

IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No.65 of 2012

IInd Appeal No.97 of 2012

DATE

ORDER WITH SIGNATURE(S) OF JUDGE(S)

Before: Mr. Justice Nazar Akbar

IInd Appeal No.65 of 2012

Appellant No.1 : Muhammad Saeed Akhtar
Appellant No.2 : Mst. Nazneen Kausar
through Mr. Amanul Haq, Advocate.

Versus

Respondent No.1 : Taha Mobeen Qureshi
Through Mr. Faizan Peshimam, advocate
Respondent No.2 : M/s Karim Housing (Pvt.) Ltd. (Nemo).

IInd Appeal No.97 of 2012

Appellant : Taha Mobeen Qureshi,
through Mr. Faizan Peshimam, advocate.

Versus

Respondent No.1 : Karim Housing (Pvt.) Ltd., (Nemo).
Respondent No.2 : Muhammad Saeed Akhtar
Respondent No.3 : Mst. Nazneen.
Through Mr. Amanul Haq, advocate.

Date of hearing : **24.02.2020**

Date of Decision : **10.06.2020**

JUDGEMENT

NAZAR AKBAR, J. The appellants through these IInd Appeals have challenged the judgment dated **02.03.2012** passed by the Vth Additional District & Sessions Judge, East Karachi in Civil Appeal **No.341/2010** & Civil Appeal **No.358/2010**, whereby, the said appeals were dismissed and the impugned judgment dated **31.08.2010** passed by the VIth Senior Civil Judge, East Karachi in

Civil Suit **No.627/2005** filed by the Plaintiff (T. M. Qureshi) was maintained.

2. Brief facts of the case are that the appellant/plaintiff (T. M. Qureshi) filed suit No.627/2005 for specific performance, possession, mesne profit, injunction and cancellation of documents in respect of Bungalow No.13-A (one unit), Rehman Villa, Sector No.22-A, Scheme No.33, Gulistan-e-Johar, Main University Road, Karachi (the suit premises) against Karim Housing (Pvt.) Ltd. (hereinafter the Builder) as respondent No.1/defendant No.1 and others. The appellant averred that the Builder launched a housing project "Rehman Villa" through publication in leading Newspapers and offered unit/villa on fixed value of **Rs.6,25,000/-** including the HBFC Loan amounting to **Rs.1,50,000/-**. The appellant (T. M. Qureshi) filled the prescribed application form and initially paid a sum of **Rs.45,000/-** against receipt dated **14.09.1987**. The standard prescribed proforma issued by the Builder was containing terms and conditions of sale of the suit premises between the Builder and the appellant/plaintiff (T. M. Qureshi). The appellant according to the prescribed terms and conditions regularly paid agreed amount of installments towards the cost of the suit premises and from time to time till **13.12.1988** an amount of **Rs.4,11,000/-** had been paid and remaining balance was only **Rs.64000/-** excluding expected loan from HBFC. But the Builder completely failed to abide by his responsibilities according to the terms and conditions which include completion of construction work in 29 months and to apply for loan to HBFC. It is averred that in the year 1992 the Builder served the appellant/plaintiff (T. M. Qureshi) with a notice dated **13.04.1992** wherein it was

mentioned / written that procedure of expected loan from HBFC is very difficult and long as such the Builder on its own has decided that appellant/plaintiff (T. M. Qureshi) must pay the expected loan amount in cash in three installments. It is also averred that the appellant/plaintiff (T. M. Qureshi) through a letter from the Builder was advised to be present at the office of Sub-Registrar alongwith his NIC for execution of lease of the suit premises but soon by another letter dated **09.09.1992** appellant/ plaintiff (T. M. Qureshi) was informed about postponement of the execution of lease and by the same letter promised to inform the appellant/plaintiff about the next date for execution of lease. The Builder did not inform the plaintiff about the next date and there was complete silence though the appellant/plaintiff (T. M. Qureshi) had informed the Builder in writing about change of his address and requested that further correspondence should be made on his fresh/new address. It is also averred that on **18.8.2000** he received a letter from the Builder about cancellation of the suit premises. In response to the said letter the appellant/plaintiff (T. M. Qureshi) visited the office of Respondent No.1/the Builder on **21.8.2000** and after comprehensive discussion with the Manager of the Builder/Respondent No.1 it was agreed that the cancellation letter stand withdrawn and the full and final payment will be settled and paid before handing over possession of the suit premises subject to payment of **Rs.50,000/-**. The appellant on the spot issued cheques No.130538 dated **21.8.2000** for the sum of Rs.50,000/- in favour of Respondent No.1/the Builder as a consideration of withdrawal of alleged cancellation letter, under written acknowledgement. Again the Builder/ Respondent No.1 neither completed the construction work, nor made any

