

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 719 of 2014

PRESENT:

Mr. Justice Arshad Hussain Khan.

Malik Zulfiqar Hussain

Vs.

Anees Parekh and two others

Plaintiff: Malik Zulfiqar Hussain
Through Ms. Alia Malik Advocate.

Defendant No.1 Anees Parekh
Through Mr. Abdul Hameed Yousufi Advocate.

Defendant No.2 Mst. Hina Fatima Abidi
Through Syed Abid Shirazi, Advocate

Defendant No.3 Pakistan Defence Officers' Housing Authority
Not represented

Date of Hg: 03.12.2019

JUDGMENT

ARSHAD HUSSAIN KHAN, J. This suit was filed on 30.04.2014 against the defendants for Declaration, Specific Performance, Recovery and Permanent Injunction with the following prayers:-

- a) For Declaration that the Defendant No.2, has agreed through her Agent the Defendant No.1, to sell out the suit plot bearing No.15-C, 10th Peninsula Commercial Lane, Phase-8, measuring 200 sq. yards or thereabout, situated in Pakistan Defence Officers Housing Authority, Karachi, to the Plaintiff, vide Agreement / Receipt dated 21.08.2013.
- b) For Specific Performance of the Agreement dated 21.08.2013, and thereby directing the Defendants No.1 and 2, to transfer the ownership rights of suit plot bearing No.15-C, 10th Peninsula Commercial Lane, Phase-8, measuring 200 sq. yards or thereabout, situated in Pakistan Defence Officers Housing Authority, Karachi, in favour of the plaintiff and to receive the balance sale consideration of Rs.252,00,000/- [Rupees Twenty Million Fifty Two Hundred Thousands] as per Agreement / Receipt dated 21.08.2013, duly executed and signed by the defendant No.1.
- c) On failure of Defendants No.1 and 2, to perform the Agreement dated 21.8.2013, the Nazir of this Hon'ble Court be directed / ordered to carry out transfer of the suit plot in favour of plaintiff, before the defendant No.3, after receipt of balance sale consideration on behalf of the defendant No.2.

- d) For permanent injunction thereby restraining the defendants, their heirs, nominees, agents, attorneys, successors, servants, officials etc., directly or indirectly under them, from creating any third party interest in respect of the suit plot bearing No.15-C, 10th Peninsula Commercial Lane, Phase-8, measuring 200 sq. yards or thereabout, situated in PDOHA Karachi, in any manner whatsoever.
- e) Without prejudice in the alternative for recovery of Rs.56,00,000/- as Refund as promised by the defendant No.1, with markup at @ 16% per annum till complete realization and damages of Rs.10,000,000/- [Rupees Ten Million].
- f) Any other favour, relief(s) which this Hon'ble Court may deem fit and proper in the circumstances of this case.
- g) Cost of the suit.

2. Briefly stated the facts of the case are that the plaintiff is a businessman carrying on his business in the name and style of M/s. Savera Enterprises, having office at Plot No,4-C, 13th Commercial Street, Phase-2, [Extn], DHA, Karachi, since long. In the month of August, 2013, defendant No.1 contacted the plaintiff being an agent /authorized person of defendant No.2 to sell out plot bearing No.15-C, 10th Peninsula Commercial Lane, Phase-8, measuring 200 sq. yards or thereabout, situated in Pakistan Defence Officers Housing Authority, Karachi [**Suit property**], and after detailed negotiations defendant No.1 agreed to sell out the aforesaid plot for a total sale consideration of Rs.280,00,000/- [Rupees Twenty Eight Millions only] and defendant No.1, had received a sum of Rs.3,00,000/- in cash and Rs.2,00,000/- through cheque No. 26258355 dated 21.08.2013, drawn on Standard Chartered Bank, Karachi, and Rs.10,00,000/- through Cheque No.10061100 dated 25.08.2013, drawn on Bank Al-Habib Limited, DHA, Phase-2 Branch, Karachi, and Rs.13,00,0000/- through Cheque No.10061101 dated 25.08.2013, drawn on Bank Al-Habib Limited, DHA, Phase-2 Branch, Karachi, making a total sum of Rs.28,00,000/- being the advance part payment. The defendant No.1 had signed a Receipt in respect thereof in favour of the plaintiff and it was also agreed that the balance payment of Rs.2,52,00,000/- will be paid by the plaintiff on or before 21.09.2013 and defendant No.1 on his part issued his own cheques in the name of defendant No.2 and the same have been credited in the account of defendant No.2. It has been stated that in accordance with the aforesaid agreement, the plaintiff after arrangement of balance sale consideration when asked the defendant

