATA-UR-REHMAN v. FAHEEM AHMED [2009 YLD 1672] And HAJI MUHAMMAD SADIQ v. HAJI SYED MUHAMMAD SHARIF and others [1997 SCMR 1994].

10. I have heard learned counsel for the parties, perused the record, and have also gone through the relevant law as well as the case law relied upon by the learned counsel for the parties and my findings on the above issues are as follows :-

ISSUES NO. 1, 2, 5, 6, 7, 8, 9, 10

AND 11: Since these are inter related issues, therefore, the same are taken up together.

From the record, it appears that there is no dispute with regard to the agreement of sale dated 2.04.2003 [Exh.P/6] entered into between the plaintiff (Mrs. Anjum Ara) and the defendant (Mr. Shabbair A. Halai) and the amount paid under the said agreement. The rival claims of the parties are in respect of breach of the terms of the agreement [Exh.P/6] and in order to ascertain such fact it would be appropriate to reproduce the relevant terms of the agreement [Exh.P/6] as under:

“WHEREAS the VENDOR above named is at the date of this agreement seized and possessed of and is otherwise well and sufficiently entitled to as the sole, exclusive and lawful owner of All

that Residential Leasehold Plot of land bearing No.54, measuring 600 Sq.Yds., with basement and double storied incomplete bungalow constructed thereon situated in 1st Street, Phase VI, off Khayaban-e-Rahat, Pakistan Defence Officers Housing Authority, hereinafter for the sake of brevity referred to as the "said Property".....

“AND WHEREAS the VENDOR has as per approved sanctioned plan, raised construction on the said plot and at present the structure of basement, ground floor and first floor have been completed;

AND WHEREAS the VENDOR above named has agreed to sell, transfer, convey and assign the said property in vacant possession to the VENDEE on ownership basis after getting the mortgage on the said plot redeemed and the VENDEE has agreed to purchase the same for an agreed lump sum sale consideration of Rs.69,00,000/- (Rupees Sixty Nine Lacs only) on the terms and conditions set forth herein;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH AND IT IS AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

- “1.
2. That the VENDOR having received Rs.16,50,000/-(Rupees sixteen Lacs, Fifty thousand only) as aforesated as part payment against the sale of the said property in part performance of the contract handed over and delivered to the VENDEE vacant and physical possession of the said property to enable him to carry on and complete the remaining construction work of the said property to its entirety.
3. That the balance sale consideration of Rs.52,50,000/-(Rupees Fifty Two Lacs Fifty Thousand Only) shall be paid by the VENDEE to the VENDOR on or before 15.08.2003 on the VENDOR executing and registering a proper Conveyance Deed and completing the sale in all respect in favour of the VENDEE and on the Vendor handing over and delivering to the VENDEE legal possession of the said property complete in all respects to the VENDEE along with all the Original Documents of Title and other relevant papers and up-to-date paid challan/bills of the said property to the satisfaction of VENDEE.
4. That the transaction shall be completed by both the parties positively on or before 15.8.2003.
5.
6.
7. That the VENDOR shall pay and clear all the electricity charges, ground rent, dues, taxes, rates, charges, fees, assessments, penalties, impositions liens and other outstanding against the said property up till date of registration of sale deed in favour of the VENDEE payable to K.E.S.C., P.D.O.H.A., Military Estate Office Karachi, Clifton Cantonment Board, Clifton Karachi, Karachi Water & Sewerage Board or any other authority / department up to the date of transfer of the said Property in favour of the VENDEE. However, it has been agreed between the parties that the Vendor shall be liable to pay electricity charges according to the units shown and consumed in the electric Meter up to the

date of handing over possession and thereafter it shall be the liability of the VENDEE.

