

IN THE HIGH COURT OF SINDH, KARACHI

Suit No.1763 of 2014

Mst. Farha Zafar

Versus

Major (Retd.) Wasim Pasha Tajammal and others

Plaintiff : Mst. Farha Zafar, through Mr. Haider Raza,
Advocate for the Plaintiff.

Defendants No.3&4 : General Head Quarter and ADH (Askari
Coloy), through Mr. Muhammad Asif Malik,
Advocate.

Nemo for Defendants No.1 & 2.

Date of hearing : 15.01.2019

Date of Judgment : 15.01.2019

Case law relied upon by Plaintiff's counsel.

- (i). **2001 SCMR Page-1053**
(*Sami ul Haq v. Dr. Maqbool Hussain Butt and others*).
- (ii). **2006 CLC Page-1802**
(*Abdul Ghaffar v. Faisalabad Development Authority through
Director-General*)

Case law relied upon by Defendants' counsel.

Other Precedent

1991 SCMR 2300 (*Nur Jehan Begum v. Mujtaba Ali Naqvi*)

Law under discussion: (1). Specific Relief Act, 1877 (SRP).
(2). Code of Civil Procedure, 1908 (CPC).
(3). Qanoon-e-Shahadat Order, 1984.
[**Evidence Law**].

JUDGMENT

Muhammad Faisal Kamal Alam, J: The present *lis* has been filed
by the Plaintiff seeking Specific Performance of Agreement dated

27.06.2013 (*Exhibit P/1*) in respect of the Apartment No.65-D, measuring 2239 Square Feet, located in a multistoried building Askari-V, built at Survey No.71/3/A, Army Officers Housing Colony, Phase-II, situated at Malir, Cantonment, Karachi, (*the subject 'Apartment'*). The Plaintiff contains the following prayer clause_

"It is, therefore, prayed that this Hon'ble Court may be pleased to pass Judgment and Decree in favour of the Plaintiff against the Defendants as under: -

- (a) *Decree for specific performance of the contract/Agreement dated 27th June, 2013 against the Defendant No.1 with the direction to him to execute the title documents of the suit property, viz. bearing Apartment No.65-D, measuring 2239 square feet, Survey No.71/3/A, Army Officers Housing Colony, Phase-II, Askari-V, situated at Malir Cantt., Karachi, in favour of the Plaintiff before the Defendants No.3 and 4 or the concerned Sub-Registrar and get the property mutate in the name of Plaintiff in the record of Defendants No.3 and 4, as the Plaintiff has already paid the sale consideration of Rs.54,00,000/- out of total sale consideration of Rs.143,00,000/- and the Plaintiff is ready to pay the balance sale consideration of Rs.89,00,000/- to the Defendant No.1 or the Terminal Dues mentioned in annexure P/10 to the Defendant No.3 at the time of mutation of suit property in the name of Plaintiff, failing which the Nazir of this Hon'ble Court be directed to execute the transfer documents or other required title documents in favour of the Plaintiff on behalf of of the Defendant No.1 before the Defendants No.3 and 4 or other Contempt Authority .*

ALTERNATIVELY.

To pass decree of Rs.54,00,000/- which was paid by the Plaintiff to the Defendant No.1 at the time of execution of Sale Agreement and also Rs.54,00,000/- as penalty if he fails to perform his contractual part of the Sale Agreement.

- (b). *To direct the Defendant No.3 to handover the possession of the suit property viz; bearing Apartment No.65-D, measuring 2239*

square feet, Survey No.71/3/A, Army Officers Housing Colony, Phase-II, Askari-V, situated at Malir Cantt., Karachi after receiving the amount of Terminal Dues of Rs.39,00,240/- as per Pay Order as Annexure P/10.

