

**IN THE HIGH COURT OF SINDH,
KARACHI**

Suit No. 871 of 1987

Muhammad Habib and others

Versus

Humayun Limited and others

Date of hearing: 20.01.2016.

Plaintiffs: Through Messers Liaquat Merchant along with Ghulam Murtaza, Advocates.

Defendants No.1 to 3: Through M/s. Makhdoom Ali Khan, Sami-ur-Rehman Khan and Jam Zeshan Ali, Advocates.

Defendant No.4: Through Mr. Arshad Warsi, Advocate.

Muhammad Faisal Kamal Alam, J: Through the present suit, the Plaintiffs have, inter alia, sought Specific Performance of Contract in respect of a Plot of land-Survey No.23/2, Survey Sheet CL-5, admeasuring 6603 Square Yards, together with the construction thereupon, which for the sake of reference be referred to as the "Suit Property", regarding which, the Plaintiff and Defendant No.1 have entered into an Agreement to Sell dated 8thDecember, 1986-the **main Agreement**.

1. The undisputed facts are that the said main Agreement was amended twice by way of Supplementary Agreements and the significant amendments relating to the present controversy is that the forfeiture cause as existed in Clause-5 in the

original Agreement (main Agreement) was subsequently deleted. The total sale consideration was agreed to be Rs.45 Million (Rupees Forty Five Million Only), out of which, a part payment of Rs.45,00,000/- (Rupees Forty Five Lac Only) was paid at the time of signing of above main Agreement and Rs.30,000,00/- (Rupees Three Million Only) was paid thereafter for settling the liability of National Bank of Pakistan-the Defendant No.2.

2. In the instant suit, besides National Bank of Pakistan and the Province of Sindh (Defendant No.3), one Sumitomo Corporation is also impleaded as Defendant No.4, which was a tenant of Defendant No.1 in respect of a portion of the suit property and initially refused to vacate the suit property under its occupation, which became the bone of contention between the Plaintiffs and Defendant No.1 as Vendee and Vendor respectively. It was also pleaded from the Plaintiffs' side that time being essence of the contract, which was required to be completed within 12 (twelve) months in terms of Clause-4 of the above referred main Agreement, which also entails a consequence in the shape of payment of five percent interest per annum, in the event of default.

3. The grievance of the Plaintiffs primarily leading to filing of the present proceedings is that the Defendant No.1 failed to fulfill its contractual obligation by not taking proper measures for vacating the Defendant No.4-Sumitomo Corporation, and a ground had been created by Defendant No.1 to frustrate the aforesaid contract in respect of the sale transaction of the suit property. Following reliefs have been claimed by the Plaintiffs:-

- “a). *against Defendant No.1 for specific performance of contract in suit and for vacant possession of property bearing Survey No.23/2, Survey Sheet No.CL-5, Civil Lines Quarters, Karachi, including premises in occupation of Defendant No.4;*
- b). *against Defendant No.4 for vacant possession of premises in property in suit in occupation of Defendant No.4;*
- c). *against Defendants No.1 and 4 for compensation and damages:*
1. *upto date of suit in the sum of Rs.94,791/=*
 2. *for compensation and damages from date of suit till payment in the sum of Rs.82,191/- per day until payment;*
 3. *for interest / profit/gain at 20 percent per annum on sum adjudged from date of suit till payment;*
 - 4). *Costs of suit;*
- d). *against Defendant No.2 for discharge and redemption of mortgage, charge and encumbrance and for subrogation of rights and entitlements of Defendants No.2 in the Plaintiffs;*
- e). *against Defendant No.3 for working out matters arising from notice of acquisition in letter CTS/CS-1/152 dated 29.04.1986 and for bringing into account and adjusting rights and obligation in the premises;*
- f). *against all the Defendants for appointment of Recovery and for injunction and also*
- g). *for such further and or other relief as the nature and or circumstances of the case may require.”*

4. The contesting Defendant No.1 filed a detailed Written Statement and while refuting the claim of Plaintiffs has elaborated its stance and placed on record various correspondences exchanged between Defendant No.1, Defendant No.4 (tenant of Defendant No.1) and Plaintiffs.