8. That the VENDOR agrees and undertakes to get the property tax assessment made by the Clifton Cantonment Board, Clifton, Karachi at his own cost and expense prior to the date of registration of Sale Deed in favour of the VENDEE and pay the same.
9.
10. That the VENDOR shall also provide to the VENDEE Clearance Certificate from Clifton Cantonment Board, Clifton Karachi, Pakistan Defence Housing Authority, Karachi, Military Estate Office, Karachi and other relevant Departments and authorities.
11.
12.
13.
14.
15.
16. That the VENDOR agrees and undertakes to apply to the office of the Clifton Cantonment Board, Clifton, Karachi for extensions of time for completion of building on the said plot of land and/or submit revised plan and shall get all the formalities thereto completed at his own cost and expense. The VENDEE shall be entitled to further time in case of any delay on the part of the Vendor to complete all the legal formalities in this respect.
17. That before obtaining the completion plan and the completion certificate in respect of the said property, the VENDOR shall immediately apply for B-Lease and complete all the legal formalities thereto and get the Lease Deed Form B duly registered with the concerned Sub-Registrar, Karachi at his own cost and expense.
18. That it has been specifically agreed between the parties that the VENDOR shall have No Objection and shall permit/allow the VENDEE to complete the remaining construction work at his own cost and expense as soon as possible within the stipulated period of 5 months or earlier. However, it has been agreed between the parties that both the VENDOR and the VENDEE shall be entitled to employ their own Chowkidar during the period of construction work going on in the said property. Before the construction work of the bungalow is completed, the VENDOR shall at her cost and expense obtain the requisite completion plan and completion Certificate from relevant Departments and authorities and forthwith apply to the Pakistan Defence Officers Housing Authority, Karachi for requisite B-Lease. After the B-Lease is obtained by the VENDOR from the Pakistan Defence Officers Housing Authority, Karachi, the VENDOR shall get the Sale Deed duly registered in favour of the VENDEE and supply all the original documents of title and other relevant papers, documents and duly paid bills to the VENDEE and hand over legal title of the said property to the VENDEE.
19. That the VENDOR shall also at the request of the VENDEE execute and register in favour of the VENDEE special power of Attorney for applying and obtaining B-Lease and completing all the formalities thereto in respect of the said

property. However, all the cost and expenses for obtaining B-Lease shall exclusively be borne and paid by the VENDOR.

20.
21. It has been agreed between the parties hereto that both the parties shall abide by the terms and conditions detailed in the said agreement and Time shall be the essence of contract. In case any party fails to perform her or his part of the contract the defaulting party shall have the right to file suit for specific performance of contract at the cost of the defaulting party.
22. That it has further been agreed between the parties that the total cost towards the construction work of the said property shall be Rs.20,00,000/- (Rupees Twenty Lacs only) approximately. This cost of completing the construction work of the said property shall be borne and paid by the VENDEE and in case the VENDOR fails to perform his part of the contract, the VENDEE shall not only be entitled to claim the part payments already made by him as aforesaid plus the investments along with accrued markup thereon but shall also be entitled to claim liquidated damages according to the market value of the said property.” [Emphasis supplied]

From the perusal of the above, it appears that firstly; the suit property was mortgaged with International Housing Finance Company Ltd., Secondly; the construction of the suit property was incomplete, and further the possession of the suit property was handed over to the Vendee to complete the construction with his own cost of Rs.20,00,000/-. Thirdly; the vendee had to pay the balance sale consideration on or before 15.08.2003 in terms of clause No.3, Fourthly; the Vendor had to clear all the electricity and other charges of the suit property as per clause 7, and to obtain clearance and completion certificates from Clifton Cantonment Board as per clause 10 and 16, however, in the event of any delay on the part of Vendor to complete all the legal formalities the Vendee was entitled to further time. Fifthly; as per clause 18, the Vendor had to obtain B-Lease from PDOHA before registration of the conveyance deed in favour of the Vendee, and lastly; the time was the essence of the contract.

From the record, it appears that after execution of the agreement [Exh.P/6], the plaintiff got redeemed the suit property on 07.04.2003 and in this regard NOC/letter dated 07.04.2003 [Exh.D/6] issued by International Housing Finance Limited [IHFCL]. Since the loan amount was paid after execution of the agreement [Exh.P/6] and admittedly the plaintiff did not produce any of her bank account or documentary proof which could show that she, at the time of execution of the agreement, had sufficient amount with her to pay off her loan amount to IHFCL,

hence, it can be presumed that the property was redeemed from the advance amount received from the defendant under the agreement [Exh.P/6]. Moreover, the above said fact is also corroborated from the evidence as during the cross examination, the defendant answered the question of the plaintiff's counsel in the following manner:

“.....It is correct that after receiving the payment of Rs.15,00,000/- from me, Mrs. Anjum Ara had cleared the loan of IHFL within one week.”