- (c) *To grant Permanent Injunction restraining the Defendants, their agents, servants, officials, employees, executants, managers, representatives, legal heirs, attorney(s) men or any other person(s) acting on their behalf not to create third party interest or handover the possession of the suit property, viz; bearing Apartment No.65-D, measuring 2239 square feet, Survey No.71/3/A, Army Officers Housing Colony, Phase-II, Askari-V, situated at Malir Cantt., Karachi to any other person, till the final decision of the instant matter.*
- (d) *Cost of the suit.*
- (e) *Any other relief(s) which deem fit and proper in the circumstances of the case in favour of Plaintiff.”*

2. Summons and thereafter notices were issued but none of the Defendants came forward to contest the matter.

3. Eventually, the service was effected through publication but the Defendants failed to appear and contest the matter and on 16.10.2017, the Defendants No.1 and 2 were declared *ex-parte*, where after, on 11.01.2018, the remaining Defendants No.3 and 4 were also declared *ex-parte*.

4. On 07.05.2018, the Commissioner was appointed to record the evidence in order to expedite the matter.

5. The Plaintiff led the evidence and besides herself examined the two marginal witnesses of the above Agreement. On behalf of Defendant No.3, their Officer Major (Retd.) Shoaib son of Salman Abdul Qureshi appeared and testified. Despite providing several opportunities, the Plaintiff and her witnesses were never cross-examined.

6. Mr. Haider Raza, the learned counsel for the Plaintiff submits that the Agreement in respect of the subject Apartment / Unit was entered into between Plaintiff and Defendant No.1 after the latter (*Defendant No.1*) was allotted the subject Apartment through an Allotment Letter issued by the Defendant No.3 (*General Headquarters AG Branch, Housing Directorate*), which is in the form of a ballot result dated 10.06.2013, produced in the evidence as **Exhibit P/3** by the Plaintiff herself and the same document was also produced by the official witness of Defendants No.3 and 4, the above named Major (Retd.) Shoaib as Exhibit D/3. It is further argued that Defendant No.1 turned dishonest and despite receiving a handsome amount of Rs.5.4 Million, he avoided to fulfill his part of the contractual obligations.

7. On the other hand, Mr. Muhammad Asif Malik, the learned counsel representing the Official Defendants No.3 and 4, has argued that both Plaintiff and Defendant No.1 did not obtain No Objection Certificate (*NOC*) from the Defendant No.3 (*General Headquarters AG Branch, Housing Directorate*), therefore, the latter does not recognize this transaction. He has referred to the evidence of above named Major (Retd.) Shoaib, that the Apartment was cancelled on 05.01.2015, *inter alia*, because terminal payment (final payment) as per Clause of the Allotment Letter was not made; said cancellation letter of 5-1-2015 was produced as **exhibit D/4**.

8. In rebuttal, the learned counsel for Plaintiff submits that the date of the cancellation as mentioned on the above Exhibit D/4 (*dated 05.1.2015*) has no sanctity in the eyes of law because at that relevant time the *ad-interim* injunction was operating in the case, which was earlier granted on 23.09.2014.

9. Arguments heard and record perused.

10. Though the matter has proceeded *ex-parte* but still it is necessary to consider the claim of Plaintiff and relief claimed in the matter in the light of available record and provisions of law.

11. The Court has to consider the following_

- (i). Whether the subject Agreement (*Exhibit P/1*) is a valid instrument and if so its effect?
- (ii). What relief the Plaintiff is entitled to?

12. The above mentioned Exhibit P/1 (*Agreement of Sale*) dated 27.06.2013 has mentioned the total sale consideration as Rs.1,43,00,000/- (*Rupees One Crore Forty Three Lac Only*); out of which it is mentioned under Clause-1 that Rs.2.4 Million was paid prior to signing of the Agreement as mentioned in Clause-1 and at the time of execution of the agreement further amount of Rs.Three Million was paid through Cheque No.0868744 dated 27.06.2013 drawn on Askari Bank Limited at its Khayaban-e-Ittehad, Branch, DHA, Karachi. This has been acknowledged by the Defendant No.1 in the Agreement itself and through a separate receipt, which has been produced in the evidence by Plaintiff as Exhibit-P/2. Besides, the learned counsel for Plaintiff has referred to the Statement of Account of the Plaintiff maintained at the above named Bank, which has been produced as Exhibit P/7-B, to show that the same amount of Rs.Three Million was transferred from the Bank of Plaintiff.

