

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI  
**Suit No.37 of 2007**

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

Plaintiff : Yusuf Babar Khan,

Defendant : Omar Saleem  
Through Mr. Iftikhar Javed Qazi, advocate.

Date of hearing : 24.11.2017

Decided on : 24.11.2017

**JUDGMENT**

**NAZAR AKBAR, J.** Plaintiff had filed this suit seeking enforcement of an agreement of sale dated **22.3.2005** in respect of property bearing Plot No.1-D/1, Sector 21, situated at Korangi Industrial Area, Karachi, (the suit plot) own and agreed to be sold by the defendant for a total sale consideration of **Rs.8,000,000/-**, the plaintiff claims that out of total sale consideration he has paid to the defendant amount of **Rs.900,000/-** cash as token money and **Rs.19,00,000/-** through pay-order at the time of signing the agreement of sale. Thus an amount **Rs.28,00,000/-** were paid by the plaintiff toward advance part payment of sale consideration. It is also pleaded by the plaintiff that he has made payment of **Rs.5,000,400/-** to the wife of the defendant against a separate agreement of sale also dated **22.3.2005** in respect of plant & machinery. It is also averred that on different dates plaintiff has made various payment to the defendant through cash and therefore the remaining balance sale consideration is only **Rs.19,29,750/-** and plaintiff is ready to pay the entire balance amount. It is further averred that defendant is avoiding / refusing

to comply with the sale agreement, the Plaintiff has therefore, filed the instant suit.

2. The Defendant filed his written statement wherein he took preliminary legal objections that the suit is not maintainable and denied the claim of the plaintiff. The defendant, however, admitted payment of **Rs.28,00,000/-** and claimed that a sum of **Rs.52,00,000/-** was balance sale consideration, which amount has not yet been paid by the plaintiff. The defendant disputed payment of money separately paid to his wife. The defendant claimed that plaintiff has breached the terms and condition of the agreement particularly **clause 4 & 5** of the agreement. On **14.10.2008** out of the pleading of the parties, the Court has framed the following issues:-

- (i) Whether the defendant is liable to specifically perform the Sale Agreement dated 22.3.2005 in regard to suit property by making/executing registered Sale Deed before the Sub-Registrar concerned in favour of the plaintiff on receiving the balance sale amount of Rs.19,29,750/- (Rupees Nineteen Lacs, Twenty Nine Thousand, Seven Hundred & fifty) from the plaintiff as such in this case?
- (ii) Whether the defendant as such is liable to deliver/hand over original title documents of such suit property to the plaintiff in this case?
- (iii) Whether the suit as framed by plaintiff is maintainable in law?
- (iv) Whether the plaintiff having disclosed and not concealed as such any relevant material or fact in plaint has come to Court with clean hands?
- (v) Whether plaintiff as such has complied and fulfilled the relevant terms and conditions of the Agreement of Sale in regard to suit property and is ready to make the balance payment due for execution of Sale Deed being avoided by the defendant?

- (vi) Whether the plaintiff failed to pay the balance sale consideration before 21.07.2005 with 40% profit on monthly basis as agreed vide clause 4 of the agreement dated 22.03.2005?
- (vii) Whether the plaintiff has failed to comply with Clause 5 of the agreement dated 22.3.2005, if no to what effect?
- (viii) Whether either of the parties have breached the terms and conditions of the agreement, and as to what amount has been paid under the agreement by the plaintiff to the defendant and what balance remains, if so, then what are its effect?
- (ix) Which party was in possession at the time of agreement and as to whether possession of the subject property was handed over by the defendant to the plaintiff at any time and whether that any of the party was dispossessed, after execution of the agreement, by force?
- (x) What should the decree be?

3. Plaintiff examined himself as Exh.P and also one witness Naseem Ahmed as PW-1. He filed his affidavit-in-evidence and produced same as Ex.P/1. He also produced agreement of sale dated 22.3.2005 as Ex.P/2, certificate of plaint & machinery dated 22.3.2003, as Ex.P/3 issued by Nargis Saleem. Agreement dated 22.5.2005 with M/s. Steel Tech, as Ex.P/4 Deed of settlement dated 22.5.2005 with M/s. Steel Tech as Ex.P/5, cheque No.1676867 dated 22.7.2005 amounting to Rs.8,50,000/- as Ex.P/6, photocopy of pay-order of Pound Stg 11275 dated 01.08.2005, as Ex.P/7 Income Tax Return Forms under companies Ordinance for the year 2006 as Exh.P/8 to P/8/2 and complaint dated 13.3.2008 as Ex.P/9 and compromise order as Ex.X/1. He and his witness were cross examined by the learned counsel for the defendant. The defendant filed his affidavit-in-evidence and produced the same as Ex.D/1, copy of written statement as Ex.D/2, mutation order No.AD/IND/1-D-1/21/KGI/93/2927

dated 08.11.1993, PT-1 form dated 2.12.1993, annual Property Tax as Ex.D/3, D/4 and Ex.5. Completion certificate No.BCA/KMC/DCB/CC/62/93/35 dated 21.11.1993 as Ex.D/5-A. Report dated 4.3.2008 as Ex.D/5-B. report dated 9.3.2008 as Ex.D/6, Inspection report dated 25.3.2008 as Ex.D/7. No objection certificate issued by Assistant Director (Land) Landhi Division, KMC, Karachi as Ex.D/7-A. copy of written statement as Ex.D/8. Bill of Clay Products (Pvt) Ltd., regarding purchase of heavy duty compression and others as Ex.D/9. Letter addressed to Controller Billing, KESC, by defendant as Ex.D/10.

