

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No.417 of 2007

<u>Date</u>	<u>Order with Signature of Judge</u>
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Present: **Mr. Justice Nazar Akbar**

Plaintiff : Syed Nusrat Ali Rizvi. (Nemo).

Versus

Defendant : Muhammad Anwar Paracha. (Nemo).

Date of hearing : **26.04.2021**

Date of Decision : **08.07.2021**

JUDGMENT

NAZAR AKBAR, J. The plaintiff has filed this suit on **12.03.2007** against the defendant for Specific Performance of Contract, Permanent Injunction and Damages.

2. Brief facts of the case are that the plaintiff entered into an agreement of sale dated **30.09.1993** with the defendant in respect of property bearing Plot No.A-286, measuring 240 sq. yds. Block No3, Scheme No.24, Gulshan-e-Iqbal, Karachi (the suit property) for a total sale consideration of Rs.850,000/-, and the possession of the suit property has allegedly been handed over to the plaintiff. The plaintiff time and again contacted the defendant to perform his part of obligation and execute a conveyance deed in favour of the plaintiff but the defendant avoided and on **23.12.2006** he has clearly refused to complete the contract and demanded more money from the plaintiff. Therefore, the plaintiff filed the instant suit for Specific Performance of Contract, Permanent Injunction and Damages against the defendant.

3. Notices of the instant suit were sent to the defendant through all modes including publication, however, the defendant has failed to appear and contest the matter, therefore, by order dated **10.05.2010** *exparte* proceedings started against him.

4. On **04.09.2012** the plaintiff filed affidavit-in-*exparte* proof and his examination-in-chief was recorded in Court. He produced certain documents in support of his claim as Ex:P.W-1/3/1 to P.W-1/3/20. The plaintiff examined only himself and closed his side for evidence. Since the matter was *exparte* it was fixed for final disposal.

5. The record shows that last appearance of learned counsel for the plaintiff in this case was on **27.10.2017**. Then on **11.4.2018** none was present for the plaintiff. Then on **29.10.2018** learned counsel for the plaintiff was not present and someone held brief on his behalf and the matter was adjourned as last chance. Then since last three years the matter was fixed time to time but it was discharged. On **26.04.2021** this case was listed before this bench when none was present and since this suit was listed for final disposal, the same was reserved for orders.

6. I have gone through the entire file and perused the record available.

7. The suit on the face of it is hopelessly time barred. The agreement of sale dated **30.09.1993 (Ex.PW-1/3/1)** between the parties clearly stipulates in clause-2 that Rs.765,000/- should be paid by the plaintiff within **15 days** from the date of signing of the agreement. Admittedly the payment was not made within 15 days. There are only two receipts of payment. First one is joint receipt of payment of Rs.10,000/- cash and Rs.75,000/- through pay-order

[**Ex.PW-1/3-1(b)**] dated **30.09.1993** and the other undated receipt is for Rs.75000/- showing remaining balance of Rs.6,90,000/- [**Ex.PW-1/3-1(a)**]. However, there is another one page document signed by the defendant which has no title and it is a kind of one sided extension of further 15 days' time to the plaintiff for payment of balance sale consideration by the defendant at his own. It has been produced as **Ex:PW-1/3/2**. It is neither witnessed by any one nor it bears signature of the plaintiff himself. In para-1 of this document 15 days' time given in the agreement of sale dated **30.09.1993** was extended to **30.10.1993** and para-2 says that the remaining balance Rs.6,90,000/- will be payable on registration of sale deed. Then again second amendment said to have been signed by the defendant which is produced as **Ex:PW-1/3/3** and in this exhibit also the time has been extended again by the defendant at his own up to **30.11.1993**. This document is again not signed by the plaintiff and it bears only signature of the defendant and one estate agent whose even NIC number is not mentioned nor his address is mentioned. It appears that even these two concessions given by the defendant were not availed by the plaintiff and he did not make any payment until **30.11.1993**. None of these documents and the so-called receipts of payment made in 1993 (Ex:PW-1/3/1(a) and (b) to 3/4) is a proof of any transaction between the parties as required under **Articles 17** and **79** of the Qanoon-e-Shahadat Order, 1984. Both the Articles are reproduced below:-

17. **Competence and number of witnesses.** (1) the competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Quran and Sunnah.
2. Unless otherwise provided in any law relating to the enforcement of *Hudood* or any other special law,

- (a) In matter pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly;
- (b) in all other matter, the Court may accept, or act on, the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant.

79. ***Proof of execution of document required by law to be attested.*** If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive and subject to the process of the Court and capable of giving evidence.