No.1 to transfer the suit property in his favour on 21.09.2013 as agreed by and between the parties, the defendant No.1 informed the plaintiff that the plot in question is being adjusted by defendant No.3 (PDOHA), due to some changes in the location of the plot. Since defendant No.1 failed to fulfill his part of obligation under the terms of contract, therefore, he had agreed to return to the plaintiff the advance part payment of Rs.28,00,000/- in double as per the practice in vogue in the market. However, defendant No.1 neither returned the advance payment amount despite promise nor the defendants have transferred the suit plot in favour of the plaintiff. It has also been stated that legal notice dated 10.03.2014 sent by the plaintiff through his counsel to defendants No. 1 and 2, demanding for return of the advance payment was replied by defendant No.2 through her counsel wherein she denied the contents of the plaintiff's legal notice and also demanded an unconditional apology from the plaintiff as she had neither entered into any agreement nor she had authorized defendant No.1, to sell out the suit plot to the plaintiff, thereafter, a reminder letter dated 31.03.2014, was also received from defendant No.2 by the plaintiff counsel. It has been stated that the plaintiff has suffered financial loss and mental torture on account of failure of defendants No.1 and 2 to perform their part of obligations under the terms of contract and as such the plaintiff is entitled to the recovery of Rs.10,00,000/- as damages from the defendants 1 & 2 jointly and severally.

3. Upon summons of the present suit, all the defendants have filed their written statements in the matter.

The **Defendant No.1**, Anees Parekh, has stated in his Written Statement that, in fact, defendant No.2 through defendant No.1 agreed to sell out the suit plot in the name of one Amjad Ali, vide agreement dated 03.10.2013 wherein there is a clause for the transfer of plot in the name of nominee on account of some compelling reasons the plaintiff offered to purchase the said plot from Amjad Ali, who on the basis of nominee, as per agreement, introduced the Plaintiff to defendant No.2 and with her consent the plaintiff paid the advance amount of Rs.28,00,000/- to defendant No.1, and defendant No.1 paid the said amount to defendant No.2 as the plaintiff is the last purchaser of suit plot with payments by way of cheques. He has admitted that defendant

No.2 has disclosed him that the plot in question is being adjusted by defendant No.3 due to some changes in the location of plot. He has also admitted that the plaintiff's protest & demands for Specific Performance and refund of advance part payment was conveyed to defendant No.2, by him but defendant No.2 turned deaf ear to the same. He, however, has denied that he is responsible or liable to pay any amount/damage to the plaintiff in any manner whatsoever as alleged by the plaintiff as the advance part payment was with defendant No.2. It has been stated that, in fact, after receipt of the advance part payment by defendant No.2, she was to perform her part of contractual obligations for the finalization of the sale of plot in question in favour of the plaintiff. It has been further stated that plaintiff is not legally entitled to claim Specific Performance from defendant No.1 and even otherwise, the refund is to be made by defendant No.2, who has finally received the advance part payment. It has been further stated that defendant No.1 is not liable for payment of any damages to the plaintiff in any manner. In the last it has been prayed that the suit against him may be dismissed with compensatory cost.

4. The **Defendant No.2**, Mst. Hina Fatima Abidi, in her Written Statement while denying the contents of the plaint has taken the following preliminary objections:-

- i) That the suit against defendant No.2 is misconceived, devoid of merits and based on concocted pleas and fraud, therefore, the suit is liable to be dismissed.
- ii) That the suit against defendant No.2 is not maintainable, no cause of action has accrued to the Plaintiff against defendant No.2.
- iii) That defendant No.2 improperly, malafidely and with ulterior motives, has been dragged, impleaded in the instant suit.
- iv) That defendant No.2 is neither proper party nor necessary party, nor party to any contract or agreement, therefore, instant suit is liable to be dismissed with special costs.
- v) That the plaintiff has not approached before this Honourable Court with clean hands.
- vi) That the suit is barred under the law.