correspondence with the appellant/plaintiff (T. M. Qureshi) about the progress of work/construction or date of next payment or lease or possession or any other thing in respect of the suit premises. It is further averred by the appellant/plaintiff (T. M. Qureshi) that in the month of **October, 2004** when his attorney visited the site of the suit premises it came to his knowledge that the Builder illegally, without any lawful authority has sold the suit premises to one Mr. Saeed i.e. Respondent/defendant No.2 and as soon as it came to his knowledge the appellant/plaintiff immediately contacted the Builder/Respondent No.1 and complained that with malafide intention to cause heavy monetary losses to the appellant/plaintiff (T. M. Qureshi) Respondent No.1 first transferred the suit premises in the name of one of his employee Ghulam Rasool and later on through said Ghulam Rasool sold the suit premises to Respondent/defendant No.2/ Saeed though the construction work of the suit premises is still incomplete and the alleged purchaser respondent/defendant No.2/Saeed is raising construction in the suit premises himself. It is averred that Respondent No.1/the Builder before cancelling the allotment of the suit premises was duty bound to serve the appellant/ plaintiff (T. M. Qureshi) with a notice to pay the dues, if any, which was to be followed by a notice of cancellation (terms and condition No.3) but unfortunately Respondent No.1/ the Builder never served notice to the appellant/plaintiff after settlement and withdrawal of cancellation letter dated **21.8.2000** on acceptance of cheque of Rs.50,000/-. Therefore, the appellant/plaintiff (T. M. Qureshi) filed suit bearing Civil Suit **No.627/2005** for declaration, specific performance, possession, mesne profit/ permanent injunction and

cancellation and also impleaded Respondent No.2 alongwith the Builder.

3. After notice/summon, Respondent No.1/the Builder filed written statement stating therein that suit is not maintainable in the law; it is barred under Article 11 of the Limitation Act, as the notice of the cancellation has been served on the appellant/ plaintiff (T. M. Qureshi) on **18.08.2000**, and the suit has been filed on **11.1.2005** after more than three years. However, the contract of sale of the suit premises and its terms and conditions were admitted by the Builder and he has even relied on terms and condition No.17 regarding cancellation. The Builder has also admitted their own letter dated **18.8.2000** whereby allotment was allegedly cancelled but denied any settlement in response to the said cancellation letter. The payments of **Rs.4,11,000/-** made by appellant/ plaintiff was not denied but payment through cheque of Rs.50,000/- dated **21.8.2000** was denied. Respondent No.2/Muhammad Saeed Akhtar the appellant of IInd Appeal No.65/2012 also filed his written statement asserting therein that he is a bonafide purchaser of the suit premises. The suit of the appellant/ plaintiff (T. M. Qureshi) is not maintainable and the Court has no jurisdiction to entertain the suit as the suit property is situated within the jurisdiction of District Malir and present market value of the suit premises is more than Rs.55 lacs and plaint does not disclose cause of action to file the present suit, and the plaintiff (T. M. Qureshi) had no legal character as required under **Section 42** of Specific Relief Act. The defendant No.3 also filed her separate written statement and took the same plea which

were taken by defendant No.2/Muhammad Saeed Akhtar and prayed for dismissal of the suit with special compensatory cost.