5. Crux of the stance of Defendant No.1 is that at all material times, the said Defendant No.1 was ready and willing to perform its contractual obligation and in pursuance thereof it got evicted different portions of the suit property from respective tenants, dismantling a Petrol Pump as well, which was being run by the said Defendant No.1 (**paragraph 1.09 of Written Statement**).In this regard, correspondences were exchanged between the said Defendant No.1 and Plaintiff, wherein, the former has offered the latter to take the possession of the suit property together with Defendant No.4 as tenant but Plaintiffs who were planning to use the suit property for a commercial venture by constructing a multi-storied project, refused to accept the offer of the Defendant No.1 and consequently, the above mentioned main Agreement had become impossible to be performed and consequently was terminated.

6. The Defendant No.4-Sumitomo Corporation also filed its Written Statement and, inter alia, while categorically refuting the allegations of collusion between itself and Defendant No.1, pleaded that being a lawful tenant of the premises, that is, in respect of a portion in the suit property, the Defendant No.4 could only be evicted through due process of law, that is, in terms of Sindh Rented Premises Ordinance, 1979. However, at a later stage, the said Defendant No.4 vacated the premises

and informed this Court accordingly by filing a CMA No.6466 of 1996, which was granted by the order dated 27.05.1997.

7. From the pleadings of the parties, following issues have been framed by the order dated 28.05.1990_

1. Whether the contract dated 08.12.1986 between defendant No.1 and the plaintiff became impossible of performance and / or stood frustrated for the reasons stated in para 1.12 of the written statement of defendant No.1, if not, what is the effect?
2. Whether the plaintiff is entitled to specific performance of the contract dated 08.12.1986 in its original form or as offered vide letter dated 12.10.1987 if not, to what compensation / damages is the plaintiff is entitled?
3. Whether the property in question underwent any change during the period 27.10.1987 and 06.12.1987 as alleged by the defendant No.1. If so, what were these changes and what is the effect on the contract in question?
4. Whether the plaintiff is entitled to any damages against the defendants No.1 and 4.
5. What should the decree be?

8. On behalf of Plaintiffs, Plaintiff No.2-Haji Mohammad Amin was examined, whereas on behalf of Defendant No.1, its the then Director Humayun Baig Muhammad (since deceased) testified and his cross examination though was recorded on various dates, but could not be concluded, inter alia, as on 27.12.2007 the latter passed away and his side was closed for recording further evidence by the Court vide order dated 07.08.2002, where after, on 27.08.2002 and 29.04.2003 side of other Defendants for leading evidence were also closed.

9. Mr. Bashir Ahmed Memon, the Official Assignee, High Court of Sindh also deposed as PW-2 in respect of his Inspection Report about the suit property. The said Official Assignee was appointed as Commissioner by the order dated 30.04.1990. Similarly, Mr. Munawar Ali Bhatti son of Abdul Shakoor, who was at that relevant time the Deputy Registrar of Companies, had produced record relating to different Companies, which were occupying their respective portions in the suit property as tenants, inter alia, to corroborate the stance of Plaintiff that all such entities were in fact associated companies of the Defendant No.1.

10. Determination on the above mentioned issues are as follows:-

ISSUES NO.1 AND 2.

11. Since the above issues are interlinked, hence, they have to be decided together. After appraisal of evidence and undisputed documentary evidence, which are exhibited during evidence, following position has emerged.

12. Rupees Seven Million Only (Rs.70,000,00/-) towards part payment of sale consideration was received by Defendant No.1 has not been disputed. In cross examination the Plaintiff No.2 has acknowledged the fact that before entering into the said main Agreement, the suit property was surveyed by him. It is also not disputed that Petrol Pump had already been dismantled and structure of Palace Cinema at the suit property was removed and tenants were evicted, except the said Defendant No.4. All this was done within the stipulated time

frame of twelve months as provided in Clause-4 of the main Agreement.

