

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 540 of 2005

BEFORE:

Mr. Justice Arshad Hussain Khan.

Mansoor Ahmed & others

Vs.

Mst. Saeeda Begum & others

Plaintiffs: through Mr. Abdul Wajid Wyne, advocate.

Defendants

No.1 to 8: through Mr. S. Farooq Ahmed Shirazi, advocate

Date of

hearing: 01.10.2018

JUDGMENT

ARSHAD HUSSAIN KHAN, J. The present suit was filed on 15.04.2005 against the defendants for Specific Performance, Perpetual Injunction and Special Damages with the following prayers:-

- i) *To direct the defendants No.1 to 7 to perform their part of the contract dated 4th August, 2003 regarding the sale of suit property Residential Plot of land bearing Survey No.101/16, measuring 760 Sq. Yards, Survey Sheet No.35-P/1, situated at Bahadur Yar Jang Cooperative Housing Society, Karachi and transfer the same in favour of the plaintiffs by executing and signing a proper Conveyance Deed before the concerned Sub-Registrar Karachi and hand over all the title documents to the plaintiffs. In case, the defendants do not execute the requisite documents, Conveyance Deed as prayed, the learned Nazir of this Honourable Court may be appointed as Commissioner to perform this act in place of the defendants by allowing the plaintiffs to deposit the balance sale consideration with the Nazir of this Honourable Court.*
- ii) *To direct the defendants to hand over vacant possession of the suit property to the plaintiffs.*
- iii) *To restrain permanently the defendants, their servants, agents, representatives, attorneys and any person or persons*

acting on their behalf from selling, transferring or creating a third party interest in the suit property referred above in any manner.

- iv) Award a sum of Rs.1,00,00,000/- as Special damages as the defendants No.1 to 7 have given mental torture, stress and agonies and financial loss to the plaintiffs.*
- v) Cost of the suit.*
- vi) Any other relief(s) as the circumstances of the case may requires.*

2. Brief facts as averred in the plaint are that the plaintiffs entered into a sale transaction with defendants No.1 to 7 to purchase a residential house constructed on plot bearing Survey No.101/16, measuring 760 sq. yds., Survey Sheet No.35-P/1, situated at Bahadur Yar Jung Cooperative Housing Society, Karachi along with fittings and fixtures (hereinafter referred to as suit property), vide agreement to sell dated 04.08.2003, for a total consideration of Rs.1,76,70,000/-. Plaintiffs at the time of execution of sale agreement had paid an amount of Rs.25,00,000/- being part sale consideration to the defendants which amount is acknowledged by defendants No. 1 to 7 in the sale agreement. Thereafter, plaintiffs and their representatives though asked the defendants for finalization the sale transaction as for the said purposes, mutation and 'B' Lease (99-years) were required in the name and favour of defendants No. 1 to 7, as the suit property was existed in the name of the deceased father of defendants namely Saghir Ahmed Khan. However, the defendants for one reason or the other delayed. It is also averred that defendants No.4 and 6 in the month of June 2004 approached the plaintiffs and demanded additional amount of Rs.13,30,000/- besides agreed total sale consideration, which amount was also paid to the defendants through cross cheques and same was duly acknowledged by the said defendants through a separate payment receipt. The plaintiffs from time to time contacted the defendants and asked them to complete sale transaction but they kept the plaintiffs on false hopes and promises. Thereafter, the plaintiffs in the month of March, 2005 again contacted the defendants and repeated the same request but the defendants refused to complete sale transaction, upon which the plaintiffs sent legal notices dated 21.03.2005 to the defendants calling upon the defendants to execute the sale deed and

complete other formalities in respect of the suit property in favour of plaintiffs but in reply to the said legal notices the defendants denied to complete the transaction and instead rescinded the contract. It is also averred that due to the non-completion of subject sale transaction in time by the defendants, the plaintiffs have suffered mental torture, agonies and stress as they have arranged the balance sale consideration through their all resources and in this regard the plaintiffs also sought claim of special damages in the sum of Rupees One Crore against the defendants through instant proceedings.

3. Upon receiving the summons of this case, Defendants No.1 to 7 filed their joint written statement wherein they denied the allegations levelled against them in the memo of plaint and have stated that the plaintiffs themselves deliberately avoided to perform their part of obligation and they failed to pay balance sale consideration within stipulated time. It is also stated that it was the responsibility of the plaintiffs to prepare draft of sale deed which include expenses in respect of stamp duty, preparation charges, legal fees and other legal requirements. It is also stated that the defendants never demanded any enhanced amount. It is also stated in the written statement that the suit property was mutated in the name of defendants and this fact has already been brought to the knowledge of plaintiffs, however, the plaintiffs failed to arrange payment resultantly the subject transaction could not be completed. Conversely, it is the defendants who had repeatedly requested the plaintiffs to complete the sale transaction and pay the balance amount but the plaintiffs failed to pay the balance sale consideration and hence the agreement lost its validity on account of breach on the part of the plaintiffs. It is also denied that any of the plaintiffs have suffered damages and losses as alleged in the plaint. It has also been stated that the plaintiffs have no cause of action against the defendants 1 to 7 as the agreement has already been revoked by the defendants No. 1 to 7. The defendants No. 1 to 7 also sought dismissal of the present suit.

