

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 696 of 2003

Date	Order with signature of Judge
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Plaintiff : Mirza Shafaat Ali Baig,
Through M/s. K. B. Bhutto &
Syed Sikendar, advocates.

Defendant No.1 : Wg. Cdr. (Rtd) Mr. Khurshid Anwar,
Through Barrister Fayyaz Ahmed,
advocate.

Defendant No.2 : Pakistan Defence Officers,
Housing Authority through
its Administrator.

Date of hearing : 14.03.2018

Decided on : 20.04.2018

JUDGEMENT

NAZAR AKBAR.J.- The plaintiff has filed this suit on **11.6.2003** for specific performance of contract, permanent injunction and damages.

2. Brief facts of the case are that defendant No.1, a resident of Abbottabad owns a plot of land bearing Plot No.34-C, measuring (800 sq.yds) situated at Khayaban-e-Bilal Phase-VIII Pakistan Defence Officers Housing Authority Karachi, (hereinafter referred to as the suit plot). On **26.3.2003** he offered to sell it to the plaintiff for a total sale consideration of **Rs.29,00,000/-**. The plaintiff agreed to purchase the suit plot and therefore a contract of sale was reduced into writing and executed on the same day on payment of a sum of **Rs.3,00,000/-** as part payment towards sale consideration. The balance sale consideration amounting to **Rs.26,00,000/-** were agreed to be paid by the plaintiff on or before **26.4.2003** at the time of signing and executing the requisite documents before concerned officer of defendant No.2. It is averred that Defendant No.1 also requested the plaintiff to pay the dues of defendant No.2 against the suit plot and allowed him to deduct the payment from

balance sale consideration. In this regard the plaintiff deposited a sum of **Rs.105,751/-** as dues against the suit plot, through pay order dated **19.4.2003** drawn on Metropolitan Bank Ltd., Ittehad Branch Karachi. In the 2nd week of April 2003, the plaintiff informed Defendant No.1 that he has arranged the money to pay him the balance sale consideration of the suit plot. On **23.4.2003**, defendant No.1 appeared in the office of defendant No.2 and inquired from the officer concerned that what documents would be required for transfer of the suit plot in the name of the plaintiff. The concerned official of defendant No.2 informed him that he has to produce original intimation letter regarding allotment of the suit plot in his name, original allotment order and to clear all outstanding dues. Defendant No.1 had brought only a photocopy of the intimation letter with him and disclosed that the original of the same has been misplaced by him. He was informed that in the absence of original ones or the certified copies of these documents the transfer of the suit plot cannot be effected. Defendant No.1 asked the plaintiff to wait till he obtains the certified copies of the aforesaid documents from the office of defendant No.2 and further promised that he would himself intimate the plaintiff and would fix a date for appearing before defendant No.2 for the purpose of signing and executing the documents for transfer of the suit plot in his name. Defendant No.1 on the same day submitted an application in the office of defendant No.2 for certified true copy of allotment order and intimation letter regarding the suit plot. Simultaneously he got published a public notice in two newspapers. Plaintiff had been in contact with defendant No.1 so as to know whether he obtained certified copies of the required documents from defendant No.2. Defendant No.1 confirmed that he has got the required documents and promised that on **7.6.2003** he would come and appear before the concerned officer of defendant No.2 and execute the requisite documents for transfer of the suit plot in his favour and shall also receive the

balance sale consideration. On **7.6.2003** the plaintiff got prepared two pay orders of total sum of **Rs.24,00,000/-** one of **Rs.8,00,000/-** bearing **No.DJC 0634772** and the other of **Rs.16,00,000/-** bearing **No.0634773** both dated **7.6.2003** drawn on Habib Bank Ltd., Jodia Bazar Br. Karachi, in the name of Defendant No.1 and arranged the remaining sum in cash. The plaintiff after this arrangement, had been waiting for the defendant No.1 in the office of defendant No.2 from morning up to afternoon. But defendant No.1 did not appear to receive the balance consideration of the suit plot and transferring the same in the name of plaintiff. Under the circumstances, the plaintiff filed an application in the office of defendant No.2 complaining about non-appearance of defendant No.1 for signing the documents of transfer in his favour. Subsequently the plaintiff contacted defendant No.1 on telephone next day, then it revealed that he had not come to Karachi on **7.6.2003** and when plaintiff protested against his conduct, then he refused to complete the transaction of sale of the suit plot on agreed price and demanded increase in the price at exorbitant rate. He clearly warned that in case the plaintiff would not pay the price of suit plot by increasing the amount according to his demand, then he would sale the same to any person. The plaintiff all along is ready and willing to perform his part of the contract of sale but defendant No.1 has neglected and avoided to perform his part of the contract and thus has committed breach of agreed terms of the contract of sale in respect of the suit plot. The plaintiff has also suffered mental torture, agonies and stress as he has developed interest in the plot and in case the defendant No.1 does not complete the transaction of sale, the plaintiff shall suffer a great financial loss, therefore, the plaintiff claims damages for a sum of **Rs.5,00,000/-** from defendant No.1. Therefore, the plaintiff filed the instant suit.

