

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1738 of 2008
*[Syed Hussain Ali vs. Syed Akhtar Ali (deceased)
through legal heirs and others]*

Date of hearings : 23.12.2020 and 24.12.2020

Plaintiff : Syed Hussain Ali, through Mr. Shakir Hussain Ali, Advocate.

Defendants : Nemo

Case law cited by learned counsel for Plaintiff

Law under discussion: (1). Specific Relief Act, 1877. *[SPR]*.

(2) The Qanoon-e-Shahadat Order, 1984. *[the Evidence Law]*.

(3) The Code of Civil Procedure, 1908 *[CPC]*.

JUDGMENT

Muhammad Faisal Kamal Alam, J: Plaintiff has brought this action at law primarily for Specific Performance of Agreement dated 22.03.2008. The Plaint contains the following Prayer Clause_

“The Plaintiff pray for following Judgment and Decree in his favour and against the Defendants as under: -

i) That, the Defendants be directed to make performance of Sale Agreement dated 22.03.2008 and receive the balance amount of the sale consideration for their shares and execute a Sale Deed in favour of Plaintiff and if they failed to do so, the Nazir of the Court may be directed to receive the balance amount as sale consideration of the House bearing No.A/223 Block-S, North Nazimabad,

Karachi and also its adjacent extra land/area and also execute Sale Deed in favour of the Plaintiff before concerned Sub Registrar at Karachi.

- ii) That to handover the peaceful vacant possession of Suit House/Property House bearing No.A/223, Block-S, North Nazimabad, Karachi, with its adjacent extra area/land to the Plaintiff.*
- iii) To grant permanent injunction in favour of the Plaintiff in which the Defendants be restrained to create any third party interest in the Suit House/Property House bearing No.A/223, Block-S, North Nazimabad, Karachi, with adjacent extra land of the area.*
- iv) Cost of the suit and any other relief in the circumstances of the case may be awarded.”*

2. The claim has been contested by the legal heirs of Defendant No.1 by filing a Written Statement. Subject matter of the present *lis* is a House No.A/223, Block-S, North Nazimabad, Karachi, admeasuring 234.33 square yards [as per Indenture of Lease, Exhibit PW 1/5], hereinafter referred to as the '**Suit Property**', said to have owned by Syed Mohsin Ali, the deceased father of the Parties hereto.

3. Mr. Shakir Hussain, Advocate for Plaintiff has referred to the following orders and states that only Defendant No.1 is contesting this suit and other Defendants have already settled their disputes with the Plaintiff.

4. It is mentioned in the order dated 28.01.2009, that Defendant No.3 [Syed Qaim Ali] is present in person and has filed a Statement, stating therein that earlier Suit No.1516 of 2005 was filed by Syed Qasim Ali, one of his brothers, who later passed away, for partitioning of above Suit Property. Later a Sale Agreement was executed by all the siblings.

Defendant No.3 acknowledged that he and Defendants No.4 and 5 [brothers] have received their respective shares in the above Suit Property in pursuance of the Sale Agreement.

5. By filing an application under Order XXIII Rule 3 of CPC, a compromise was effected as **per order dated 26.10.2015** and it was observed that the present suit will proceed only against Defendant No.1. From perusal of the order of 08.11.2009, it appears that Defendants No.4 and 5 appeared and stated that they have received their respective shares from Plaintiff and they have no further interest in the corpus of the suit and it may be decreed against them. Vide order dated 16.10.2020, Rs.605,625/- (*rupees six hundred five thousand six hundred twenty-five only*) was directed to be deposited with the learned Nazir of this Court as share of Defendant No.1.

6. The learned Nazir has submitted its Report dated 09.11.2020 and has confirmed that Plaintiff has deposited the said amount through cheque drawn on Bank Al Habib Limited.

7. From the pleadings of the parties, following Issues were settled by the Court vide order dated 15.03.2019_

“1. Whether the suit as framed is maintainable in law?

2. Whether the Sale Agreement dated 22.03.2008 between the Plaintiff and Defendants is a valid Agreement enforceable in law?

