

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI

**Suit No.1359 of 2004 &  
Suit No.1372 of 2004**

Date	Order with Signature of Judge
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Present: **Mr. Justice Nazar Akbar**

**1. Suit No.1359 of 2004**

Plaintiff : Muhammad Shafiq Qureshi  
Through Mr. Hashmat Alam Khan, advocate.

Defendant : Dr. Arifa Akram.  
Through Mr. Muhammad Safdar, advocate.

**2. Suit No.1372 of 2004**

Plaintiff : Dr. Arifa Akram.  
Through Mr. Muhammad Safdar, advocate.

Defendant : Muhammad Shafiq Qureshi  
Through Mr. Hashmat Alam Khan, advocate.

Date of hearing : 28.02.2018

Decided on : 12.04.2018

**JUDGMENT**

**NAZAR AKBAR, J.** By this common judgment I intend to dispose of consolidated suit No.1359/2004 and 1372/2004. On **02.12.2004** Muhammad Shafiq Qureshi had filed **suit No.1359/2004** for Specific Performance of Contract dated **27.11.2002** against the sole defendant Dr. Arifa Akram. Before summons in suit No.1359/2004 could be issued to her, on **7.12.2004** Dr. Arifa Akram filed **suit No.1372/2004** for declaration and permanent injunction and cancellation of the said contract against the sole defendant Muhammad Shafiq Qureshi. Both suits were consolidated and Suit No.1359/2004 was declared leading suit.

2. Brief facts of the case are that the defendant is owner of bungalow No.154/I, Khayaban-e-Hafiz, Phase-VI, measuring 500 square yards, situated in Pakistan Defence Officers Housing Authority, Karachi (hereinafter referred as the “suit property”). The plaintiff, an estate agent of M/s. Qureshi Estate in November, 2002 through another estate agent of Mr. Arshad Shahbaz M/s. Abad Estate approached the defendant to purchase the suit property. Mr. Arshad on **24.11.2002** paid Rs.100,000/- as token money to her against kutchra receipt. Subsequently, an agreement to sell dated **27.11.2002** was executed between the plaintiff and the defendant allegedly in presence of two witnesses wherein agreed total consideration was **Rs.6,500,000/-**. In pursuance of the said agreement, the plaintiff further paid an amount of **Rs.550,000/-** to the defendant through pay order No.184200 dated **26.11.2002** drawn on ABN Amro Bank, Karachi and balance payment of **Rs.58,50,000/-** was payable on or before **30.01.2003** at the time of registration of sale/ conveyance deed and handing over of peaceful vacant possession of the suit property to the plaintiff. The plaintiff invited public objections on the proposed sale of the suit property through a publication in daily Dawn Karachi dated **11.01.2003**. The plaintiff alleges that he repeatedly approached the defendant to complete the sale transaction and specifically informed the defendant directly and also through M/s. Abad Estate that he was ready and willing to pay the balance consideration of **Rs.5,850,000/-** but the defendant avoided to do so on one or the other pretext. Therefore, the plaintiff sent a legal notice dated **29.01.2003** to the defendant through courier service but the defendant neither replied the said notice nor performed her part of the contract. The plaintiff on **7.10.2004** sent second legal notice to the defendant through courier

service and the defendant on **26.10.2004** through her advocate replied the said legal notice and refused to perform her part of the contract. Therefore, on **2.12.2004** the plaintiff filed the instant suit and prayed for the following relief(s):-

- 1) *For a declaration that the agreement of sell dated 27.11.2002 executed between the plaintiff and defendant is a legal and valid document and has binding effect on both the plaintiff and defendant.*
- 2) *Direct the defendant to fulfill her part of the agreement dated 27.11.2002 as the plaintiff is ready and willing to fulfill his obligation thereby transferring all the property, possessory rights in favour of the plaintiff vested in the property bearing Bungalow No.154/I, Khayaban-e-Hafiz, Phase-VI, Defence Housing Authority, Karachi, admeasuring 500 square yards, after receiving balance and sale consideration as agreed upon with the plaintiff.*
- 3) *A permanent injunction thereby restraining the defendant, her agents, person, persons, haries, assigns, representative, attorneys acting on her behalf and under her authority from selling, encumbering or in any manner otherwise dealing adversely to the interest of the plaintiff with the demised property bearing Bungalow No.154/I, Khayaban-e-Hafiz, Phase-VI, Defence Housing Authority, Karachi, admeasuring 500 square yards, or creating a third party interest against the bonafide claim of the plaintiff.*
- 4) *This Hon'ble Court may further be pleased to direct/ mandate the defendant to execute the sale deed in favour of the plaintiff thereby transferring all the ownership, proprietary and possessory rights in favour of the plaintiff along with handing over of all the original and other germane documents in terms of the judgment of this Hon'ble Court or **otherwise** appoint Nazir of this Hon'ble Court to execute the sale deed in terms and mandate for the adjudication of this lis.*
- 5) *This Hon'ble Court may further be pleased to direct the defendant to handover vacant peaceful possession of the demised property bearing bungalow No.154/I, Khayaban-e-Hafiz, Phase-VI, Defence Housing Authority, Karachi, to the plaintiff.*
- 6) *Cost of the suit.*
- 7) *Any other further relief in the circumstances of this case may be awarded to the plaintiff.*