3. Defendant No.1 in his written statement raised preliminary legal objections that suit is not at all maintainable under the law and averred that defendant No.1 was in urgent need of cash to be paid to the third party and therefore he had agreed to sale the suit plot on very low price then the market rate to complete the deal in one month. It is averred that at the time of signing the said agreement to sale it was agreed by defendant No.1 that all the requirement / formalities will be completed by the plaintiff with defendant No.2 so as to ensure the transfer of suit plot in the name of plaintiff on or before **26.4.2003**. At the request of plaintiff one Mr. Fareed of Al-Fareed Estate was required on behalf of defendant No.1 to remove hurdles of any nature whatsoever and to facilitate the defendant, he had handed over to said Mr. Fareed a blank paper duly signed by him in good faith. It was later misused by the plaintiff when he has forged document dated 12.5.2003 annexure P/7 on the said blank paper in order to show that the transfer formalities could not be finalized due to the non-availability of the plaintiff to arrange and prepare all the documents on or before **26.4.2003**. It is submitted that defendant No.1 approached the office of defendant on agreed date i.e. **26.4.2003** for the purpose of execution of transfer documents of the said plot in favour of the plaintiff, but plaintiff deliberately with malafide intention failed to discharge his responsibilities towards preparation of all necessary documents required for transfer of the suit plot and he also failed to pay the remaining amount of sale consideration to the defendant No.1 in terms of **clause 10** of the Agreement to sell. It is also averred that as it was the responsibility of plaintiff and one Mr. Fareed of Al-Fareed Estate to prepare all necessary documents required for the purpose of transfer so also to clear the dues if any in respect of the suit plot, therefore, it is incorrect that defendant No.1 never approached the office of defendant No.2 to execute transfer in favour of plaintiff.

4. It is also averred that defendant No.1 was under obligation to execute transfer documents in favour of the plaintiff on or before **26.4.2003** and in order to discharge his obligation he had appeared at the office of defendant No.2 on agreed date. Therefore, the allegation that defendant No.1 deliberately refused and avoided to perform his part of obligation as required under the agreement of sale does not arise and whatever the mental torcher, agonies and stress, if suffered by anyone, it is defendant No.1 due to the negligence, malafide intension and ulterior motives of the plaintiff for which defendant No.1 reserves his rights to sue him. Therefore, the plaintiff is not entitled to claim damages of his own negligence. It is also averred that in term of **clause-10** of the agreement to sell plaintiff is not entitled to file suit against the defendant No.1 as no cause of action ever accrued against defendant No.1, therefore, the suit is liable to be dismissed on this ground alone.

5. On **14.11.2005** out of the pleadings of the parties followings issues were framed by the Court.

- i. Whether the plaintiff has no cause of action for filing of this suit?
- ii. Whether the plaintiff is entitled to seek specific performance of the agreement of sale dated 26.3.2003 against defendant No.1?
- iii. Whether the plaintiff is entitled to claim damages in the sum of Rs.5,00,000/- against defendant No.1?
- iv. To what relief the plaintiff is entitled?
- v. What should the decree be?

6. The plaintiff examined himself and produced three witnesses namely PW-2, Syed Javed Karrar, PW-3, Farid Ahmed and PW-4, Administrative Officer DHA, Major (R) Rashid. The defendant No.1 appeared through his attorney, Muhammad Arshad. All the witnesses were cross-examined by respective counsel.

7. I have heard learned counsel for the parties and perused the record. My findings with reasons on the issues are as follows:-

ISSUE NO.1

Admittedly there has been an agreement to sell between the parties and non-implementation of the agreement provides cause of action to either side, therefore, issue No.1 is decided in NEGATIVE.

