

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 432 of 2015

[Muhammad Arif v. Mrs. Uma Jawaid and others]

Dates of hearing : 31.01.2019, 19.02.2019 and 15.04.2019.

Date of Decision : 30.12.2019.

Plaintiff : Muhammad Arif, through Ms. Saman Rafat Intiaz, Advocate.

Defendants 1&2 : Uzma Jawaid and Jawaid Bashir, through Malik Altaf Javed, Advocate.

Defendant No.3 : Nemo.

Decisions relied upon by Plaintiff's Counsel

1. 2015 S C M R page-21
[*Muhammad Iqbal v. Mehboob Alam*],
2. P L D 2017 Sindh page-88
[*Messrs Tee Jays Exclusive (Pvt.) Ltd. through Managing Director and another v. Muhammad Naveed*] – *Tee Jays case*
3. 2016 Y L R page-1229
[*Gul Rasheed Khan and 3 others v. Israr Khan and 3 others*],
4. 2009 Y L R page-2359
[*Noor Muhammad v. Fazal Mahmood and others*],
5. 1997 M L D page-880
[*Fazalur Rehman through Legal Heirs and others v. Mst. Batul and others*],
6. 2003 C L C page-923
[*Kaniz Fatima and another v. Sh. Muhammad Sohail and 7 others*],
7. A. I. R. 1938 Rangoon page-367 [*U Tha Nyo and another v. M. M. R. M. Chettyar Firm and another*],
8. 2008 S C M R page-1639
[*Nazir Ahmad and another v. M. Muzaffar Hussain*] – *Nazir case*, and
9. 2013 S C M R page-1600
[*Abbas Ali v. Liaqat Ali and another*] – *Abbas Ali case*.

Decisions cited by Defendants' Counsel

1. P L D 2011 Supreme Court page-241
[*Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others*] – *Tassaduq case*,
2. P L D 2018 Supreme Court page-698
[*Bilal Hussain Shah and another v. Dilawar Shah*] – *Bilal case*,

3. P L D 2015 Supreme Court page-187
[*Farzand Ali and another v. Khuda Bakhsh and others*] – *Farzand Ali case*,
4. 2017 S C M R page-1696
[*Muhammad Abdur Rehman Qureshi v. Sagheer Ahmad*] – *Qureshi case*,
5. 2018 Y L R page-713
[*Hamood Mehmood v. Mst. Shabana Ishaque and 3 others*], and
6. P L D 2014 Supreme Court page-506
[*Liaqat Ali Khan and others v. Falak Sher and others*] – *Liaqat Ali Case*.

Other precedents

- Law under discussion:**
1. Specific Relief Act, 1877 [“SRA”]
 2. Contract Act, 1872.
 3. The Limitation Act, 1908 (“**Limitation Law**”).
 4. Qanun-e-Shahadat Order, 1984 (Evidence Act, 1872); Evidence Law.
 5. Civil Procedure Code, 1908 (“CPC”)

JUDGMENT

Muhammad Faisal Kamal Alam, J: - Plaintiff has filed this suit for Specific Performance, Permanent Injunction and Damages. Plaintiff contains the following prayer clause _

“1. (a) *Direct the Defendants to specifically perform their obligations by conveying, selling, transferring the Subject Property and handing over vacant peaceful possession of the same to the Plaintiff as under the terms of the Agreement dated March 14, 2012 after satisfaction of all conditions precedent*

OR in case of non-compliance for any reason, whatsoever,

(b) **Direct the Nazir of this Honorable Court to execute/sign sale deed and any and all documents in respect of transfer of Subject shop in favour of the Plaintiff and to hand over vacant peaceful possession of the same to the Plaintiff and direct the Defendant No.3 to record the transfer / mutation of the Subject Shop in favour of the Plaintiff and to allow the Plaintiff to**

deposit the balance Sale Consideration in the amount of Rs.4,000,000/- with the Nazir;