3. The defendant contested the suit and in her written statement she raised legal objections as to maintainability of suit and averred

that she has already filed a suit bearing **No.1372/2004** for cancelation of agreement and to restrain the plaintiff from extending illegal threats to her. The defendant averred that she had signed blank agreement and received an amount of Rs.6,50,000/- on **27.11.2002** as a token money/part payment against receipt. It was also averred that as per agreed terms and conditions the sale deed was to be registered on or before **30.1.2003** a date mentioned in the agreement but the plaintiff failed to arrange the balance sale consideration by the said date. The defendant contacted with the plaintiff who showed his inability to purchase the suit property for non-availability of funds. Therefore, the defendant forfeited his token money and cancelled the agreement/contract and informed the plaintiff about such cancellation. After cancellation of the sale agreement the plaintiff never contacted the defendant and the defendant in **October, 2004** first time received a legal notice from the plaintiff, which was based on fictitious and concocted story. However, the defendant replied the same, thereafter the plaintiff started harassing/threatening the defendant through different means and therefore on **7.12.2004** she was constrained to file a suit against the plaintiff as stated above and prayed for the reliefs(s) as under:-

- a. to declare that the defendant has no right or title to forcibly taking the possession or to dispossess the plaintiff from the property bearing No.154/1, Khayaban-e-Hafiz, phase VI, Defence Housing Authority, Karachi measuring 500 sq.yds.
- b. to declare that the agreement dated 27.11.2002 has come to an end due to the failure of the defendant to perform his part of contract.
- c. to restrain the defendant, his agent, representative, attorneys or any person acting on his behalf to threatening, dispossessing, interfering or disturbing the possession of the plaintiff of house # 154/1 Khayaban-e-Hafiz, phase VI, DHA Karachi, or claiming any right on

the basis of the sale agreement dated 27.11.2002.

d. to grant any better relief/relieves which tis Hon'ble Court deem fit and proper in the circumstances of case.

e. Cost of the proceeding.

4. The court on **21.09.2006** from the pleadings of the parties framed the following consolidated issues:-

1. *Whether the plaintiff committed breach of agreement dated 27.11.2002, if so, whether such agreement is liable to be cancelled?*
2. *Whether the plaintiff is entitled to specific performance of the agreement?*
3. *What should the decree be?*

5. On **13.11.2008** the Court has appointed Mr. Justice (R) Attaur-Rehman as Commissioner for recording evidence. The Plaintiff had filed his affidavit in evidence as Ex.P/1 alongwith various documents. The plaintiff also examined two witnesses namely Shahid Iqbal (Ex.P/11) and Arshad Shahbaz (Ex.P/13) . All the witnesses of the plaintiff were cross examined by defence counsel. Defendant Dr. Arifa Akram had filed her affidavit in evidence as Ex.D/2 alongwith various documents. The plaintiffs' counsel cross examined the defendant.

6. I have heard learned counsel for the parties at length and perused the record. My findings on the above issues with reasons thereon are as under:-

#### **ISSUES NO.1 & 2**

7. Learned counsel for the plaintiff has contended that since the plaintiff has always been ready and willing to perform his part of contract and it was the defendant who refused to complete the deal by handing over vacant possession of the suit property and executing sale deed before the Registrar on **30.1.2003**, the breach has been

committed by the defendant. Learned counsel for the plaintiff has contended that after entering into an agreement of sale, the plaintiff has published public notice inviting objections, if any, before completion of the sale. Such public notice was published on **11.1.2003** and before 30.1.2003 when the plaintiff realized that the defendant is avoiding the execution of sale deed, the plaintiff has sent a legal notice dated **29.1.2003** through his counsel S. Yousuf Ali & Co. The said legal notice was not replied, thereafter the plaintiff made further efforts and tried to contract the defendant to complete the deal by visiting even at her work place at Jinnah Hospital, Karachi and again when he could not find any positive reply, the plaintiff has sent one more legal notice dated **7.10.2004**. After receiving the reply from the defendant, the plaintiff has filed the instant suit for specific performance of the contract. Learned counsel further contended that on directions of this Hon'ble Court by order dated **21.9.2006** to deposit the balance sale consideration with the Nazir within 15 days, the plaintiff has complied with the order and since then plaintiff's money is lying in Court and as such the plaintiff is entitled for the specific performance of the contract. He further contended that the plaintiff has not denied the sale agreement and time was not essence of the contract, his client is not at fault. Learned counsel for the plaintiff has relied upon the following case law.