13. It is admitted by the Plaintiff in his evidence that he was offered by the Defendant No.1 (Vendor / Seller), the possession of the suit property together with Defendant No.4, which could be subsequently evicted through due process of law by the Plaintiffs themselves. It is also not disputed that an area of 222.8 Square Yards was acquired by Defendant No.3- Government of Sindh, therefore, in the draft Conveyance Deed, which has also been exhibited as an undisputed document Ex-D/16, the latest physical possession of the suit property at that relevant time, was mentioned, however, the Plaintiffs through their correspondence dated 11.08.1987 (Ex-DW-1/11;Page 377 of case file), refused to take possession of the suit property, in order to complete the sale transaction in question. Admittedly, the said Defendant No.1 offered to return the above part payment to Plaintiffs, but the fact remains, the above amount of Rs.75,00,000/- (Rupees Seventy Five Million Only) remained with Defendant No.1.

14. It was admitted by the said PW-1 being the Co-Vendee / purchaser that the plaintiffs were not ready to take the property with defendant No.4 as tenant, besides the plaintiff wanted adjustment of price on account of acquisition of a portion of land as mentioned above.

15. After almost sixteen months of filing of the instant proceedings, the Plaintiffs filed an application being CMA No.2560 of 1989 under Section 14 of the Specific Relief Act read with Order XII Rule 6 of CPC, praying that the instant suit

may be decreed to the extent as offered by Defendant No.1 in its letter dated 12.10.1987 (Exh: DW-1/20), however, in this regard, since an issue was already framed, therefore, by an order dated 28.05.1990, the said interlocutory application was dismissed.

16. The Defendant No.1 in its pleadings as well as in Counter Affidavit to the above mentioned CMA No.2560 of 1989, had mentioned that various portions of the suit property had already been let out to different entities, viz. (i) National Beverages Limited, (ii) Huma Services Limited and (iii) Qualiton Ltd, it has been proved by the Plaintiffs that the above entities were in fact the Associates Companies of Defendant No.1 on account of their intertwined shareholding-Directorship. However, this plea of defendant No.1 cannot be given due weightage after appraisal of the cross examination of the said DW-1 (Late) Humayoun Baig Muhammad.

17. In his cross examination, DW-1 has specifically mentioned the measures the latter had taken in pursuance of the main Agreement (of December, 1986), including demolishing and removal of 'Malba' of Palace Cinema, dismantling and clearance of Petrol Pump site, eviction of tenants including Pangrio Sugar Mills (Ltd) and settling loan of State Life Insurance, which facts have never been disputed by the Plaintiffs in their evidence.

18. In this regard, relevant portion of the cross-examination of PW-1 is pertinent when in response to a question it was acknowledged by him that though the substantial compliance in pursuance of the said main Agreement was made, but

primarily due to refusal of Defendant No.4 to handover tenement under its occupation as tenant, and for want of adjustment in sale price as small portion of the suit property was acquired by Defendant No.3, Plaintiffs were not ready to take over the peaceful possession of the suit property and complete the sale transaction. It would be advantageous to reproduce relevant portion of the cross examination of PW-1 (Page -85 of the Evidence File)_

“However we were not ready to take the property with one tenant namely Sumitomo not vacating it’s office as we had agreed to take vacant possession of the property. Apart from the question of the premises of Sumitomo we wanted adjustment in price on account of some land in the property having been compulsorily acquired by the Govt. and it’s compensation to be adjusted out of the price. No other objections were there. It is not correct to suggest that the acquisition of land matter was beyond the scope of the agreement.”

19. It was also not refuted by the PW-1 in his cross-examination that the amended draft of the Conveyance Deed was sent back to the Plaintiffs by Defendant No.1 on 18.07.1987 and, where after, the same was not objected to by the Plaintiffs. It can be easily deduced from the evidence of PW-1 and DW-1 that the said Defendant No.1 had arranged meetings between the Defendant No.1-Sumitomo for resolving the matter amicably, so that the said Defendant No.4 could be evicted from the suit property conveniently without any litigation.

20. Though the liability of Defendant No.2-National Bank of Pakistan was not settled, but that was not an impediment in transferring the suit property in question in favour of the plaintiffs; what became a measure impediment in completing the sale transaction in question and leading to the filing of the present proceeding was refusal of Defendant No.4-Sumitomo Corporation to vacate the portion of the suit property in their possession as tenant and acquisition of 222.8 square yards of part of suit property by the Government regarding which the Plaintiffs wanted to re-negotiate the price.

