

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 315 of 2000

[S. M. Inam-ul-Haq v. Mirza Amjad Baig & another]

Date of hearings : 18.09.2018, 24.09.2018 & 01.10.2018.
Date of Decision : 28.01.2019.
Plaintiff : S. M. Inam-ul-Haq, through Syed Muhammad Abbas Haider, Advocate.
Defendants : Nemo.

Case law relied upon by Plaintiff's Counsel

1. P L D 2004 Supreme Court page-465
[*Muhammad Bashir and others v. Iftikhar Ali and others*]
2. P L D 2011 Supreme Court page-296
[*Hafiz Tassaduq Hussain v. Lal Khatoon and others*]
3. P L D 2013 Sindh page-513
[*Captain Syed Warasat Hussain v. Muhammad Ahad Saad*]
4. 1993 M L D page-643
[*Abdul Latif Khan and another v. Gul Rehman and others*]
5. 2002 C L C page-1770
[*Ghulam Rasool v. Muhammad Saleem and others*]

Other precedents

1. 2018 S C M R (Supreme Court Monthly Review) page-1586
[*Haji Baz Muhammad Khan and another v. Noor Ali and another*]-Baz Case
2. 2015 P.Cr. L.J. (Pakistan Criminal Law Journal) page-1240
[*Messrs Ittefaq Foundries (Pvt.) Ltd. and 4 others v. Federation of Pakistan, through Secretary, Ministry of Law, Federal Secretariat, Islamabad and 2 others*]-Ittefaq Case.
3. 2003 P.Cr. L.J. (Pakistan Criminal Law Journal) page-1353
(Agha Wazir Abbas v. The State)

Law under discussion:

1. The Contract Act, 1872.
2. Civil Procedure Code, 1908 ("CPC")
3. Qanun-e-Shahadat Order, 1984
(Evidence Act, 1872); **Evidence Law.**

JUDGMENT

Muhammad Faisal Kamal Alam, J: - The Plaintiff has instituted the present proceeding for recovery of an amount of Rs.30,01,859/- (*Rupees Thirty Lac One Thousand Eight Hundred Fifty Nine Only*) from the Defendants. Following is the prayer clause of the Plaint_

- “(i). Judgment and Decree in the sum of Rs.30,01,859/- against the Defendant No.1, with future markup at the rate of 18% per annum from the date of payment i.e. 11.1.1999 till its realization.***
- (ii). To pass Judgment and decree for Rs.7,50,000/- for the amounts payable by the Defendant No.2 to Defendant No.1, being the balance amount.***
- (iii) Defendant No.2, be directed to deposit an amount of Rs.30,01,859/- the share of Defendant No.1, with the Nazir of this Hon’ble Court till decision of the suit.***
- (iv) Cost of the Suit.***
- (v) Any other relief/reliefs as deem fit by this Hon’ble Court under the circumstances of the case.”***

2. Summons and notices were issued to the Defendants. The matter was initially contested mainly by the Defendant No.1 by filing his side of pleadings / Written Statement; whereas, the Defendant No.2 did not seriously dispute the claim of Plaintiff, but replied to those part of pleadings, which concerned the said Defendant No.2.

3. On 21.01.2002, the following consent Issues were framed_

- “1. Whether the plaintiff had paid a sum of Rs.10,00,000/- towards the part payment of sale consideration of sale agreement dated 28.8.1995 to Mohammad Zahoor, Vendor of the suit property?***