ISSUES NO.2&3

The burden of proof of these issues is on the plaintiff. His counsel insists that the plaintiff has paid advance amount of Rs.300,000/- and has not committed any breach of the terms and conditions of the agreement to sell, hence, he is entitled to seek specific performance of the contract. He claims that the documents of the defendants were defective and therefore, the transfer could not be effected on the agreed date and time i.e. **26.4.2003**. To show his bonafide, counsel for the plaintiff says that even the pay order to the tune of Rs.24,00,000/- were made available and the rest of the amount was to be paid cash to defendant No.1 in the office of defendant No.2. In rebuttal, learned counsel for the defendant No.1 submits that defendant No.1 has come all the way from Islamabad to Karachi to execute requisite documents in favour of the plaintiff on **23.04.2003** and he has presented himself in the office of defendant No.2/DHA to execute the documents. In fact the plaintiff has not brought the balance sale consideration to be paid to defendant No.1 and therefore, the transaction could not be completed and the failure of the plaintiff is evident from the fact that he has failed to produce proof of availability of funds for payment of balance sale consideration. It is further contended by the counsel for defendant No.1 that he had already given even

blank paper signed by the defendant to the plaintiff to make any application needed in respect of completing the requirement of defendant No.2. The plaintiff knew that defendant lives in Islamabad and the relevant office of D.H.A. is in Karachi. The plaintiff did not use the blank paper having signature of defendant No.1 within the period of 30 days to obtain the copies of documents, if any. The plaintiff filed an application as late as on **12.05.2003** for issuance certified copy of the allotment intimation letter.

8. In the above background, the plaintiff has sought specific performance of the agreement dated 26.3.2003 which was admittedly executed at Islamabad and to secure the interest of both sides and to avoid any litigation, clauses 10 and 11 were inserted in the agreement with conscious mind. The two clauses are reproduced below:-

10. *The vendor and vendee agree that the amount of biana i.e. three hundred thousand only) will not be refunded and forfeited if remaining amount i.e. Rs.twenty six hundred thousand only) is not paid within 30 days after finalization of the deal. The vendor and vendee agree that the vendee will not get into any litigation and obtain stay order from court if deal is not finalized. **This clause supersedes all the clauses of this agreement.***
11. *In case vendor refuses to sell the said plot on a/m terms & conditions the vendor will pay Rs.Six hundred thousand to vendee as compensation that includes the amount of Rs.Three hundred thousand received.*

In view of aforesaid clauses of the agreement, the plaintiff right to enforce the contract in question was reduced to enforcement of clause 11 above whereby he could not sue defendant No.1 for anything more than a claim of **Rs.60,00,000/-** on refusal of defendant No.1 to sale the suit plot to him. The plaintiff himself

admitted the contents of clause 10 and 11 of the agreement in his cross-examination as below:-

It is correct that there is a clause 10 of the agreement that the vendee will not go to court and obtain a stay order. It is correct that the contents of clause 11 of the sale agreement is correct.”

Despite the above admitted position, the plaintiff has filed the instant suit for specific performance of contract amongst others for the following relief.

- a) **To direct the Defendant No.1 to perform his part of the contract / agreement dated 26.3.2003, regarding the sale of plot of land bearing No.34-C (ad measuring 800 Sq. Yds) situated Khayabane Bilal Phase VIII Defence Officers Housing Authority Karachi and transfer the plot in favour of the plaintiff by executing and signing the necessary documents before the concerned Officer of Defendant No.2.** In case the Defendant No.1 does not execute the requisite documents as prayed, the learned Nazir of this Hon'ble Court may be appointed as Commissioner to perform this act in place of Defendant No.1 by allowing the plaintiff to deposit the balance sale consideration with the Nazir of this Hon'ble Court.

In view of the admitted contents of contract, the plaintiff suit should have been limited to enforcement of the penalty clause No.11 in the agreement subject to discharge of burden of proof that defendant No.1 has refused to sale the suit property to him as well as his own willingness and ability to perform his part of the contract on time. The evidence shows that the plaintiff himself is guilty of not having the balance sale consideration readily available to be paid to defendant No.1 on **26.4.2003**. In this regard the plaintiff in his cross examination has admitted as follows:

“It is correct that the pay order for the payment to the defendant No.1 were obtained after 26.4.2003. It is correct that I have not given the details of the damages claimed

in this suit. I was dealing in medical business and at present I am dealing in real estate business.....