21. Mr. Ghulam Murtaza, learned counsel for the Plaintiffs has strenuously argued that since the testimony of DW-1, the sole witness from Defendants' side was not concluded, the same should be discarded, as it is not admissible in evidence. In support of this proposition, he has cited the following case law_

- (i) PLD 1980 Karachi Page-213 (relevant Page-216-C)
- (ii) PLD 2005 Supreme Court Page-63 (relevant page-76-C)
- (iii) 1986 SCMR Page-1735 (relevant page-1767)

22. On this very point of law, Mr. Makhdoom Ali Khan, learned counsel, representing Defendant No.1, while controverting the above stance of Plaintiffs, has relied upon following case law_

- (i) PLD 1970 Lahore Page-845 (relevant Page-853-D).
- (ii) 2002 YLR Page-2242 (relevant page-2248)
- (iii) AIR 1946 Patna Page-384 (relevant Page-385)
- (iv) AIR 1936 Patna Page-35-C
- (v) PLD 1929 Lahore Page-840 (relevant Page-842)

23. The gist of the above mentioned pronouncements is that when no opportunity to cross-examine the deponent has been given or the witness has disappeared or did not turn up after entering the witness box earlier, his testimony would be inadmissible. Facts of the instant case are entirely different. The Defendants' witness (DW-1) was cross-examined on number of occasions and it is also evident from the record that on few dates he could not be cross-examined on account of adjournments sought by the Plaintiffs' side. On 27.12.2007, the said DW-1 passed away. Considering this aspect, the law cited by the Plaintiffs' side is clearly distinguishable as against the case law relied upon by the Defendant No.1, which are applicable to the present case. Hence, the evidence adduced by DW-1 cannot be excluded or discarded. In this regard, the above mentioned decision of the Hon'ble Lahore High Court (PLD 1970 Lahore Page-845) squarely applies to the instant case and the relevant paragraph-17 is reproduced herein below: -

"17. To my mind, there is no difficulty about the admissibility of the evidence of a witness who could not be further cross-examined. The question is of the weight to be attached to such an evidence. If the cross-examination is complete then the mere argument that the accused could further meet the case against him by further cross-examination will not ordinarily persuade the Court to throw out the entire evidence. It is a part of the record and has to be considered unless prejudice or possibility of prejudice is shown (See the case of Lockley AIR 1920 Mad. 201 referred to above). In Mst. Horil Kuer and another v. Rajab Ali and others (7) a witness was examined on commission but before his cross-examination could be complete, he died. It was held that this evidence could not be ignored and that the weight to be attached to such evidence depended on the circumstances of the case."

24. It was next argued by the Plaintiffs' counsel that the subject contract for sale of the suit property was not frustrated, as the Defendant No.1 lacked sincerity to fulfill its part of the obligation. It was next contended that even otherwise a party (in the instant case, the said Defendant No.1), cannot take a plea of frustration of contract because the said Defendant No.1 malafidely created insurmountable impediments. The following judicial precedents have been relied upon by the Plaintiffs' side to augment his argument: -

- (i) PLD 1960 Dacca Page-308(relevant Page 314)
- (ii) PLD 1965 Supreme Court Page-37 (relevant Page-41).
- (iii) PLD 1965 W.P Karachi Page-274 (relevant Page 244-C)
- (iv) 1992 SCMR Page-1629
- (v) 1989 MLD Karachi Page-3429 (relevant Page 3431)
- (vi) 1992 SCMR Page-1629
- (vii) PLD 1965 SC Page-61
- (viii) PLD 1978 Karachi Page-585 (relevant Page 590)
- (ix) 1993 SCMR Page-804
- (x) 1984 CLC Page-3080 (relevant Page-3086).

