

Rs.45,000,00/- and got three Demand Drafts for Rs.15,00,000/- each dated 11.2.2002 from the Metropolitan Bank Limited, I.I. Chundrigar Road Branch for payment to the Defendant on agreed date i.e. 20.2.2002 after verification of documents for transfer of the suit plot in favour of Plaintiff before the concerned officer of DHA Karachi. It is averred in the plaint that the Defendant after receiving advance payment from the Plaintiff, avoided to perform his part of the agreed terms and conditions of sale of his plot to the Plaintiff and he did not come forward to transfer the suit plot in favour of Plaintiff. Therefore the plaintiff filed the instant suit for specific performance of contract.

3. The Defendant on 16.09.2002 filed written statement and contended that the suit was not maintainable as the Plaintiff had never come in contact with him nor any terms and conditions of sale were ever settled with the Plaintiff. The property agent came in contact with the Defendant and made payment of token amount and obtained a receipt in the name of Mr. Ameen Ghauri with an undertaking that a Sale Agreement shall be executed between the parties and the Vendee shall personally contact the Defendant but it never happened. Therefore there was no privity of contract between the Plaintiff and the Defendant. The Plaintiff never had any money for making payment to the Defendant in respect of the

suit plot, the agent only made an investment in the hope that he would find out purchaser for better price and consequently he would make money out of the transaction and with this ulterior motive the Broker did not provide even complete address and particulars of the Plaintiff. The Defendant waited upto 20.2.2002 and then he sent a notice to the Defendant regarding cancellation of sale as neither the Plaintiff contacted the Defendant nor he provided his NIC or NTN for the purposes of his identification. Even payment of balance sale consideration was not offered within the specified time.

4. On 10.2.2003 from the pleading of the parties following issues were framed by the Court:-

- i. Whether suit is not maintainable?
- ii. Whether the Defendant offered to sell his plots bearing No.231, 26th Street, Phase-VIII, measuring 2000 sq.yds, situated in DHA, Karachi and the Plaintiff agreed to purchase the same for a total sale consideration of Rs.48,000,00/-?
- iii. Whether Defendant received a sum of Rs.3,00,000/- from the Plaintiff as part payment in respect of suit plots and passed receipt dated 26.1.2002?
- iv. Whether the Defendant after receiving advance payment from the Plaintiff, avoided to perform his part of the agreed terms and conditions of sale of suit plots?
- v. Whether the name of the Plaintiff is a fake person and whether the attorney is properly appointed?
- vi. Whether the Plaintiff ever offered the payment of balance sale consideration to the Defendant?

vii. Whether the Plaintiff is entitled to the relief of Specific Performance?

viii. What should the decree be?

5. Muhammad Hanif and Humayoon Shamsi appeared as witnesses for the Plaintiff, Dr. Saeed Ahmed Khan the Defendant himself and Iqbal Husain Zaidi cashier of Habib Metropolitan Bank appeared as witnesses for the defendant.

6. Muhammad Hanif (PW-1) produced receipt of advance as Exh. A, three bank drafts of Rs.1500,000/- as Exh.B, B-1, B-2, letter dated 17.2.2002 as Exh.C, cheque of cash for Rs.2,50000/- as Exh.D. Dr. Saeed Ahmed Khan (DW-1) produced postal receipt as Exh.D/2, envelope as Exh.D/3, receipt as D/4, letter dated 17.12.2002 as Exh.D/5, letter dated 20.2.2002 as Exh.D/6, postal receipt as D/7, cheque of Metropolitan Bank dated 11.2.2002 as exh.D/1/1, application for bank draft as Exh.D/1/2.

7. I have heard the arguments and perused the record.

8. None of the parties have pressed **Issue No.1**, therefore, since this issue is not pressed, it stand dropped.

9. The burden of **Issues No.2 and 3** was on the Plaintiff that he had agreed to purchase the suit property from the Defendant and that the Plaintiff had paid an amount of Rs.300,000/- to the Defendant. The Plaintiff had not