- vii) That instant suit as framed against defendant No.2 is false, frivolous, malicious, mischievous, fraudulent, bogus and also based on concocted please and story.

Apart from the above preliminary objections, the defendant No.2, in her written statement has stated that DHA Karachi originally allotted to defendant No.2, a Plot bearing No.33-C, 10th Peninsula Commercial Lane, Phase-8, DHA, Karachi, which was subsequently changed / adjusted on 28th July, 2008 and allotted a new number as Plot No.15-C, 10th Peninsula, Commercial Lane, Phase-VIII, DHA, Karachi [suit property] and since then defendant No.2 is the absolute and lawful owner of the suit property. It has been stated that defendant No.2 never authorized and/or executed any power of attorney in favour of defendant No.1 to sell the suit property and as such defendant No.1 is neither authorized person nor attorney of defendant No.2. It has further been stated that defendant No.2 was not in the knowledge regarding alleged contract entered into by and between the plaintiff and defendant No.1 in the month of August, 2013, in connection with the alleged sale of suit property. It has been also stated that the alleged sale contract came into the knowledge of defendant No.2 when legal notice was received from the plaintiff and subsequently through instant suit. It has also been stated that defendant No.2 has no notice or knowledge that defendant No.1 has received amount Rs.28,00,000/- from the plaintiff on behalf of defendant No.2 and further the defendant No.2 has no concerned with the alleged agreement/receipt dated 21.08.2013 executed and signed by defendant No.1 and alleged deposit slips and cheques. It has been stated that the agreement/receipts, deposit slips and cheques as annexed with the plaint are bogus, forged, fabricated, manipulated, fraudulent documents and as such are untenable in law. It has been further stated that defendant No.1 was neither the agent, nor authorized / attorney of defendant No.2 and as such the alleged sale contract / agreement entered into by and between the Plaintiff and defendant No.1 is not binding upon defendant No.2.

The defendant No.2 in her written statement has also stated that she intended to sale out her plot in question in the month of October, 2013, and in this regard she approached to Muhammad Raza an Estate Agent of M/s. Raza Associate, Karachi, the said estate agent

subsequently contacted defendant No.1, Anees Parekh to sell out her plot in question.

It has been further stated that one Mr. Amjad Ali son of Shoukat Ali, through Anees Parekh (defendant No.1) agreed to purchase the suit property for a sum of Rs.27.500 million and the said Amjad Ali delivered four cheques amounting to Rs.27,50,000/- to defendant No.2, the owner of the suit property, as an earnest money token money of sale consideration and she [defendant no.2] agreed to sell her plot in question to Amjad Ali, the purchaser. The sale agreement dated 03.10.2013 executed and signed by vendor [defendant No.2] and vendee Amjad Ali and the said agreement of sale had been witnessed by one Mr. Muhammad Raza having CNIC 42301-2058025-3 of M/s. Raza Associate [as witness No.2] and Muhammad Anees Parekh having CNIC 42301-2090305-7 of M/s. Parekh Corporation [as witness No.1] but his signature on the sale agreement due to oversight could not be obtained. It has been further stated that the said vendee (Mr. Amjad Ali) has failed to pay the balance amount of Rs.24.750 Million to the vendor Mrs. Hina Fatima Abidi [defendant No.2] as per terms of clause-2 of the sale agreement dated 03.10.2013, the token / earnest money of vendee has since been forfeited and the sale agreement dated 03.10.2013 has become automatically null and void. It has been further stated that defendant No.2 has no concerned with any promise made by defendant No.1 to the plaintiff and Defendant No.1 never disclosed regarding alleged bogus receipt / agreement dated 21.08.2013 to defendant No.2. It has also been stated that since defendant No.2 either directly or through her agent never entered into any sale transaction to sell her suit property with the plaintiff, therefore, the question of breach of alleged contract does not arise and as such the plaintiff cannot either seek specific performance of the alleged contract and/or claim damages for any breach of alleged contract. In the last, defendant No.2 has prayed for dismissal of instant suit as well as for award of the costs.

5. As far as **Defendant No.3**, DHA, is concerned, Written Statement has also been filed on their behalf. In their Written Statement, they have taken preliminary legal objections viz. That the Plaintiff has got no legal cause of action against Defendant No.3; that the suit of the Plaintiff against Defendant No.3 is not maintainable,

hence liable to be dismissed and that the suit of the Plaintiff is not properly drafted. It has been stated that the suit of the Plaintiff may be dismissed against Defendant No.3.

