

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No.1563 of 2006

Date Order with Signature of Judge

Present: **Mr. Justice Nazar Akbar**

Plaintiff : Dr. Javed Akhtar
through Mr. Nadeem Farooqi, Advocate.

Versus

Defendant No.1 : M/S Ruff Builders & Developers

Defendant No.2 : Cantonment Board Malir.

Defendant No.3 : Mr. Abdul Wahid.
(Nemo for defendants).

Date of hearing : **31.05.2021**

Date of Decision : **05.07.2021**

JUDGMENT

NAZAR AKBAR, J. The plaintiff on **30.09.2006** has filed this suit against the Defendants for Declaration, Cancellation, Specific Performance of Contract, Possession, Injunction and Damages.

2. Brief facts of the case are that the plaintiff is a doctor in U.K, whereas defendant No.1 is a builder having several projects under the name and style of Ruff Builders & Developers. The plaintiff contracted defendant No.1 for purchase of a bungalow in the project of Dream Land Homes bearing Bungalow Site No.B-29 measuring 200 sq. yards, 'B' Tupe One Unit, Sector 39A & 39B, Scheme-33, Karachi (the suit property) for a total sale consideration at Rs.11,50,000/- which includes extra cost of Rs.25,000/- being corner site thereof and the allocation letter dated 19.11.1993 was issued by defendant No.1. The terms of contact as settled were that the total cost will be Rs.11,50,000/- and further payment of extra land measuring 50 sq. yds. will be made at the cost of Rs.200,000/-,

the plaintiff was also required to pay Rs.55,000/- for lease and Rs.70,000/- for connection charges etc., therefore, total charges comes to Rs.14,75,000/- and it was settled that the bungalow shall be completed and delivered to the plaintiff by defendant No.1 within three years till 1996 without fail. It was averred that the plaintiff completed his part of contract and made full and final payment till 23.4.1998 but defendants failed to fulfill their commitment and part performance of contract. The plaintiff paid Rs.55,000/- on 24.8.1996 for lease, Rs.5,000/- on 15.11.1997 and on the same day paid Rs.70,000/- for connection charges and on the back of connection charges, defendant No.1 claimed Rs.8,000/- as full and final payment which was also paid on 23.4.1998. It was further averred that Defendant No.1 committed breach of contract despite having full payment and in July, 2003 has demanded from the plaintiff to further pay an amount of Rs.90,000/- towards boundary all, 2 years advance maintenance and connection and meter charges which demand was prohibited and barred by Section 13 of the Building Control Ordinance, 1979. After said demand, defendant No.1 on 01.10.2003 sent a cancellation letter to the plaintiff which was apparently illegal and without lawful authority. In reply thereto the plaintiff on 02.01.2004 sent legal notice to defendant No.1 and subsequently two reminders dated 15.3.2004 and 31.5.2004 were also sent by the plaintiff to defendant No.1 but no response. In the month of July, 2004 the plaintiff personally visited the office of defendant No.1 and met with one Mr. Javaid and it was settled that all process will be done and at the time of possession the demand of Rs.90,000/- will be made and the cancellation letter was mutually settled to be treated as withdrawn. In July, 2005 the plaintiff again visited the office of defendant No.1 and met the concerned person who assured the plaintiff to hand over possession of the bungalow

within three months and the plaintiff returned to U.K to resume his job and continued to make inquiries about the progress from defendant No.1 and he gave assurances of giving possession within the stipulated time but defendant No.1 failed to do so. In December, 2005 the plaintiff came to Karachi and visited the office of defendant No.1 and demanded possession of suit property as promised by them but refused to perform their part of contract by saying that the allotment of the suit property has been cancelled. The plaintiff also sent a letter to KBCA but no action was taken against defendant No.1. Therefore, the plaintiff filed the instant suit against the defendants.

3. Notices of the instant suit were sent to the defendants and defendant No.1 filed their written statements wherein they contended that the suit is barred by limitation, therefore, is liable to be dismissed. They admitted that the plaintiff has booked a bungalow in their project and the total sale consideration was also agreed as stated by the plaintiff in the plaint, however, they stated that since the plaintiff has failed to pay Rs.110,000/- for boundary wall of the suit property and two years advance maintenance charges and KESC three phase meter despite several notices and reminders by defendant No.1, therefore, the allotment of the suit property was cancelled and it was intimated to the plaintiff by letter dated 01.10.2003 and after cancellation of allotment of the suit property, defendant No.1 on 15.11.2003 allotted the same to defendant No.3 and after full and final payment by defendant No.3, the physical possession of the suit property was also handed over to him on 27.12.2003. They denied that the plaintiff has completed his part of contract and full and final payment was made till 23.4.1998. Defendant No.1 denied all adverse allegations leveled against him in the plaint and contended that since the plaintiff has failed to perform

his part of contract, therefore, the allotment of suit property was cancelled and same has already been given to defendant No.3 being bonafide purchaser.

4. Defendant No.3 also filed his written statement wherein he stated that he is not in knowledge of any allotment, payment or dispute with defendant No.1 and the plaintiff in respect of the suit property. He further contended that he has purchased the suit property without having knowledge of any agreement or booking or any transaction between the plaintiff and defendant No.1 and after issuing allocation letter dated 15.11.2003 and after full and final payment to defendant No.1, defendant No.3 was put into vacant possession of the suit property being lawful and bonafide purchaser of the suit property and the plaintiff has no right or claim on the suit property in any manner whatsoever.

