

# IN THE HIGH COURT OF SINDH KARACHI

Before :

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Adnan-ul-Karim Memon

## HCA No. 317 of 2022

USUF Pakistan (Pvt) Ltd  
Appellant: Through Mr. Muhamad Kamran Mirza, advocate

Respondent No.1: Through Mr. Merajuddin, advocate

Respondent No.2: Through Ms. Lubna, advocate

Date of hearing  
& Decision: 21.02.2023.

## ORDER

Through the captioned High Court Appeal, the appellant has called in question the legality of the order dated 16.9.2022 passed by the learned Single Judge (OS) of this court in Suit No.2329/2017, whereby application under Order XXXIX Rule 1 & 2 CPC (CMA No.15383/2017) filed by the appellant has been dismissed.

2. It has been contended by the learned counsel for the appellant that appellant had entered into a contract dated 03.01.2016 in respect of purchase of plot No.D-239/A, admeasuring 0.50 Acre, with construction thereon, situated in SITE Karachi, for a total sale consideration of Rs.22,500,000/- (Rupees Twenty Two Million Five Hundred Thousand Only), whereas, 10% of the said amount i.e. Rs.22,50,000/- was paid by the appellant as earnest money, however, in view of certain discrepancies the appellant issued a legal notice dated 22.01.2016 to the respondent No.1 to remove such discrepancies so that sale agreement dated 03.01.2016 could be materialized and/or executed and the balance payment of sale consideration could be made smoothly, however, needful was not done as Non Utilization Fund (NUF) etc. charges were not paid by the respondent No.1 on account of some dispute arose between the respondent No.1 and respondent No.2 SITE compelling the appellant to institute Suit No.2329/2017 before this court, for specific performance of the agreement, wherein, stay was granted in favour of the appellant vide order dated 07.12.2017 in relation to the suit

property, however through impugned order dated 16.09.2022, the application bearing CMA No.15313/2017 has been dismissed. Learned counsel emphasized that there is the likelihood that respondent No.1 may create 3rd party interest in the subject property, whereas, in the absence of any restraining order, the suit filed by the appellant and relief of specific performance may become infructuous. It is urged by learned counsel for the appellant that the time was not the essence of the subject agreement as there is no penal consequence mentioned in such agreement; besides there is no default on the part of the appellant, however, this aspect of the matter has not been taken into consideration by the learned Single Judge, while dismissing the application for an interim order. Learned counsel further submits that the appellant has always been willing to make payment of the balance sale consideration, but due to the unwillingness of the private respondent to receive the balance sale consideration he approached, the learned Single Judge of this Court for such purpose, however, no direction in this regard was issued by the learned Single Judge either to deposit the balance sale consideration in Court or otherwise and the matter remained pending till the subject application was dismissed. Learned counsel submitted that after the filing of this appeal, this court vide order dated 27.9.2022 directed the parties to maintain the status quo and in the meanwhile directed the appellant to deposit the balance amount of sale consideration before the Nazir of this court within two weeks. Per learned counsel, the order dated 27.9.2022 has been complied with by the appellant which factum is disclosed by Nazir vide his report dated 12.10.2022. He prayed for allowing the instant appeal. In support of his contention, learned counsel for the appellant has placed reliance on the case of *Amina Bibi v. Mudassar Aziz* **PLD 2003 SC 440**.

3. Mr. Merajuddin, learned counsel for respondent No.1, has supported the impugned order dated 16.9.2022 passed by the learned Single Judge in Suit No.2329/2017. Learned counsel submitted that respondent No.1 approached the SITE who had issued a letter dated 7.1.2016 certifying that no dues were outstanding in respect of the suit property including NUF; that such letter was communicated to the appellant but the appellant was not ready and willing to pay the balance sale consideration and sought discount in the price agreed by and between the parties vide agreement dated 03.1.2016. Learned counsel submitted that vide legal notice dated 15.2.2016, the appellant was put on notice that if he

failed to pay the balance sale consideration on or before 17.02.2016 the sale agreement could be treated as canceled. Learned counsel asserted that the appellant failed to comply with the requirement as made in the sale agreement and directly approached this court and succeeded in obtaining ex-parte ad-interim order from the learned Single Judge of this court which application was contested finally the learned Single Judge was pleased to dismiss CMA No.15383/2017, therefore, no further indulgence of this court is required in the matter. He lastly prayed for allowing the parties to leave the evidence in the matter if the appellant is interested in pursuing his case before the learned Single Judge, however, that is without prejudice the right of respondent No.1 to file a proper application for rejection of plaint and/or dismissal of the suit on the ground that the appellant has failed and neglected to perform his part of contract vide sale agreement dated 3.1.2016.

4. We have heard the learned counsel and with their assistance examined the documents available on record and case law cited at the bar.