4. Defendant No.8 (Bahadur Yar Jung Cooperative Housing Society despite having been served did not come forward to contest the present case resultantly on 14.11.2005 it was declared ex-parte.

Whereas defendant No.9 (Province of Sindh through Secretary Land Utilization B.O.R) and defendant No.10 (Sub-Registrar T. Division XI, Karachi), upon statement of their counsel that defendants will comply with whatever order will be passed in the present matter, were deleted from the plaint on 24.04.2006.

5. Record of the case also reflects that during pendency of the proceedings, defendant No.1 passed away resulting which defendants No. 2 to 7, who are also the only serving legal heirs of defendant No.1, have remained left to contest the proceedings.

6. Out of the pleadings, on 06.11.2006 by consent following issues were settled:-

1. *Whether the plaintiffs entered into an Agreement to Sell dated 4th August, 2003 for the purchase of Residential Plot of land bearing Survey No.101/16, measuring 760 Sq. yards, Survey Sheet No.35-P/1, situated at Bahadur Yar Jang Coop. Housing Society, Karachi with fittings and fixtures with the defendants against the total sale consideration of Rs.1,76,70,000/-?*
2. *Whether the defendants agreed to enhance a sum of Rs.13,30,000/- in the total sale consideration of the suit property and paid the said amount by way of Cheques?*
3. *Whether the plaintiffs are prepared and willing to perform their part of the contract of sale in respect of the suit property and have full arrangements of their balance sale consideration for payment to the defendants?*
4. *Whether the plaintiffs are entitled to the relief claimed?*
5. *Whether the plaintiffs deliberately avoided to execute the Sale Deed as they have no arrangement to pay to the defendant No.1 to 7 the balance sale consideration of the suit property?*
6. *What should the decree be?*
7. *Who breached the contract? What is its effect?*

7. By consent of the parties, commissioner was appointed for recording of evidence in the matter who after completing the evidence returned commission, vide his report dated 10.09.2009.

8. The plaintiffs in support of their instance in the case examined plaintiff No.1-Mansoor Ahmed as their witness, who produced following documents:-

01.	Affidavit-in-evidence	Exh.P/1
02.	Agreement to sell dated 01.08.2003	Exh.P/2
03.	Four Cheques all dated 04.08.2003 and drawn on Standard Chartered Bank	Exh.P/3 to P/6
04.	Permission letter dated 02.05.1953 to raise construction on the suit property	Exh.P/7
05.	Form 'A' Sub-License No.2 dated 09.02.1955	Exh.P/8
06.	Letter dated nil addressed by the defendants to Section Officer Ministry of Housing & Works Government of Pakistan Islamabad, requesting therein for mutation.	Exh.P/9
07.	Site plan of suit property	Exh.P/9-A
08.	Challans	Exh.P/10
09.	Authority letter dated 17.05.2004 in favour of Minhaj Ahmed Khan (one of the legal heir of late Saghir Ahmed Khan)	Exh.P/11
10.	Counter foils of cheques all dated 25.07.2003	Exh.P/12 to P/14
11.	Payment receipt dated 16.06.2004	Exh.P/15
12.	Public notice appearing in newspaper on 23.03.2005	Exh.P/16
13.	Legal notice dated 21.03.2005 send to defendant	Exh.P/17-A
14.	Postal receipt of legal notice	Exh.P/17-B
15.	Legal notice dated 21.03.2005 send to Mst. Saeeda Begum	Exh.P/18-A
16.	Postal receipt of legal notice	Exh.P/18/B
17.	Legal notice dated 21.03.2005 send to Mst. Humaira Begum	Exh.P/19-A
18.	Postal slip of legal notice	Exh.P/19/B
19.	Legal notice dated 21.03.2003 send to Mst. Aalia Khanum	Exh.P/20/A
20.	Postal slip of legal notice	Exh.P20/B
21.	Legal notice dated 21.03.2003 send to Mrs. Nafeesa Maqsood	Exh.P/21/A
22.	Postal slip of legal notice	Exh.P/21/B