25. To controvert the above submissions of the Plaintiffs, Mr. Makhdoom Ali Khan, the learned counsel for the Defendant No.1 has argued that the relief of Specific Performance is of discretionary nature and in terms of Section 22 of the Specific Relief Act, 1877, the Court is not bound to grant Specific Performance as a rule of thumb and has to take into account other attending circumstances, as has happened in the present case, that the Plaintiffs admittedly opted not to take over the possession of the suit property and declined the written offer of Defendant No.1, which has been discussed in the foregoing

paragraphs. In support of his arguments, following case law has been relied upon_

- (i) AIR 1944 Madras Page-239 (relevant page 243)
- (ii) 1989 MLD Page-3429 (relevant Page-3431)
- (iii) PLD 1978 Karachi Page-585 (relevant Page 590)
- (iv) AIR 1936 Sindh (relevant Page-26)
- (v) 2006 CLC Page-1110
- (vi) 1992 SCMR Page-1629

26. It was also argued on behalf of the Defendant No.1 that in the given circumstances, the Plaintiffs are not entitled for damages, as the contract became impossible to be performed in terms of Section 56 of the Contract Act, 1872, so also as Plaintiffs did not lead evidence in respect of the relief of damages in terms of Order VIII Rule 3 of CPC, hence, damages cannot be awarded to them. In this regard, following judicial precedents have been relied upon_

- (i) 1984 CLC Page-1280 (relevant Page-1284)
- (ii) 2001 MLD Page-1181 (relevant Page-1182)
- (iii) 1999 YLR Page-1523 (relevant Page-1528)
- (iv) 1991 MLD Page-1101 (relevant Page-1111)

27. No doubt, a contractual obligation is to be taken seriously being a sacrosanct commitment amongst the parties and, if any of the parties, it appears on record is attempting to wriggle out of his commitment / promise, then the Court has to intervene, in order to save a contract, not only being a legal obligation but a social one too. In a society, where its members do not keep their promises, that society is bound to witness

decadence. A performance of contract is a social and moral obligation of the party also.

28. The Judgments relied upon by the learned counsel for the Plaintiffs are basically to the effect that contract for sale of land must be performed despite presence of difficult conditions or even if some unforeseen event arises. It is further submitted that contracts mentioning a time frame would not be strictly construed so as to allow some party to resile from an obligation. The Hon'ble Supreme Court in Joydeb Agarwala case PLD 1964 Supreme Court Page-37 (ibid) has held, that even if a land has been compulsory acquired by the Government authorities, the contract shall not be frustrated but the purchasers who paid the sale price would be entitled to get the compensation awarded by the competent authority for such acquisition of land.

29. The précis of decisions cited by the learned counsel for the Plaintiffs as mentioned herein above is that Courts have saved the contract from being frustrated and ordered its specific performance. Even otherwise, the parties invoking the doctrine of frustration has to show that their exist factors, which are beyond the control of that party and such factors have made it impossible to continue with the contract by destroying a very basis of the contract itself or striking at its root, as decided by Dacca High Court (PLD 1960 Dacca Page-308).

30. In pursuance of the Sale Agreement dated 8thDecember, 1986 (the main Agreement), it has come on record that Vendors / Defendants took substantial steps (as mentioned in the

earlier paragraphs), but said Defendant No.1 became helpless when it comes to evict the Defendant No.4 (a tenant) from a portion of the suit property and in this regard Plaintiffs were also involved in the negotiations for reaching an amicable settlement, but they also failed. Consequently, the Plaintiffs refused to take possession of the suit property with Defendant No.4, besides, as is also evident from the testimony of Plaintiffs' witness, the Plaintiffs were also interested in getting the adjustment in sale price on account of acquisition of a small portion of the suit property by the Defendant No.2-Province of Sindh. The status of Defendant No.4 being a duly inducted tenant is not in dispute and, therefore, neither Plaintiffs nor Defendant No.1-Vendees and Vendor respectively could have evicted the said Defendant No.4-Sumitomo from the premises without due process of law. This very stance of Plaintiff, rather refusal, to complete the sale transaction by accepting Defendant No.4 as tenant, goes to the very root of the main Agreement. It is also a matter of record that almost after sixteen months from the date of filing the suit and almost after thirty two (32) months from their (Plaintiffs) refusal vide missive of 11.08.2007 (Ex DW-1/17; page 377 of the case file), the Plaintiffs moved the above mentioned application under Section 14 of the Specific Relief Act-CMA No.2560 of 1989, for seeking a decree in terms of above referred letter of 12.10.1987 (Ex DW-1/20), that is to say, the Plaintiffs after refusing to complete the sale transaction changed their mind, rather, resiled from its earlier stance/position, which, in my considered opinion, it was too late in the day to ask for such a relief, while knowing fully that the suit property is located at a prime location in the City of Karachi and by that time, the