6. On 07.05.2018, out of the pleading of the parties, the following issues have been settled by the Court:-

1. Whether there is any privity of contract between the Plaintiff and Defendant No.2 and, has any cause of action arisen in favour of the Plaintiff ?
2. Whether the amount of Rs.28,00,000/- was received by the Defendant No.2 as part payment of the total sale consideration through the cheques issued by Defendant No.1?
3. Whether under Clause 12 of the Agreement dated 03.10.2013 the suit property could be transferred in the name of the nominee of the Vendee ?
4. Whether the Plaintiff is entitled for Specific Performance of the Agreement dated 21.08.2013 or in the alternative is entitled for recovery of Rs.56,00,000/- as refund with mark up @ 16 % per annum from the Defendants till realization ?
5. Whether the Plaintiff is entitled for recovery of Rs.10,000,000/- as damages from the Defendants No.1 and 2 jointly and severally ?
6. To what relief(s), if any, is the Plaintiff entitled ?
7. What should the decree be ?

Then on the same day, i.e. 07.05.2018, by consent of the parties, Commissioner was appointed for the purpose of recording evidence, who after completing the commission submitted his report along with evidence file, which was taken on the record.

From the perusal of the report it appears that the plaintiff in support of his stance examined himself as PW-1 and produced the following documents:-

Affidavit in evidence	Exhibit PW-1
Copy of Receipt dated 21.08.2013	Exhibit PW-1/1
Copies of Deposit Slips	Exhibit PW-1/2 to PW-1/3
Photocopies of Cheques	Annexures O and O/1
Copy of Legal Notices, Reply & Reminder	Exhibit PW-1/4 to PW-1/6

Thereafter, the plaintiff was cross-examined by learned counsel for defendant No.2. However, learned counsel for the other defendants did not cross examine the said witness. The defendant No.1, despite the opportunity was given to him, has failed to file his affidavit in evidence, hence, the side of Defendant No.1 to lead evidence was closed by this Court on 05.08.2019. Thereafter, the examination-in-chief of Attorney of Defendant No.2 namely Syed Ashfaq Zaidi, was conducted who has produced the following documents :

Affidavit in evidence	Exhibit DW-2
Power of Attorney	Exhibit DW-2/1
Copy of Legal Notice	Exhibit DW-2/2 [already marked PW-1/4]
Copy of reply of legal notice	Exhibit DW-2/3 [already marked PW-1/5]
Copy of Reminder	Exhibit DW-2/4 [already marked PW-1/6]
Copy of Agreement to sell	Annexure –O
Original Bank Statement	Exhibit DW-2/5

Record also reflects that witness of defendant No.2 was not cross examined either by the plaintiff or by other defendants despite opportunities given to them. Defendant No.3 has also chosen not to produce its evidence in the case. After completion of the evidence, the matter came up for arguments.

7. Learned counsel for the plaintiff made her submission in writing whereas learned counsel for Defendants 1 and 2 made their submissions orally.

Learned counsel for the plaintiff in her submissions, has reiterated the contents of the plaint and the affidavit-in-evidence of the Plaintiff. It has been stated that the documents produced by the plaintiff in his evidence clearly establish the case of the plaintiff. It has also been stated that the statement of the plaintiff has remained unshaken during his cross examination. It has also been stated that defendant No.2 deliberately avoided to face the Court proceedings hence, she has produced her attorney who has filed his affidavit-in-evidence. It has been further stated that plaintiff's counsel had raised objection that defendant No.1 be examined and cross-examined first as per procedure of evidence that is why the attorney of defendant No.2 was not cross-examined. It has been also stated that defendant No.1 in his written statement has admitted that he entered into the subject transaction as an agent of defendant No.2 such statement supports the stance of the plaintiff and both these defendants have acted in collusion

with each other with intent to deprive the plaintiff of his valuable rights and usurp his huge amount of Rs.28,00,000/-, therefore, they are bound in law either to transfer the suit plot in favour of the plaintiff and/or in the alternative refund the sum of Rs.56,00,000/- to the plaintiff jointly. It has also been urged that on account failure of defendants 1 and 2 to perform their part of obligations under the contract, the plaintiff has suffered financial loss and mental torture and as such the Plaintiff is entitled to the damages as prayed in the suit.

