

Judgment Sheet

**IN THE HIGH COURT OF SINDH AT KARACHI**

Suit No. 1110 of 2010

Before :

Mr. Justice Nadeem Akhtar

Date of hearing : 10.01.2013.  
Plaintiff : Jehangir Anwar called absent.  
Defendant : Khalid Hussain present in person.

**J U D G M E N T**

**Nadeem Akhtar, J.** – The plaintiff filed this Suit against the defendant, praying for a declaration that he is the owner of House No.818, Khalilabad Block 'T', KDA Scheme No.2, Karachi, measuring 151.66 sq. yds., **(the suit property)**, and that the defendant has no concern whatsoever with the same ; for cancellation of the agreement of sale dated 11.11.2009 **(the Agreement)**, executed by the plaintiff in favour of the defendant in respect of the suit property ; for permanent injunction, restraining the defendant from claiming ownership of the suit property ; and, for damages of Rs.10,000,000.00.

2. It was the case of the plaintiff that, as the owner of the suit property, he executed the Agreement, whereby it was agreed that he will sell the suit property to the defendant in consideration of Rs.3,300,000.00. After agreeing to the terms and conditions of the Agreement, the defendant paid a sum of Rs.800,000.00 to the plaintiff at the time of the Agreement. The balance sale consideration of Rs.2,500,000.00 was payable by the defendant as per Clause 3 of the Agreement, by paying a sum of Rs.1,850,000.00 at the time of receiving the possession of the suit property, and Rs.650,000.00 at the time of execution and registration of the sale deed or general power of attorney in his favour in September 2010. In the plaint, it was admitted by the plaintiff that he had received from the defendant a sum of Rs.1,990,000.00 (inadvertently mentioned as Rs.1,890,000.00 in the plaint) prior to the filing of the Suit. However, it was averred that the defendant was avoiding to pay the remaining amount, and was interested only in getting the possession of the suit property. The plaintiff further averred that he informed the defendant that the Agreement stood revoked in view of the defendant's default, and that he will return the payments made by the defendant after selling the suit

property. It was alleged by the plaintiff that the defendant started demanding the possession of the suit property by extending threats to him. The Suit was filed in the above background.

3. The defendant filed his written statement, wherein he denied all the averments and allegations made by the plaintiff. It was claimed by him that, after paying Rs.1,990,000.00 to the plaintiff, he was entitled to the possession of the suit property in terms of Clause 3 of the Agreement, and as such his demand in this behalf was fully justified. It was specifically pleaded by the defendant that, after filing the Suit, the plaintiff received from him further amounts of Rs.5000,000.00 on 06.09.2010 (Rs.450,000.00 through cheque and Rs.50,000.00 in cash), and Rs.300,000.00 on 08.09.2010 through cheque ; and the plaintiff also executed on 01.09.2010 an undertaking / statement on oath, wherein it was stated that the matter had been amicably settled by the parties out of court. It was further pleaded by the defendant that the cause of action alleged by the plaintiff had ceased to exist in view of subsequent payments and the out of court settlement. A counter claim was made by the defendant in his written statement, praying for a declaration that he had not committed breach of the Agreement, and was entitled to the possession of the suit property subject to payment of Rs.160,000.00 ; for a declaration that the plaintiff will be entitled to receive the last installment of Rs.650,000.00 only after handing over the possession of the suit property to him, and consequently he will be entitled for execution of the sale deed in his favour ; and for specific performance of the Agreement. An alternate prayer was also made by the defendant against the plaintiff for the recovery of the amount paid by him along with profit thereon at the rate of 15% per annum, as well as for damages to the tune of Rs.5,000,000.00.

4. An application bearing CMA No.7046/2010 was filed by the plaintiff, praying that the defendant be restrained from claiming ownership of the suit property, and from taking over the possession thereof illegally or forcibly, till the final disposal of the suit. The defendant also filed an application bearing CMA No.11378/2010, praying that the plaintiff be restrained from creating third party interest in the suit property, and also from handing over its possession to any third party. By order dated 22.02.2011 passed on the defendant's CMA No.11378/2010, the plaintiff was restrained by this Court from creating third party interest in the suit property till the next date of hearing, and the defendant was directed to deposit the amount of Rs.650,000.00 with the Nazir of this Court, the amount payable by the defendant to the plaintiff at the time of receiving the possession of the suit

property. The said amount was deposited by the defendant with the Nazir. Vide order dated 19.05.2011, the plaintiff's CMA No.7046/2010 was allowed with the consent of the defendant, and the Nazir was directed to invest the amount deposited by the defendant in some profit bearing scheme.