4. The Court order sheet shows that plaintiff's counsel and plaintiff since **29.4.2014** have not shown any interest in the case. On the said date plaintiff was present in person and counsel was absent and adjournment was granted. On **02.10.2014** none was present and on **25.3.2015** plaintiff was present and again sought adjournment. Then he engaged Mr. Tasawwar Zulfiqar, advocate who filed his power on **11.11.2015** and an application for urgent hearing, which was listed on 20.1.2016 but thereafter he never turned up and the case was repeatedly listed on **12.8.2016**, **12.1.2017**, **27.1.2017**, **23.2.2017**, **20.9.2017** and **23.10.2017**. None was present for the plaintiff on all these dates nor plaintiff came forward. Be that as it may, I have heard learned counsel for the defendant and with the help of learned counsel I have also gone through the evidence. My findings on the issues are as follows:-

5. There is no dispute on the execution of agreement to sell dated **22.3.2005** in respect of the suit property. Even total sale consideration that is to say Rs.80,00,000/- as mentioned in para-3

of the sale agreement as Ex.P/2 is also admitted. On examination of the issues I am of the view that issues No.3 & 4 are formal and need no comment. The counsel for the defendant has not pressed the issue of maintainability (issues No.3) and after evidence everything has come on record, therefore, concealment of facts by plaintiff (issue No.IV) is immaterial. Issues No.1, 2, 5, 6, 7 & 8 are interlinked and the consolidated effect of these issues is that whether the balance sale consideration was Rs.19,29,750/- or Rs.32,50,000/- out of total sale consideration of Rs.80,00,000/- and who, the plaintiff or the defendant, has breached the terms and conditions No.4 & 5, of Ex.P/2. These terms & conditions are reproduced as follows:-

4. That the part balance sale consideration of Rs.3,250,000/- (Rupees Thirty Two Lac Fifty Thousand Only) shall be paid on or before 21.07.2005 along with a profit of any @ 40% on monthly basis on the net profit earned by the company i.e. M/s.Steel Tech Pvt. Ltd. till the payment of further and the final remaining balance amount of Rs.1,950,000/- (Rupees Nineteen Lacs Fifty Thousand Only) being the final balance Sale consideration of total agreed price i.e. of Rs.8,000,000/- (Rupees Eight Million Only) shall be paid by the Vendee to the Vendor on or before 21.03.2006 before the Sub-Registrar at the time of execution of conveyance deed of the "SAID PRPERTY" in favour of the Vendee along with a profit if any @ 15% on monthly basis, till this full and final payment is made.

5. That in case at any later stage the Vendee fails to make the payment to the Vendor on or before the aforesaid dates the remaining amounts within the specified dates, the Vendee hereby undertakes / agree to pay a sum of Rs.1,00,000/- (Rupees One Lac Only) per month being the rent of the said property and the Vendee shall sign a agreement of rent with the Vendee for the Said Property.

6. The counsel for the defendant has referred to the evidence of the plaintiff to show that the plaintiff has neither paid the balance

sale consideration nor fulfill any of the terms and conditions mentioned above. He has drawn my attention to the examination-in-chief and cross-examination of the plaintiff available at page 131 to 141 of the evidence File. In the cross examination it has been conceded by the plaintiff that at the time of signature he has paid Rs.28,00,000/- out of total sale consideration of Rs.80,00,000/- and for any other payment no proof has been filed with the plaint or any evidence that any other payment was made in connection with the payment of sale consideration. He contended that according to clauses of agreement reproduced above the balance sale consideration was to be paid on or before **21.7.2005** along with profit and in the cross-examination the plaintiff has conceded that;

..... "It is correct that I have not paid 40% profit to the defendant. Voluntarily says that since no profit was earned, therefore, I did not pay the same.....I was bound to pay Rs.One Lac per month as rent to the defendant. It is correct that I have not paid month rent of Rs.One Lac to the defendant till to date"....."It is correct to suggest that I had not paid any amount except Rs.28,00,000/- therefore, possession was not handed over to me. It is correct that original title documents related to the suit property were to be handed over (to me) before sub registrar at the time of registration of sale deed".

7. The record shows that even after filing of the suit in 2007 the plaintiff has never offered to fulfill his part of the contract. The payment of the monthly rent in terms of **clause 4 & 5** of the agreement as well as balance sale consideration amounting to Rs.52,00,000/- has neither been offered to the defendant nor deposited in Court. However, the defendant present in Court, is ready to return **Rs.28,00,000/-** to the plaintiff which he had received as part payment at the time of execution of agreement of

sale with Nazir of this Court within three months. Offer appears to be fair, therefore, it is ordered that the defendant shall deposit the amount Rs.28,00,000/- within three months from today with the Nazir of this Court. The Nazir shall forthwith invest the said amount in some profit bearing Government saving scheme since the plaintiff is unrepresented for the last three years. On payment of such amount to Nazir of this Court within 90 days, the suit of the plaintiff shall be deemed to have been dismissed and plaintiff shall be entitled to withdraw the amount so deposited by the defendant.

The suit is disposed of in the above terms.

**J U D G E**

Karachi,  
Dated: \_\_\_\_\_

*SM*