In the light of the above provisions of law **Ex:PW-1/3/1**, the first agreement of sale was supposed to be proved by producing marginal witnesses but none of the two marginal witnesses was produced by the plaintiff without giving any explanation that why and under what circumstances he was unable to produce witnesses of the agreement. The other thing to be noted from **Ex:PW-1/3/1** is that signatures of plaintiff are not available on page-1 and 2 of the said agreement. There are only two receipts of payment of so-called sale agreement said to have been executed in 1993 but none of the two receipts **Ex:PW-1/3/1(a)** and **PW/1/3/1(b)** are attested by two witnesses as required under **Article 17** of the Qanoon-e-Shahadat Order, 1984. Likewise **Ex:PW-1/3/2**, whereby the defendant has shown to have handed over physical possession of the suit property and received only **Rs.75,000/-** from the plaintiff and extended time to another 15 days till **30.10.1993**. This exhibit PW-1/3/2 is also not witnessed by anyone. Even it does not bear signatures of the plaintiff himself. Neither there is acknowledgement of handing over taking over of the possession of the suit property by the plaintiff nor it is a proper receipt of Rs.75,000/- said to have been received by the defendant.

Likewise second amendment (**Ex:PW-1/3/3**) in which again the time has been extended by the defendant at his own up to **30.11.1993**, too, is not proof of anything since it is also not attested by two witnesses to prove its contents in terms of the requirement of **Article-79** of Qanoon-e-Shahadat Order, 1984.

8. All the documents relied upon by the plaintiff repeatedly refer to the time for the plaintiff to perform his most important part of contract, that is, to pay the sale consideration in time. Irrespective of admissibility of these documents or otherwise evidentiary value, through these documents until execution of second amendment (**Ex:PW-1/3/3**) dated **10.11.1993**, the plaintiff, as per contents of plaint, has only paid Rs.160,000/- through two receipts **Ex:PW-1/3/1(a)** and **P-1/3/1(b)** and balance sale consideration was payable by **30.11.1993**. The perusal of the documents filed by the plaintiff clearly suggests that the time has been essence of the contract and the plaintiff was required to make balance sales consideration of Rs.690,000/- on or before at the most **30.11.1993** and the suit has been filed on **12.3.2007**. The plaintiff despite his repeated failure to meet the deadline for payment of sale consideration has averred in the plaint that time was not essence of contract. Therefore, the plaintiff on **14.08.2005** after 12 years forged an undertaking on stamp paper of Rs.20/- on behalf of the defendant and produced it as **Ex:PW-1/3/4**. The plaintiff claimed that the defendant through this undertaking has received full and final sale consideration in respect of the suit property without mentioning the exact amount and agreed to execute conveyance deed within 90 days. This **Ex:PW-1/3/4**, too, has no evidentiary value. The so-called undertaking otherwise is not a proof of balance sales consideration as required to be proved in terms of **Article 17** and **79** of the Qanoon-e-Shahadat Order, 1984

nor it can be considered as a document reviving the relationship between the parties after 12 years to be broken again. The limitation for filing the suit on the basis of agreement of sale dated 30.09.1993 has at the most expired in three years from 30.11.1993, date of payment of sales consideration categorically mentioned in the documents filed by the plaintiff himself.

9. Besides the above legal and factual position, it is also important to note that the plaintiff except the so-called agreement of sale has not taken any steps to confirm and verify the status of the seller/defendant and possibility of any encumbrance or claim of anybody on the suit property. In this regard the following steps which should have been taken by the plaintiff in 1993 at the time of entering into agreement of sale Ex:PW-1/3/1 have not been taken till date.

- i. The plaintiff has not even obtained a photocopy of the title documents from the defendant.
- ii. The plaintiff has not even issued public notice after entering into the agreement with the defendant inviting objection from the public at large.
- iii. The plaintiff has also failed to prove the date and time of refusal of the defendant to perform his part of contract.
- iv. The plaintiff is silent as to the fact that on what date and time the plaintiff has approached the defendant to execute part of the contract.
- v. The plaintiff has not even sent a legal notice to the defendant at any point of time to prove refusal of defendant to perform his part of contract after having realized the sale consideration as claimed by the plaintiff.

The failure of the plaintiff to take these steps before filing of the suit for specific performance also adversely affected the claim of the plaintiff.

10. In the peculiar facts and circumstances of this case, it is duty of the Court to ensure that unscrupulous person like the plaintiff should not be allowed to remain in possession of the suit property which he has taken over by unfair means and/or in a manner contrary to law taking advantage of either his own knowledge that the defendant/owner has expired or otherwise his whereabouts cannot be traced. Therefore, he has attempted to use the process of Court to give some legal cover to his otherwise unlawful possession of the suit property. This suit was filed in 2007 and during the last 14 years no-one has come forward to claim it even as a legal heir of the owner. This fact confirms that the whereabouts of actual owners of the said property are not traceable. The Court cannot be oblivion of the present state of affairs in our country which at times compels owners of immovable properties to temporarily settle outside Pakistan without making proper arrangement for protection of their properties back in Pakistan and they either fell terminally ill while in a kind of self-exile and later on died and their legal heirs keeping in view the law and order situation and corruption do not dare to come forward to lay their hand to such properties. I am of the considered opinion that in a situation like this, it is the duty of the Court to invoke the provisions of **Article 24** of the Constitution of Islamic Republic of Pakistan, 1973 to remove the illegal occupant and handover it to the state to protect the immovable property. It is indeed the duty of the State to protect all such properties of its citizens in terms of **Article 24** of the Constitution of Islamic Republic of Pakistan, 1973 and takeover possession of such property under Article 24 clause 3(b)

and (d) of the Constitution of 1973 for a **limited period to protect it for the benefit of its owner**. Article 24(3)(b) and (d) are reproduced herein below:--

