

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI

**Suit No.1279 of 2017**

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

Plaintiff : Muhammad Nazir Awan, through  
Mr. Arshad Iqbal Rana, Advocate.

**Versus**

Defendant No.1 : Imtiaz Fatima Rizvi. (Nemo).  
Defendant No.2 : Syed Muhammad Mehdi Rizvi. (Nemo).

Date of hearing : **20.04.2021**

Date of Decision : **12.07.2021**

**JUDGMENT**

**NAZAR AKBAR, J.** The plaintiff on **16.05.2017** has filed this suit against the defendants for Declaration, Specific Performance of Agreement of sale and Permanent Injunction.

2. Brief facts of the case are that the plaintiff on **30.09.2015** handed over a cheque of 10% amounting to Rs.31,00,000/- as token payment to defendant No.2 in respect of purchase of double storey house No.5/1, "D" Street, Phase-V, DHA, Karachi measuring 569.50 sq. yards (the suit property) on **as is where is basis**. On **18.11.2015** after receipt of another amount of Rs.2,48,00,000/-, the defendants entered into an agreement to sell with the plaintiff in respect of the suit property for a total sale consideration of Rs.3,10,00,000/- and defendants accordingly acknowledged in the said agreement that upto the signing of the sale agreement, they have received Rs.2,79,00,000/- 90% of the total sale consideration and also made a separate receipt thereof. The balance amount of Rs.31,00,000/- was agreed to be paid to defendants at the time of transfer of the suit property in the name of plaintiff. It is averred that the plaintiff on

verbal requests of defendants, also paid and cleared the utility bills and charges, which amount was otherwise liability of the defendants prior to handing over possession of the suit property. It was further averred that thereafter on request of defendants, the plaintiff also paid a sum of Rs.11,00,000/- for obtaining completion plan of the suit property from the office of Clifton Cantonment Board. In January, 2017 the office of Clifton Cantonment Board approved and handed over the original completion plan of the suit property to the plaintiff and the only formality left for transfer of the suit property was to execute sale deed in favour of the plaintiff as per agreement to sell dated **18.11.2015**. It is also averred that the plaintiff made several phone calls, messages, Whatsapp etc asking them to come and transfer the suit property, as he is ready to pay the balance sale consideration but the defendants have not paid any heed rather they have indicated that their family is not willing to transfer property in the name of the plaintiff. Therefore, the plaintiff first sent legal notice to the defendants through his counsel and subsequently filed the instant suit for Declaration, Specific Performance of Agreement and Permanent Injunction.

3. Notices of the instant suit were sent to the defendants through courier service and the same were declared served upon them, however, on their none-appearance no efforts were made to serve them through publication. However, by order dated 17.09.2018 the matter was ordered to be proceeded ex parte against them. Then on **16.01.2019** the plaintiff was directed to deposit balance sale consideration amount of Rs.31,00,000/- and the plaintiff had deposited the said amount with the Nazir, therefore, the ad-interim order earlier granted was confirmed. Evidence of plaintiff has been recorded and he produced original sale agreement as Ex:P/2; original

receipt of token payment of Rs.31,00,000/- as Ex:P/3; **photocopy** of general power of attorney executed by defendant No.1 in favour of defendant No.2 as Article-1; **photocopy** of cross cheque dated **18.11.2015** for Rs.2,48,00,000/- as Article-2; **photocopy** of payment receipt dated 13.01.2016 issued by DHA as Article-3; **photocopy** of certificate for regularization completion plan of building violations issued by Clifton Cantonment Board, DHA, Karachi dated 13.01.2017 as Article-4; photocopy of cross-cheque of balance sale consideration in favour of Nazir of this Court and statement filed by the plaintiff as Ex:P/4 and P/4-A. Since the defendants were not appearing before the Court, therefore, cross-examination was marked as NIL.