4. The trial Court from pleadings of the parties has framed the following issues:-

1. *Whether the present market value of the property is not more than 55 lacs and this Hon'ble Court have limited jurisdiction upto 30 lacs only?*
2. *Whether the suit is maintainable according to law and plaintiff/attorney have legal character under section 42 of Specific Relief Act?*
3. *Whether the plaintiff purchased Bungalow No.13-A, "Rehman Villa" Sector 220-A Scheme No.33, Gulistan-e-Johar, Main University Road, Karachi, from defendant No.1 against valuable consideration?*
4. *Whether the defendant No.1 illegally unlawfully and without notice to the plaintiff sold the bungalow in question to the defendant No.2, if so to what effect?*
5. *Whether the suit is filed by the plaintiff/attorney against the proper party, as per own statement of the plaintiff, first property transferred to Ghulam Rasool or anyone else, from whom the property purchased by the defendant No.2, being said Ghulam Rasool is not necessary party and in absence of Ghulam Rasool, plaint/suit is not bad for want of necessary and property party?*
6. *Whether the plaintiff is entitled to the reliefs claimed, if so to what effect?*
7. *What should the decree be?*

5. Attorney of the appellant/plaintiff (PW-1) namely Abdul Aleem Qureshi filed his affidavit in evidence on 12.07.2008 and he was examined as Exh.P/1. He produced photocopy of CNIC as Exh.P/2, General Power of Attorney dated April, 1988 as Exh.P/3, application form for allotment of bungalow in Rehman Villas (Blank) as Exh.P/4. Schedule of payment as Exh.P/5, allocation

letter dated 13.12.1987 with the overwriting 1988 as Exh.P/6. Terms and conditions form of Rehman Villa (Blank) as Exh.P/7, payment receipt dated 13.12.1988 as Exh.P/8, payment dated 11.07.1988 as Exh.P/9, payment receipt dated 14.09.1987 as Exh.P/10, payment receipt dated 28.02.1988 as Exh.P/11. Payment receipt dated 13.12.1988 as Exh.P/12, payment receipt dated 19.04.1989 as Exh.P/13, payment receipt dated 16.07.1989 as Exh.P/14, payment receipt dated 12.09.1989 as Exh.P/15, payment receipt dated 12.01.1988 as Exh.P/16, letter dated 13.04.1992 regarding payment of remaining dues as Exh.P/17, letter dated 01.09.1992 and 09.09.1992 both addressed to plaintiff Taha Mubeen Qureshi mentioning subject as lease Rehman Villa as Exh.P/18 & P/19, copy of change of address dated 23.02.1998 as Exh.P/20, legal notice dated 18.08.2000 as Exh.P/21, letter dated 21.08.2000 as Exh.P/22, and photocopy of cheques dated 21.08.2000 amounting to Rs.50,000/- in the name of M/s. Karim Housing Pvt, Ltd., thereafter side of evidence of plaintiff was closed. Defendant No.2 Muhammad Saeed Akhtar was examined as Exh.D/1. Defendant No.3 Nazneen Kausar was also examined as Exh.D/2, she produced indenture of lease deed dated 25.05.2002 as Exh.D/3, and sale deed dated 4.5.2004 as Exh.D/4. Then the side of evidence of the defendants was closed.

6. The trial Court after recording evidence and hearing the parties partly decreed the suit of the appellant/plaintiff to the extent of prayer clause 1, 2 and 4 of the plaint by judgment dated **31.08.2010**. Against the said judgment, the plaintiff (T. M. Qureshi) and only Defendant Nos.2 & 3/Muhammad Saeed Akhtar and his wife preferred Civil Appeal **No.341/2010** & Civil Appeal

No.358/2010 respectively. The Builder has not preferred any appeal as he already knew that any possible decree against the Builder would not have any force against him as expected his part of duty was assigned to the Nazir of the Court. Both the appeals were dismissed by common judgment dated **02.03.2012** and the judgment dated **31.08.2010** by the trial Court in Civil Suit **No.627/2005** was maintained. Both the appellants have challenged the said judgment of appellate Court here in these IInd Appeals.

7. I have heard learned counsel for both the appellants and perused the record as well as written arguments filed by them. Learned counsel for the Builder has filed power but he remained absent and did not avail the opportunity to even file written synopsis of his arguments.