*..... It is not correct to suggest that I had no finance upto 26.4.2003 to pay the balance sale consideration. **It is correct that I have not filed the copy of Bank statement for the relevant period.**-----.*

The plaintiff witnesses PW-3 Farid Ahmed also conceded that he did not see pay order with the plaintiff. Relevant evidence from cross-examination of PW-3 is reproduced below :-

*“On 23.4.2003 myself with plaintiff and the defendant No.1 went to the office of D.H.A. at about 10 A.M. **I did not see the pay order with the plaintiff on that date.***

Q. Please see para 4 of your affidavit-in-evidence where you have stated that “the plaintiff offered him the balance sale consideration of the plot”. Please state whether it was in cash or pay orders?

Ans: When we reached the office of D.H.A., the officer concerned directed to produce the allotment order and intimation letter, the defendant No.1 produced the photo copies of the same.

Now states that I did not see the pay order, but I was informed by the plaintiff that he had brought the pay order for payment to the defendant No.1.

The plaintiff is only an investor for the purchase of property, whenever we receive a deal for the sale of property we ask the plaintiff if he is willing to purchase the same.”

However, not a single pay order was produced in evidence. The plaintiff has produced inadmissible photocopies of two cheques both dated **7.6.2003**.

9. The other important thing to be noticed is that during the stipulated 30 days' time the plaintiff never invited objections from the public at large for having entered into a contract for purchase

of the suit plot with defendant No.1. The plaintiff knew that defendant No.1 is in Islamabad and he would come only on appointed date, therefore, at least in 30 days' time he should have checked with defendant No.2 about the requirement for transfer of the said plot in his name. Admittedly he has not made such effort. This conduct of plaintiff confirms that the stance of defendant No.1 that all the formalities were to be completed by the plaintiff who resides in Karachi. The fact and circumstances of the case suggests that the plaintiff was supposed to have applied for certified copy of intimation letter through Mr. Fareed of Al-Farid Estates on behalf of defendant No.1 or at least he should have asked defendant No.1 to make such an application on or before the agreed date of execution of the transfer documents. It was PW-2 Farid Ahmed to whom defendant No.1 has given a blank paper signed by him and said Mr. Fareed got the public notice of lost and found regarding intimation letter of suit plot in the newspaper of **26.4.2003** and **3.5.2007**. It was also need of the plaintiff to make sure that all the documents should have been intact for completing the sale. But the plaintiff did nothing to secure his interest under the sale agreement in the suit plot. He did not even bother to send a legal notice to defendant No.1 before filing the suit. In view of the evidence on record and particularly clauses 10 & 11 of the agreement, the plaintiff is not entitled to specific performance of agreement of sale to the extent of enforcing defendant No.1 to executive transfer documents in respect of the suit property. Therefore, both the issues No.2 & 3 are decided in **NEGATIVE**.

ISSUE NO.4

As far as relief for the plaintiff is concerned, in view of the above discussion and the evidence of either side, the plaintiff and

defendant were bound to comply with clauses 10 and 11 of the agreement to sell. Defendant No.1 on **23.4.2003** had come to know that his documents were defective and the defect was curable but neither he got the defect removed nor suggested any other date for completing the deal. This behavior of defendant No.1 cannot be considered as anything short of his refusal to sale the suit plot to the plaintiff. Defendant No.1 himself has emphasized on clauses 10 & 11 of the agreement to sell, therefore, he is not entitle to forfeit the biana / advance in terms of clause 10 of the agreement. Consequently, the plaintiff is entitled to claim only Rs.6,00,000/- as stipulated in clause 11 of the agreement to sell.

ISSUE NO.5

In view of above, the suit of the plaintiff is decreed only to the extent that the plaintiff is entitled to Rs.600,000/- from the defendant No.1. The defendant No.1 is directed to make the payment of Rs.600,000/- to the plaintiff either through cross cheque or Pay Order in favour of the plaintiff within 30 days from today. In case of failure of defendant No.1 to make the payment of Rs.600,000/- to the plaintiff within 30 days, the plaintiff shall be entitled for 10% markup per annum interest on Rs.600,000/- from the date of expiry of 30 days till its realization.

J U D G E

Karachi
Dated: 20.04.2018