2. *Whether the Vendor Muhammad Zahoor son of Mohammad Yaqoob of suit property No.158-P, Block 2, PECH Society, Karachi, issued certificate dated 11.1.1999 for Rs.22,51,859/- received from the plaintiff in respect of sale agreement dated 28.8.1995?*
3. *Whether the plaintiff had paid all the legal and misc. expenses as per deed of agreement dated 20.6.1996 in respect of suit property from the date of execution of sale agreement dated 28.8.1995?*
4. *Whether the defendant No.1 was not liable to pay 50% of sale proceeds as well as all legal and misc. expenses incurred by the plaintiff, vide deed of agreement dated 20.6.1996?*
5. *Whether the plaintiff is entitled to receive the balance share of Rs.7,50,000/- from the defendant No.2, payable to defendant No.1?*
6. *Whether the suit of the plaintiff is maintainable against the defendant No.2?*
7. *Whether the plaintiff has accrued any cause of action against the defendant No.2?*
8. *Whether the demand of plaintiff in suit is justified against the defendant No.2 under the circumstances of this suit?*
9. *Whether the plaintiff is entitled to any relief against the defendant No.2?"*

4. The Plaintiff as a sole witness led the evidence and closed his side, but despite providing ample opportunities, both the Defendants did not come forward to lead the evidence.

5. On 29.10.2001, the application – C.M.A. No.9736 of 2000, filed by the Plaintiff was granted and Defendant No.2 was directed to execute a surety bond in the sum of Rs.7,50,000/- (Rupees Seven Lac Fifty Thousand Only) before the Nazir of this Court, binding himself (Defendant No.2) to deposit the said amount in case the suit is decreed against Defendants No.1 and 2. Subsequently, the Nazir's endorsement dated 26.11.2001 has confirmed that surety bond has been executed by Saleem Zaki son of

Muhammad Zaki Usmani, the authorized representative of Defendant No.2 (Junaid Associates Private Limited).

6. The controversy involved in the matter has a chequered history. Earlier a Suit No.47 of 1993 was filed by one Muhammad Zahoor against Defendant No.2, but was dismissed vide Judgment dated 27.01.1999, which was challenged in the High Court Appeal No.55 of 1999, though unsuccessfully. Admittedly, in the above HCA, a Review Application was pending when parties entered into a compromise. The controversy in the earlier round of litigation was in respect of a built up property on a Plot of land bearing No.158-P, Block-2, PECHS (Karachi), which was originally belonged to one Mst. Iqbal Jehan Begum, the mother of above named Muhammad Zahoor, as claimed by Plaintiff. As averred in the present proceeding, the aforementioned property was subsequently purchased by present Plaintiff and Defendant No.1 from the said Muhammad Zahoor, but eventually the parties of the present *lis* as well as the above named Muhammad Zahoor entered into an Agreement dated 24.06.1999, which has been produced in evidence by the Plaintiff's side as **Exhibit P/25**. On the basis of this Agreement, the Review Application jointly preferred by the present Plaintiff and the above named Muhammad Zahoor was withdrawn, followed by the Application jointly preferred by the parties hereto under Order XXIII of CPC, whereupon the order dated 24.06.1999 was passed. These documents are produced in the evidence (by the Plaintiff's witness, P.W.-1) as Exhibit P-5/26 and P-5/5, respectively; available on pages-159 and 55 of the Evidence File.

7. In view of the above undisputed facts, it is necessary to frame the following Additional Issue_

“8-A. Whether the claim of Plaintiff against the Defendants is maintainable after entering into a subsequent compromise Agreement dated 24.06.1999?”

8. Since the Issues No.6 and 7 relate to the maintainability of present suit against the Defendant No.2 (Junaid Associates Private Limited), therefore, it is necessary to first decide these Issues in the following paragraphs.

ISSUES NO.6 AND 7.

9. Syed Muhammad Abbas Haider, Advocate, has argued that the undisputed Agreement dated 24.06.1999 (Exhibit P/25), through which the earlier litigation in respect of the subject property in the shape of Suit No.47 of 1993 and subsequent High Court Appeal No.55 of 1999, came to an end, besides Plaintiff, Defendant and one Muhammad Zahoor, was also executed by the said Defendant No.2 and admittedly the latter made payments in pursuant to the above agreement, therefore, the present suit is also maintainable against the Defendant No.2. It is further argued that for the part of the claim of Rs.7,50,000/- (Rupees Seven Lac Fifty Thousand Only), a specific relief has been claimed against Defendant No.2, which through its above named representative, on 26.11.2001, also deposited a surety bond for the above amount, before the learned Nazir of this Court. The contention of the Plaintiff's learned counsel is primarily based on the undisputed record of the case. Perusal of the Written Statement / pleadings of Defendant No.2 also shows that the latter has not seriously disputed the claim of Plaintiff against Defendant No.1, except responded to those averments of Plaintiff, which were directed against Defendant No.2.