Record further transpires that after execution of the agreement [Exh.P/6] series of correspondences exchanged between the plaintiff and defendant. The plaintiff sent letters viz. Exh.D/8 dated (08.04.2003), Exh.D/9 (23.4.2003), Exh. D/10 (26.4.2003), Exh.D/12 (05.07.2003), Exh.P/10 (18.07.2003), Exh.D/15 (28.7.2003), Exh.P/12 (4.08.2003), Exh.P/13 (08.08.2003), Exh.P/14 (11.08.2003), Exh.P/15 (13.08.2003), Exh.P/17 (16.08.2003), Exh.P/18 (25.08.2003), Exh.P/19 (28.08.2003), Exh.P/21 (30.08.2003), Exh.P/23 (08.09.2003), Exh.P/24 (11.09.2003), Exh.P/25 (17.09.2003), Exh.P/27 (27.09.2003) and whereas the defendant in response to the above letters have addressed letter viz. Exh. P/9 dated (15.07.2003), Exh.P/16 dated (11.08.2003), Exh.P/20 (28.08.2003), Exh.P/26 (18.09.2003), Exh.P/29 (22.10.2003).

From perusal of the above correspondences, it appears that the plaintiff alleged that the purposes of handing over the physical possession of the suit property to the defendant has been defeated as the defendant failed to carry out construction to make it habitable resulting which she could not obtain the requisite certificates from the Clifton Cantonment Board and B-lease from DHA. Whereas the stance of the defendant in his letters was that he has carried out construction as per the approved plan provided to him within the stipulated time and in this regard the plaintiff can get the suit property inspected to the satisfaction of Clifton Cantonment Board, Clifton, Karachi and DHA. The defendant had also shown his willingness to perform his part of contract by making the balance sale consideration subject to fulfillment of plaintiff's part of contract as mentioned in the agreement.

From the record, it also reveals that except letter dated 05.07.2003 [Exh.P/8] there is nothing available on the record, which could show that the plaintiff has approached either CCB and or DHA

for the requisite certificate or 'B' Lease or for any inspection of the suit property.

For conveyance sake Exh.P/8 is reproduced as under:

"The Administrator
Defence Housing Authority
2/B, East Street, Karachi

Dated:05.07.2003

SUBJECT: Application i/r Building Completion
Plot No. 54, First Street, Ph VI, DHA-Karachi

Dear Sir,

I hereby give notice of completion in respect of Building/additions & Alteration & Alterations in my building situated on Plot No.54, First Street, Khayaban-e-Rahat, Phase VI measuring 600 Sq.Yds inclusive of drainage and gas arrangements therein as well as apply for your permission to occupy and let the said building.

Construction of the above building has been carried out in accordance with the Approved Building Plan copy whereof is also enclosed herewith.

While I agree to pay all cantonment Taxes from the date of completion, information u/s 66 of the cantonment Act, 1924 is furnished on the attached proforma and the Documents required as per DHA-Check List dated 26.03.03 are enclosed as detailed here under:

| No | Particulars of Attached Documents | Dated | Copies |
|----|-------------------------------------|----------|--------|
| 1 | Completion Form from the CCB | 16.10.02 | 01 Nos |
| 2 | Copy Approved Building Plan | 17.04.94 | 01 Nos |
| 3 | Completion Plan of the Building | 20.05.03 | 07 Nos |
| 4 | Renovated Site Plan of the Building | 28.04.03 | 02 Nos |
| 5 | National Identity Card of owner | 26.11.75 | 02 Nos |
| 6 | Demarcation plan issued by DHA | 03.12.90 | 01 Nos |
| 7 | NOC of Elect. Gas & Sewerage | 20.06.03 | 03 Nos |
| 8 | Form 'A' Sub-Lease from DHA | 03.01.94 | 04 Nos |
| 9 | No Violation certificates-DHA | 30.11.98 | 03 Nos |