- i. *Agha Ghazanfar Ali vs. Shoukat Ali and 2 others* (**PLJ 1997 SC 681**);
- ii. *Muhammad Ikhlq vs. Shaikh Muhammad Saeed* (**NLR 1991 CLJ 512**);
- iii. *Mst. Amina Begum and others vs. Mehar Ghulam Dastagir* (**PLD 1978 Supreme Court 220**);
- iv. *Abdul Hamid vs. Abbas Bhai-Abdul Hussain Sodawaterwala* (**PLD 1962 Supreme Court 1**);
- v. *Mst. Bakhan ..Vs.. Ahmad Yar* (**2006 YLR 831**).

8. In rebuttal, learned counsel for the defendant contends that the defendant has also filed a suit for cancellation of the agreement. He vehemently contended that the plaintiff never had the funds available with him to complete the deal on or before **30.1.2003**. In fact the plaintiff who is himself an Estate Agent through another Estate Agent with malafide intentions persuaded the lady to sale her property and instantly handed over Rs.100,000/- as a token money and later on obtained signatures on a blank agreement of sale. The agreement was not signed by the plaintiff in presence of defendant nor even witnessed by anyone in front of the defendant. The defendant was subsequently informed by Abad Estate that the deal has been cancelled since the buyer has no funds and the plaintiff thereafter never approached the defendant. However, with malafide intention he sent a legal notice on **29.1.2003** which has never been delivered to the defendant. The plaintiff has not been able to purchase the suit property that is why even in notice dated **29.1.2003** or subsequent notice he has not mentioned the pay order or even cross-cheque available to handover to the defendant towards payment of balance sale consideration. It was also the duty of the plaintiff to have prepared sale deed duly stamped from the stamp office on or before **30.1.2003** and it was not prepared by the plaintiff, therefore, the fault lies in the conduct of the plaintiff. The plaintiff has sent a legal notice after one years and 10 months of the expiry of the time mentioned in the agreement. The plaintiff has hardly contacted the defendant and it has come on record in the cross examination of the plaintiff that even at the time of execution of the agreement of sale the plaintiff was not in contact with the defendant. The counsel for the defendant has relied upon the following case law.

- i. *Malik Bahadur Sher Khan vs. Haji Shah Alam and others (2017 SCMR 902);*
- ii. *Anwar Sajid vs. Abdul Rashid Khan and another (2011 SCMR 958);*
- iii. *Saeed Nasem Cheema vs. Mrs. Rukhsana Khan (2010 MLD 123);*
- iv. *Nausher Khan vs. Muhammad Yousuf and others (2006 YLR 2070).*
- v. *Fazal-ur-Rehman vs. Ahmed Saeed Mughal and others (2004 SCMR 436);*

9. The burden of proof was on the plaintiff to show that he was capable of purchasing the suit property within the time frame given in the agreement of sale. The plaintiff has failed to discharge his burden as is clear from the following evidence on record.

*I delivered the pay order of Rs.550,000/- to Arshad Shahbaz who later on delivered me the receipt executed by the owner. I had paid the said amount of Rs.550,000/- to Arshad Shahbaz in my office. ---*

*-----*  
*-----*  
*It is correct that the balance amount of Rs.5,850,000/- was to be paid by me to the defendant on or before 30.01.2003. Mostly I dealt about this transaction with Arshad Shahbaz not with defendant.-----*

*-----*  
*-----*  
*“It is correct that we have not placed any proof to show that on 30.01.2003 I had the balance amount available with me in my bank account. It is correct that I have not submitted any document i.e draft of the conveyance deed to show that on 31.01.2003 I was ready for the purchase of the property”.*

The witness of the plaintiff Arshad Shahbaz also conceded in his cross-examination as below:-

*“It is correct that I was not shown any pay order by the plaintiff to show that he was ready for making the balance payment”*