23.	Legal notice dated 21.03.2018 send to Minhaj Ahmed Khan	Exh.P/22/A
24.	Receipt of legal notice	Exh.P/22/B
25.	Legal notice dated 21.03.2005 send to Mst. Raisa Nazim	Exh.P/23
26.	Receipt of legal notice	Exh.P/23/A
27.	Reply legal notice dated 04.03.2005 on behalf of all the defendants through Mr. Tasawur Ali Hashmi advocate	Exh.P/23/B
28.	Letter/Notice on behalf of Defendants dated 08.04.2005 Letter/Notice dated 14.06.2008 by Mr. Tasawur Ali Hashmi advocate to plaintiffs' advocate to produce documents.	Exh. P/23/C Exh.P/24
29.	Bank statement issued by ABN AMRO Bank.	Exh.P/25
30.	Deposits statement issued by Standard Chartered Bank.	Exh.P/26
31.	Deposits statement issued by Standard Chartered Bank.	Exh.P/26/A
32.	Deposits statement issued by Standard Chartered Bank.	Exh.P/26/B
33.	Statement of account issued by Standard Chartered Bank	Exh.P/26/C
34.	Deposits statement issued by Standard Chartered Bank.	Exh.P/26/D
35.	Deposits statement issued by Standard Chartered Bank.	Exh.P/26/E

9. The said witness was subsequently cross-examined. On completion of the plaintiff's evidence, defendants 1 to 7, examined defendant No.6-Minhaj Ahmed Khan as their witness (who is also attorney of defendants No.1 to 5 & 7). He produced his affidavit-in-evidence as **Exh.D**. He produced letter dated 21.06.2004 of Karachi Cooperative Housing Societies Union Ltd. regarding approval of change of ownership of the suit property in the names of the defendants as **Exh.D/1**. The said witness was also cross-examined by learned counsel for the plaintiff.

10. Learned counsel for the plaintiffs during the course of argument while referring para-3 of agreement to sell [Exh.P/2] has contended that in terms of the said para all the transaction in respect of the suit property was to be finalized between the parties i.e. defendants

(Vendors) and Plaintiffs (Vendee) within a period of 15 days from the date of signing of agreement i.e. 4.08.2003 and within the said stipulated time the vendors were required to get the suit property mutated in their names from Bahadur Yar Jung (BYJ) Cooperative Housing Society Karachi, and Karachi Co-operative Housing Societies Union Ltd., (KCHSUL) and also to get executed Lease Deed (99-years) in their favour. He further argued that the defendants have failed to fulfill their part of obligation within the said stipulated period hence the transaction could not be finalized as per terms and time, stipulated in the para-3 of Exh.P/2. He further argued that the defendants in the month of June 2004 demanded an additional amount of Rs.13,30,000/- from the plaintiff for completion of the transaction. The plaintiff, on the assurance of the defendants that they will complete their part of obligation within a period of two months from the date of said additional payment, paid Rs.13,30,000/- to the defendants on 16.06.2004 upon proper receipt [Exh. P/15]. However, the defendant again failed to fulfill their commitment resulting which the plaintiff sent legal notices to the defendants [Exh.P/17-A, 18-A, 19-A, 20-A, 21-A, 22-A and 23-A] the said notice were replied to by learned counsel for the defendants, vide his consolidated reply dated 04.03.2005 [Exh. P/23-B]. Thereafter, the counsel of the defendant again addressed a letter dated 08.04.2005 [Exh. 23/C] to the counsel for the plaintiff whereby the agreement was revoked. The plaintiffs having no option has approached this court for redressal of their grievances. It is also contended that the plaintiffs were all along ready to pay the balance sale consideration, however it is the defendants who have failed to fulfill their part of obligations as per the terms of sale agreement and got executed 99-years lease deed (B-Lease) in their favour. It is also argued that till date no B-lease has been executed in favour of the defendant which shows the non-fulfillment of the obligations on the part of defendants. Whereas the plaintiff in order to show their willingness to perform their part of obligation that is to pay the balance sale consideration, have deposited the amount with the Nazir of this court. It is also argued that the time was never the essence of the contract as the completion of the transaction was linked to the mutation and execution 99-years Lease Deed (B-Lease) in favour of the defendants. Even otherwise, time stipulated in the agreement has

become invalid when the defendants on 16.06.2004 received further additional amount for completion the subject transaction. Learned counsel further argued that it is settled law that mere mentioning of specific period in agreement for completion of sale, does not make time essence of the contract, unless time is specifically made essence of the contract. Learned counsel also argued that entire evidence of the defendants is based on hearsay and as such cannot be relied upon whereas the plaintiffs have proved their case and are entitled to the decree of specific performance as prayed. It is also argued that the plaintiffs in compliance of the order of this Court dated 25.11.2009 deposited the balance entire sale consideration with the Nazir of this Court who invested the same in profit bearing scheme. It is also argued that due to the defendants' non-fulfillment of their part of obligation under the terms of agreement to sell, the plaintiff suffered losses and as such the plaintiffs are also entitled to damages. Learned counsel in support his stance in the case have relied upon cases reported in (i) *SANDOZ LIMITED and another v. FEDERATION OF PAKISTAN and other* (1995 SCMR 1431), (ii) *Mrs. DINO MANEKJI CHINOY and 8 others v. MUHAMMAD MATIN* (PLD 1983 SC 693), (iii) *SARFRAZ HAIDER and another v. Mst. KHATIJA BAI and 4 others* (1990 CLC 1649), (iv) *Messrs TANZEEM OVERSEAS v. Mst. ZAINAB BAI and another* (PLD 1965 (W.P.) Karachi 274), (v) *MIRAN alia MIR MUHAMMAD v. GHULAM HUSSAIN* (PLD 1985 Karachi 674) and (vii) *Mir MUHAMMAD ASLAM through L.Rs. and others v. BILQEES BEGUM through GENERAL-Attorney and others* (PLD 2008 Lahore 42).

