

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO.184 of 2012

Plaintiff: Syed Muhammad Iqbal Hussain through his legal heirs through Mr. Umair Bachani advocate.

Defendants Nos.1&2: Mrs. Tasneem Kausar Alvi and Khalid Anwar Khan declared exparte

Defendant No.3: DHA, none present.

Date of hearing: 09.12.2021

Date of judgment: 09.12.2021

J U D G M E N T

SALAHUDDIN PANHWAR, J.- Present Suit was preferred in 2012 by plaintiff through his Attorney, for Specific Performance and Perpetual Injunction. Case, as set out in plaint, is that plaintiff is in possession of and is a bona fide purchaser of the Bungalow bearing No. 37-A/I, South Circular Avenue, Phase-II, Defence Housing Authority, Karachi admeasuring 1000 square yards (hereinafter referred to as the "Suit Property") having paid Rs.4,00,00,000/- (Rupees Four Crores) out of the total sale consideration of Rs.4,15,00,000/- in pursuance of the Sale Agreement dated 16.02.2007 between the Plaintiff and the Defendant Nos. 1 and 2 (hereinafter referred to as "the Subject Sale Agreement"); that the suit property was initially in the name of Mrs. Saeeda A. Bilgrami wife of Sqn. Ldr. Aftab A. Bilgrami in whose favour the Sub-Leases A and B were executed by the erstwhile predecessor Cooperative Society of the Pakistan Defence Officers Housing Authority (DHA) and the same duly registered on 15.03.1977 and 08.03.1979; that on 31.05.1979, the suit property was purchased by Muhammad Sardar Muhammad Khan Alvi son of Choudhry Shamsuddin against Sale

Consideration of Rs.400,000/- through a Conveyance Deed dated 31.05.1979, which was registered on 03.06.1979; that on 30.05.1990, the record DHA in respect of the suit property was mutated in favour of Sardar Muhammad Khan Alvi; that on 27.09.1984, Sardar Muhammad Khan Alvi gifted the suit property to his daughter namely Mrs. Tasneem Kausar Khan (Defendant No.1), who acknowledged and accepted the same and a Declaration was also reduced in writing on 03.02.1985, which was duly registered with District Registrar, Karachi. Subsequently, the officers of the Military Estate Officer, Karachi, DHA and Clifton Cantonment Board were informed about the change of ownership, who all mutated their records accordingly, thus in all such records the defendant No.1 was recorded as lawful owner; that since the defendant No.1 was not able to look after and attend to the affairs in respect of the suit property, she appointed Mrs. Iqbal Bano wife of Niaz Baloch as her lawful attorney. The said General Power of Attorney executed by the defendant No.1 in favour of Mrs. Iqbal Bano was presented for registration before the Sub-Registrar, T-Division-II, Karachi on 27.08.1995 and to date it has neither been revoked nor cancelled; that on 15.08.2001, the defendant No.1 through her lawful attorney namely Mrs. Iqbal Bano entered into a Sale Agreement for sale of the suit property for consideration of Rs.80,00,000/- in favour of defendant No.2 or any person nominated by him (2001 Sale Agreement is hereinafter referred to as the performed Sale Agreement); that as can be seen from the performed Sale Agreement the defendant No.2 paid the defendant No.1 Rs.500,000/- as the earnest money towards the purchase of the suit property on 31.07.2001, Rs.65,00,000/- at the time of signing and executing the said Sale Agreement and the remaining balance consideration of Rs.10,00,000/- on 30.11.2001 at the time of being handed over the possession of the Suit property along with all the relevant original documents. That prior to the said sale, the defendant No.2 had