appeared in the witness box, however, one Muhammad Hanif Parekh, claiming to be the Attorney of the Plaintiff appeared in the witness box. But the Attorney neither filed Power of Attorney with the Affidavit-in-Evidence nor produced the same subsequently. However, Power of Attorney is available in the main suit file. I have examined the same and found that it lacks basic ingredients of a routine power of attorney. The Plaintiff has not authorized the Attorney to appear in the witness box and lead evidence. The Power of Attorney does not disclose that the Principal namely the Plaintiff had ever entered into an agreement to purchase the suit property with the Defendant or he had paid any amount to the Defendant in respect of the sale/purchase of the suit property. Not only this, even the Attorney of the Plaintiff has admitted in his cross-examination that he has no knowledge that the Plaintiff has any account in Pakistan and that he is not in possession of even copy of Identity Card of the Plaintiff. He denied that the Plaintiff had signed the Cheque for the sum of Rs.250,000/- dated 26.01.2002, which is said to have been paid by the Plaintiff to the Defendant as token money. The same witness disowned three Pay Orders/Bank Drafts (Exs.B, B-I and B-II). He also admitted that the counterfoil showing the person who arranged the bank drafts were not given to him and he also admitted that Ex."C", which is said to be a letter from the Plaintiff addressed to the Defendant containing

particulars of demand drafts were not even signed by the Plaintiff.

10. The other witness of the Plaintiff namely Humayun Shamsi, the Estate Agent, who is the mastermind of the deal, admitted in his cross-examination that the Plaintiff never met the Defendant in respect of the purchase of the suit plot and he conceded in his cross-examination that he made payment of Rs.300,000/- through Cheque of Rs.2,50,000/- (Ex."D") as well as cash Rs.50,000/- from his own resources. He has also admitted in his cross-examination that the address of Amin Ghauri (Plaintiff) mentioned in the Ex."C", which is said to be a letter from the Plaintiff to the Defendant is the address of the Estate Agent himself and not of the Plaintiff. He also failed to connect the ownership of the Bank Drafts (Exs.B, B-I and B-II) with the Plaintiff when he admitted in cross-examination that he did not know, who has arranged for this amount. He also admitted that he has received the letter from the Defendant regarding cancellation of the Contract dated 20.02.2002 and that he wanted to transfer the suit plot in the name of a third party in DHA and not in the name of the Plaintiff.

11. The evidence discussed above shows that the Plaintiff has failed to discharge his burden of proof of the fact that entered into a contract with the Defendant and thus the

Plaintiff has never agreed to purchase the suit property from the Defendant and he has not paid the sum of Rs.3,00,000/- to the Defendant towards token money to acquire title of the suit plot, therefore, both the Issues are answered in negative.

12. Burden of **issue No.4** was also on the Plaintiff to prove that when and how he contacted the defendant to request him to perform his part of contract and in what circumstances and why the defendant avoided to transfer the suit property. As discussed above, the Plaintiff never approached the Defendant and it was again and again the Estate Agent himself, who attempted to persuade the defendant to sell the suit property to someone else without disclosing the particulars of prospective buyer to the seller. There was no denial of the fact that Humayun Shamsi (Estate Agent) failed to introduce the Plaintiff with the Defendant nor the Plaintiff has ever appeared in Court even his particulars were not disclosed in the receipt of payment made by the Broker and not by the Plaintiff. Therefore, this issue is not proved by the Plaintiff and this issue is answered in negative.

13. **Issues No.5 and 6**. The evidence discussed in the above clearly suggests that the Plaintiff has never come in contact with the Defendant and, therefore, whether he is a fake person or not, his non-appearance in Court and failure to enter into proper contact to purchase the suit plot is

sufficient to establish that the Plaintiff has never offered balance sale consideration to the Defendant and even token money was not advanced by the defendant. Therefore, there is no evidence of offer of balance consideration by the Plaintiff to the Defendant consequently both the issues are answered in negative.

14. **Issue No.7.** In view of the failure of the Plaintiff to establish his character and status as well as contract with the Defendant, the Plaintiff is not entitled to the relief of specific performance. If the Court is to treat the receipt itself as an agreement to sell enforce then it is required to be proved in terms of Article 79 of the Qanoon-e-Shadaat Order, 1984. Mere admission of acceptance of token money by the Defendant from an stranger is not sufficient to prove execution of contract enforceable at law by and between the Plaintiff and the Defendant and particularly when the particulars of one of the parties are missing from the so-called receipt-cum-agreement.

15. In view of the evidence discussed above, this Suit is dismissed with no order as to cost.

Karachi
Dated: 22.11.2014

JUDGE

Mubashir