11. Conversely, learned counsel for defendants during the course of his arguments contended that as per terms of agreement of sale [Exh.P/2] the transaction in respect of suit property was to be finalized within 15 days of signing of agreement. He further contended that transaction could not be finalized within the stipulated time as at the time of execution of agreement of sale the suit property was in the name of deceased father of defendants and mutation could not be effected within the said stipulated period. However, the names of the defendants were mutated in the records on 21.06.2004, by mutually extended time, and the plaintiffs were immediately informed in respect

thereof. It is also contended that the copies of documents of the suit property were handed over to the plaintiffs for preparation of sale deed, stamp duty, revenue charges etc. It is further contended that it was the duty of plaintiffs to get sale deed prepared and bear expenses in respect of stamp duty, preparation charges, mutation and transfer fee etc. however, the plaintiffs have failed to act in accordance with agreement despite the fact that defendant No.1 to 7 were time and again requested the plaintiffs to execute sale deed and make balance sale consideration but they deliberately failed to fulfill their part of obligation as per terms and conditions of sale agreement and were intentionally avoided to execute sale deed. It is also contended that the suit property was mutated on 21.06.2004 in the name of defendants, therefore, there was no excuse of payment of balance sale consideration. It is also contended that defendants sent notice to the plaintiffs to make balance sale consideration, however, the plaintiffs instead of making payment filed present suit with mala fide intention with no cause of action, therefore, plaintiffs are not entitled to any of the reliefs claimed in the present suit. It is also contended that in the evidence it has been proved that plaintiffs did not have sufficient amount and only Rs.48,81,333/- were lying in their bank account at the time of service of legal notice. It is also contended that the plaintiffs have failed to produce any Bank Statement, Pay order, cheque, online etc. before this Court and/or eye-witness regarding refusal to accept the amount by the defendants. It is also argued that the plaintiffs deliberately avoided to execute the sale deed as they did not have sufficient funds to pay the balance sale consideration further the bank statements produced by the plaintiff reflecting payments after filing the present suit as such the same are invalid and are liable to be unconsidered. Lastly, it is argued that the plaintiffs failed to establish their case from the evidence as well, as such, present suit is liable to be dismissed with compensatory cost. In support of his contention learned counsel for the defendants has relied upon the cases (i) *Mrs. MUNAWAR JAHAN v. Mrs. FEEROZA SHAHEEN ALEEM and 2 others (1999 MLD 3345)*, (ii) *ALLAH DITTA v. Haji MURAD ALI (2004 SCMR 834)*, (iii) *BANK AL-FALAH LTD. v. Mrs. SHAHZADI ZARFASHAN SOHAIL (2016 YLR 2528)*, (iv) *SHAH NAWAZ v. FERHAT ALI KHAN and 2 others (2001 CLC 1686)*, (v) *ZAHID RAHMAN v. MUHAMMAD ALI ASGHAR RANA*

(2007 CLC 1814), (vi) *ABDUL GHAFUOR CHAUDHRY v. MASOOD AKHTAR* (2007 YLR 2333), (vii) *BOOTAY KHAN (DECEASED) through his Lrs. v. MUHAMMAD RAFIQ ETC.* (2003 SCJ 818), (viii) *SAEED NASEEM CHEEMA v. Mrs. RUKHSANA KHAN* (2005 YLR 1905).

12. I have given due consideration to the arguments advanced by the learned counsel for the parties as well as their submissions in writing, minutely perused the evidence available on record as well the case law cited at the bar. My findings on the issues are as under:-

13. **ISSUES NO.1 & 2:** Both these issues are taken up together. Since there is no dispute in respect agreement to sell [Exh.P/2] entered into between the parties i.e. Plaintiffs and the defendants No. 1 to 7, and additional payment of Rs.13,30,000/- made by the plaintiffs [Exh.P/15] to the defendants, therefore no finding is required to be made on these issues.

14. **ISSUES NO.3, 4, 5 & 7.** Since these issues are related to each other, therefore, same are taken up together. From perusal of the evidence available on record, it appears that the plaintiff entered into a contract with the defendants to purchase the suit property, which was in the name of Sagheer Ahmed Khan, the deceased husband and father of defendants No. 1 to 7, through agreement to sell dated 04.08.2003 [Exh.P/2] for a total sale consideration Rs.1,76,70,000/-(Rupees One Crore Seventy-six Lacs and Seventy-thousand Only), out of which the plaintiffs paid Rs.25,00,000/-(Rupees Twenty-five Lacs Only) till the date of execution of the agreement. Thereafter, on 16.06.2004 the plaintiffs paid additional amount of Rs.13,30,000/- (Rupees Thirteen Lacs and Thirty Thousand Only) the said payment was duly acknowledged by the plaintiffs through payment receipt [Exh. P/15].