10. In view of the above, Issues No.6 and 7 are answered in Affirmative that the present suit as instituted by Plaintiff is maintainable against the Defendant No.2.

11. The answer to the other Issues directly depend upon a finding on the Issue No.8-A, thus it is necessary to decide this Issue first.

ISSUE NO.8-A.

12. Primarily, the claim of Plaintiff against Defendant No.1 revolves around the Agreement dated 20.06.1996 (**Exhibit No.P-5/3**) and Irrevocable General Power of Attorney, which has been produced in evidence as Exhibit No. P-5/4. Under these documents, the Plaintiff and Defendant No.1 agreed to purchase the aforementioned subject property from one Muhammad Zahoor, who claimed to be the owner thereof being the sole legal heir of late Iqbal Jehan Begum, who undisputedly was the exclusive owner of the afore-referred house property.

13. Admittedly, it was one of the basic terms of the above Deed of Agreement (Exhibit P-5/3) that all the litigation expenses will be borne by the present Plaintiff and Defendant No.1 relating to the earlier Suit No.47 of 1993 filed by the above named person Muhammad Zahoor against the present Defendant No.2 (Junaid Associates).

14. This Court by its Judgment dated 27.01.1999, while dismissing the Suit No.47 of 1993, *inter alia*, held that the above named Muhammad Zahoor was not the son of the actual owner, viz. Mst. Iqbal Jehan Begum. As already mentioned in the foregoing paragraphs, that a High Court Appeal was filed to challenge the above Judgment, which too was dismissed and while the Review Application (as mentioned above) was pending, an Application under Order XXIII of C.P.C. was filed in the said H.C.A. No.55 of 1999; Exhibit P-5/26 (page-159 of the evidence file). It is

mentioned in this application that the parties to the litigation had “*compromised their outstanding dispute in terms of agreement dated 24.6.1999 duly signed by all the concerned parties*”. In paragraph-3 of the application, the applicant Muhammad Zahoor had stated that he withdraws his review application No.7 of 1999. The learned Division Bench by its order dated 24.06.1999 disposed of the review application; the order of 24.06.1999 (Exhibit P-5/5) reflects that the said Muhammad Zahoor, present Plaintiff and Defendant No.1 were personally present in Court, besides representative of Defendant No.2, the above named Saleem Zaki. The Agreement, which formed basis for settlement of dispute is the aforementioned compromise Agreement dated 24.06.1999 (**Exhibit P/25**).

15. Some of the salient terms of the above compromise are mentioned herein under_

- Clause-1 states that the conveyance deed executed between the above named deceased lady and Defendant No.2 was a valid and subsisting document; whereas, in Clause-2, the present Plaintiff, Muhammad Zahoor and Defendant No.1 specifically acknowledge and relinquish all their rights, claim and interest if existing or contingent, in favour of present Defendant No.2, vis-à-vis the subject property.
- In consideration of the above, the Defendant No.2 agreed to pay a sum of Rs.37,50,000/- (Rupees Thirty Seven Lac Fifty Thousand Only) each to the Plaintiff, Defendant No.1 and Rs.2,25,00,000/- (Rupees Two Crores and Twenty Five Lac Only) to Muhammad Zahoor.
- Clause-10 provides that the aforementioned earlier Agreement in respect of the property between Muhammad Zahoor, present Plaintiff and Defendant No.1 (**Exhibit No.P-5/3**) and the Power of Attorney (**Exhibit P-5/4**) were delivered to Defendant No.2 with a further undertaking that the above documents would not be acted upon.