3. Whether the Plaintiff has made part payment to the Defendants in pursuance of the Sale Agreement?

4. Whether the Sale Agreement is binding on the legal heirs of Syed Akhtar Ali?

5. Whether the Plaintiff is in part possession of the suit property and thus the Sale Agreement has been partly performed?

6. What should the Decree be?"

8. Arguments heard and record perused.

9. Order of 2-10-2015 shows that a joint compromise application was moved by Plaintiff and Defendants 2, and numbered as '**CMA No. 13577/15**', wherein Defendant No.2 [Syed Ahmed Ali] accepted to have received his remaining share of Rs. 6,55,000/- in pursuance of the Sale Agreement and consequently this Lis was decreed against Defendant 2 as stated above vide Order of 26-10-2015. Similarly, in the intervening period, Syed Fazal Ali, one of the legal heirs of Defendant 1, who is impleaded as Defendant No. 1(3) also filed an Application under Order 23, Rule 3 of CPC [CMA 586 of 2010], admitting to have received his share of Rs.74,375/- in the Suit Property from Plaintiff. This Application was allowed vide Order dated 6-3-2017 and the Suit was decreed against him.

10. Plaintiff has examined himself as well as his two attesting witnesses of the Sale Agreement of 22.03.2008, produced in the evidence as Exhibit- **PW-1/2**. Testimonies of two attesting witnesses, namely, Rana Shafiq Junjua and Muhammad Khaliq Janjua as PW-2 and PW-3, are available at pages-91 and 125 of the evidence file.

11. It is the case of Plaintiff that earlier one of the brothers-Syed Qasim Ali (now deceased), filed a Suit No.1516 of 2005, which was eventually decreed, produced in the evidence as PW-1/X1, which is based upon the order of 12.12 2007. As per the order of 09.04.2008, that is, subsequent to passing of the decree, it is mentioned that the price of above Suit Property was enhanced from Rs.5,000,000/- (rupees five million) to Rs.5,100,000/-

(rupees five million one hundred thousand) and by consent it was ordered to deposit an amount of Rs.784,620/- (rupees seven hundred eighty-four thousand six hundred twenty only) as a share of Plaintiff of Suit No.1516 of 2005, that is, the above named deceased brother, namely, Syed Qasim Ali, with the Nazir of this Court within three days and the amount will be disbursed to the latter {the said deceased brother}, upon executing his Surrender Deed before the learned Nazir of this Court.

12. To a specific question that why above Syed Qasim Ali was not made a party to the present proceeding?, the learned counsel has referred to the Decree dated 26.12.2007 passed in earlier Suit No.1516 of 2005 filed by the said person-Syed Qasim Ali against all brothers and sisters, who are now Plaintiffs and Defendants in the present *lis*. The operating part of the Decree is as follows_

“That the defendants No.1 to 5 will pay the share of the plaintiff within two months and the plaintiff will execute necessary documents in favour of defendant No. 1 to 5 for transfer of his share in the property in favour of defendant Nos. 1 to 5”.

It is further contended that since present Defendants did not have funds to pay the share of said Syed Qasim Ali, the same was paid by the present Plaintiff-Syed Hussain Ali and in this regard Sale Agreement dated 22.03.2008 (Exhibit PW-1/2) was signed between the parties hereto. After perusal of this Agreement, which is an undisputed document, the reply of learned Advocate is found to be correct, that this subject Sale Agreement is also a family arrangement / Agreement as well, where-under, Parties hereto had/have agreed to sell their respective share in the Suit Property to present Plaintiff for a total sale consideration of Rs. 4.5 million [approximately]. The Surrender Deed dated 09.05.2008, that is, subsequent to the subject Sale Agreement is produced as PW-1/7 (at page-63 of the Evidence File),

wherefrom it is apparent that said Syed Qasim Ali has received his share of Rs.784,620/- (*rupees seven hundred eighty-four thousand six hundred twenty only*). This document (Surrender Deed) was executed before the learned Nazir of this Court in pursuance of the order dated 09.04.2008, produced in the evidence by Plaintiff as PW-1/1.