Thanking you in anticipation and with my profound regards I remain

Yours faithfully
Mrs. Anjum Ara

Whereas perusal of cross examination of the plaintiff shows that the said letter [Exh.P/8] was never submitted to the addressee of the said letter, i.e., the Administrator DHA. Relevant excerpts of the cross examination of the plaintiff's witness is reproduced as under:

".....I see Ex.P/8 addressed by the Plaintiff to the Administrator D.H.A and say that the copy of the said letter was also sent to Shabbir Halai as an enclosure to my letter of even date, which was acknowledged by him in his letter Ex.P/9. It is

correct that there is no endorsement on Ex.P/8 that its copy along with the annexures mentioned therein was sent to Shabbir Halai. Voluntarily says that the same is on court record. It is correct that I have not filed nor exhibited the documents listed under Items 1 to 9 in Ex.P/8. Voluntarily says that these documents however were personally handed over by me to Shabbir Halai on 26.07.2003 as confirmed vide my letter Ex.P/11. It is correct that Ex.P/11, there is no mention that Mr. Sajjad Halai or Mr. Shabbir Halai have acknowledged to have received the afore-stated documents under Items 1 to 12. Voluntarily says that Ex.P/11 was acknowledged by Mr. Sajjad E. Halai. It is incorrect to suggest that the contents of Ex.P/11 and more particularly on page 2 are totally incorrect.

Q: Did you receive any acknowledgement receipt from DHA in respect of Ex.P/8 and the documents sent thereunder?

A: No because all my attempts to file this letter with documents with DHA were foiled by Shabbir Halai as mentioned in Ex.P/12 to P/15.

It is correct that for the aforesaid reason. I could not file the Ex.P/8 and the documents listed therein with DHA. It is correct that I have not filed the documents listed in Ex.P/8 in this suit. It is incorrect to suggest that I have not filed the aforesaid documents in this suit because I do not possess the said document. It is incorrect to suggest that despite my having the aforesaid documents listed in Ex.P/8 in my possession, I have intentionally not filed the same in the present suit...”

11. Insofar as the plea of the plaintiff regarding defendant's failure to carry out remaining construction as per the terms of the agreement resulting which she could not obtain the requisite certificates and B-Lease from DHA, is concerned, a perusal of the agreement shows that first of all the term 'remaining construction work' was neither explained nor defined in the agreement except in clause 2 of the agreement which states that the plaintiff upon receiving the part sale consideration handed over the physical possession of the suit property to enable him to carry on and complete the remaining construction to its entirety and secondly it also does not show that the said remaining construction work will have any bearing for obtaining requisite documents on the part of the plaintiff. Moreover, the agreement also does not show that in the event the defendant being vendee if failed to complete the remaining construction during the stipulated period, either the contract will be rescinded or possession will be taken back and the amount so paid by the defendant will be forfeited. Conversely, clause 22 of the agreement states that the cost of completing the construction

work of the suit property shall be borne and paid by the defendant (vendee) and in case the plaintiff (vendor) fails to perform his part of the contract, the Vendee shall not only be entitled to claim the part payments already made by him plus the investments along with accrued markup thereon but shall also be entitled to claim liquidated damages according to the market value of the said property. A perusal of the agreement also shows that cost of remaining work was estimated in the agreement as Rs.20,00,000/- and further since the said cost does not form the part of sale consideration therefore the same can be safely assumed as investment on the part of defendant to make the suit property habitable before the stipulated date.