Before going into further discussion, it would be advantageous to reproduce the relevant portion of the Agreement to Sell dated 04.08.2003 [Exh.P/2] as under:

“WHEREAS the VENDORS above named are at the date of these presents seized, possessed of and are otherwise

well and sufficiently entitled inherited property i.e. Residential Plot of Land bearing Survey No. 101/16 measuring 760 Sq. Yds., Survey Sheet No.35-P/1, situated at Bahadur Yar Jung Cooperative Housing Society Ltd., Karachi, along with fitting & fixtures, having acquired the same by way of inheritance from deceased Saghir Ahmed Khan son Kabeer Ahmed Khan Sahib by virtue of Indenture of Form "A" Sub-License No.2, Registered at No. 525, at pages No. 78 to 80, Volume No.205, of Book No.I Addl. Registered before the Sub-Registrar, Karachi Dated 09.02.1955, herein after referred to as the SAID PROPERTY."

"1. That the VENDORS have agreed to sell the said property and the VENDEES has agreed to purchase the same from VENDORS for lump sum total sale consideration of Rs.1,76,70,000/- (Rupees One Crore Seventy Six Lacs Seventy Thousand only), @ Rs. 23250/- per Sq. yds. Out of which a sum of Rs.25,00,000/- (Rupees Twenty Five Lacs only) by (5) Cheque in the following manner:

- (i) Rs.6,00,000/- (Rupees Six Lacs only) vide cheque No.0107143.
- (ii) Rs.6,00,000/- (Rupees Six Lacs only) vide cheque No.0673221.
- (iii) Rs.6,00,000/- (Rupees Six Lacs only) vide cheque No.0107258.
- (iv) Rs.5,00,000/- (Rupees Five Lacs only) vide cheque No.0101120.
- (v) Rs.2,00,000/- (Rupees Two Lacs only) vide cheque No.0107143., all drawn at Standard Chartered Bank Karachi, dated 25.07.2003, well and truly paid by the VENDEES to the VENDORS part payment of sale consideration of the aforesaid property, whereof the VENDORS doth hereby admit and acknowledge as well. The remaining balance amount of Rs.1,51,70,000/- (Rupees One Crore Fifty One Lacs Seventy Thousand only) shall pay by the VENDEES to the VENDORS on execution, signing of Sale Deed in favour of vendees or their nominee(s) after completion of Mutation & Lease Deed of 99 years in favour of Vendors and delivery of peaceful possession of the said property.

3. That all transaction of the aforesaid property shall be finalized between VENDORS and VENDEE with 15 days from the date of signing of this Agreement. The Vendors shall mutate

from Bahadur Yar Jang Cooperative Housing Society, Karachi Cooperative Housing Societies Union Ltd. in their favour and execute Lease Deed (99 year) in their favour in respect of the above said property within the abovementioned stipulated time period.

4. That all expenses i.e. Stamp Duty, preparation charges, legal fees, registration fees, Mutation and transfer fees etc. of the said property shall be borne and paid by the VENDEE and in this connection the VENDORS shall have no responsibility, except the delivery of the said property together with all its original documents of title bills etc. from all dues thereof to the VENDEES.”
- “9. That Vendors will clear all the dues/outstanding including K.E.S.C. dues Water & Sewerage dues, Sui Southern Gas dues, Excise and Taxation, Telephone dues Bahadur Yar Jang Cooperative Housing Society dues, Karachi Cooperative Housing Societies Union Ltd., dues etc. till at these presents.
10. That this Agreement is irrevocable and neither party shall vary to revoke or cancel the same and if done so either party shall be liable for specific performance of Contract/Act through Court of law against the defaulting party.”

[Emphasis supplied]

From perusal of the above clauses of the agreement to sell, it appears that though the time was mentioned for performance of the agreement of sell, however, it was never the essence of the contract, as remaining/balance payment of sale consideration was to be made after completion of Mutation & Lease Deed of 99 years in favour of Vendors. Record also transpires that at the time when subject agreement [Exh.P/2] was entered into between the plaintiffs and defendants, only Sub-License No.2, Form ‘A’ [Exh.P/8] was issued/executed by BYJCHS in respect of the suit property that too in the name of deceased father of the defendants namely Saghir Ahmed Khan. The said Sub-License was issued/executed by the Society in favour of the allottee/deceased father of defendants whereby he was authorized and permitted by the Society to enter upon the plot of land for the purpose of construction a building

thereon. Whereas Clause 2 of sub-license [Exh.P/8] stipulates as under:

“2. It is hereby agreed that on the completion of the building in accordance with the said terms and condition and on the Sub-Licensee No.2 complying with the said rules, he shall be entitled to a lease of the said plot for 99 years in Form ‘B’ appended to the Main Agreement and IT IS HEREBY FURTHER AGREED that until such lease has been granted by the Landlord the Sub-Licensee No.2 shall not have any right or interest in the said plot except that of bare licensee and shall not without pervious permission in writing of the Sub-licensee No.1, the Licensee and the Landlord transfer his interest in the area allotted to him either in part or whole, except for the purpose of raising loans from the House Building Finance Corporation for construction of building thereon.”