8. During the course of arguments, learned counsel for defendant No.1, while reiterating the contents of the written statement, argued that defendant No.2 through defendant No.1 agreed to sell out the suit property in the name of Amjad Ali, vide agreement dated 03.10.2013 wherein there is a clause for the transfer of plot in the name of nominee on account of some compelling reasons the plaintiff offered to purchase the said plot from Amjad Ali, who on the basis of nominee, as per agreement, introduced the Plaintiff to Defendant No.2 and with her consent the plaintiff paid the advance amount of Rs.2,800,000/- to defendant No.1, and defendant No.1 paid the said amount to defendant No.2 as the Plaintiff is the last purchaser of the suit plot with payments by way of cheques. Further argued that defendant No.1 is not responsible and/or liable to pay/refund any amount to the plaintiff as the advance part payment was with defendant No.2 who after receiving the advance the same had to perform her part of contractual obligations for finalization of the sale of suit property in favour of the plaintiff. It is also urged that the refund is to be made by Defendant No.2, who has finally received the advance part payment. It is also urged that defendant No.1 is not liable for payment of any damages to the Plaintiff in any manner.

9. On the other hand, learned counsel for defendant No.2, while opposing the submissions of learned counsel for the plaintiff as well as defendant No.1, has contended that the suit against defendant No.2 is misconceived, devoid of merits and based on concocted pleas and fraud, and further no cause of action has accrued to the Plaintiff against defendant No.2, therefore, the suit is not maintainable and as such is liable to be dismissed against Defendant No.2. Further contended that there is no privity of contract between the plaintiff and defendant No.2.

It is further argued that defendant No.2 never authorized defendant No.1 to enter into any transaction either with the plaintiff and or with anyone else in respect of her suit property. It has been argued that defendant No.2 came to know first time about the subject transaction, when she received the legal notice from the plaintiff's counsel. The said notice was immediately replied by defendant No.2 through her counsel. It is also argued that the agreement / receipts, deposits slips and cheques as annexed with the plaint are bogus, forged, fabricated, manipulated, fraudulent and not admissible under the law and defendant No.2 has no concern with the alleged documents. It is argued that the Plaintiff has failed to place on the record any sale and purchase agreement of plot in question, executed and signed by Plaintiff and Defendant No.2. It is also argued that plaintiff through his evidence has failed to substantiate his stance against defendant No.2. It is also argued that in absence of any evidence, which could show that defendant No.1 was authorized by defendant No.2 to enter into sale transaction with plaintiff in respect of her suit property, the plaintiff cannot seek specific performance of the contract, if entered into by and between him and defendant No.1, for the property owned by defendant No.2. It is also argued that the stance of defendant No.2 taken in the affidavit-in-evidence, produced in the examination-in-chief has gone unrebutted and unchallenged as the witness of defendant No.2 was not cross-examined by any of the parties in the present proceedings. And it is settled law that the deposition of witness if not cross-examined deemed to have been admitted. Thus, the present suit is liable to be dismissed against defendant No.2 on this count alone. It is argued that the present suit even otherwise is liable to be dismissed as it is now well settled that a party seeking specific performance of an agreement to sell is essentially required to deposit the sale consideration amount in Court. Failure of a party to meet the said essential requirement disentitles him to the relief of specific performance whereas the plaintiff in the present case neither deposited nor shown his willingness and readiness to deposit the balance sale consideration in the court. It is also argued that the plaintiff has also failed to produce any evidence to substantiate his claim of alleged damages. Lastly, he has argued that considering his submissions, the suit may be dismissed with compensatory cost.

10. Insofar as defendant No.3, DHA, is concerned, they have not been represented by any law officer; though their written statement is available on the record stating therein that the Plaintiff has got no legal cause of action against them and that the suit of the plaintiff against them is not maintainable, hence liable to be dismissed against Defendant No.3.

11. I have heard the learned counsel for the parties, perused the record minutely, and have also gone through the relevant law as well as the case law relied upon by the learned counsel for the parties in the suit. My findings on the above issues are as follows :-

ISSUES # 1 & 2

These issues are interrelated with each other therefore the same are taken up together.