Record further shows that the physical possession of the suit property was handed over to the defendant on 1.04.2003 through letter of possession [Exh.P/7] by the plaintiff prior to the execution of the agreement [Exh.P/6]. A perusal of the said letter and the agreement, reflects that the plaintiff had handed over the physical possession of incomplete Bungalow comprising of basement, ground and first floor to the defendant. The plea of the defendant in this regard is that after taking over the possession of the suit property he had completed the construction within the stipulated time and had informed the plaintiff accordingly. The defendant in para-7 of his affidavit-in-evidence has mentioned the details of construction work he made after taking over the possession of the suit property and in order to substantiate such statement he has placed on record a letter dated 06.04.2003 [Exh.D/39] issued by one M/s. Hashim Ali & Co. , a procurement Coordinator, reflecting the work for remaining construction was assigned to him and in this letter the said coordinator has also shown to have received amounts from the defendant on different dates. Besides this, the defendant also placed on record different photo graphs [Exh. D/40 (A) to D/40(O)] of the suit property which reflect that the property is in habitable condition. The defendant though was cross examined on letter [Exh.D/39], however no cross examination was made in respect of [Exh. D/40-(A) to D/40(O)]. Even otherwise, it is an admitted position that the defendant along with his family has been residing in the suit property since July 2003, which could not have been possible without the same having made habitable and obviously to make the property

habitable, one has to spend money and without the money it cannot be done.

12. Insofar as the willingness of the defendant to pay the sale consideration is concerned, the defendant in his letter dated 15.07.2003 [Exh.P/9], which was written in reply to the letters of the plaintiff, has clearly mentioned that he has completed the construction as per the terms of the agreement and further he is ready to perform his part of obligation by making payment of balance sale consideration subject to providing requisite documents. For convenience sake relevant paras of the said letter are reproduced as under:

“8. Please note that time for completion all the formalities of B Lease and completing the sale in all respect in favour of my client is 16.08.2003 and time is the essence of Contract. On my client’s part he is ready and willing to perform his part of the contract by making payment of balance sale consideration within the time stipulated in the agreement. My client reiterates that he has already completed the remaining work on the subject plot well within time. Now it is upon you to complete your part of the contract as stated above and get the Sale Deed registered in favour of my client on or before 15.08.2003 as agreed upon.”

9.

10. You may if you so desire get the said property duly inspected to the satisfaction of Clifton Cantonment Board, Clifton, Karachi and D.H.A. My client once again through this letter inform you that all the construction work on the said plot have been completed by my client and which is well within your knowledge.”

Record further reflects that the plaintiff also got property inspected from one Muhammad Anees Akhtar [Exh.5] who has produced the property inspection report dated 16.08.2003[Exh.5/1]. For the sake of ready reference his cross examination is reproduced as under:

“Cross-examination to Mr. Abdul Aziz,
Advocate for Defendant.

The name of our firm is “Pre-Inspection Services and Completion Plan Facilitators”. We have not got our firm registered before any authority or department. I or my firm do not have any license to do our business. Our firm was not registered with the Registrar of Firms or with the Income Tax Department. We do not maintain any record or register of inspection of various properties carried out by us. It is incorrect to suggest that I am not B.E. (Chemical) nor do I have any other qualification to carry out such inspection as aforesaid. I did my B.E. (Chemical) from NED University in the year 1988-89. I do not remember my Roll No. I have

not produced any B.E. (Chemical) Degree but I can produce the same if directed. It is correct that there is no co-relation between my degree of B.E (Chemical) and the site inspection of the subject property in this case. Voluntarily says that I have been working with my friend and partner Mr. Abdul Qavi Khan in the field of such inspection. There is no written partnership deed with my partner for doing the work because he is my friend. We do not maintain any accounts for such inspection work that we carry out and as such I am not able to produce any account for the work done by us for Mrs. Anjum Ara. We also do not file any income tax return for our aforesaid business. There was no written correspondence or agreement between our firm and Mrs. Anjum Ara for carrying out the aforesaid inspection work by us. I had never written letter to Mrs. Anjum Ara for recovery of my outstanding fee of Rs.10,000/-. The husband of Mrs. Anjum Ara was also present at the time of both inspections. Neither Mrs. Anjum Ara nor her husband Dr. Lateef Siddiqui ever requested us for submission of our report for the said inspection. It is incorrect to suggest that the total evidence given by me today is false. It is incorrect to suggest that I have never inspected the suit property nor was I qualified to inspect the property. It is incorrect to suggest that I have never done the job of inspection of the property.