2. *Permanent injunction restraining the Defendants, their agents, servants, person or persons acting on their behalf, from conveying, selling or transferring in any manner, or creating any third party interest / encumbrance in the Subject Shop except in favor of the Plaintiff;*
3. *Direct the Defendants to pay Rs.11,000,000/- to the Plaintiff as compensation and damages for loss of investment, goodwill and reputation, mental torture and agony suffered by the Plaintiff at the hand of the Defendants in terms of paragraph No.13 herein above;*
- iv. *Cost of the suit; and*
- v. *Any other relief(s) that this Honorable Court may deem fit in the circumstances of the present case.”*

2. The case of Plaintiff is that Defendants No.1 and 2 have not fulfilled their part of contractual obligation and delayed the performance of Sale Agreement dated 14.03.2012 (the “**Contract**”) produced in evidence as Exhibit **P/1**.

3. Main defence of Defendants’ side is that Plaintiff did not pay entire sale price within stipulated time and, therefore, sale transaction could not be completed and has come to an end and amount paid so far by Plaintiff stands forfeited.

4. On 18.01.2018, following Issues were settled as Court Issues_

- 1) *Whether the Suit is maintainable?*
- 2) *Whether the Plaintiff is entitled for Specific Performance of the agreement dated 14.3.2012?*
- 3) *Whether the Plaintiff is entitled for damages, if any?*
- 4) *What should the decree be?*

5. Both Plaintiff and Defendants No.1 and 2 have examined one witness each. Plaintiff himself appeared as P.W.-1, *whereas*, Attorney of Defendants No.1 and 2, namely, Khushal Yaqoob testified as D.W.-1.

ISSUE NO.1:

6. The Sale Agreement dated 14.03.2012 between Plaintiff and Defendant No.1 (Mrs. Uzma Javed), who is the sole owner of the Suit Property has not been disputed. The same Agreement has been produced by the sole witness, the Plaintiff himself (P.W.-1) as **Exhibit P/1**. The total sale consideration agreed upon is Rs.6.9 Million (Rupees Sixty Nine Lacs only), out of which till date, admittedly, Rs.2.9 Million (Rupees Twenty Nine Lacs) has been paid to Defendants No.1 and 2, *whereas*, Rs.4 Million (Rupees Forty Lacs only) is deposited with the Nazir of this Court in compliance of the order dated 22.01.2015. After exchange of legal notices between the parties with regard to completion of transaction, which have been produced as Exhibits P/7 and D/3, the present *lis* was filed on 22.01.2015. Under Article 113 of the Limitation Law, a proceeding of the nature for enforcement of the contract should be filed within three years. The present suit has been filed within the limitation period and given the fact that a substantial amount is already lying with the private Defendants and balance amount is lying with the Nazir, the present suit is held to be maintainable. Issue No. 1 is answered in Affirmative.

ISSUE NO.2:

7. The main defence of private Defendants as argued by Mr. Malik Javed Altaf, Advocate, and so also pleaded in the Written Statement and their evidence is that time was the essence of contract in terms of Clause 8 of the Agreement and since the balance sale price was not paid within sixty days from the execution of Agreement, therefore, the Agreement stood cancelled and amount forfeited.

8. On the other hand, Ms. Saman Rafat Imtiaz, Advocate, has argued that there was no specific clause in the contract that time is the essence of contract and besides this, since further payment of Rupees Two Million was accepted by the Defendants through banking instruments after the expiry of sixty days, therefore, the defence of Defendants is devoid of merits.

Terms of the Agreement have been perused. Clause 8 whereof is vague and it does not stipulate that time will be essence of contract. For ready reference the said clause is reproduced hereunder_

“8. That this is the essence of this agreement that the Vendor and Vendee shall carry out their respective obligations, mandate by the terms and conditions of this agreement and failure on the part of the Vendee shall render them liable to be deprived of the payment already made or to pay the double amount of payment by the Vendee in case the failure is on the part of Vendor.”