The plea of the plaintiff is that on 21.08.2013 he entered into sale transaction with defendant No.1 to purchase the suit property of defendant No.2 for a total sale consideration of Rs.2,80,00,000/- and out which he paid Rs.28,00,000/- as advance payment and in this regard payment receipt [Ex.PW-1/1], was issued by defendant No.1. It is also the stance of the plaintiff that defendant No.1, on behalf of defendant No.2 being her authorized agent/ attorney, entered into the subject sale transaction and further the advance amount paid by the plaintiff to defendant No.1 in respect thereof was subsequently paid by defendant No.1 to defendant No.2 through his own cheques, and as such the transaction is valid and he is entitled to the specific performance of the contract in respect of the suit property and if the specific performance is not possible then he is entitled to the double of the amount of earnest money paid through Exh.PW1/1. Whereas defendant No.1 in his stance in the case though admitted the transaction and receiving the money from the plaintiff but denied that he is responsible for specific performance of the contract and/or return of the money. The stance of defendant No.1 is also that he acted on behalf of defendant No.2 and the amount he received from the plaintiff has been given to defendant No.2 through his own cheques.

Conversely, defendant No.2, the owner of the suit property emphatically denied assertions of the plaintiff and defendant No.1 both.

The stance of defendant No.2 is that she neither entered into subject contract directly or through defendant No.1 as alleged thus transaction is sham and as such she is neither liable to perform the alleged contract nor to pay any amount to the plaintiff.

Before going into any further discussion, I would like to dilate upon the doctrine of 'Privity of Contract' which refers to relationship between the parties to a contract which allows them to sue each other but prevents a third party from doing so. It is a doctrine of contract law that prevents any person from seeking the enforcement of a contract, or suing on its terms, unless they are a party to that contract. As a general rule, a contract cannot confer rights or impose obligations arising under it on any person except the parties to it. The premise is that only parties to contracts should be able to sue to enforce their rights or claim damages as such. Privity of contract refers to a legally recognizable relationship between the parties to a contract or a legally recognized successive or mutual relationship to some property as happens in between the members of a family or those who have entered into a contract together. Privity is the legal term for a relationship coupled with right and power to enforce a promise or warranty. Reliance in this regard can be placed on the case of *TALAAAT INAYATULLAH KHAN and another v. Dr. ANIS AHMAD SHEIKH [PLD 2015 Sindh 134]*.

In the present case record transpires that the plaintiff's entire claim is based on payment receipt [Exh.PW1/1] as there is no other written instrument, available on the record, which may exist between the parties. Here, it would be appropriate to reproduce the Exh.PW-1/1 as under:

Date: 21/8/2013

RECEIPT

Received from MALIK ZULFIQAR HUSSAIN S/O. SUMANDAR (LATE), Muslim, adult, address: Savera Enterprise Plot No.4-C, 13th Commercial Street, Phase-II Extn., DHA, Karachi, holding CNIC No. 42301-1938813-3, a sum of Rs.300,000/- (Rupees Three Lac only) in cash and Rs.200,000/- (Rupees Two Lac only) vide Cheque No.26258355 dated 21.08.2013 drawn on Standard Chartered Bank, Karachi, and Rs.10,00,000/- (Rupees Ten Lac only) vide Cheque No. 10061100 dated 25.08.2013 drawn on Bank Al-Habib Ltd., DHA, Phase-II, Br. Karachi, and Rs.13,00,000/- (Rupees Thirteen Lac only) vide Cheque No.10061101 dated 25.08.2013 drawn on Bank Al-Habib Ltd., DHA, Phase-II, Br. Karachi, making a total sum of 28,00,000/- (Rupees Twenty Eight Lac only) being the advance part-payment out of total sale consideration of

Rs.280,00,000/-(Rupees Two Crore Eighty Lac only) in respect of sale of plot No.15-C, 10th Peninsula Commercial Lane, Phase-VIII, measuring 200 Sq. Yards, or thereabout, situated in Pakistan Defence Officers Housing Authority, Karachi, Balance payment of a sum of Rs.252,00,000/-(Rupees Two Crore Fifty Two Lac only) on or before 21.09.2013.

Sd.