From the above evidence, it appears that the survey was conducted by an unrecognized surveyor, hence the report [Exh.5/1] cannot be taken into consideration.

Apart from Exh.8, there is nothing available on the record, which could show that the plaintiff before the date stipulated in the agreement for performance of the contract, has ever complied with clauses No.7, 8, 10, 16, 17, part of 18, of the agreement [Exh.P/6], which she was liable to comply with the same under the terms of the contract.

As per the above clauses, inter alia, it was the obligation of the plaintiff, being vendor, to obtain completion certificate and B-Lease from the DHA and it is an admitted position that the plaintiff neither obtained the completion certificate nor B-Lease from the concerned authorities and as such the vendor had failed to make out marketable title of the property in question. It is settled position that a conveyance deed cannot be registered unless B-Lease, which is a document by which Pakistan Defence Officers Housing Authority grant 99 years' lease in favour of allottees, is issued by DHA. Reliance is made in this regard on the case of ATA-UR-REHMAN v. FAHEEM AHMED [2009 YLR 1672].

13. Insofar as the question of entitlement of the plaintiff to get back the possession of the suit property is concerned, it may be observed that

the defendant, who was put into possession of the suit property upon making part sale consideration and further after having made investment put the suit property in habitable condition, has acquired certain rights in respect of the suit property through possession of the same which otherwise is also protected in terms of section 53-A of the Transfer of Property Act, 1882, which provides that where any person enters into an agreement to transfer for consideration, any immovable property from which the terms necessary to constitute the transfer can be ascertained, and the transferee has, in part performance of the contract, taken possession of the property and has done some act in furtherance of the contract and is also willing to perform his part of the contract then notwithstanding the fact that the transfer has not been completed in the manner prescribed by law for the time being in force, the transferor shall be debarred from enforcing against the transferee any right in respect of the property for which the transferee has paid substantial amount towards sales consideration and has also been put in lawful possession.

14. Insofar as the question whether time was essence of the contract or not, though no issue in this regard has been framed, however, the plaintiff has taken this plea in his pleadings, it is well settled that Intention to make time of the essence of contract must be expressed in unmistakable language and it may be inferred from what had passed between parties before, but not after, the contract is made. A mere mention of a specified period in an agreement for completion of sale would not make the time of the essence of contract. In contracts of sale of immovable property, ordinarily time is not considered to be of the essence of the contract, unless it was expressly intended by the parties and the terms of contract do not permit of any other interpretation. Reliance in this regard is placed on the case of *Mst. AMINA BIBI v. MUDSAR AZIZ* [PLD 2003 SC 430].

In the instant case, clause 4 of the agreement provided that the transaction shall be completed by both the parties positively on or before 15.08.2003. Though the said clause does not provide consequences of failure to perform by either of the parties; their part of obligation under the agreement to make time essence of the contract. Nonetheless, the defendant appears to have discharged

burden by categorically showing his willingness to pay the balance sale consideration whereas the plaintiff was not in a position to perform her part of obligation either on the cut of date i.e., 15.08.2003 or thereafter, as neither the plaintiff obtained completion certificate nor B-lease was issued by the Defence Housing Authority in her name which the plaintiff, as per term of the agreement, was required to provide before execution of sale-deed, which was necessary for transferring marketable title in favour of the defendant. It also appears that the plaintiff has failed even to apply for the requisite documents viz. completion certificate and B-Lease. She, therefore, cannot take advantage of her own default and also cannot insist that the defendant must have performed his part of the contract, namely, to pay the balance sale consideration. The question of payment of balance sale consideration could occur only after the plaintiff might have obtained the requisite documents. Hence, the stage of payment of the balance sale consideration never arose in the instant case on account of the failure on the part of the plaintiff to perform her part of obligation. Whereas, the defendant had signified his continuous willingness to perform his part of the contract by making the payment of balance sale consideration and, therefore, I am of the view that he is entitled to the specific performance of the contract.