5. The Instant High Court Appeal has been filed against the interlocutory order dated 16.09.2022 passed by the learned Single Judge in Suit No.2329/2017, whereby, the ad-interim order granted in favor of the appellant was recalled while dismissing the CMA No.15383/2017 filed under Order XXXIX Rule 1 & 2 CPC by the appellant. For convenience's sake, an excerpt of the order is reproduced as under:

“5. Heard the learned counsel and perused the record.

6. The case set-up by the plaintiff is essentially that since there was no construction on on the suit plot, there had to be NUF outstanding in respect of the suit plot which fact was being suppressed by the defendant No.1; hence it was obvious to the plaintiff it would subsequently be saddled by the SITE with outstanding NUF which was the liability of the defendant No.1. uch reason given by the plaintiff is hardly any justification for not paying the balance sale consideration within the time agreed. Firstly, the letter dated 07-01-2016 issued by the SITE, which has been suppressed by the plaintiff, categorically stated that no dues were outstanding in respect of the suit plot. In its written statement, the SITE has endorsed such letter. Reliance placed by the plaintiff on another letter at page 33 (Annexure D to the plaint) purportedly issued by SITE is of no help to it inasmuch as such letter is un-dated, un-signed, and in any case it relates to NUF outstanding in the year 2009, not 2016. Secondly, if it is the case of the plaintiff that it had being lured into the transaction by a misrepresentation of the outstanding NUF, then its remedy is to seek refund/compensation and not specific performance.

7. It is settled law, as reiterated in *Amina Bibi v. Mudassar Aziz* (PLD 2003 SC 440), that for relief of specific performance of a contract, the plaintiff has to demonstrate that he was ever ready and willing to perform his part of the contract from the date of the contract to the date of the suit. Given the circumstances discussed above, the plaintiff has not been able to do so. Therefore, CMA No. 15383/2017 is dismissed.”

6. It appears from the record that the appellant had entered into a contract in respect of the purchase of plot No.D-239/A, admeasuring 0.50 Acre, with construction thereon, situated in SITE Karachi, for a total sale consideration of Rs.22,500,000/- (Rupees Twenty Two Million Five Hundred Thousand Only), whereas, 10% of the said amount i.e. Rs.22,50,000/- was paid as earnest money, however, sale agreement could not be executed in time as the balance payment of sale consideration was not paid by the appellant, therefore, the subject suit was filed by the appellant to seek specific performance of the agreement, wherein, the stay was granted in favor of the appellant, however through impugned order, the same has been vacated by dismissing the application.

7. The record reflects that the sale agreement was made between parties on 03.01.2016 who agreed on the sale consideration of Rs.22,500,000/- and at the time of signing the agreement, the vendor had received 10% part payment of the total sale consideration. Per clause No.3 of the said agreement, the remaining amount of Rs.20,250,000/- was required to be paid by the vendee to the vendor on or before 13.01.2016 with the grace period of 30 days, and as per the record, the appellant failed to pay the balance sale consideration to the respondent No.1 within time as required in the sale agreement.

8. Primarily, the issue involved in the present proceedings is simple for the reason that agreement to sell, as noted above, is comprised of reciprocal promises and corresponding obligations to be performed in the manner provided for. The Hon’ble Supreme Court of Pakistan has held in its various pronouncements that a vendee cannot seek enforcement of reciprocal obligation on the part of the vendor to execute the sale deed unless he demonstrates that he not only has the financial capacity but he was and is also always willing and ready to meet the same. The Promisor /Vendor need not perform his part of the promise or obligation to execute conveyance, unless the Promisor/Respondent, (the vendee) "is ready and willing to perform his reciprocal promise."

9. To go ahead further on the subject issue, the Honorable Supreme Court in the cases of *Space Telecommunication (Pvt.) Ltd. v. Pakistan Telecommunication Authority* **2019 SCMR 101** and *Mst. Samina Riffat and others v. Rohail Asghar and others* **2021 SCMR 7** held it to be "mandatory for such party that on first appearance before the court or on the date of institution of the suit, it shall apply to the Court for permission to deposit the balance amount. Any omission in such regard would entail the dismissal of the suit or decretal of the suit if it was filed by the other side.

10. The Hon'ble Supreme Court of Pakistan has decided the subject issue which is the issue of the present case on the premise that often it is misconstrued that time is not the essence of the contract in cases of specific performance, in respect of the immovable property. Generally, reliance is placed on section 55 of the Contract Act. The archaic rule that generally, time is not of the essence in contracts involving the sale/purchase of immovable property, could not be used as a ground to grant or otherwise specific performance unless the circumstances that prove otherwise are highlighted and proved by the vendor and or vendee as the case may be.