8. To be precise the appellant/ plaintiff in IInd Appeal No.97/2012 is aggrieved only to the extent that the trial Court has omitted to grant him relief of handing over/ delivery of possession of the suit premises despite the fact that the action of cancellation of allotment of suit premises from the name of appellant/ plaintiff by the Builder has been held unlawful and it was further ordered that on failure of Respondent No.1/**the Builder**, the Nazir of the Court to execute registered conveyance deed in respect of the suit premises in favour of the appellant (T. M. Qureshi). On the other hand Respondent No.2/the appellants in IInd Appeal No.65/2012 are aggrieved by the said partial decree to the extent of registration another conveyance deed in respect of the suit premises in presence of lawfully registered sale deed in favour of one of the appellants in IInd Appeal No.65/2012/ defendant No.3 in the suit.

9. Learned counsel for the appellant/Plaintiff has contended that the contents of the plaint have been admitted by the Builder/Respondent/Defendant in the written statement which include the admission of the very existence of terms and conditions that constitute the agreement of sale between the parties. He contended that even the learned trial Court has accepted the very existence of sale agreement while partly decreeing the suit, however, the trial Court inadvertently withheld the relief of possession in prayer clause-3 whereby the appellant has sought directions to the builder to complete construction of the suit premises and deliver possession to the appellant/plaintiff. The learned trial Court having appreciated from the evidence that after having realized more than 85% of the sale consideration the Builder has violated the terms and conditions of the agreement which included mode and method of cancellation of allotment of the suit premises and, therefore, granted prayer clause 4 whereby Defendant No.1/the Builder has been directed to execute registered conveyance deed on payment of balance consideration amounting to only Rs.164,000/- in respect of the suit premises and in case of his failure by the Nazir of the Court. The grant of prayer No.4 without grant of prayer clause 3 for delivery of possession is in fact an incomplete decree in suit for specific performance of contract. The denial of delivery of possession of the suit premises even after payment of cost/price/ consideration would mean the obligation of the Builder to perform his part of contract would remain unperformed. Therefore, the omission of the trial Court has rendered the decree meaningless. He has further contended that the appellate Court while maintaining the decree has failed to

appreciate that without modifying the judgment and decree by including the prayer clause regarding delivery of possession of the suit premises the judgment and decree was of no legal practical consequences. The appellate Court misled itself by misinterpreting an out of context sentence from cross-examination of the appellant wherein the appellant has stated that the appellants have not produced any agreement executed between the Builder/M/s. Karim Housing Private Limited and the appellant/ plaintiff though in the same breath the appellant has stated that form containing terms and conditions and schedule of payment have been filed along with affidavit in evidence. The learned appellate Court has failed to appreciate complete evidence resulting in the partial decree of the suit filed by the appellant. Learned counsel has also contended that pursuant to the decree the appellant has already filed **execution application No.09/2012** for cancellation of sale deed of defendant No.3/appellant in IInd Appeal No.65/2012 and for registration of sale deed in the name of the appellant.

10. On the other hand learned counsel for Respondent No.2 and appellant in IInd Appeal No.65/2012 has vehemently contended that the decree is against the Builder and the learned trial Court has already observed in discussion of issue No.7 that there does not appear to be any fault on the part of defendants No.2 and 3 (the appellant in IInd Appeal No.65/2012) and yet in the discussion of the same issue No.7 the trial Court has declared that the basic act of the Builder (Defendant No.1) is illegal/null and void, therefore, as a result all subsequent acts became illegal. However, the learned Courts below have not specifically cancelled the sale deed in favour of the appellant and, therefore, the adverse

effect cast on the title of the appellant should be declared as null and void and of no legal consequence.

11. In the case in hand both the appellants have derived their title from the Builder namely **M/S Karim Housing (Pvt.) Ltd.**, one through a registered sale deed in his favour prior to the date of suit for specific performance and the other by virtue of a lawful decree against the Builder in the suit for specific performance. The Builder has appeared before the trial Court, he has filed written statement in which he has not denied payment of installments alleged in the plaint amounting to a sum of **Rs.411,000/-** during the period from **14.09.1987** to September, **1989** in 8 installments. The so-called cancellation letter dated **18.8.2000** was also admitted and in the said cancellation letter the Builder has mentioned that the appellant/plaintiff may collect the refund of amount paid by him from the office. This fact re-affirms that sale consideration as alleged by the appellant (T.M. Qureshi) has been realized by the Builder. It is also admitted position that the Builder has never completed the construction of the suit premises. In view of the admission of the Builder that parties were bound by the terms and conditions filed by the appellant/plaintiff with the plaint and also his admission of cancellation letter dated **18.8.2000**, I believe few relevant terms and conditions are needed to be reproduced below:-