The contention of learned counsel for the plaintiff that not tendering the balance sale consideration by the defendant to the plaintiff rendered the contract void and she was entitled to revoke the same and further the suit filed by the defendant is liable to be dismissed being not maintainable on this count, merits no consideration, being untenable, in view of the discussion in the preceding paras, as such the same is repelled.

In view of the foregoing, I have come to the conclusion that neither any negligence nor any breach can be attributed towards the defendant and as such he is entitled to the discretionary relief for enforcement of the agreement of sale [Exh.P/6]. Hence, these issues are answered accordingly.

15. **ISSUES NO. 3 & 12:**

Though in the preceding paras, it has been held that the defendant is not at fault in completing the transaction, yet I am of the

opinion that since the defendant has started residing in the suit property from July 2003, without making payment of balance sale consideration either to the plaintiff or depositing the same in the court, the defendant is liable to pay the rentals at the modest rate of Rs.50,000/- per month from the month of July 2003.

16. **ISSUE NO. 4**

From the perusal of the evidence, it seems that on this point also the plaintiff has failed to justify her stance through the evidence, which has been brought on the record. Relevant excerpts of the cross examination of the plaintiff's witness [PW-1] are reproduced as under:

“.....It is correct that in the sale Agreement (Ex.P/6) with Shabbir Abbas Halai (Defendant), there is no mention of my wife's intention to purchase another property from the sale consideration receivable from the Defendant for our alternate residence. It is correct to say that in the entire chain of correspondence between my wife and the defendant Shabbir Halai from Ex.P/8 to P/30 there is no mention of her having entered into another Sale Agreement (Ex.P/31) relating to purchase of Malir property. At the time of executing sale-agreement (Ex.P/31) we were residing in the above flat of Maymar. It is correct that prior to filing Suit No. 90 of 2004 I had not intimated the Defendant in writing about the existence of the Sale Agreement (Ex.P/31) nor I had supplied it's copy to the Defendant because it was well within his knowledge since its very inception. It is correct to suggest that from the chain of correspondence vide Ex.P/8 to P/30 there is no inference to show that the Defendant was in the knowledge of sale agreement Ex.P/31 for the afore-stated reasons. It is incorrect to suggest that the Defendant was not in the knowledge of existence of Ex.P/31 and/or that he had not assured me for the timely payment of balance sale consideration under Ex.P/6 to enable me to honour my commitment under Sale Agreement Ex.P/31. It is correct to suggest that I had purchased the property under Ex.P/31 without any broker or without any advertisement in the newspaper but I had purchased it directly from the seller. The owner of the property (Ex./P31) approached me with his intention to sell the said property. It is correct that the seller of the property (Ex.P/31) had not given any notice in writing to me that he was going to forfeit the earnest money/part payment if I failed to make payment of the balance price within the stipulated period under Ex.P/31. Voluntarily says that the notice was not necessary as it was already mentioned in the said agreement Ex.P/31. Immediately after signing of sale agreement (Ex.P/31) we shifted to the said property at Malir around 4.4.2003. When the seller under Ex.P/31 forfeited the earnest money/part payment and evicted us from the said property in Malir we did not lodge any protest or objected to it because we knew that we shall cease to hold the above property and enjoy its peaceful possession. It is incorrect to suggest that the sale agreement (Ex.31) is a fake and fictitious document. It is incorrect to suggest that the said document (Ex.P/31) was fabricated by the plaintiff.”

“.....We lived in Malir house purchased by us from April 2003 to December 2003. It is correct that during the above period of 9 months

we did not receive any correspondence or letter addressed to us at the Malir address. Voluntarily says that the change of address was not communicated by us. The reason for not communicating the change of address was because we did not want any unnecessary miscommunication of our correspondence and important communication. We had also not intimated our Bankers to that effect regarding change of address. The utility bills relating to the Malir house continued to be paid by the seller and we did not pay such bills. There is no such clause in Ex.P/31 that the utility bills relating to the Malir property, during the period of our stay there, will be paid by the seller. I rely on clause 4 Ex.P/31 for the right of the seller to forfeit the part payment of Rs. 15 lacs paid by us to him in case of non-payment of balance amount within the specified period . It is incorrect to suggest that there is no clause in Ex. P/31 for forfeiture of Rs.15 lacs by the seller. It is incorrect to suggest that it was not stipulated in the agreement Ex.P/31, that the time was essence of agreement. I reply on clause 2 of Ex. P/31. It is correct that the endorsement Ex.P/33 was written by the seller Mohammad Shamim by my permission.”