4. I have heard learned counsel for the plaintiff and perused the record.

5. Learned counsel for the plaintiff has contended that the evidence of the plaintiff has gone un-rebutted and, therefore, the suit may be decreed. However, to few queries from the Court regarding admissibility of the document produced in evidence and the proof of payment of sales consideration, such as that how a simple cheque issued by the plaintiff in favour of someone else can be considered as payment through the said cheque towards sale consideration to the owner of the suit property unless proved to have been encashed and/or otherwise the said amount is transferred to the account of the owner/seller of immovable property. He conceded that the plaintiff has not produced evidence from his bank to show that the proceeds of cheques issued by him were transferred into the account of the owner of the suit property. It is settled principle of law that irrespective of absence of the other side according to **Article 117** of the Qanoon-e-Shahadat Order, 1984, the plaintiff has to prove existence of facts to get the judgment as to his legal rights. 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. **Ex:P/3** is first ever receipt said to have been issued by defendant No.2 on **30.09.2015** towards 10% payment of token money for purchase of the suit property. In the first place on **30.09.2015** defendant No.2 was not even authorized to receive the token payment and the perusal of the receipt shows that it was through cheque No.48221270, dated NIL and even the name of the drawee bank is not disclosed on it. None of the two witnesses of **Ex:P/3** have been produced in Court to testify that the said undated cheque of an unidentified bank was handed over by the plaintiff to defendant No.2 as token payment. A photocopy of another cheque of Rs.2,48,00,000/- dated 18.11.2015 produced in evidence as **“Article-2”** also allegedly towards payment of sale consideration is totally out of any relevance to the so-called transaction of sale of suit property. It is neither in the name of defendant No.1 nor in the name of defendant No.2. This cheque, too, is not proof of payment of sale consideration nor there is any receipt of even handing over of this cheque to any of the defendants. This cheque, too, has not been shown to have been encashed by the recipient. In any case the payment of Rs.2,48,00,000/- by no means can be considered as proof of payment towards sales consideration in favour of defendant No.1.

6. The plaintiff has also failed to establish the very existence of agreement of sale (Ex:P/2). Like his failure to produce any witness of payment receipts or otherwise any cogent evidence to show the transaction of money as sale consideration to the owner of the suit property, the plaintiff has also failed to prove execution of sale

agreement as required under **Article 79** of the Qanoon-e-Shahadat Order, 1984, which is 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.

None of the witnesses of the agreement of sale have been produced and a copy of another receipt annexed to it showing a payment of Rs.2,79,00,000/-, too, is not even attested by any one though it also relates to financial transaction. Independent to the agreement, this receipt was also required to be attested by two witnesses in terms of **Article 17** of the Qanoon-e-Shahadat Order, 1984, which 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.

Besides the above, both the clause-1 of the agreement and the receipt attached to it carries blank which needed to be filled by showing mode of payment to the Vendor, defendant No.1. To be exact it is reproduced below:-

NOW THEREFORE THIS AGREEMENT WITNESSETH AS UNDER:-

“1. That the Vendor has this day received from the Vendee a sum of Rs.2,48,00,000/- (Rupees Two Crore Forty Eight Lacs only) Vide \_\_\_\_\_

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and has already received Rs.31,00,000/- (Rupees Thirty One Lacs only) as advance money making a total sum of Rs.2,79,00,000/- (Rupees Two Crore Seventy Nine Lacs only) being the 90% advance payment towards sale consideration of the ‘Said Property’ receipt of which the Vender hereby fully admit and acknowledge separately.”

As stated above no separate receipt of payment of Rs.2,48,00,000/- was issued and in the agreement even cheque number is not mentioned. If the sale agreement was after the payment of Rs.2,48,00,000/- through cheque, as averred in para-2 of the plaint, then why cheque number, name of recipient and bank was not filled in even by handwriting in the agreement and the so-called receipt. The photocopy of the cheque produced and marked as **“Article-2”** shows that it is not in the name of the vendor. I am also surprised to note that signatures of defendant No.2 on **Ex:P/3** the first ever receipt of token payment allegedly executed by him are entirely different from his purported signatures available on agreement of sale (**Ex:P/2**). The naked eye definitely distinguishes the signatures of defendant No.1 of these two documents.

7. The plaintiff has also averred that a general power of attorney was executed by defendant No.1 in favour of defendant No.2 and a photocopy of the same has been produced and marked as **“Article-1”**. The perusal of this simple photocopy shows that it does not bear specimen signature of the attorney. It is neither properly stamped nor it authorizes defendant No.2 to execute even a formal sale agreement on behalf of defendant No.1. The photocopy of dubious general power

of attorney further damages the case of the plaintiff as regards the possession of the suit property. It clearly stipulates that *“the possession of the house will be given to the purchaser once complete payment is paid to my son”*. It means the possession of the plaintiff is also illegal as from the own showing of the plaintiff he has not paid entire sale consideration to claim possession as per even the inadmissible power of attorney. Likewise, the plaintiff has claimed to have paid a sum of Rs.11,00,000/- to DHA on oral instruction of defendant for obtaining completion plan of the suit property from the office of Clifton Cantonment. A photocopy of this document has been produced and marked as **“Article-3”** but its original has not been produced on the pretext that it was allegedly handed over by the plaintiff to defendant No.2 in **January, 2017** (Para-4 of the plaint). The requirement of DHA is that the payment should be through cross cheque or bank draft. If this amount has been paid by the plaintiff from his own funds, then at least a copy of cross pay-order or bank draft in favour of DHA should have been produced in evidence. This photocopy is not proof of any payment made by the plaintiff and even if so, it does not improve the case of the plaintiff for specific performance of the contract. It is pertinent to note that the suit has been filed in May, 2017 after sending a formal legal notice to the defendants as stated in the plaint but no such legal notice has been produced in evidence.