9. In fact payment mode is mentioned under clause 1 of the Agreement, relevant part is reproduced hereunder _

“ ***MODE OF PAYMENT***

i) Nine lacs only (Rs.9,00,000/-) cheques No.27443 MCB Ltd. Al-Hilal Security,

ii) Sixty lacs only (Rs.60,000,000/-),

iii) Within 60 days or before of the signing of this Agreement.”

10. From the above, it appears that in two installments the entire sale price of Rs.6.9 Million is to be paid. The first installment of Rupees Nine Hundred Thousand is not disputed. With regard to balance sale price of Rupees Six Million, it has been testified by the Plaintiff witness that an amount of Rs.8,70,000/- and Rs.11,30,000/- have been paid to Defendants. The Plaintiff witness has produced copy of the cheque No.0196413 dated 18.05.2012, drawn on Muslim Commercial Bank, favouring Defendant No.1-Uzma Javed, for a sum of Rs.8,70,000/- as Exhibit P/5 and pay order

1130000 drawn on Bank Al-Habib Limited, in which Defendant No.1 is mentioned as beneficiary. If the defence of Defendant is accepted, then the sixty days' time period was to be expired on 14.05.2012, *whereas*, the above payments through the above two banking instruments shows that the Defendants accepted the payment after expiry of sixty days' time. *Secondly*, the counter argument of Plaintiff's side is that the balance sale price was dependent on clause 2 of the Agreement, which reads as under_

“2. That the Vendor will clear all the dues of utilities (Gas, Telephone, Electricity, Water), property tax upto date in respect of the above said property.”

11. That is, the vendor will clear all the dues of utilities (Gas, Telephone, Electricity, Water and Property tax). It has been specifically asserted by the Plaintiff witness in his testimony that Defendant No.1 failed to clear the utility bills and property tax, but on this material assertion, the Plaintiff witness was neither cross examined nor the witness of private Defendants in his deposition has stated that utility bills and taxes were paid as stipulated. *Thirdly*, it is not disputed that Plaintiff on 17.7.2012 sent a legal notice to Defendant No.1 for clearance of the above dues while showing his readiness and willingness to complete the transaction. This legal notice has been produced in evidence as Exhibit P/7.

12. On the other hand, the sole defence witness in his cross examination has admitted the suggestion that he has not produced 'any proof of payment of Utilities and Property Tax', with his Affidavit-in-Evidence / examination-in-chief. Another suggestion was not denied by Defendant's sole witness that all the dues were to be paid within sixty days. The payment of full Sale Price was dependent on clearing of dues towards Property Tax and Utility Bills; *thus*, there was reciprocal promises required to be performed by both Plaintiff as *Vendee* and Defendant No.1 as *Vendor* as envisaged in Section _____ of Contract Act, 1872; it follows that

Plaintiff did not commit any default in paying full Sale Price. The reported decision of Tee Jays (*ibid*) is relevant, in which suit for specific performance was decreed. *Secondly*, in order to successfully invoke Section 55 of the Contract Act about time being essence of contract, the Defendants have to show that the same is clearly mentioned in the Agreement. As already stated hereinabove that no such specific clause is there in the Agreement and neither this was intention of the parties, otherwise admittedly the Defendants have not received a substantial amount of Rupees Two Million after the expiry of sixty days, that is, on 14.05.2012.

The decisions relied upon by learned counsel for the Defendants, *particularly*, of the Honourable Supreme Court that now a view has been changed with regard to specific performance of contract relating to immovable property, in its reported decision of Qureshi Case [*ibid*, 2017 S C M R 1696], is also distinguishable.

13. The above judgment of Apex Court (Qureshi Case) is carefully examined for guidance. As far as contention of present Defendants about time being essence of contract is concerned, in the above judgment also, the same was repelled on the grounds that on various dates, time to complete the transaction was extended; similar is the present case, as undisputedly Defendants accepted a further amount of Rs.2 million after the expiry of sixty days and thus this defence of Defendants is baseless. The background facts leading to the rule laid down in the above judgment, which is a departure to a certain extent from the general rule that time usually is not the essence of contract relating to immovable properties, is based on the ground realities of present times, when the real estate market is not as stable as it was a century ago, rather the market prices nowadays fluctuate.