“Q: Did you send any demand to Mr. Muhammad Shameem that he should return and/refund the amount of Rs.11,00,000/- as part payment for purchase of his Malir property by me because I had not committed any breach of contract for purchase of the same with him dated 4.4.2003 ?

A: I did not do because Mr. Shameem is known to us for more than 25 years for his dealing based on mutual trust and fair play.”

Besides above, in view of the findings of issues No. 1,2 and 5 to 11, I have already held that neither any negligence nor any breach can be attributed towards the defendant and the defendant is not at fault for completing the agreement, therefore, he cannot be held liable for any breach, if committed by the plaintiff in respect of the sale agreement dated 04.04.2003 entered into between her and one Muhammad Shamim in respect of Bungalow No.364, measuring 600 Square Yards, scheme No.1 DHA, Malir Cantt. In the circumstances, this issue is answered accordingly.

17. **ISSUE NO.13 :** In view of the peculiar circumstances of the case, and the foregoing discussion as well as my findings on issues No. 1 ,2 and 4 to 12, I am of the opinion that the plaintiff has failed to substantiate her claim for cancellation of agreement [Exh.P/6], possession and damages. However, she is entitled to the rentals as compensation whereas the defendant has established his claim for specific performance of the contract subject to payment of balance sale consideration and monthly rentals for utilizing the suit property from the month of July 2003 till the decision. Accordingly, the above suits are disposed of in the following terms:

- i) The Suit No.90 of 2004 filed by the plaintiff [**Mrs. Anjum Ara**] is dismissed whereas Suit No.443 of 2004 filed by the defendant [**Shabbir A. Halai**] for specific performance of the sale agreement dated 02.04.2003 is decreed. Consequently, the defendant is directed to deposit with the Nazir of this Court within 45 days hereof, the balance sale consideration of Rs.52,50,000/-[in terms of the sale agreement dated 02.04.2003] along with 10% per annum simple markup from the date of filing of the case and Rs.50,000/- per month from July 2003 till the decision of this case being monthly rentals for utilizing the suit property.

However, in the event the defendant fails to comply with the above order, then the plaintiff will be entitled to recover the physical possession of the suit property through Nazir of this Court and the amount paid by the defendant towards advance part payment and the amount incurred towards cost of remaining construction shall be forfeited.

- ii) Upon deposit of the above amount, the plaintiff will execute a conveyance deed in favour of the defendant and will also handover all its original title documents including completion certificate, 'B Lease (99-years) and paid bills as well as challan in respect of utilities and taxes etc., up to the month of June 2003 to the defendant under the supervision of the Nazir of this Court within a period of thirty (30) days and in lieu thereof the amount so deposited by the defendant shall be handed over/released to the plaintiff upon proper verification and identification.

However, in the event the plaintiff fails to comply with the above order, then the Nazir of this Court shall enquire first from the concerned quarters about the completion certificate and execution of B-Lease in favour of the plaintiff and once it is confirmed that B-Lease has been executed in respect of the suit property, execute a conveyance deed in favour of the defendant on behalf of the plaintiff. However, in the event if it is found that B-lease in respect of the suit property has not been executed then the Nazir will get B-lease executed first in favour of the plaintiff and then execute a conveyance deed in favour of the defendant.

- iii) All the expenses in respect of obtaining completion certificate and the B-Lease (99-years) and or payment of utilities and taxes up to 30th June 2003 shall be borne by the plaintiff and/or may be deducted from the amount so deposited by the defendant with the Nazir. However, for obtaining completion certificate, if the construction of the suit property is required to be altered and amended the same will be done without delay at the cost and expenses of the defendant. As well as the charges for registration of the conveyance deed and Nazir's fee for supervision shall be borne by the defendant.

Karachi;
Dated: **20.03.2020**

JUDGE