Defendant No.1 had started utilizing the suit property in accordance with its own commercial need, therefore, the Plaintiffs are estopped by their conduct from now getting the relief of specific performance either in respect of the said main Agreement to Sale {dated 8th December,1986}, or, as subsequently offered by Defendant No.1 in its Letter dated 12.10.1987 (Ex-DW-1/20); Page-399 of suit file) in the present proceedings. The Main Agreement to Sale became impossible to perform.

31. The other important factor is that the Plaintiffs never deposited the balance sale consideration in the Court with their above mentioned interlocutory application filed under Section 14 of the Specific Relief Act, 1877, in order to show their bona fide. On this very issue, even conduct of the Defendant No.1 is also not a bonafide one though it is an admitted fact that earlier Defendant No.1 did offer to refund the entire part payment, but the Defendant No.1 should have deposited the part payment of Rs.7.5 Million (Rupees Seventy Five Lac Only) with the Nazir of this Court, even if the Plaintiffs had refused to receive it, which was never done. However, consequences of this act vis-à-vis Defendant No.1, would be discussed while giving finding on Issues No.4 and 5. Therefore, the Issues No.1 and 2 are answered in Affirmative and Negative respectively, but, against the Plaintiffs.

ISSUE NO.3

32. The main stance of Defendant No.1 is that after termination of main Agreement vide letter dated 29.10.1987 (Ex DW1/D/16, page-433 of the main case file), the suit

property underwent changes and various tenants were inducted in respect of different portions in the suit property in the intervening period, that is, between 27.10.1987 to 06.12.1987; when the present suit was filed. Although the Plaintiffs have disproved this plea of Defendant No.1 in evidence by proving that the said different tenants were in fact the associated companies and entities of said Defendant No.1, but the fact remains that earlier the Plaintiffs have refused to complete the sale transaction in question as offered by the Defendant No.1 vide its above referred correspondence of 12.10.1987. Even, if the version of Plaintiffs is accepted that the suit property did not undergo any significant change between 27.10.1987 to 06.12.1987 (in two months), and all such tenancies in respect of the suit property was artificially created by Defendant No.1 at that relevant time, with the ulterior motive to frustrate the above referred main Agreement, even then the present suit cannot be decreed, for the reason that it is not these changes or developments which occurred in those two months; from 27.10.1987 to 6.12.1987, but, the conduct of Plaintiffs, inter alia, **(i)** persistent refusal of Plaintiffs to complete the sale transaction, which persuaded the Defendant No.1 to utilize its suit property in a viable manner in years to come, by taking irreversible steps, **(ii)** belated change in the stance of Plaintiffs, when eventually they agreed to take the suit property as offered earlier by Defendant No.1 through its letter dated 12.10.1987 (supra), **(iii)** avoidance to execute the Conveyance Deed (amended one), and **(iv)** non-depositing of the balance sale transaction in the present proceedings to show their bona fide.

33. Issues involved in the instant case justify invoking Section 22 of the Specific Relief Act, 1877, particularly its sub paragraph-II and it would be useful to reproduce the relevant portion of the said provision.

“22. Discretion as to decreeing specific performance.---*The jurisdiction to decree specific performance 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.*

The following are cases in which the Court may properly exercise a discretion not to decree specific performance:

- (I) *Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.*
- (II) **Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff. (emphasis added)**
- (III) *Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance”.*

34. Consequently, Issue No.3 is answered accordingly.

ISSUE NO.4.