14. It is also necessary to keep in mind that the sale transaction involved in the above Qureshi case was 10.01.1995, when both vendor and vendee (Appellant and Respondent, *respectively*, of the reported case) agreed that property would be commercialized for undertaking a commercial project. However, the sale could not be completed and the purchaser / Respondent was found guilty of delaying the transaction and in paragraph-23, the learned Apex Court has observed that specific performance is being sought after 22 years, when the value of the property in dispute has multiplied '*exponentially*' and while setting aside the sale transaction, Section 22 of the SRA, was invoked and vendor / seller was ordered to pay an additional amount of Rs.10 Million to Respondent by way of compensation, because at the relevant time when the matter reached ultimately in Supreme Court the price of the property was increased tenfold. The undisputed facts of present case are completely different. No evidence is led by Defendants to show that price of suit property, which is a shop, has increased many folds than the original price. **Secondly**, out of Rs.6.9 million, which is the total sale consideration, Defendant No.1 / vendor has already received a sum of Rs.2.9 Million, that is, 40% of the sale price for the past seven years and enjoying the fruits of the same together with the suit property. More so, the remaining sale price has been deposited with the Nazir of this Court by Plaintiff, which shows bona fide intention on the part of the Plaintiff that he is ready and willing to perform the contract. No contrary evidence is led when the Plaintiff witness has deposed that no third party interest has been created and he has also produced the latest Search Certificate (at the relevant time) as **Exhibit P/15**, which is a public document and presumption of genuineness as mentioned in Article _____ is attached to it.

On the contrary when this Court vide order dated 26.04.2017 directed the private Defendants to deposit the amount of part payment of

Rs.2.9 Million lying with them (as stated above, being part payment), they felt aggrieved with this Order and preferred a High Court Appeal No. 347 of 2017, which was disposed of on following terms_

- “(i) *In case the suit for specific performance is decreed by the learned trial court, of course the advance amount paid to the seller/defendant No.1 in the suit shall be adjusted in the sale consideration amount and remaining amount as may be ordered by the trial court shall be paid to the seeler.*
- (ii) *In the eventuality if the suit for specific performance is dismissed and the learned trial court passes the order to refund the amount received by the seller / defendant No.1 in suit, the amount will be refunded back to the plaintiff along with prevailing rate of markup according to the State Bank Circular/Policy.*”

15. The above discussion shows that Defendants were not even ready to deposit the part payment of sale price in their possession, but on the contrary the Plaintiff has deposited the balance sale price with the Nazir of this Court. This is sufficient to prove that Plaintiff was all the time ready and willing to perform the contract but due to deceptive tactics adopted by the private Defendants, the transaction could not be completed.

Learned counsel for the Defendants has also argued that Superior Courts have in recent past invoked Section 22 of the SRA, considering the present volatile real estate market and to do complete justice, between both parties – Vendors and Vendee, his reliance upon the famous case of Liaqat Ali (*ibid*), handed down by the Honourable Supreme Court and also followed in the above **Qureshi Case**, I am afraid, is fruitless at this stage, in view of the above discussion, that after considering the pleadings of the parties and evidence led, it is not a case to invoke section 22 of SRA, rather specific performance is to be granted.

16. As a last ditch effort, the learned counsel for the Defendants has taken up a defence of Article 79 of the Evidence Law, even though it has

not been pleaded in the Written Statement nor any evidence is led, yet he insists that since it is pure question of law, which can be decided in view of the undisputed record of the case, that is, the Agreement itself (Exhibit ___). It is argued by Mr. Malik Altaf Javed, Advocate, that the Agreement has not been provide by Plaintiff as required under Article 79, as not attesting witnesses have been produced by the Plaintiff. In support of his arguments, he has cited the cases of Bilal, Tassaduq and Farzand Ali (*supra*), all handed down by the Honourable Supreme Court, in which this principle is exhaustively expounded.