4. *All sums not paid on due dates shall bear interest at prevailing Bank Rate from the period of first notice and in case of non-payment the Company shall serve the Final Notice and then cancel the allotment and the accumulated amount will be refunded after deducting an amount equivalent to 10% of the total cost of the bungalow as establishment/service charges.*

5. *If the company fails to hand over possession of the bungalows by the due date then the company shall pay the interest at prevailing bank rate for the period of delay.*
6. *The buyer of bungalow, if so wishes, can also withdraw his/her money on surrendering to the company, the letter of allocation/allotment in original. In the event, the company will refund to the buyer with the condition that after suitable purchaser for his/her bungalow is found and **within 15 days** of the payment made by the **second purchaser**, the amount deposited till that time but after deducting an amount equivalent to 10% of the actual price of the bungalow as establishment/service charges.*

12. It has come on the record from the evidence that after the alleged cancellation of allotment letter dated **18.8.2000** to the appellant/ plaintiff (T.M. Qureshi) the Builder lawfully or unlawfully, has found **second purchaser** and on **25.5.2001** he has executed registered lease in favour of the second purchaser namely Syed Umar Farooq. It means according to terms and conditions mentioned above the Builder was under obligation to refund the amount so far realized by him within **15 days** to the appellant/plaintiff. The Builder after finding a second buyer, has also failed to comply with the aforementioned condition No.6 of the agreement with the appellant/ plaintiff (T.M Qureshi). Additionally, according to terms and condition No.5 the Builder having failed to complete construction by the due date which was 29 months' time from September, 1987. The record shows that the cancellation letter is dated **August, 2000** and within 10 months from the said letter of cancellation the Builder namely **M/s Karim Housing (Pvt.) Ltd.** through his Managing Director (Haji) **Adam Khan Jokhio** son of Haji Abdul Raheem Jokhio has executed an indenture of lease dated **25.5.2001** in favour of Syed Umar Farooq and in the written statement filed on **27.8.2005** he has

suppressed the fact that after the letter of cancellation he has sold the suit premises to second purchaser. In terms of the above reproduced terms and conditions the Builder was admittedly required to forthwith refund the amount of **Rs.461,000/-** having realized from the appellant/ plaintiff (T.M Qureshi) but the Builder neither in the trial Court and first appellate Court nor before this Court has even offered to return the said amount to the appellant though at every stage of the proceedings the Builder was represented by **Muhammad Shafi Rajput, advocate**. The contents of plaint against the Builder have to be even otherwise admitted as true and correct since the appellant/plaintiff has reiterated all facts from the plaint in his evidence and nothing has been shaken in cross-examination as the counsel for the Builder has not cross-examined the appellant/plaintiff nor the Builder or his representative has come in the witness box to disprove the version of the appellant. The second purchaser has sold the suit premises to Respondent No.3 through a registered sale deed on **4.5.2004** and both the registered lease from Builder to Umer Farooq and sale deed by said Umar Farooq to Respondent No.3 have come on record in evidence as Ex.D/4 and D/5 respectively.

13. In view of admitted position from the written statement of the Builder and evidence of appellant/plaintiff the trial Court was justified in decreeing the suit, however, both the courts below have failed to appreciate that when the appellant of IInd Appeal No.65/2012/ Defendants No.2 and 3 have not been found guilty of any malafide act on their part in purchasing the suit premises, the execution of sale deed by the Nazir of the Court to satisfy the partial decree would adversely affect the title of the appellant,

though their possession on the suit premises has not been disturbed. In fact as contended by learned counsel for the appellant/ plaintiff the denial of prayer clause-3 has created legal anomaly on the status of title of the suit premises as subsequent execution of conveyance deed through the Nazir of Court would create another title document in presence of already existing sale deed in favour of appellant/defendant No.2 & 3 with possession. The subsequent sale deed through the Court in the hands of the appellant (T.M Qureshi) without possession of the suit premises would render the title of the other appellant Mst. Nazneen Kausar wife of Muhammad Saeed Akhtar ineffective. In view of this situation, I believe both the orders of the Courts below are contrary to law and in the given fact and circumstances, though the case of plaintiff/ appellant (T.M Qureshi) for specific performance of contract against the Builder was made out but it has become a case of hardship for the subsequent purchaser i.e. Respondents No.2 and 3 through a registered sale deed.