invited public objections through an advertisement in two leading newspapers namely 'The News Karachi' and 'Jisarat Karachi' dated 31.07.2001; that these objections are believed to have been invited with the consent of the defendant No.1 and no objections appear to have been raised from any quarter; that in performance of the said performed Sale Agreement, it is submitted that Mrs. Iqbal Bano for and on behalf of the defendant No.1 executed on 28.12.2001, an irrevocable Sub Power of Attorney in favour of the defendant No.2 with the power to sell/ gift the suit property and transfer and update the records of the suit property maintained and kept by DHA/defendant No.3; that on 16.02.2007, the plaintiff entered into the subject sale agreement with the defendant No.2 for sale of the suit property; that the plaintiff entered into the subject Sale Agreement relying on the representations of the defendant No.2 that he is the lawful owner being legally entitled and fully competent to sell the suit property which representations are believed to be correct; that total sale consideration of the suit property as agreed in the subject Sale Agreement was Rs.4,15,00,000/-; that in accordance with subject Sale Agreement, Rs.400,00,000/- has been paid to the defendant No.2 on following dates, who acknowledged the same through separate receipts:

i)	Rs.3,50,00,000/-	On 16.02.2007 by cheque
ii)	Rs.10,00,000/-	on 19.05.2008 by cash
iii)	Rs.20,00,000/-	on 20.08.2009 by cash
iv)	Rs.20,00,000/-	on 05.03.2010 by cash

Total: Rs.4,00,00,000/-

2. It is further averred in the plaint that as can be seen from the subject Sale Agreement on the date of execution of the same i.e. 16.02.2007 having received part consideration of Rs.350,00,000/- the defendant No.2 through his Tenant, handed over/ delivered possession of the suit property along with originals of all the title documents to the plaintiff i.e. Form-A- Sub lease

dated 15.03.1977, Form B Lease dated 08.03.1979, Conveyance Deed dated 31.05.1979, Declaration & Confirmation of Oral Gift dated 03.02.1985, General Power of Attorney dated 27.08.1995, Sale Agreement dated 15.08.2001, Irrevocable General Power of Attorney dated 29.12.2001, approved plans, completion certificate/ plan and other relevant documents; that plaintiff continues to enjoy possession and obligations pertaining thereto; that plaintiff has been regularly paying the utility bills and necessary taxes regarding the suit property to the concerned authorities and has also deputed guards under contract with the Frontier Constabulary Foundation Security Services for the security and protection of the suit property and inhabitants; that since the transfer of possession, the suit property has also been improved by renovation and made in accordance with desires of the plaintiff for which the plaintiff has incurred million of rupees; that the plaintiff has repeatedly approached the defendant No.2 for execution of the sale deed in his favour, however, the latter had been requesting for time on one pretext or the other including that he was in USA for more than a year; that the defendant No.2 returned to Pakistan in the month of March 2010, where after the plaintiff having paid another instalment again required him to execute the requisite Sale Deed in his favour and simultaneously received balance consideration of Rs.15 lacs; however, the defendant No.2 has been avoiding the same; that plaintiff has recently made several attempted to contact the defendant No.2 who is now avoiding the plaintiff altogether; that now the plaintiff has come to know through different sources that the defendant No.2 wants to dispose of the suit property to third person on a separate and higher sale consideration in order to deprive the plaintiff of his valuable rights as well as money; that the Sale Agreement dated 16.02.2007 coupled with payment of almost entire sale consideration along with transfer of possession has created in favour of the plaintiff vested rights in and

entitlement to the suit property by way of specific performance of the subject Sale Agreement; that under law and equity the defendants are liable to perform their contractual obligations under the Sale Agreement which they are avoiding; that unless the subject Sale Agreement is specifically enforced and the suit property conveyed to the plaintiff, the acts of the defendants tantamount to deprivation of the plaintiff's property in breach of his fundamental rights; that at the same time the defendants are bound to perform all such legal formalities as well as contractual obligations for successful and complete transfer of the suit property in favour of plaintiff; that the plaintiff has duly performed his contractual obligations and is still willing and ready to perform all acts and deeds including payment of balance sale consideration of Rs.15,00,000/- and all other necessary acts for execution of sale deed including payment of stamp duty, registration charges etc. That the cause of action firstly accrued on 16.02.2007 when the Sale Agreement was executed; again when payments were made and on the same day when the possession of the suit property was delivered and from time to time when the balance consideration was paid in instalments to the defendant No.2; and on 05.03.2010 when the last payment of Rs.20,00,000/- was made to the defendant No.2 and at the time of filing the suit, when the plaintiff noticed that the defendant No.2 is not willing to perform his part of the subject Sale Agreement; that the cause of action is continuously recurrent in character till date. Hence plaintiff prayed for judgment and decree in his favour and against defendants for :-