16. **Clause-13 states**, *inter alia*, that the Plaintiff and Defendant No.1 will also have no claim against each other in respect of the said property. It would be advantageous to reproduce Clause-13 herein under_

“13. That besides the above parties abovenamed have no claim of any nature against each other. It is further declared that Muhammad Zahoor, Mirza Amjad Baig and S.M. Inamul Haque have jointly and severally entered into this agreement voluntarily without any duress or compulsion and in between themselves they have no claim against each other in respect of the said property and they hereby release each other from their obligation and undertaking, if any.”

17. It is an admitted fact, so also acknowledged in the pleadings of Plaintiff and in his evidence that the Plaintiff has received a sum of Rs.30,00,000/- (Rupees Three Million). To a specific query, the Plaintiff, who was also present in person, has admitted that he has received the entire amount of Rs.3.75 Million (Rupees Thirty Seven Lac Fifty Thousand) from Defendant No.2. This aspect is further substantiated by the fact that the present claim is not against the Defendant No.2, that the latter (Defendant No.2) has not paid the entire agreed amount to Plaintiff, but the present suit has two components; **(a)** recovery claim against Defendant No.1; **(b)** and, the balance amount of Rs.7,50,000/- (Rupees Seven Lac Fifty Thousand Only) payable to Defendant No.1 by Defendant No.2 under the Agreement dated 24.06.1999 (Exhibit P/25), be paid to Plaintiff.

18. The Plaintiff's side has vehemently argued that the Defendant No.1 acted fraudulently and surreptitiously in the entire transaction by not investing anything but took undue advantage of the entire situation by pocketing Rupees Three Million in terms of the above Agreement (compromise). It is further argued that considering all these factors, the Defendants did not file any appeal against the order dated 29.10.2001, whereunder, the Defendant No.2 executed a surety bond in the sum of Rs.7,50,000/- (Rupees Seven Lac Fifty Thousand Only). This has already

been discussed in the preceding paragraphs. In the above order, it is mentioned that an amount of Rs.7,50,000/- (Rupees Seven Lac Fifty Thousand Only) was to be paid to Defendant No.1 by Defendant No.2.

19. Notwithstanding the above, by entering into a subsequent Agreement dated 24.06.1999 (Exhibit P/25), the situation all together changed. The aforementioned salient covenants of the subsequent Agreement (dated 24.06.1999-Exhibit P/25) clearly describe that the parties hereto with a conscious mind and free consent have entered into the said subsequent Agreement (of 24.06.1999). The present case of Plaintiff is covered by Section 62 of the Contract Act, relating to novation of contract. More so, Clause-4, sub-clause(c) of the above Agreement mentions that initially the present Plaintiff received an amount of Rs.22,50,000/-, which is the same amount of claim as mentioned in the present pleadings of Plaintiff.

20. The Plaintiff's side has argued by relying upon the reported decisions, which are already mentioned in the opening part of this judgment under the heading "*case law relied upon by Plaintiff's Counsel*", that since testimony of Plaintiff has gone unchallenged, as admittedly Defendants did not lead the evidence, therefore, suit should be decreed as prayed for.

21. Even though, crux of the rule laid down in the case law relied upon by the Plaintiff's side is that if the evidence of Plaintiff has gone unchallenged either due to the fact that the opponent / Defendant(s) did not lead any evidence, or, the material part of the evidence of Plaintiff has not been challenged in the cross-examination by the Defendants, then it may be inferred that truth of such part of the testimony has been accepted; however, this rule is a qualified one; and the qualification is that if deposition of Plaintiff has not been challenged in cross-examination, even then, Court has

to apply an independent judicial mind while handing down a decision. It is the duty of the Court to see that relief sought can be granted or not, while scrutinizing the merits of the claim in the light of record of the case as well as law and the case law on the Issues involved.