ANEES PAREKH
S/o. NOOR MUHAMMAD PAREKH'

A perusal of the above receipt, does not reflect that whether the property in question belongs to defendant No.2 and whether defendant No.1 received the amount from the plaintiff and issued the payment receipt on behalf of defendant No.2 as her authorized agent and or attorney and further defendant has any nexus with the transaction, thus Exh. PW-1/1 does not create any privity of contract between the plaintiff and defendant No.2. Moreover, to attain validity the contract should have certain features like consensus ad idem, Certainty, free consent, two directional consideration, fulfillment of legal formalities, legal obligations, lawful object, capacity of parties, possibility of performance, etc., which in the present case also lacks.

Besides the above receipt, plaintiff's own evidence also does not support his claim of specific performance of contract as he has, during his cross examination, admitted that he has not filed any bank statement with the plaint or his Affidavit-in-evidence. He has also admitted that there exists no agreement of sale in respect of the suit property between him and defendant No.2 and he has not filed any public notice, if published in newspaper, neither with the plaint nor with his Affidavit-in-evidence.

In addition to above, the stance of defendant No.2 has not been rebutted as her witness who produced his affidavit in evidence in his examination-in-chief was neither cross-examined by the plaintiff's counsel nor by the counsel of defendant. It is by now a settled principle of law that any deposition made in the examination-in-chief, if not subjected to cross-examination, shall be deemed to have been admitted. Reliance can be placed in the cases of FARZAND ALI v. KHUDA BAKHSH and others [PLD 2015 SC 187], MUHAMMAD AKHTAR v. Mst. MANNA and 3 others [2001 SCMR 1700] And MUHAMMAD

AKRAM QURESHI and another v. PAKISTAN DEFENCE HOUSING AUTHORITY [2017 CLC 495].

In the present case, defendant No.1 in his written statement though admitted the stance of the plaintiff to the extent that he entered into the sale transaction, received money from the plaintiff and issued payment receipt in respect thereof on behalf of defendant, he however denied that he is liable to return the money to the plaintiff as the same upon receiving from the plaintiff has been given to defendant No.2 and thus defendant No.2 is liable to perform the contract and if not then she has to return the amount paid by the plaintiff at the time of execution of contract [Exh.PW-1/1]. Surprisingly, defendant No.1 neither produced any witness in support of his stance nor his counsel cross-examined the witnesses of defendant No.2 and the plaintiff.

It is also well-established principle of law that a written statement contains averments of a party, which are to be proved through cogent evidence. If a party does not produce any evidence to support the contents of its written statement, in absence of any admission on the part of a plaintiff, the averments contain in the written statement cannot be treated as evidence. Reliance in this regard can be placed on the cases of FEDERATION OF PAKISTAN through Secretary Ministry of Defence and another v. JAFFAR KHAN and others [PLD 2010 Supreme Court 604] and MUHAMMAD NOOR ALAM v. ZAIR HUSSAIN and 3 others [1988 MLD 1122].

For the foregoing discussion, I am of the view that there is no privity of contract exists between the plaintiff and defendant No.2. And further, in absence of any evidence, it cannot be said that defendant No.2 ever authorized defendant No.1 to enter into the subject sale transaction with the plaintiff. It is also to be noted that the Plaintiff has categorically stated in his cross-examination that the amount was paid to defendant No.1 against the suit plot and that the defendant No.1 is not the owner of the suit property. More so, the plaintiff and defendant No.1 have also failed to establish their claim that the amount paid by the plaintiff at the time of execution of the alleged contract was

subsequently received by defendant No. 2. In the circumstances, these issues are answered in negative.

12. **ISSUE NO.3:** Since none of the counsel for the parties have argued nor lead any evidence on this point as such no finding is required to be given on this issue.

13. **ISSUE NO. 4:** In view of the findings of issues No. 1 and 2, I am of the opinion that the plaintiff has failed to establish his claim for specific performance. Even otherwise, it is now well settled that a party seeking specific performance of an agreement to sell is essentially required to deposit the sale consideration amount in Court. In fact, by making such deposit the plaintiff demonstrates its capability, readiness and willingness to perform its part of the contract, which is an essential pre-requisite to seek specific performance of a contract. Failure of a party to meet the said essential requirement disentitles him to the relief of specific performance, which undoubtedly is a discretionary relief. Reliance in this regard can be placed in the case of Messrs KUWAIT NATIONAL REAL ESTATE COMPANY (PVT.) LTD. and others v. Messrs EDUCATIONAL EXCELLENCE LTD. and another [2020 SCMR 171].