5. On 23.12.2011 when this matter was fixed for hearing of applications as well as for settlement of issues, it was observed by this Court that no one had been effecting appearance on behalf of the plaintiff. Accordingly, the claim of the plaintiff in this suit was rejected / dismissed vide order dated 23.12.2011. It was further ordered on that date that since no written statement had been filed by the plaintiff in reply to the counter claim of the defendant, the suit should be fixed for final disposal on 13.01.2012. Further, the interim injunction order, passed on the defendant's CMA No.11378/2010 restraining the plaintiff from creating third party interest in the suit property, was extended till the next date of hearing. It is important to note here that the plaintiff did not challenge the order dated 23.12.2011 rejecting / dismissing his claim, and as such the said order attained finality.

6. On 17.01.2012 when the matter was fixed for final disposal, the defendant was directed by the Court to file his affidavit in *ex parte* proof, which was filed by him accordingly. In his said affidavit, the defendant reiterated his counter claim and the contents of his written statement. The defendant examined himself and produced a number of documents in support of his counter claim. He produced the original Agreement as Ex.DW-1/4 ; the original receipt dated 26.11.2009 for Rs.800,000.00 issued by the plaintiff, as Ex.DW-1/5 ; the original receipt dated 26.11.2009 for Rs.515,000.00 issued by the plaintiff, as Ex.DW-1/6 ; the original receipt dated 29.03.2010 for Rs.200,000.00 issued by the plaintiff, as Ex.DW-1/7 ; the original receipt dated 10.06.2010 for Rs.340,000.00 issued by the plaintiff, as Ex.DW-1/8 ; the original statement on oath dated 01.09.2010 executed by the plaintiff and the defendant, as Ex.DW-1/9 ; the original receipt dated 06.09.2010 for Rs.500,000.00 issued by the plaintiff, as Ex.DW-1/10 ; a copy of the cheque dated 06.09.2010 for Rs.450,000.00 issued by the defendant in favour of the plaintiff, as Ex.DW-1/11 ; the original counter foil of the said cheque, as Ex.DW-1/11(a) ; the original public notice in the daily Urdu 'Nawa-e-Waqt' dated 04.02.2011, as Ex.DW-1/12 ; the original counter foil of the pay order dated 09.03.2011 for Rs.650,000.00 in the name of the Nazir with the Nazir's receipt thereon, as Ex.DW-1/13 ; a copy of the said pay order, as Ex.DW-1/14 ; and the original public notice in the daily Urdu 'Imaan' dated 04.02.2011, as Ex.DW-1/15. As the defendant

was not cross examined by or on behalf of the plaintiff, the cross examination to the plaintiff was marked as "Nil".

7. After the defendant's evidence when this Suit came up before the Court on 20.12.2012 for final disposal, the defendant submitted that he was required to pay only a sum of Rs.160,000.00 out of the entire agreed sale consideration, and that he was ready to deposit the said amount in Court. Accordingly, he was directed on 20.12.2012 to deposit the said amount with the Nazir of this Court within two weeks. In compliance of the said order, the defendant deposited the said amount with the Nazir.

8. I have observed that under Clause 3 of the Agreement, the sale was to be concluded in September 2010, when the defendant was required to pay Rs.650,000.00 to the plaintiff as the last installment of the agreed sale consideration and the plaintiff was obliged to execute the sale deed or power of attorney in his favour. This Suit was instituted by the plaintiff without any justification on 17.06.2010, that is, much prior to the mutually agreed date for completion of the sale. It is an admitted position that before filing the Suit, the plaintiff had received Rs.1,990,000.00 from the defendant. Exhibit DW-1/9 produced by the defendant shows that the matter had been amicably resolved by the parties on 01.09.2010, when both the parties executed on oath a statement to this effect. Exhibits DW-1/10, 1/11 and 1/11(a) produced by the defendant support his contention that, after filing the Suit, substantial amounts mentioned therein were received from him by the plaintiff on 06.09.2010 in pursuance of the said settlement. The record shows that the defendant deposited the entire remaining amount with the Nazir in pursuance of the orders of this Court.

9. As observed earlier, the claim of the plaintiff in this suit was rejected / dismissed by this Court on 23.12.2011, which was not challenged by the plaintiff. The order of the rejection / dismissal of the plaintiff's claim, therefore, attained finality a long time ago. It is to be noted that after the rejection / dismissal of the plaintiff's claim, only the counter claim of the defendant remained to be adjudicated in this Suit. The plaintiff neither filed his written statement in reply to the defendant's counter claim, nor did he cross examine the defendant or confront him with any suggestion, question or document. In such circumstances, not only did the entire evidence produced by the defendant remain un-rebutted, but he also proved his case by discharging his burden successfully. Thus, the defendant has become entitled to a decree for declaration, specific performance of the Agreement and permanent injunction prayed for by him in his counter claim.

10. The above are the reasons for the short order announced by me on 10.01.2013, whereby prayers 'A', 'B', 'C' and 'E' made by the defendant in his counter claim, were allowed, and this Suit was decreed with costs in his favour in terms of the said prayers.

J U D G E

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