14. It is settled principle of law that in certain situations even if the contract is found to be lawful and enforceable, the relief of the specific performance being discretionary can be withheld by the Court. However, when the Court finds that grant of relief of specific performance is made out but it would be a case of hardship to other side or unfair and inequitable to any third party who is not at fault, the Court can adequately compensate the appellant/ plaintiff in exercise of powers conferred on Court under **Section 19** of the Specific Relief Act, 1877. The appellant/ plaintiff has proved payment of an amount of **Rs.461,000/-** to the Builder which included undisputed payment of Rs.4,11,000/- by **December,**

1988. Therefore, the trial Court has rightly concluded that there was a contract between the appellant/ plaintiff and the Builder which has been broken by the Builder and the first logical consequence was to decree the suit for specific performance. But only execution of title document before the relevant registrar of the property is not specific performance of a contract of sale of immovable property when the plaintiff is not in possession of the suit premises in such eventuality, the execution of title document has to be coupled with delivery of possession of the suit premises by the seller or the Nazir of the Court as the case may be to the appellant/plaintiff. However, when the facts and circumstances of the case are such that the court cannot grant decree of possession of the suit premises to the appellant/ plaintiff as it was the position in the case in hand owing to the presence of bonafide purchaser of the suit premises, the court ought to have substituted the relief of specific performance with compensation as envisaged under **Section 19** of Specific Relief Act, 1877. It reads as follows:-

19. Power to award compensation in certain cases.--- Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, **and that some compensation for breach of the contract should also be made to the plaintiff**, it shall award him such compensation accordingly.

Compensation awarded under this section may be assessed in such manner as the Court may direct.

Explanation- The circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section.

15. The perusal of above quoted provision empowers the court to grant **two** decrees of compensation combined in one judgment in a suit for specific performance. The order of specific performance may be substituted with compensation for it with additional compensation for breach of contracts. In the given facts of the case in hand the Court ought to have passed an adequate decree of compensation both as substitution of specific performance and obviously it was not sufficient to satisfy the justice, therefore, at the same time additional compensation for breach of contract, too, should also have been granted. A decree of specific performance of an agreement to sell through execution of title document against the Builder in favour of the appellant is in the field with no result as the Builder is not interested and there is every likelihood that even the decree of compensation against the Builder will also be very conveniently avoid by him. Therefore, before modifying the judgment and decree already passed by the learned trial Court against the Builder I feel it just and proper that an order of attachment of movable and immovable properties of the Builder should also be passed in terms of powers conferred on this Court under **Order XXXVIII Rule 5 CPC** read with **Section 151 CPC** to meet the ends of justice.

16. The likelihood of frustrating the possible decree is apparent from the fact that registered lease in respect of the suit premises (Ex:D/4) has been executed by one **Mr. Adam Jokhio** as Managing Director of M/s Karim Housing (Pvt.) Limited (**the Builder/**

Respondent No.1) was arrested by the National Accountability Bureau. He, as Chief Executive of **the Builder**/Respondent No.1 has recently applied for bail through Constitution Petition No.D-404/2020 before this Court. I have called file of C.P No.D-404/2020 from the relevant branch to ascertain the facts of the NAB Reference against the Builder and on examining the file I have noted that the entire project launched by M/s Karim Housing (Pvt.) Limited in **1987** in which the appellant/plaintiff has booked the suit premises is also subject matter of NAB Reference. In the said Constitution Petition for grant of bail an undertaking has been given by the Managing Director of Respondent No.1/ **the Builder** that he will compensate all the affectees/ allottees including the affectees of Karim Housing (Pvt.) Limited, situated in Deh Dozan by executing lease/giving possession and/or giving monetary compensation as the case may be. A statement has been filed by the Builder in the said Petition wherein it has been categorically stated that there are **434** plots and possession whereof can be given to the affectees subject to codal formalities or giving monetary compensation. It means even after **32** years several plots are still in possession of M/s Karim Housing (Pvt.) Limited/ **the Builder**. However, keeping in view the fact that the appellant/plaintiff has claimed specific plot from M/s Karim Housing (Pvt.) Limited which has already been transferred in favour of Respondent No.3 through a registered title document, therefore, in exercise of powers under **Section 19** of the Specific Relief Act 1877. When I intend to modify partial decree of specific performance of contract against the Builder to the decree for compensation both as decree in substitution of performance and also as compensation for breach of contract as well I believe in