[Emphasis supplied]

From the perusal of the above, it appears that after construction of the building on the plot of land, a 99-years Lease in Form ‘B’ in respect of the suit property was to be executed in favour of the deceased father of the defendants which appears to have not been done. Record also reflects that the defendants having inherited right, which they acquired upon the death of their father [late] Saghir Ahmed Khan, over the suit property entered into the subject transaction and at the time of execution of agreement [Exh.P/2] the suit property was existed in the name of deceased father of the defendants and only sub-license [Exh.P/8] was executed that too in the name of deceased father of the defendants. It is also an admitted position that without having 99-year lease (a title document) in their favour the defendants cannot execute sale/conveyance deed in favour of the plaintiffs. And that was the reason that in the agreement the balance sale consideration was linked with mutation and execution of 99-years in favour of the defendants. Record also transpires that on 16.06.2004 defendants received additional amount of Rs.13,30,000/-from the plaintiffs and issued receipt [Exh.P/15] in respect thereof. In the said receipt the defendants undertook to complete the mutation and get the “B” Lease (99 years) executed within a period of two months from the execution said receipt [Exh.P/15]. From the said receipt it also reflects that till June 2004, the defendants could neither mutate their names nor got executed the

B- Lease (99-Year lease) in their favour in respect of suit property. Record also transpires that plaintiff addressed legal notices dated 21.03.2005 [Exh.17-A, 18-A, 19-A, 20-A, 21-A, 22-A and 23-A] to the defendants, wherein the plaintiffs shown their readiness to pay the balance sale consideration and also called upon to execute sale deed and to complete the sale transaction. The said legal notice was subsequently replied to by the defendants' counsel through its reply notice [Exh.23/B] wherein it was informed that the property was mutated on 21.06.2004 and it has also been stated that since after the mutation the plaintiffs failed to pay the balance sale consideration, therefore, the agreement has lost its validity due to breach on the part of the plaintiffs the defendant already revoked the same. The counsel for the defendants again sent notice [Exh.23/C] whereby it has been informed that because of the breach on the part of the plaintiffs, the agreement has been revoked and any advance made to the defendants shall be refunded at the option of the plaintiff. The plaintiffs upon receiving the above reply filed the present suit.

15. The defendants neither with their written statement nor in their evidence, produced the 'B' Lease (99-years lease) either in their favour or in favour of their deceased father, which was one of the conditions precedent for payment balance sale consideration and completing the subject sale transaction in respect of the suit property. The defendants in their evidence insisted that 99 years lease has been executed and in this regard they referred to Exh.D/1, the only document produced by the defendants in their evidence, which is a mutation letter that, too, issued by the Karachi Co-operative Housing Societies Union Ltd. Contents of the said letter for the sake of ready reference is reproduced as under:

Exh.D/1

“Karachi Co-operative Housing Societies Union Ltd.
SHAHEED-E-MILLAT ROAD,
KARACHI-74800

KCHSU/1785/2004

Dated 21.06.2004

M/s. (1) MST. SAEED, (2) MRS. ALIYA KHANUM, (3) MRS.NAFISA MAQSOOD, (4) MEHRAJ AHMED KHAN, (5) MRS. RAISA NAZIM (6) MR. MINHAIJ AHMED KHAN AND (7) MRS. HUMAIRA BEGUM.

Subject:— Mutation in respect of Plot No.Resd. 101 Block No.3 Measuring 760 Square Yards in BAHADUR YAR JUNG

Co-operative Housing Society Ltd. Karachi.

Dear Sir/Madam,

With reference to your letter dated 07.06.2004 we have to inform you that the change of ownership in respect of the above plot has been approved. Your name has been mutated in our record as the owner of the plot or building. This mutation has been effected on the basis of documents submitted by the applicant/owner as approved by the Society.

This mutation is issued on the basis of society recommendation vide letter No.BYJCHS/2004/2400 dated 07.06.2004.

Sd.

Administrator Karachi Co-operative Housing Societies
Union Limited”

The above document, by stretch of any imagination cannot be considered as ‘B’ Lease (99-year Lease) in respect of the suit property.

16. Record further transpires that the plaintiffs in compliance with the direction of this court dated 25.11.2009 deposited the balance sale consideration with the Nazir of this Court who has invested the said amount in profitable Government scheme.

