

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No.1417 of 2017

Date	Order with Signature of Judge
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Present: ***Mr. Justice Nazar Akbar***

Plaintiff : Zahid Ali Khan, through
Mr. Mustafa Lakhani, Advocate

Versus

Defendant No.1 : Mrs. Fauzia Aqeel Lari. (Nemo).
Defendant No.2 : Works Cooperative Housing Society. (Nemo).

Date of hearing : **21.04.2021**

Date of Decision : **08.07.2021**

JUDGMENT

NAZAR AKBAR, J. The Plaintiff has filed this suit on **23.05.2017** against the Defendants for Specific Performance of Contract of sale of immovable property dated **29.05.1995**.

2. Brief facts of the case are that the Plaintiff has entered into an agreement of sale dated **29.5.1995**, with Defendant No.1 in respect of a residential plot No.A-129, Block No.4, measuring 240 sq. yards situated in Works Cooperative Housing Society, KDA Scheme No.36, Gulistan-e-Jauhar, Karachi (the suit property) for a lump sum sale consideration of **Rs.150,000/-**. Defendant No.1 was owner of the suit property as allottee in the Cooperative Society (defendant No.2). It is averred that the Plaintiff has paid entire sale consideration amounting to Rs.150,000/- to Defendant No.1 on the date of signing of agreement of sale i.e 29.05.1995 Defendant No.1 acknowledged receipt of the said amount and handed over original documents relating to the suit property to the Plaintiff. It was further averred that Defendant No.1 also executed a General Power of Attorney dated

29.05.1995 authorizing one Mr. Moin Ahmed as her general attorney to sell / mortgage the suit property. The said attorney had died on **02.09.2012** and the suit property could not be transferred in the name of the Plaintiff. It was further averred that the Plaintiff on **17.07.1989** paid a sum of Rs.9,600/- and on **02.11.1999** paid a sum of Rs.44,880/- to Defendant No.2 towards part payment of occupancy value of the suit property. The Plaintiff on **29.11.2001** also paid a sum of Rs.17,040/- to Defendant No.2, the society towards water connection charges. It was further averred that the Plaintiff several time requested Defendant No.1 to transfer the suit property in his name by executing transfer documents before Defendant No.2 but Defendant No.1 failed to perform her part of contract. Therefore, the Plaintiff on **06.5.2017** sent first legal notice to Defendant No.1 and subsequently filed the instant suit for specific performance of contract against Defendant No.1.

3. Notices of the instant suit were sent to Defendant No.1 through all modes i.e through bailiff, pasting and lastly through publication, however, Defendant No.1 has failed to appear and contest the matter, therefore, by order dated 15.10.2018 the case against Defendant No.1 was ordered to be proceeded exparte.

4. Defendant No.2 was served and they filed written statement wherein they admitted that Defendant No.1 was the allottee of the suit property. However, they contended that the water connection as well as part payment of occupancy value charges were respectively paid on 17.07.1989 and 02.11.1999 by Defendant No.1 through Attorney to Defendant No.2.

5. On **07.05.2019** learned counsel for the Plaintiff submitted that Defendant No.2 may be deleted from the array of the Defendants and

he will not press his claim against Defendant No.2, therefore, name of Defendant No.2 was deleted from the array of Defendants by order dated **07.05.2019**.

6. Then on **26.04.2019** 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-1/1 to P.W-1/7 and Articles "A", "B", "B-1" to "B-3" and since the matter was proceeded exparte against sole Defendant No.1, therefore, cross-examination of Plaintiff was marked as NIL. Learned counsel for the Plaintiff closed his side for evidence and the matter was fixed for final arguments.

7. I have heard learned counsel for the Plaintiff and perused the record.

8. Learned counsel for the Plaintiff argued that since the matter was proceeded exparte against the sole Defendant No.1 and she has failed to rebut/deny the claim of the Plaintiff, nor she even led any evidence in rebuttal, therefore, the instant suit is liable to be decreed as prayed. Learned counsel for the Plaintiff has relied upon the case of Syed Hakeem Shah (deceased) through LRs and others vs. Muhammad Idrees and others (**2017 SCMR 316**).