view of the peculiar facts of the case in hand an order to protect the decree, too, and order of attachment of properties of Defendant No.1/Respondent No.1 has to be passed in exercise of powers of Court under **Order XXXVIII Rule 5 CPC**. I rely on the authority of Hon'ble Supreme Court reported as Mohiuddin Molla vs. the Province of East Pakistan (**PLD 1962 SC 119**). The relevant observations of Hon'ble Supreme Court from page-123 are as under:-

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-----The Court has inherent jurisdiction to preserve the property of the judgment-debtor in order that it may be available for realization of the decretal amount. This principle has been recognised to Order XXXVIII, rule 5 of the Civil Procedure Code which empowers the Court to attach the property of the defendant in order that any decree that is passed in the suit may be satisfied by sale of the attached property. If the Court has power to attach the property of the defendant at a time when there is only a possibility of a decree in favour of the plaintiff, it will be anomalous to hold that after he has actually secured a decree the Court cannot act to protect his interests just because the execution of the decree has been postponed. The jurisdiction of the Court to attach the property of the defendant truly arises from the fact that the Court has power to grant relief. A power to grant relief necessarily implies power to take all such steps as may be needed to ensure the grant of relief to the plaintiff. Full relief is not granted to a plaintiff by a paper decree. It is only when the decree is satisfied that he gets full relief and the Court has power to pass all such orders as may be required for the satisfaction of the decree unless any such order be expressly or by necessary implication prohibited. Order XXXVIII, rule 5, should be regarded as a provision which recognizes a power rather than a provision which confers a power. The Civil Procedure Code, generally speaking, does not create new powers but regulates the exercise of power already possessed by the Court. Even before the Civil Procedure Code was enacted the Civil Court possessed powers of the in mentioned in the Civil Procedure Code. It possessed these powers because the Civil Court has jurisdiction to determine and protect civil rights and for the

protection of those rights the exercise of such powers is essential.”

Therefore, before converting the decree of specific performance to a decree of compensation and determining the compensation, an order of attachment of properties of the Builder has to be passed. In this context taking advantage of having examined file of **C.P No.D-404 of 2020** all Bank accounts of M/s Karim Housing (Pvt.) Limited and individual Bank Account of **Mr. Adam Jokhio**, the Petitioner of C.P No.D-404/2020 and also Bank Accounts of present Chief Executive of M/s. Karim Housing (Pvt.) Limited and following Directors shall also be attached by the Nazir of this Court forthwith.

1. Lal Muhammad Jokhio, Chief Executive Officer as well as Director, CNIC No.42201-96499079.
2. Muhammad Adeel, Director, CNIC No.42501-44717353.
3. Karim Jokhio, Director, CNIC No.42301-04648487.

17. It has already been established from the record that there has been a contract between the appellant/plaintiff and the Builder which has been breached by the Builder who has enticed the appellant and hundred others by extending assurances that the project will be completed in **29 months** that is by **October, 1990**. The Builder by misrepresentation has received a sum of **Rs.4,11,000/-** from the appellant way back by **December, 1988**, which the Builder ought to have returned in terms of admitted terms and conditions of contract between the parties reproduced in para-12 above. But it has not been done by the Builder, therefore, the appellant/plaintiff is entitled to the adequate compensation which can be ascertained by reference to escalation in valuation of

the suit premises during last **32** years and/or value of the currency which has gone down due to high inflation in the country. The Hon'ble Supreme Court in a similar situation in the case reported as Jamil Akhtar and others vs. Las Baba and others (**PLD 2003 SC 494**) has been pleased to accept/endorse a decree of **Rs.1,30,000/-** as an increased amount from **Rs.26,000/-** only on account of lapse of around 22 years. The relevant para-9 of the judgment in the case of Jamil Akhtar is reproduced below:-