35. The instant proceedings is one of its kind, where a tenant has been impleaded as Defendant No.4 in a suit for Specific

Performance, which clearly indicates that even the eviction of said Defendant No.4 was beyond the control of Plaintiffs as well. Prayer clause (b) against the Defendant No.4 even otherwise could not have been granted, had said Defendant No.4 continued as a tenant in the suit property, as for evicting the said Defendant No.4-Sumitomo, a rent proceeding under the Sindh Rented Premises Ordinance, 1979, was to be filed. Therefore, even prayer clause particularly against the said Defendant No.4 is defective and not tenable.

36. Mr. Arshad Warsi, Advocate representing the said Defendant No.4-Sumitomo, has rightly argued that since the Plaintiffs had no privity of contract with his clients-the said Defendant No.4, therefore, the present suit against the said Defendant No.4 is not maintainable. It is a settled position and the same is also mentioned in the preceding paragraphs that either the said Defendant No.4 could have been evicted from the suit property by way of an amicable settlement for which there is ample evidence on record that the Defendant No.1 had tried and also involved Plaintiffs in the joint meetings, **or**, alternatively, the said Defendant No.4 would have been evicted by way of an appropriate proceeding.

37. Although, admittedly, the Defendant No.1 offered to refund the entire part payment of Rs.7.5 (Rupees Seventy Five Lac Only), despite the fact, that the said Defendant No.1 had taken substantial measures in compliance of the terms of the main Agreement, which has been discussed in detail herein above, yet the fact remains that the amount of part payment of Rs.75,00,000/- (Rupees Seventy Five Lac Only), which at that relevant time was a hefty one was not refunded to the Plaintiffs

and rather the acknowledgment of DW-1 in evidence shows, the said amount being utilized by the said Defendant No.1 in its business. Therefore, utilization of Plaintiffs' fund / money by Defendant No.1 for almost three decades justifies that the former (Plaintiffs) should be compensated in terms of Section 19 of the Specific Relief Act, 1877.

38. I am inclined to follow the decisions of the Hon'ble Supreme Court handed down in Mohammad Ishaque Versus Mst. Soofia Begum (supra) and Liaquat Ali Khan Versus Falak Sher reported in PLD 2014 Supreme Court page-506. In these cases the Hon'ble Apex Court though did not decree the suit for Specific Performance, but, granted compensation. In Mohammad Ishaque case (ibid), Respondent was directed to refund part payment along with profits, which may have accrued on the use of the amount from 20.04.1964 when Agreement for Sale was entered into till the payment of the amount at the rate Rs.10% per annum. However, in the subsequent decision in Liaquat Ali Khan (supra) a more pragmatic approach has been laid down, wherein, Court has granted a compensation of Rs.50,000,00/- (Rupees Five Million) for a part payment of Rs.30,000/- (Rupees Thirty Thousand Only) received by Vendor way back in 1979 against the total sale price of Rs.3,56,000/- (Rupees Three Hundred Fifty Six Thousand Only).

39. An amount of Rs.7.5 Million (Rupees Seventy Five Lac Only), which was a huge sum of money in 1986 is still lying with the Defendant No.1 and it has come in DW-1 deposition that the said amount was not kept in a separate bank account. This is one aspect of the case and the other is that during this

protracted litigation, the value of money / part payment of Plaintiffs lying with the Defendant No.1 kept declining, as it is a matter of common knowledge and record that in the recent decades Pak Rupees has suffered enormous devaluation, but, on the other hand, the suit property of Defendant No.1 has experienced an enormous appreciation in its value, therefore, equitable and fair exercise of discretion necessitates that Defendant No.1 should refund the part payment of Rs.7.5 Million (Rupees Seventy Five Lac Only) to the Plaintiffs along with Rs.5,00,000,00/- (Rupees Fifty Million Only) as compensation. Consequently, while declining the main reliefs to the Plaintiffs as prayed and answering the Issue No.4 in Negative to the extent of awarding Damages, the Defendant No.1 is liable to pay the compensation as an upshot of the above discussion.

ISSUE NO.5.

40. Suit of the Plaintiffs is decreed in the above terms and Defendant No.1 is directed to refund the part payment of Rs.75,00,000/- (Rupees Seventy Five Lac Only) in addition to Rs.5,00,000,00/- (Rupees Fifty Million Only) as compensation to Plaintiffs. There is no order as to costs.

Dated: 18.02.2016

JUDGE