17. In the present case, agreement to sell [Exh.P/2], and payment towards part sale consideration of the suit property by the plaintiffs are not disputed. Furthermore, though in the agreement to sell [Exh.P/2] time for performance of the contract was mentioned, however, same was linked to the mutation and obtaining of ‘B’ Lease (99-years) by the defendants in respect of the suit property which has not been done. The said fact is also reflected from [Exh.P/15] wherein the defendants upon receipt of payment of additional amount from the plaintiff in the month of June 2004 undertook to get the required mutation and “B” Lease of suit property within two months. Even otherwise, in relation to contract of immovable property the rule is that the time ordinarily is not the essence, however, this by no means is an absolute rule and it is always open to the party, who claims exception thereto, to establish otherwise dependent upon the contents/text, letter and spirit of the agreement

and/or from the intent and conduct of the parties, as well as the attending circumstances. In the present case the same is lacking.

18. Notwithstanding the above, evaluating the conduct of the plaintiffs in so far as their willingness to perform their part of obligation under the agreement to sell [Exh. P/2] is concerned, and/or examining his alleged failure to do so, it is pertinent to note that the plaintiffs paid part sale consideration at the time of execution of the agreement to sell [Exh. P/2] and thereafter, on 16.06.2004 [Exh. P/15] paid further amount of the sale consideration and in order to show his willingness he issued legal notices [Exh.17-A, 18-A, 19-A, 20-A, 21-A, 22-A and 23-A] to the defendants and when the defendants had refused to complete the sale consideration they filed the present suit and sought specific performance of the contract. In the plaint of the present suit the plaintiffs have also stated that they are fully prepared and willing to perform their part of obligation under the terms of agreement of sell [Exh. P/2] as they have full arrangement of the balance sale consideration.

The plaintiffs' witness in his cross examination reiterated the stance of the plaintiffs. Relevant excerpts of the cross examination of the plaintiff's witness, for the sake of ready reference is reproduced as under:

“ There are three Plaintiffs named in the title.

Q: Have got power of attorney from remaining two?

A: All the three plaintiffs are present/available therefore, I do not need the power of attorney. It is incorrect that the balance amount required for completion is not available. Voluntarily says that the remaining balance Rs.19 million is separately kept preserved for payment and still today it is with us in our custody.

Q: Where you have kept the amount?

A: It is not necessary to disclose the place for keeping the amount for security purposes. We have equivalent amount in bank accounts as well.

Q: In which bank you are maintaining the accounts, since it is personal-life question, hence same is disallowed.

Q: Mr. Hashmi in which bank account you are keeping the amount and what is its number?

A: Standard Chartered Bank at the moment I do not remember the number of account.”

“I received notice dated 14.06.2008 as per contents of the requirement in the notice I have brought the

statement of account and placed the same for Mr. Hashmi's looking into notice produced as Exh.24 and statement of account ABN AMRO as Exh.25, statement of account of Standard Bank Ltd. as Exh.26.

Q: Have you only these accounts?

A: I have produced the accounts/statement those are only accounts maintained.

Q: What balance you had to pay to the defendants?

A: The defendants were to be paid Rs. One Crore Fifty One lac Seventy Thousand as balance in the year 2003.

Q: In the year 2003 you had no such balance.

A: It is incorrect that to say on the contrary I had, that much amount/ balance.

Q: Do you know that on 21.6.2004 the property was mutated in the name of all defendants.

A: I had the knowledge about it.

Q: That in spite of demands you did not make efforts for preparing the sale deed.

A: We personally met the defendants for finalizing the sale deed but they insisted for some time as they were in search of a house and verbally requested for extension of time.

Q: Did you give any written notice or proof for extension of time.

A: No, it was verbal, a notice was sent.

Q: Did you purchase adhesive stamp papers?

A: No Sir.

Q: Did you make any application for tendering the balance amount in Court?

A: No Sir, I filed the present suit.

Q: Agreement dated 4th August, 203 (Para No.3) referred, there is time period mentioned therein.

A: Since the defendants had not made the property marketable as documents were to be prepared on their part thus time was mutually extended.

Q: Defendants had been making demands of balance payment but you did not make the payments.

A: Defendants did not make demand of balance.

Q: Did you pay the balance.

A: Since defendants not demanded so we did not pay."

"Q: Para No.13 of the affidavit referred to the defendant had you offered the balance and they had refused to accept the amount.

A: We did offer the balance amount but defendants refused to accept the amount."

"Q: Is it correct that in getting the stamps papers and typed the same. There was no obstacle.

A: Yes Sir.

Q: Was there any legal obstacle in the same.

A: Since documents were with defendants and were not complete.

Q: Is it correct that on 21st June 2004 all documents were supplied by defendants.

A: No Sir, documents not supplied as alleged."

- “Q: You are guilty of breach of the agreement as you did not fulfill and complete the formalities for registration of sale deed.
- A: We did not commit any breach, always remained ready to pay the balance and time and again approaching at their house for delivery of possession, but the defendants always demanded time, then we issued notice.
- Q: It is suggested that all title documents were delivered to you but you failed to prepare the sale deed.
- A: No Sir, title documents were not delivered only entry.