9. The increase of decretal amount to Rs.1,30,000 from Rs.26,000 is never challenged by Las Baba and hence he is bound to pay Rs.1,30,000 to the legal heirs of Rasheed Ali as compensation under section 19 of the Specific Relief Act. During arguments before us, the parties at the Bar were of the view that the value of the property today is more than Rs.2.00,000. Some settlement was suggested in the circumstances, but in spite of adjournment it could not be arrived at. Anyhow, from such discussion at the Bar and various offers made in this connection, we have come to the conclusion that if the property has so much escalated in value, the amount given by Rasheed Ali, the original plaintiff, has equally escalated in similar proportion. The value of currency today has gone down due to high inflationary trends in the economy and not only that the amount paid by the plaintiff also requires to be raised in the same proportion but the plaintiff Rasheed Ali and his legal heirs need to be compensated for the torture of protracted litigation for the last 22/23 years. We are convinced that had this amount been invested, it would have enhanced in value by at least ten times. To such compensation he is entitled by all means.

In the case in hand the amount is far more than Rs.26,000/- and the time lapsed is **33** years not only 22 years. The Builder in December, 1988 has realized an amount of **Rs.4,11,000/-** toward sale consideration of the suit premises from the appellant/plaintiff. Then he never completed the construction and sold out the suit premises to one Mr. Umar Farooq by registered lease on **25.05.2001**. The value of the suit premises by all means in the **32**

years has gone safely beyond the figure of **Rs.1,50,00,000/-**. Therefore, keeping in view the fact that in the case of Jamil Akhtar supra range of compensation from Rs.26,000/- to Rs.130,000/- was endorsed by the Hon'ble Supreme Court in the year **2003** on account of lapse of 22/23 years and in the case in hand an amount of **Rs.4,11,000/-** was received by the Builder/Respondent No.1 in 1987/88 and by now time of 32/33 years has been lapsed. Therefore, both in view the escalation of value of the suit premises as well as unprecedented devaluation of Pakistani currency during this period, the appellant/ plaintiff is entitled to compensation to the tune of Rupees Eleven Million (**Rs.110,00,000/-**) to be paid by Respondent No.1/ the Builder to the appellant within **15 days** from today.

18. In the meanwhile, the Nazir of this Court should immediately take steps for attachment of Bank Accounts of the Builder and its past and present Directors mentioned in para-16 above to the extent of Rs.110,00,000/- and in case of insufficient funds in their Bank accounts also identify immovable properties of the Builder and/or its Directors with the help of NAB Authorities and registrar of properties and attach such properties worth Rs.110,00,000/-. The Nazir may contact the NAB authorities who are aware of several other properties of the Builder namely **M/s Karim Housing (Pvt.) Limited** for assistance to attach the same equal to the value of the orders herein. The NAB Authorities should also treat the appellant/ plaintiff (Mr. T.M. Qureshi) as one of the affectees of **M/s Karim Housing (Pvt.) Limited** and as soon as possible compensate the appellant in terms of this judgment. The attachment of the moveable/immovable properties and/or Bank

accounts of the Builder and its Directors shall remain attached as long as this judgment is in the field and executable.

19. In view of the above, the judgment and decree of the trial Court is modified. The suit of appellant/plaintiff (T.M. Qureshi) is decreed in terms of **Section 19** of the Specific Relief Act, 1877 and the appellant (T.M. Qureshi) is entitled to receive compensation amounting to **Rs.110,00,000/-** from the Builder and/or its present and past Directors within 15 days with directions to the Nazir of this Court to attach the movable/immovable properties of the Judgment Debtor, M/s. Karim Housing (Pvt.) Limited and its Directors mentioned hereinabove pending the satisfaction of decree as long as it is executable. Consequently, IInd Appeal No.97/2012 is allowed in the above terms and IInd Appeal No.65/2012 is dismissed as it has become infructuous in view of the above order.

JUDGE

Karachi, Dated:10.06.2020

Ayaz Gul / SM