22. The appraisal of the evidence of Plaintiff's witness leads to the conclusion that the documents produced in the evidence, including the aforementioned Deed of Agreement dated 20.06.1996 (Exhibit P-5/3), Irrevocable General Power of Attorney (Exhibit P-5/4), receipts issued from time to time by the above named Muhammad Zahoor are the documents earlier in time, that is, before the signing of the compromise / settlement Agreement dated 24.06.1999 (Exhibit P/25). The only subsequent document about the payment made by Plaintiff is Exhibit P/29, "Affidavit-cum-Declaration", which is of 16.11.1999 and is executed by one Muhammad Naeem. However, this document cannot be considered because the said Muhammad Naeem, who is the signatory of this document, was admittedly never examined, as required under Articles 78 and 81 of the Evidence Law. The reported decision of Agha Wazir case (*supra*) is relevant here.

23. The Plaintiff has not claimed damages or compensation against the Defendants, particularly Defendant No.1, in the present proceeding. It is one of the main pleas of Plaintiff that Defendant No.1 is not entitled to receive any amount under the aforesaid Agreement dated 24.06.1999 (the said compromise), because in terms of the earlier Deed of Agreement dated 20.06.1996 (as referred above) the parties thereto, that is, present Plaintiff and Defendant No.1, were entitled to share the profit in equal proportion after deduction of expenses made by the present Plaintiff. As already determined hereinabove that the terms of all previous Agreement(s), Arrangement(s) and Transaction, merged into the afore-referred

compromise / Agreement of 24.06.1999 (Exhibit P/25) and under Section 62 of the Contract Act, once the contract has been novated and altered by subsequent agreement then original contract need not be performed.

24. The gist of the reported decisions mentioned in the opening paragraph of this judgment under the heading “Other precedents” supports this view; only exception mentioned in these decisions, particularly in Baz Case [2018 S C M R page-1586] and Ittefaq Case [2015 P.Cr. L.J. page-1240] is, that unless it is specifically stipulated in the fresh agreement that the rights and interest of a particular party as contained in the original agreement will not be prejudiced, a right and interest of a party as contained in the earlier agreement / arrangement stands novated in terms of Section 62 of the Contract Act. In the present case, the Agreement dated 24.06.1999 (Exhibit P/25), admittedly does not contain any such clause or covenant that the earlier Agreement / arrangement between the parties to the present suit shall continue and will not be affected by the terms of subsequent Agreement dated 24.06.1999. **On the contrary,** Clause-13 of the Agreement (of 24.06.1999) as referred in the preceding paragraphs expressly states, *inter alia*, that even Plaintiff and Defendant No.1 have released each other from any claim, obligation and undertaking.

25. The present case of Plaintiff is also covered by the principle of ‘Waiver’. It would be advantageous to reproduce the word ‘Waiver’ as mentioned in the Black’s Law Dictionary, 9th Edition for a ready reference_

*“Waiver (way-ver), n. (17c) 1. The voluntary relinquishment or abandonment – express or implied – of a legal right or advantage; FORFEITURE (2), <waiver of notice>. * The party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it. Cf. ESTOPPEL [Cases: Estoppel – 52.10.]”*

26. The conclusion of the above discussion on Issue No.8-A is that claim of Plaintiff in its present form is not maintainable against the

Defendants as grievance and claim of Plaintiff stood remedied in terms of the aforementioned Agreement dated 24.06.1999, which in fact was/is a final settlement / compromise-Exhibit P/25.

ISSUES NO.1, 2, 3, 4, 5, 8 AND 9.

27. In view of the above discussion, Issues No.1, 2, 3 and 4 have become redundant and, therefore, do not require any independent determination. Similarly, no finding is required under Issues No.8 and 9, because the Defendant No.2 admittedly has paid the agreed share of Plaintiff to him, as discussed in the forgoing paragraphs.

28. The upshot of the above discussion is that the present suit of the Plaintiff is dismissed with no order as to costs.

Judge

Karachi Dated: .01.2019.

M.JavidP/A.