- 24. Protection of property rights.** (1)
- (2)
- (3) Nothing in this Article shall affect the validity of __
- (a)
- (b) any law permitting the taking over of any property which has been acquired by, or come into the possession of, any person by any unfair means, or in any manner, contrary to law; or
- (c)
- (d) any law providing for the taking over of the management of any property by the State for a limited period, either in the public interest or in order to secure the proper management of the property, or for the benefit of its owner, or

However, the order of taking over of property by state can be passed by the Court only when the Court is satisfied that none is known to the Court for having any right or entitlement in the said property. In a situation like the one in hand the court is first required to find out the actual owner and/or his/her legal heirs before holding that the suit property is escheatable and liable to be declared as an ownerless property in terms of Article 172 of the Constitution of Islamic Republic of Pakistan, 1973. It is reproduced below:-

- 172. Ownerless property.** (1) Any property which has no rightful owner shall, if located in a Province, vest in the Government of that Province, and in every other case, in the Federal Government.

In addition to Article 24 of the Constitution, Succession Act, 1925 also empowers Courts to interfere for “**protection of property**” even prior to grant of any probate or letter of administration. **Section 269** read with **Section 300** of the Succession Act, 1925 are the other

enabling provisions of law to protect the suit property pending the rightful owner or claimants of the property comes forward to the Court. These two enabling sections are reproduced below:-

269. When and how District Judge to interfere for protection of property.---(1) Until probate is granted of jurisdiction any part of the property of the deceased person is situate, is authorized and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, **and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose**, if he thinks fit, to **appoint an officer to take and keep possession of the property**. (Emphasis provided)

300. Concurrent jurisdiction of High Court.---(1) The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

11. In the case in hand though it is indeed not a case requiring interference for protection of the property of a deceased person since we do not know whether the owner is alive or not, but one thing is clear that there is "**risk of loss or damage**" to the suit property and the phrase "**and in all other cases**" enlarges the scope of the authority of Court to cover cases of every property at the risk of incurring loss or damage. Therefore, keeping in view the facts of the case in hand that the plaintiff has unlawfully occupied suit property of a citizen whose whereabouts are not immediately traceable and the property is indeed at risk of loss or damage, therefore, to protect the suit property as an immediate measure it has to be taken over by the court prior to handing it over to the State under **Article 172** of the Constitution of Islamic Republic of Pakistan, 1973. The Nazir of this Court is directed to visit the suit property within **24 hours** and take photographs from inside the suit premises to preserve' the status of its fitting and fixtures. The Nazir should takeover possession of the suit property from the plaintiff within **15 days** and should ensure

that all the dues of electricity and sui-gas bills/charges are cleared by the occupant. In case of any resistance or if the suit property is found locked the Nazir is authorized to remove locks and prepare an inventory of all the items lying therein and place his locks and seal on each door of the suit property. The area police should also be informed in advance so that if police aid is needed, it should be available readily and no fresh order to break open the locks or police force to evict the plaintiff from the suit property is required.

12. However, Nazir is not supposed to retain the possession of the suit property of a missing owner for an indefinite period. Therefore, Nazir is further directed to approach NADRA authorities in locating the actual owner namely Muhammad Anwar Paracha son of Haji Saeed Ahmed Paracha whose NIC No.502-51-124378 is mentioned in evidence file (**Exh.PW-1/3/1**) and also try to locate his legal heirs through the B-form of NADRA, if any, was issued to the said Muhammad Anwar Paracha.

13. Nazir should complete the exercise within **six months** and he should also put up a board in front of the suit property stating that property is in possession of the High Court and if anybody knows whereabouts of the owner or claimant may approach the Nazir of this Court. In case nobody turns up to claim title to the suit property within **six months** the suit property shall be deemed to have been escheated to the State in terms of **Article 172** of the Constitution of Pakistan, 1973 and Nazir should handover possession of the suit property to the Deputy Commissioner (East) Karachi in whose jurisdiction the suit property is situated under a proper documentation.

14. In view of the above facts, law and discussion the suit is dismissed with cost of Rs.100,000/- to be borne by the plaintiff who is in illegal possession of the suit property. The cost is to be paid by the plaintiff within 7 days and in case the cost is not paid the Nazir while taking over possession may attach moveable properties of the plaintiff to the extent of Rs.100,000/- and sale the same towards recovery of cost. Once the cost is recovered, Rs.25000 shall be appropriated toward Nazir's fee for the exercise of recovery of possession of suit property and out of remaining cost Rs.25000/- each may be given to the High Court Clinic, High Court Employees' Benevolent Funds and Library of Sindh High Court Bar Association.

15. The Nazir is directed to submit compliance report on completion of 15 days from today for perusal in Chamber by the Court.

JUDGE

Karachi, Dated: 08.07.2021

Ayaz Gul