13. The complaint/representation to Defendant No.3 (*General Headquarters*) made by Plaintiff was produced as Exhibit P/10 (dated 15.08.2014) and in paragraph-4 whereof, it is specifically mentioned that the amount of Terminal Payment was sent to Defendant No.1 but he refused to receive the same.

14. The other relevant document is the afore referred 'Ballot Result' dated 10.06.2013 (**Exhibit P/3**), which in fact is the Allotment Letter as it contains the terms of allotment, including the payment schedule. Under Clause-3, the tentative completion cost is mentioned as Rs.Four Million and the Terminal Payment date was 31.07.2013 and in terms of Clause 4 (b), failing to abide by such date, a markup of 1.5% per month was to be paid.

15. The learned counsel for the Plaintiff has then referred to the evidence of Ahteshamuddin, the Defendant No.2 herein, who acted as an estate agent and supported the case of Plaintiff, *inter alia*, by stating that the Agreement was signed by the Defendant No.1 in his presence. He has deposed that he (*Witness/Defendant No.2*) went to Rawalpindi and met the Defendant No.1 to hand over Pay Order No.565158 dated 04.07.2014 towards terminal payment but the Defendant No.1 refused to accept the payment. The said Pay Order has been exhibited as P/9, available at page-51 of the evidence file. This Pay Order is in favour of "HOUSING DTE GHQ RAWALPINDI", the Defendant No.3, for an amount of rupees three million, nine hundred thousand, two hundred and forty only. The other marginal witness, namely, Muhammad Jawad Gul also corroborated the version of Plaintiff, *inter alia*, confirming the total sale consideration and part payment made so far.

16. While referring to the cross-examination of witness of Defendant No.3, the learned counsel for Plaintiff has stated that the said witness has acknowledged during his cross-examination that due to non-provision of electricity, the Terminal Payment was deferred upto March, 2014. The perusal of the evidence of the above named Official witness **also leads to the conclusion that though the subject Apartment was cancelled by them,** but it is still intact and is not transferred to any other person.

This aspect of purported cancellation will be dealt in the following paragraphs.

17. The correspondence of Defendant No.3 dated 29.08.2014, produced by Plaintiff's witness as **Exhibit P/11**, has not been disputed by any side nor the Plaintiff was cross-examined on this very aspect. This correspondence is a response by Official Defendant No.3 to the Plaintiff's earlier complaint/representation dated 15.08.2014 (referred above), and the said Defendant No.3 in the afore mentioned correspondence has advised the Plaintiff to approach the Court for a decision. This means that at that relevant time, that is, 29.08.2014, the Official Defendants were in knowledge that a dispute is going on between the Plaintiff and Defendant No.1, but did not raise any serious objection to the subject transaction, entailing an adverse consequence.

18. Since the entire evidence of Plaintiff and her attesting witnesses have gone unchallenged, thus the testimony of the Plaintiff's side in fact has been admitted by the Defendant No.1. In this regard a reported decision of Hon'ble Supreme Court handed down in the case of *Nur Jehan Begum v. Mujtaba Ali Naqvi (ibid)* is relevant. Hence, the Plaintiff has successfully discharged the onus of proving the subject Agreement dated 27.06.2013 (*Exhibit P/1*).

19. The conclusion is that the Plaintiff and Defendant No.1 with a conscious mind and free consent entered into the subject Agreement, which is valid and is a contract enforceable by law, *inter alia*, in terms of Section 12 of the Specific Relief Act, 1877.