13. The Plaintiff has also examined the two attesting witnesses of Sale Agreement, namely, Rana Shafiq Janjua as Exhibit PW-1 and M. Khalid Janjua as Exhibit PW-2. Their testimonies are considered and the conclusion is that they have corroborated the version of Plaintiff. Record also shows that despite providing ample opportunity the Plaintiff and his witnesses were never cross-examined. On the other hand, contesting Defendants did not lead any evidence. The version of Plaintiff has not only gone un-rebutted but also acceded to by all other Defendants, as stated in the foregoing paragraphs. To a specific question about the mother of Plaintiffs and Defendants, it is submitted that she has passed away long time back.

14. In order to evaluate the veracity of claim of Plaintiff, the title document of the Suit Property is also taken into the account. Karachi Development Authority (KDA) has granted a 99 years lease in favour of Syed Mohsin Ali (deceased father of Plaintiffs and Defendants), which is produced in the evidence at **Exhibit PW-1/5**. This is also an undisputed document and it means that the ownership of deceased father of present parties is genuine.

In view of the above stated position, the findings on the Issues framed on 15.03.2019 are as under: -

ISSUE NO.1	Affirmative
ISSUE NO.2	Affirmative
ISSUE NO.3	Accordingly
ISSUE NO.4	Affirmative

ISSUE NO.5 Accordingly
ISSUE NO.6 Suit decreed to the extent of Prayer
Clause (i), (ii) and (iii).

REASONS

ISSUE NO.1

15. Since Plaintiff is seeking Specific Performance of an Agreement to which majority of Defendants have acceded to and other defendants did not lead evidence, therefore, **this Issue is answered in Affirmative that Suit is maintainable.**

ISSUE NO.2.

16. In view of the above, **this Issue No.2 is also answered in Affirmative but to the extent of area** mentioned above and in the Indenture of Lease issued by Lessor KDA and for adjacent extra land, the Plaintiff can approach the concerned authorities, which shall decide the request in accordance with law and applicable rules.

ISSUE NO.3.

17. Defendants 2 to 5 have acknowledged that they have received their respective shares in the House Property, so also one of the legal heirs of Defendant No.1, namely, Syed Fazal Ali, as discussed in the preceding paragraphs. Vide order dated 16.10.2020, the proportionate share of Defendant No.1 has already been deposited with the Nazir of this Court regarding which Nazir has submitted his Report dated 09.11.2020, therefore, **Issue No.3 is answered accordingly**, that all the Defendants except the legal heirs of Defendant No.1, excluding above Fazil Ali, has received their respective shares and the proportionate share of the legal heirs of Defendant No.1 is already deposited with the learned Nazir of this

Court can be disbursed to them together with accruals [if any] by adopting proper procedure.

ISSUE NO.4.

18. This Issue, in view of the above, **is answered in Affirmative** that, Akhtar Ali-deceased Defendant No.1 was one of the signatories of the subject Agreement dated 22.03.2008, which has been proved by the present Plaintiff, as required by the Evidence Law, hence, terms whereof are binding on the legal heirs who are impleaded as Defendants No.1 (1) to 1(12). Above named legal heir [Fazil Ali] has already received his share.

ISSUE NO.5.

19. It is specifically testified by Plaintiff in his evidence that those Defendants / legal heirs, who have received their shares have left the possession and in paragraph 17 of the Affidavit-in-evidence it is stated by the Plaintiff that he is already in part possession of the suit property, which assertion has gone unchallenged, thus, **this Issue is also answered in affirmative.**

ISSUE NO.6.

20. Facts of present case justify invoking of provisions of Specific Relief Act. Thus, in the above terms, the present Suit is decreed to the extent of Prayer Clause (i), (ii) and (iii) **but to the extent of area** mentioned above and in the Indenture of Lease issued by Lessor KDA and for adjacent extra land, the Plaintiff can approach the concerned authorities, which shall decide the request in accordance with law and applicable rules.

21. Parties are left to bear their own costs.

Dated 24.12.2020
M.Javaid P.A.

JUDGE