- A. Suit for specific performance of the Sale Agreement dated 16.02.2007 against the defendants No.1 and 2 with the directions to execute proper Sale Deed in respect of the Bungalow bearing No. 37-A/I, South Circular Avenue, Phase-II, DHA Karachi admeasuring 1000 square yards (the suit property) in favour of plaintiff after receiving the balance sale consideration;

- B. That in case the said defendants fail to execute the required Sale Deed than this Hon'ble Court may please appoint Nazir of this Hon'ble Court to execute Sale Deed for the suit property in favour of plaintiff upon payment of balance sale consideration stamp duty and registration charges etc.
- C. After execution of the Sale Deed, a direction be issued to defendant No.3 namely PDOHA to transfer and mutate its record in favour of the plaintiff;
- D. Prohibitory injunction against the defendants, their successors, representatives, legal heirs, attorney, agents or any other person acting on her behalf from selling; alienating, mortgaging or creating third party interest in any manner on suit property;
- E. Prohibitory injunction restraining the Defendants, their agents, representatives, successors, servants, assigns from dispossessing or evicting the plaintiff from suit premises in any manner and without adopting the due process of law;
- F. Any other additional relief/reliefs as this Hon'ble Court may deem fit and proper in the circumstances of the case;
- G. Grant cost of the suit and proceedings.

3. Thereafter summons were issued. Vide order dated 12.01.2015 the defendants No.1 and 2 were declared ex-parte after completing all formalities, however it has been stated by learned counsel that defendant No.3 was only custodian of record and was not contesting party, hence the suit was fixed for ex-parte proof/final disposal.

4. Thereafter, on 24.02.2015, the Plaintiff filed his Affidavit-in-ex parte proof along with copies of various documents, and his examination in chief was recorded in Court on 18.01.2016, at which time his Affidavit was exhibited in evidence as Exhibit P/1, and the various documents were exhibited as Exhibits P/2 to P/33. Counsel for the defendant No.3 did not cross-examine the plaintiff though opportunity was provided, therefore cross of the Plaintiff was marked as "Nil" as well as none appeared on behalf of defendants No.1 and 2 to challenge his veracity.

5. Learned counsel contends that in view of there being no contest to the suit, the same ought to be decreed in favour of the Plaintiff. I am conscious of

the legal position, as reiterated in the case of 'C.N. Ramappa Godwa v. C.C. Chandergowda & Ors (2013 SCMR 137 *Supreme Court of India*)' that:

'As pointed out earlier, the court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a written statement has not been filed the court should be a little cautious in proceeding under Order VIII, Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of the court's satisfaction and therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the court may, in its discretion, require any such fact to be proved" used in sub-rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order VII".

6. *Prima facie*, there is no denial from the side of the private defendants that Sale Agreement dated 15.08.2001 was executed by the defendant No.2 on behalf of defendant No.1; further there is no denial that no payment was made by the plaintiff to the private defendants in pursuance of said Sale Agreement. Record further reflects that the possession of the suit property is with the plaintiff and the defendants No.1 and 2 chosen not to contest the instant suit, hence in such eventuality, *prima facie*, there is no denial to cause and claim of the plaintiff because it was/is the responsibility of the private defendants or their representatives to bring correct picture before the Court(s) of law couple with their stands/defences. The absence thereof, needless to add, shall bring legal consequences, which *legally* include *ex-parte judgment*. Besides, learned counsel for the plaintiff contends that subject

matter property is free from all encumbrances. Accordingly, this suit is decreed as ex-parte. Nazir shall ensure execution hereof.

JUDGE

Sajid