Furthermore, regarding the fact that the plaintiffs had the sufficient amount with them was proved when the plaintiffs, upon the direction of the Court deposited the entire balance sale consideration with the Nazir of this Court. These facts clearly establish the bona fide and readiness / willingness of the plaintiffs to perform their part of obligation under the agreement [Exh.P/2]. As far as the capability of the plaintiffs to pay the balance sale consideration is concerned, the defendant never asked from the plaintiffs to pay the balance sale consideration and shown his willingness to perform his part of obligation under the contract, besides there is nothing available on record which could show that the defendants have obtained B lease (99-years lease) as per the terms of the subject contract, therefore, the question of capability of payment raised by the defendant does not appear to be reasonable and justifiable. Furthermore, from the evidence, it is reflected that the defendants have failed to fulfill their part of obligation under the agreement [Exh.P/2]. Relevant excerpts of the cross-examination of the defendants’ witness, for the sake of ready reference, is reproduced as under:

“It is correct that an agreement dated 4th August 2003 for sale of House No.101/16, Survey Sheet No. 35-P/1, Bhadur Yar Jung Road, Karachi, was executed and we agreed with the terms and conditions mentioned therein, I am conversant with the clause No.3 appearing Page No.4 of 5 and according to this clause the lease period was required to have been got extended in your favour.

- Q: That vide clause No.3 you had to obtain lease period for 99 years and was required to be extended within 15 days from the date of signing of the agreement?
- A: I got lease period extended and delivered the copy on 21.06.2004, obtained from Bahadur Yar Jung Cooperative Society Ltd.

Q: Can you show any document that Bahadur Yar Jung Cooperative Society Ltd. extended for further period of 99-years?

A: The document as Exh.D/1 already produced and executed by Karachi Cooperative Housing Society Union Ltd. (Original seen and returned)

Q: The document Exh.D/1 is not lease deed by itself but a letter of Mutation?

A: The document D/1 is Mutation and Lease is executed only once.”

“Q: Do you agree with the terms appearing in para No.1?

A: I do agree with the terms appearing in para No.1?

Q: Is it correct that despite agreement and sale price you and your brother (Minhaj Ahmed) demanded for exorbitant amount of Rs. thirteen lacs thirty thousand and same was enhanced by the plaintiff.?

A: The Plaintiff themselves extended the sale price of thirteen lacs thirty thousand, we never demanded.

Q: Is it correct that vide receipt dated 16.06.2004 you had issued acknowledgement of receiving amount of Rs. thirteen lacs thirty thousand and you along with your brother Minhaj Ahmed Khan (defendant No.4) signed the receipt?

A: Yes, we did receive the said amount and issued the receipt of receiving the said amount.?

Q: Whatever written in the receipt do you agree?

A: Yes, we agree with the contents of receipt dated 16.06.2004.”
reflected from the evidence”

In view of the foregoing, I have come to the conclusion that neither any negligence nor any breach can be attributed towards the plaintiffs and as such they are entitled for the discretionary relief for enforcement of the agreement to sell [Exh.P-2]. Hence, these issues are answered accordingly.

19. **ISSUE No.6.** In the circumstances and in terms of the above findings on issues No. 3, 4, 5 and 7, I am of the considered view that in the instant matter the plaintiffs have established their claim while the defendants have failed to substantiate their stance in the case. Accordingly, the suit of the plaintiffs is decreed in the following terms:

- (i) The defendants are directed to perform their part of obligation in terms of agreement to sell dated 04.08.2003

and execute a conveyance deed in favour of the plaintiffs and also handover the suit property (*Plot of land bearing Survey No.101/16, measuring 760 Sq. Yards, Survey Sheet No.35-P/1, situated at Bahadur Yar Jang Cooperative Housing Society, Karachi*) along with all its original title documents including 'B' Lease (99-years) to the plaintiffs under the supervision of the Nazir of this Court within a period of thirty (30) days and in lieu thereof the amount of sale consideration so deposited by the plaintiffs along with profits accrued thereon shall be handed over/released to the defendants as per their shares in the property upon proper verification and identification.

However, in the event the defendants fail to comply with the above order, then the Nazir of this Court shall enquire first from concerned quarters about the execution of B-Lease in favour of the defendants and once it is confirmed that B-Lease has been executed in respect of the suit property, execute a conveyance deed in favour of the plaintiffs on behalf of the defendants. However, in the event if it is found that B-lease in respect of the suit property has not been executed then the Nazir will get B-lease executed first in favour of the defendants and then execute a conveyance deed in favour of the plaintiffs.

- (ii) All the expenses in respect obtaining the B-Lease (99-years) shall be borne by the defendants and/or may be deducted from the amount of sale consideration lying with the Nazir. However, charges for registration of the conveyance deed and Nazir's fees, which is fixed at Rs.30,000/- (rupees thirty thousand only) shall be borne by the plaintiffs.

JUDGE

Karachi;
Dated:10.01.2019