20. Mr. Asif Malik, the learned Advocate for the Defendants No.3 and 4, has stated that on account of lapse of considerable time complexity have arisen in the matter as subject Apartment was cancelled as mentioned in the foregoing paragraph. He reiterated his arguments of

non-obtaining of No Objection Certificate (*NOC*). Per learned counsel, the private dispute between the Plaintiff and Defendant No.1 should not result in any financial loss to the Defendant No.3.

As far as the contention of cancellation of subject Apartment is concerned, in my considered view, it hardly has any force. It is a matter of record that when the Apartment was cancelled by the above correspondence dated 05.01.2015, the *ad-interim* injunction was in the field, although, the witness of Defendant No.3 has deposed that they had no knowledge of the injunction. In these circumstances, a lenient view is taken; and instead of initiating contempt proceedings against the Officials of Defendant No.3, it is held that the cancellation of the subject Apartment was / is an illegal act on the part of the Defendant No.3, thus, such purported cancellation is of no legal effect.

21. Adverting to the other objection(s) of the Defendant No.3 and 4. The concerned authority and the department has been impleaded as Defendants No.3 and 4; despite service of summons and notices by this Court they opted to remain absent. **Secondly**, from the above discussion it is now proved that the Defendant No.3 was at the relevant time **in knowledge of the dispute** between Plaintiff and Defendant No.1 arising out of the sale transaction in respect of the subject Apartment, therefore, it cannot be argued that Defendants No.3, being the concerned authority was kept in dark; conversely, the correspondence dated 29.08.2014 (*Exhibit P/11*) of said Defendant No.3 is in fact an advice to Plaintiff for invoking the jurisdiction of a Civil Court. **Thirdly**, the Plaintiff has shown her *bona fide* conduct during proceeding when the balance sale consideration of Rs.8.9 Million was deposited with the Nazir of this Hon'ble Court within time in compliance of the order dated 20.03.2017. **Fourthly**, the principle laid down in the reported decision relied upon by

the Plaintiff's side-2001 SCMR 1053 (*Sami-ul-Haq v. Dr. Maqbool Hussain Butt and others*), is applicable to the facts of the present case. The Hon'ble Apex Court (*in the above referred case*) has held that a barring clause in the Allotment Letter of CDA (*Capital Development Authority*) will not come in the way of transfer of Plot in favour of a *bona fide* party, who was the respondent in the said reported case. Transfer by an allottee through a valid contract was recognized by the Hon'ble Supreme Court in the above Judgment being not against any public policy nor the same can be termed as illegal or void. Even, *ex post facto* permission can be granted in cases where the transaction itself is lawful but one of the parties to the contract is avoiding to fulfill covenants. Therefore, the defence set up on behalf of Defendants No.3 and 4 is neither plausible nor acceptable. Even for the sake of argument, a NOC was not obtained, the same cannot be fatal to the transaction in question as the Defendant No.3 can give *ex post facto* permission now, *inter alia*, for the reasons mentioned in the preceding paragraphs.

It is also note worthy to mention that Rules and Procedures of an authority, in the present case the Defendant No.3, has to pass the test of reasonableness, besides being *intra vires* the parent statute. No delinquent person/party should be allowed to take undue advantage of such rules, bye-laws and procedures, *inter alia*, to cover one's defaults with the object to frustrate lawful transactions.

22. Summation of the above is that the point number (i) for consideration (*supra*) is answered in the affirmative; that the Plaintiff is entitled to the relief claimed and accordingly for the Decree for Specific Performance of the subject Agreement (contract).

23. The amount deposited with the Nazir along with the accruals will be released to the Plaintiff for onward payment to Defendant No.1, who

shall then comply the formalities of Defendant No.3 for completing the subject sale transaction in favour of Plaintiff. However, in case of default or for any other reason, the said transaction is not completed within four weeks from today, then the Nazir will complete the same in accordance with the Rules. In the second eventuality, the Nazir will himself settle his fee / charges.

24. The suit stands decreed in terms of prayer Clauses [a] read with the above directions, [b] and [c].

25. Parties to bear their respective costs.

Dated: 15.01.2019.

M.Javaid.PA

JUDGE