In the present case, the plaintiff neither in the plaint and/or in the affidavit in evidence has shown his willingness to pay the balance sale consideration nor he produced any document in his evidence. It is also a fact that the plaintiff in order to demonstrate his capability, readiness and willingness to perform his part of the contract, which is an essential pre-requisite to seek specific performance of a contract, neither at the time filing of the plaint nor subsequently, either deposited the balance sale consideration or sought any permission in respect thereof. In the circumstances, the plaintiff's failure to meet the said essential requirement disentitles him to the relief of specific performance on this count also.

Insofar as the entitlement for recovery of the amount paid by the plaintiff, at the time of execution of contract [Exh.PW-1/1], is concerned, the defendant No.1 in his written statement has admitted this fact that he has received this amount from the plaintiff.

Therefore, on account of admission and for the reasons mentioned while dealing with the Issues 1 and 2, I am of the view that the plaintiff is entitled for recovery of the said amount from defendant No.1 only. In the circumstances, the issue is answered accordingly.

14. **ISSUE NO.5.** From perusal of the record, it appears that the plaintiff in the plaint as well as in his affidavit-in-evidence has stated that since he has suffered financial loss and mental torture at the hands of defendants 1 & 2 as such he is entitled to the recovery of Rs.10,000,000/- as damages from defendants 1 and 2, jointly and severally. It shows that the nature of the damages claimed by the plaintiff in the instant case falls within the ambit of general damages, which is required to be established through a cogent and reliable evidence, mere feeling of resentment in one's mind is not sufficient to establish general damages. And if a person claims mental torture/agonny or damage/injury, initial burden would lie upon him to lead evidence on such point. Furthermore, determining the general damages for mental torture, agony, defamation and financial losses, they are to be assessed following the "rule of thumb" and the said exercise falls in the discretionary jurisdiction of the Court, which has to decide in the facts and circumstances of each case. Reliance in this regard can be placed upon cases of *MURTAZA ALI v. SABIR ALI BANGASH* [2015 YLR 1239], *Mst. NAGINA BEGUM v. Mst. TAHZIM AKHTAR and others* [2009 SCMR 623], *Messrs KLB-E-HYDER AND COMPANY [PVT.] LTD., through Chief Executive v. NATIONAL BANK OF PAKISTAN through President and 3 others* [2008 CLD 576] & *CHIEF OFFICER, DISTRICT COUNCIL, SHEIKHPURA and 2 others v. Haji SULTAN SAFDAR and 2 others* [1999 YLR 1963]. *GOVERNMENT OF KHYBER PAKHTUNKHWA and others v. Syed JAFFAR SHAH* (2016 MLD 223) and *MUBASHIR AHMAD v. Syed MUHAMMAD SHAH through Legal Heirs* (2011 SCMR 1009), *Dr. M. RAZA ZAIDI v. GLAXO WELLCOME PAKISTAN LIMITED, KARACHI* [2018 MLD 1268] & *CHAIRMAN, MARI GAS CO. LTD. and 2 others v. ABDUL REHMAN* [2017 YLR 2505].

In the present case, the Plaintiff did not lead any evidence to establish his claim in respect of damages, hence I am of the opinion that the Plaintiff has failed to discharge his burden to prove his stance. Accordingly, this issue is answered in negative.

15. **ISSUES # 6 & 7**

In view of the foregoing discussion and my findings on Issues 1 & 2, I am of the view that the plaintiff has failed to establish his claim for specific performance as well as return of the amount from defendant No. 2. Consequently, the suit against defendant No.2 is dismissed. The suit is also dismissed against defendant No.3 as no relief has been sought by the plaintiff against it. However, in view of the findings of issue No.4, the plaintiff is entitled to the grant of an alternative relief i.e. refund of the advance part payment of Rs.28,00,000/- paid by him to defendant No.1 and as such the present suit is decreed to that extent only against defendant No.1. Accordingly, defendant No.1 is directed to return the said amount of Rs.28,00,000/- (Rupees twenty-eight lacs only) to the plaintiff.

The suit is decreed in the above terms.

JUDGE

Karachi
Dated: 26.02.2020.

*jamil****