5. On **06.01.2012** the proposed issues filed by the plaintiff were adopted as Court issues which are as follows:-

1. Whether the suit is maintainable?
2. Whether the plaintiff purchased from defendant No.1, the Bungalow Site No.B-29, measuring 200 sq.yds. as 'B' Type One Unit in "Rufi Dreamland Homes" Project situated in Section 39/A & 39/B, Scheme 33, Karachi and Extra Land of 50 sq.yds. in addition thereto & paid full price thereof as agreed in full & final settlement?
3. Whether defendant No.1, despite receiving full amount, Lease & Connection Charges, has failed to deliver possession to the plaintiff & committed breach of contract?
4. Whether the defendant No.1 was bound to deliver the possession of subject bungalow duly constructed, completed & equipped within stipulated time?
5. Whether Notices of defendant were properly served on plaintiff as alleged, except cancellation letter dated 01.10.2003?
6. Whether cancellation letter being illegal & contrary to the rules & regulations of defendant itself, is liable to be withdrawn/ canceled?

7. Whether plaintiff is entitled to damages & compensation in case of specific performance decreed, as stated in para-15 of plaint?
8. Whether claim of excess payment by defendant is illegal and allotted bungalow on that basis could not be cancelled?
9. Whether plaintiff is entitled for restoration of allotment/ possession of bungalow?
10. Whether defendant No.3 is a setup person & drama of sale was staged without actual sale & without possession in order to escape legal liability of delivery of possession to the plaintiff?
11. Whether the plaintiff is entitled for the relief claimed?
12. What should the decree be?

6. On **10.11.2014** application for appointment of commissioner for recording evidence filed by the plaintiff was allowed and the commissioner was appointed to record the evidence and in the said order the commissioner was empowered to either impose cost of Rs.10,000/- or close the side of the witnesses who failed to respond on two consecutive dates. The plaintiff has filed affidavit-in-evidence of his attorney namely Nadeem A. Farooqi and two witnesses namely Muhammad Yameen and Muhammad Bashir Qadri and their examination-in-chief were recorded, however, the record shows that the defendants have never appeared before the commissioner for recording evidence, therefore, their side to cross-examine the plaintiff and his witnesses was closed and neither the defendants filed their affidavit-in-evidence before the commissioner nor led any evidence in their favour and the commission was returned on 14.12.2015. Even learned counsel for defendant No.3 on 31.05.2021 filed application for discharge of his power on the ground that his client has taken away the file from his office around six years back, therefore, his application for withdrawal of Vakalatnama was allowed.

7. I have heard learned counsel for the plaintiff and perused the record. My findings with reasons on the issues are as follows:-

8. All the issues are interconnected and, therefore, jointly decided. The plaintiff in support of his case filed affidavit-in-evidence before the Commissioner for recording of evidence. All the payment receipts towards the cost/price of the suit property paid to the defendant were produced and exhibited as Ex:P/5 to P/36. The record shows that the defendant has even admitted most the averments of the plaintiff in their written statement including the cancellation of allotment of suit property and as such the documents were admitted. The defendants have not cross-examined the plaintiff nor they have even appeared in the witness box in support of stance taken by them in their respective written statements and therefore, the entire evidence of the plaintiff has gone un-rebutted. There is no cavil to the proposition that mere written statement filed by the defendant has no meanings since it cannot be treated as evidence at all. Even defendant No.3 who claimed to have purchased the suit property within three months from the date of alleged notice of cancellation of allotment of the suit property to the plaintiff has not cross-examined the plaintiff nor he himself has come in the witness box to establish that he was really a bonafide purchaser of the suit property without notice. This conduct of defendant No.3 is also in favour of the plaintiff who has asserted in plaint and also on oath in evidence that defendant No.3 is a set up person only to threaten the plaintiff. He is at the most front man of the builder. Learned counsel for the plaintiff in support of his contention that since the evidence of the plaintiff has gone unchallenged, it shall be deemed to have been admitted by the defendants has relied on the cases of Mst. Nur Jehan Begum through Legal Representatives vs. Syed Mujtaba Ali Naqvi (**1991 SCMR 2300**) and Hafiz Tassaduq Hussain vs. Lal Khatoon and

others (**PLD 2011 SC 296**). Relevant observations from both the judgments are reproduced below:-

1991 SCMR 2300

The principle enunciated in the commentaries and rulings is that where on a material part of his evidence a witness is not cross-examined it may be inferred that the truth of such statement has been accepted. Statement of a witness which is material to the controversy of the case particularly when it states his case and the same is not challenged by the other side directly or indirectly, then such unchallenged statement should be given full credit and usually accepted as true unless displaced by reliable, cogent and clear evidence.

PLD 2011 SC 296

10.
 **This all brings the case within the realm of the principle that if a material fact has been deposed in the examination-in-chief and it is not subjected to the cross-examination, it shall be deemed to have been admitted.** The elements of overt indicators are also conspicuously missing in the case; there is no incorporation of the appellant's agreement in the Revenue Record. Besides, the most vital and striking aspect of the case is, that the plaintiff in rebuttal to the relevant issue after the evidence was led by the respondents who had discharged their initial onus has led no evidence (emphasis supplied) at all to prove that the respondents lacked in the payment, their transfer is mala fide and is meant to effect their (plaintiffs). equitable interest under the agreement. And above all that they (subsequent vendees) had the notice of their sale agreement. This omission is a very fatal lapse on their part. Thus, the views set out by the appellate Court and the High Court that the rights of the respondents are protected under section 27(b) of the Act (ibid) are unexceptionable. This appeal, therefore, has no merits and is hereby dismissed.

9. In view of the above all the issues which are interconnected are answered in affirmative and the instant suit is decreed as prayed.

JUDGE

Karachi,
Dated: 05.07.2021