Besides the above inability to execute his part of the contract on the given date, the manner and method in which the agreement to sell has been got executed by lady doctor also confirms that no one was



witness to the agreement of sale. It is indeed a fact on piece of paper that two persons have been shown as witness but in reality they have not witnessed its execution. It was executed by circulation. In his evidence the plaintiff has conceded that the agreement (Ex:P/4) was not executed even by the defendant and other witnesses in his presence. Irrespective of the fact it is signed by the two persons as witnesses, the manner of execution of agreement was novel and unprecedented. About execution of sale agreement the plaintiff has stated as follows:-

*“Ex.P/4 agreement was delivered to me by Arshad Shahbaz after getting it signed by the defendant. This Ex.P/4 was delivered to me by Arshad Shahbaz at my office. I signed on the agreement earlier then the signature of the defendant”.*

and the witness to the exhibit Mr. Shahid Iqbal has stated as follows:-

*“It was not present when the Ex.P/4 was signed. I signed the Ex.P/4 as a witness in my office, which was brought by the plaintiff. It is correct that I had no meeting with the defendant prior to 30.1.2003”.*

and the main person Mr. Arshad Shahbaz of M/s. Aahad Estate who played main role on behalf of the plaintiff of Qureshi Estate to persuade the defendant to enter into the agreement of sale himself confirmed in cross-examination that:-

**“It is correct that after Ex.P/4 was signed by the defendant. I delivered the same to plaintiff, till that time it was not signed by the plaintiff. It is correct that no other person were present except me when the Ex.P/4 was signed by the defendant. I was agent for plaintiff as well”.**

In fact since no objection has been raised by anyone in response to the public notice dated **11.01.2003** (Ex.P/6) published by the plaintiff regarding sale of suit property, there was no impediment in the way of the defendant to complete the deal. The plaintiff himself

has categorically denied that he had dealt with the defendant. The above evidence clearly indicates that broker Arshad Shahzad has persuaded landlady to enter into an agreement of sale and not the plaintiff. Therefore, it was precisely an inability of the three Estate Brokers including the plaintiff to find an investor within stipulated time and on realizing their weakness one day before the date of execution, they sent notice dated **29.1.2003** to the defendant. Even delivery of the said notice was not proved as it admitted by the plaintiff in his cross:-

*“It is correct that Ex.P/7 did not disclose the complete address of the defendant. I have not produced the original TCS receipt No.3004865991”.*

The very legal notice dated **29.1.2003** (Ex.X/1) just one day before the date mentioned in the agreement for completion of the deal before the sub-Registrar of Properties was simply to play fraud on the defendant. The question is how and why notice was sent 24 hours before the given date and time for payment of balance sale consideration and execution of sale deed which was agreed to be **30.1.2003**. It means the plaintiff on **30.1.2003** had no intentions to present himself before the concerned sub-Registrar of properties on the appointed time for the obvious reasons that he had no money and he had failed to fetch a buyer / investor by that time. The above evidence confirms that it was an attempt of Estate Agents to create charge on the defendant's right to sell her property and blackmail her to sale it to them or their investor, if any, on the later stage.

10. In view of the clear facts and circumstances discussed above, the case of the defendant for cancellation of agreement appears to be on better footing since the defendant on receipt of first legal notice in October, 2004 had immediately replied the same through her

counsel. She has categorically stated in reply to the legal notice dated **26.10.2004** (Ex.P/10) that as far as the amount (advance) is concerned she is ready to return the same and she never knew that such amount was paid to her for the purpose of blackmailing. Then and on blackmailing by the plaintiff / estate agent and other estate brokers to complete the dead deal after about two years, she had to file a suit to resist harassment. However, the plaintiff never asked the defendant to return the earnest money even verbally and preferred to file suit for specific performance of a contract. The burden was on the plaintiff to pay the balance consideration in time and prove that when and how it was offered by him and refused by the defendant to allege breach of contract by her. Such burden has not been discharged by the plaintiff. It was in fact the plaintiff who could not complete the deal as far as back in **October, 2002**, and after 15 years the equity does not favour the plaintiff who even otherwise has failed to give any cogent reason for his failure to perform his part of contract. The crux of the discussion is that the plaintiff was guilty of breach of the contract dated **27.11.2002** and therefore, it is liable to be cancelled. Consequently, the plaintiff is not entitled for the specific performance of contract. Issue No.1 is decided in affirmative and issue No.2 is decided in negative.

### **Issue No.3**

11. In view of the above findings on issue No.1 & 2, Plaintiff's Suit No.1359 of 2004 is dismissed with no orders as to cost. He may withdraw the amount deposited by him with the Nazir of this Court alongwith all profits accrued on it since the date of investment. Suit No.1372 of 2004 filed by Dr. Arifa Akram is decreed as prayed.

J U D G E

*Karachi,*  
*Dated:12.04.2018*