17. Crux of the case law relied upon by Defendants is that the Agreement to Sale squarely falls within the definition of financial obligation as mentioned in Article 17(2) of the Evidence Law and thus has to be proved (i) by producing two attesting witnesses as required under Article 79 of the Evidence Law, and this mode of proving an Agreement to Sale is mandatory; (ii) admission of one of the Vendors, who was a co-defendant cannot bind other co-owners / vendors and / or co-defendants; (iii) a scribe of an agreement to sale an immovable property cannot be a substitute for an attesting witness, because a scribe is not legally qualified to be so; and (iv) this mandatory requirement cannot be condoned even if one attesting witness is examined and other one could not be, for which no plausible explanation has been given or proved, as required in the Evidence Law itself.

18. On the other hand, the above contention has been refuted by learned counsel for the Plaintiff on the ground that *firstly*, the subject Agreement is an admitted document, which has been produced in the evidence an Exhibit, therefore, the case law relied upon by Defendants is distinguishable and what is applicable to the facts of present case is the principle laid down in the other reported decision of the learned Apex

Court, relied upon by the Plaintiff's side (already mentioned in the opening part of this judgment). It is further argued that even in the latest decision in *Bilal case* (even though cited by Defendants' counsel), supports the case of Plaintiff, that when Agreement to Sale is disputed only then the above rule becomes mandatory for examining both the attesting witnesses.

19. The subject sale Agreement (Exhibit P/1) has been examined. It has been witnessed by two marginal witnesses, namely, Abdul Rehman and Muhammad Khursheed, who have also put their signatures on the receipt issued by Vendor, which is part of sale Agreement, as Exhibit P/2, which is again an undisputed document. The Honourable Supreme Court in Abbas Ali case (*ibid*) has clarified the above principle of non-production of attesting witnesses. It is held that when the Agreement to Sale itself is not disputed and admitted in Written Statement, then provision of Article 81 of the Evidence Law, will be applicable and the rule laid down in afore-referred Tassaduq Case [P L D 2011 Supreme Court page-241, as relied upon by Defendants], would not be an obstacle. In Nazir case (*Supra*), the Apex Court has held that an agreement is to be proved as required in the Evidence Law, only when its execution is denied. With these background facts, Article 30 of the Evidence Law has been explained by the Honourable Supreme Court in the following words_

“8. It means that the execution of agreement is admitted not disputed and it is well settled proposition of law that the admitted facts need not to be proved. The admission has been defined in Article 30 of the Qanun-e-Shahadat Order, 1984 which reads as under:--

“30. Admission denied. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.” ”

20. Conclusion of the above discussion is, that since subject sale Agreement is an admitted document, therefore, non-production of the two

attesting witnesses is not fatal and in this regard the plea of Defendants is devoid of any force.

ISSUE NO.3:

21. The onus is on Plaintiff to prove his claim of damages and compensation. No convincing evidence is led in support of his pleading that he has already made initial investment for starting his Car Showroom business. Since, conclusion of the foregoing paragraph is that this suit is to be decreed to the extent of prayer clause relating to specific performance therefore, in my considered view, awarding damages in these circumstances, is not necessary. Therefore, Issue No.3 is answered in Negative and against the Plaintiff.

ISSUE NO.4:

22. The upshot of the above discussion is that the present suit is decreed to the extent of prayer clauses 1(a), (b), 2 and iv. The balance sale consideration deposited with the Nazir together with accruals will be paid to Defendant No.1, who will immediately execute the Conveyance Deed and in failing to do so the Nazir will execute the Sale Deed. Plaintiff is also entitled to the cost of the proceeding.

Judge

Karachi,
Dated: 30.12.2019.

Riaz / P.S.