9. The perusal of evidence reveals that suit appears to be hopelessly time barred. The suit is for specific performance of a contract said to have been entered into by the parties on **29.5.1995 (Ex:P.W-1/1)** and on same day even entire sale consideration said to have been paid through a receipt (**Ex:P.W-1/2**). The suit has been filed on **23.05.2017** after 22 years of the date of agreement by showing its market value as **Rs.2 Crore**. The learned counsel for the

plaintiff has not commented on the lapse of **22** years of delay in filing of the suit. Even in paragraph-16 of the plaint regarding cause of action it is stated that cause of action arose on **29.05.1995** and after **1995** it arose on **06.05.2017** when the plaintiff's counsel called upon the defendant No.1 to come forward to effect transfer of the suit plot in the name of the plaintiff. There is no explanation that why counsel was engaged after **22** years to send first ever legal notice to defendant No.1 and not to his attorney in his lifetime who knows after 22 years the lady was alive and living at the same address? Be that as it may, it means even the legal notice was beyond the limitation for seeking specific performance of the contract dated **29.05.1995** through the Court.

10. According to the Ex:P.W-1/1 & P.W-1/3 a power of attorney has been executed by defendant No.1 in favour of one Moinuddin with intimation to the Secretary, Works Cooperative Housing Society Ltd., (defendant No.2) through a letter. It was very much in the knowledge of the plaintiff that he was required to approach the attorney of defendant No.1 for performance of any part of contract by defendant No.1 but the plaintiff has never approached the attorney despite the fact that he has original power of attorney with him and produced it in evidence as Ex:P.W-1/3. The plaintiff himself has stated in para-6 of the plaint that the attorney has died on **02.09.2012**. The plaintiff from 1995 to 2012 has never approached the defendant No.1 or his attorney. After 22 years by sending a legal notice, the plaintiff cannot claim that until 2017 he had no notice of refusal by the defendant No.1 who has already at the option of plaintiff executed a power of attorney to a man of his choice. If the attorney has refused to perform any act required to be done by defendant No.1, he must have refused, if at all, during his lifetime.

Therefore, even from **2012** to **2017**, the time period is more than **05** years when the legal notice has been sent to the defendant. The legal notice was beyond **03** years from the death of the attorney as the suit has been filed on **23.05.2017**. It is by all means time barred.

11. Besides the issue of limitation in the way of the plaintiff, even on merit the plaintiff has no case. He has also failed to discharge burden of proof as required under **Article 117** of the Qanoon-e-Shahadat Order, 1984, to support the existence of facts alleged by him in the plaint. Without any explanation the plaintiff has failed to produce any of the witnesses of the agreement of sale in support of his claim of specific performance of the agreement of sale. The plaintiff has failed to prove very existence of sale agreement as required under **Article 79** of the Qanoon-e-Shahadat Order, 1984 reproduced below:-

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.

It is settled law that every transaction of money has to be established through a proper receipt showing due acknowledgement in presence of witnesses as required under **Article 17** of the Qanoon-e-Shahadat Order, 1984. It is 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.

The perusal of Ex.PW-1/2, the receipt of sale consideration reveals that it was not attested by two persons, therefore, even this payment of sale consideration amounting to **Rs.1,50,000/-** in respect of the property is not proved.

12. Yet another aspect of the case is that according to the agreement of sale dated **29.5.1995**, defendant No.1 was holding **NIC No.502-45-537075**. In old NIC number two digits in the middle have always referred to the year of birth of the NIC holder. It means defendant No.1 was born in 1945 and at the time of filing of the instant suit in the year 2017, if at all, she was alive, she was supposed to be **72** years of age. The plaintiff for **22** years has not contacted defendant and no efforts seems to have been made by him to ensure whether the defendant No.1 was still alive or not. He should have attempted to locate **72** years old lady or her legal heirs at the time of filing of the suit. Therefore, even if for the sake of arguments we ignore the limitation at least there should have been some genuine efforts by the plaintiff to seek specific performance from defendant No.1 before filing of the time barred suit. The plaintiff not only failed to approach defendant No.1 for specific performance of sale agreement, but he also failed to produce marginal witnesses of the agreement.

13. Learned counsel for the plaintiff's reliance on the case law reported as *Syed Hakeem (Deceased) through LRs and others ..Vs.. Muhammad Idrees and others (2017 SCMR 316)* has no relevance to the facts of the case in hand. Admittedly, the owner of the suit plot himself was not in possession and therefore, question of plaintiff to be in possession of the suit plot on the basis of the agreement of sale dated **29.5.1995** does not arise.

14. In view of the above fact, law and discussion the **suit is dismissed** and defendant No.2 -- Works Cooperative Housing Society--is directed not to entertain the plaintiff or his nominee/attorney/representative in respect of Plot No.A-129, Block No.4, measuring 240 sq. yards situated in Works Cooperative Housing Society, KDA Scheme No.36, Gulistan-e-Jauhar, Karachi. Copy of this judgment may be sent to the Society for its record and dealing with the suit plot in accordance with law.

JUDGE

Karachi,
Dated: 08.07.2021

SM