11. The Honorable Supreme Court, in the cases of *Muhammad Jamil and others v. Muhammad Arif*, **2021 SCMR 1108**, and *Malik Bahadur Sher Khan v. Haji Shah Alam* **2017 SCMR 902** has calibrated the rule under the intent and spirit of the provision of the Contract Act in following terms:

"The argument of the learned ASC for the respondent that the time was not of the essence of the agreement does not appear to be correct when we look at the words used in the agreement providing that the remaining part of the agreement would be performed within one and a half months. If for a while we do not consider the dates mentioned in the agreement showing terminus a quo and terminus ad quern then time would not be of the essence in any contract. If the date stipulated in the agreement is not considered a terminus ad quern, we are at a loss to understand what else could be considered as a terminus ad quern. Such interpretation of the agreement, quite obviously, would not only put the vendor at a disadvantage but also leave him at the mercy of the vendee who may or may not perform the remaining part of the agreement on one pretext or another. This state of things could be accepted in the sixties and seventies of the 20th Century when the prices of land used to be static for decades and decades together. Perpetuation of such a state of things in this part of the 21st Century would rather be unfair, unjust, and even inequitable when every passing day brings a decrease in the value of the rupee and a manifold increase in the prices of the land. We, thus, do not approve diluting the import of the words used in the agreement expressing terminus a quo and terminus ad quem and envisaging time as the essence of the contract."

12. The question, of whether time is the essence of the contract or otherwise, was also examined by the Honorable Supreme Court in the case of Muhammad Abdur Rehman Oureshi v. Sagheer Ahmad **2017 SCMR 1696** and it was concluded that:

“As far as the argument of learned counsel for the appellant that time was of the essence of the contract is concerned, we do not find ourselves in agreement with him for the reason that admittedly time for execution of the sale deed was extended on a number of occasions and at least on a few of the said occasions it was on the request of the appellant. However, in view of the commercial nature of the property business and a widespread trend of rapid increase in prices of immovable properties, a seller cannot be left at the mercy of the buyer to bind him in an agreement to sell and then delay completion of the contract for as long as he may wish hiding behind an archaic legal principle that in contracts involving immovable properties, time is generally not of the essence. This rule was settled many centuries ago when prices of real estate remained constant and stagnant for years on end. It is high time that this rule was revisited and revised keeping in view the changed circumstances and the ground realities of the real estate market. In this day and age, on account of rapid increase in population demand for real estate has increased. Further, on account of various reasons better financial resources are available with prospective purchasers. Big investors have also entered the fray to take the benefit of growing demand for real estate. On account of increasing demand and limited supply, property prices rise rapidly, at times in a matter of months. Therefore, the aforesaid principle that in real estate transactions, time is not of the essence cannot indiscriminately be applied. It must be interpreted and applied specifically considering the facts and circumstances of each case to balance equities, keeping the standards of reasonability in mind and ensuring that injustice is not done to either side.”

13. So far as the jurisdiction to decree specific performance which is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal. Reliance is also placed on the judgment of the Honorable Supreme Court in the case of Liaqat Khan v. Falak Sher (PLD 2014 SC 506): wherein it has been held that a buyer's primary obligation in a contract of sale is to make payment of the balance sale consideration as stipulated in the contract. If the seller refuses to receive payment the buyer must establish that he had the required money which was kept aside for the seller, for instance, by making a payment order or cashier cheque in his name. This would show that the buyer no longer had access to the sale consideration. Alternatively, the buyer could have deposited it in court.

14. In the present case, the appellant did neither. It is well-settled law that if a buyer does not fulfill his primary obligation to secure/tender the sale consideration and files suit and does so without depositing the sale consideration in court at the first opportunity, the buyer is placed in an advantageous position.

15. In this case, the agreement was executed on 03.1.2016 and the suit was filed on 06.11.2017. And now after six years, it would be eminently unfair if the appellant, the purported buyer is permitted to pay the same amount to the seller as pointed out by learned counsel for the appellant that the said amount has been deposited in terms of order dated 27.9.2022. We have perused the order which is conditional i.e. subject to all just exceptions, thus the appellant cannot ask for condonation of delaying the payment of sale consideration.

16. We have noticed that over time the price of land has increased and the value of the rupee has continuously depreciated. Therefore, if the suit was to be decreed now it would give an unfair advantage to the appellant, who would have got the plot for what effectively would have been a lesser price (in real terms) than what the parties had agreed to in the agreement dated 03.1.2016. Respondent No. 1 would have also retained and utilized the amount (the balance sale consideration).

17. In view of the above facts and circumstances of the case, without prejudice to the rights of parties in pending litigation, we do not find any illegality in the impugned order for our interference, therefore, for the reasons mentioned above, this appeal is dismissed.

**JUDGE**

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Nadir\*