8. Beside the above, it may be noted that the plaintiff himself seems to be fully aware of weakness of his claim against defendant No.1. The plaintiff is probably in some undisclosed dispute with defendant No.2 and to settle his score with him, the plaintiff after taking illegal possession of the suit property knowing that the owner of the suit property (defendant No.1) is out of Pakistan, has

threatened ONLY defendant No.2 to initiate criminal proceedings against him in para-9 of the plaint in the following terms:-

“9. Hence the Plaintiff while reserving his right to initiate Criminal proceeding against defendant No.2 if and when required, files this suit for Declaration, Specific Performance of the agreement 18<sup>th</sup> November, 2015 and Permanent Injunction. To hold the defendants liable, either to compensate the plaintiff for payment of double the amount of total agreed sale consideration and or otherwise to compel them to immediately transfer said property in the name of the plaintiff with other prayers of Injunction etc. therefore the Plaintiff through his Counsel have already served a Legal Notice to defendants.

In addition to the above, since the plaintiff knew that he has not entered into any agreement of sale with the owner of the suit property, he has not taken any step to find out the status of suit property whether it is free from any charge/encumbrance or any other liability to protect his possible rights under the agreement of sale for smooth and peaceful transfer of title of the suit property to him. **(i)** He did not demand/obtain copy of the title documents from any of the defendants; **(ii)** He has never approached the Registrar of Properties on the basis of agreement of sale to obtain search certificate of the suit property to ascertain who is owner of the suit property; **(iii)** He has not issued a public notice in newspapers inviting any objections to sale of the suit property through the so-called sale agreement with the defendants.

9. The plaintiff's deliberate failure from November, 2015 till date to verify the particulars of seller and his/her title as prudent man before or immediately after payment of token money to defendant No.2 points towards the fact that no such transaction has even taken place, therefore, he is not entitled to discretionary relief of specific performance of a contract of sale of immovable property owned by a woman. However, in the peculiar facts and circumstances of this case, dismissal of suit simplicitor would not serve the ends of justice.



The record clearly suggests that the plaintiff has unlawfully and illegally occupied the suit property. His so-called sale agreement has not been proved and his alleged possession was by all means unfair and/or in a manner contrary to law. He through the instant proceedings has attempted to misuse the process of Court to give some legal cover to his otherwise unlawful possession of the suit property. This suit was filed in 2017 and irrespective of the way in which service of summons has been declared as served on a woman, during the last 04 years no-one has come forward to claim the suit property even as a legal heir of the owner. This fact confirms that the whereabouts of actual owner of the suit property, who is a woman, are not traceable and these proceedings clearly suggesting that the plaintiff has illegally and unlawfully entered in the suit property, therefore, it is in danger of mis-appropriation only because its owner is not available in Pakistan to diligently take care of it. In these circumstances, it is duty of the Court to ensure that unscrupulous person like the plaintiff on dismissal of his suit should not be allowed to remain in possession of the suit property which he has acquired 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/her whereabouts cannot be traced in Pakistan.

10. The Court cannot be oblivious 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 deals with the proposition that when and how the Court can 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 of 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 at risk of loss or damage by the

plaintiffs, therefore, to protect the suit property from further damage 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. Therefore, 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 the fitting and fixtures of the suit property. The Nazir should takeover possession of the suit property from the plaintiff within **15 days** and 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 Mrs. Imtiaz Fatima Rizvi wife of Wazir Alam Rizvi whose Overseas Pakistani NIC No.915090-115489-9 is mentioned in evidence file (**Ex:P/2**) and also try to locate her legal heirs through the B-form of NADRA, if any, was issued to the said Mrs. Imtiaz Fatima Rizvi.

13. Nazir should complete the exercise within **six months** and he should also put up a board in front of the 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 property is situated under a proper documentation.

14. In view of the above facts and the law, 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 Nazir while taking over possession of the suit property will refund the amount deposited by the plaintiff on 29.01.2019 together with returns that may have accrued on the said amount after deducting Rs.100,000/- 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:12.07.2021

Ayaz Gul