

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

**Suit No.197 of 2010**

**Abdul Rahseed -----Plaintiff.**

**Versus**

**M/s. Rufi Builders & Developers-----Defendant.**

**Dates of hearing: 16.03.2017 & 18.10.2017**

**Date of Judgment 25.10.2017**

**Plaintiff: Through Mr. Abdul Wajid Wyne,  
Advocate.**

**Defendant: Nemo.**

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

**Muhammad Junaid Ghaffar, J.** Through this Suit for Declaration, Specific Performance, Mesne Profit, Compensation, Damages and Permanent Injunction, the Plaintiff seeks the following relief(s):-

- i) Declaring that the plaintiff is legally and lawfully entitled for the specific performance of the contract executed between the plaintiff and the defendants in respect of the one unit bungalow No.C-8, measuring 150 Sq. yards in the Project of Defendant known as Rufi Green Land situated at Sector 13-A, Off. Abul Hassan Ispahani Road, Deh Gujro, KDA Scheme No.33, Karachi.
- ii) Direct the defendant to specifically perform his part of the contract which is executed between the plaintiff and the defendant in respect of one unit bungalow No.C-8, measuring 150 Sq. Yds in the Project of Defendant known as Rufi Green Land situated at Sector 13-A, Off, Abul Hassan Ispahani Road, Deh Gujro, KDA Scheme No.33, Karachi so that the remaining part of the contract may fully be performed and the above said bungalow C-8, in the Project of Defendant known as Rufi Green Land may be handed over to the plaintiff along with all the rights, title and interest available in the above said Suit bungalow.

- iii) A decree in favour of the plaintiff in respect of the mesne profit at the rate of Rs.20,000/- from June, 2007 till the date upon which the Suit bungalow is handed over to the plaintiff along with all the rights, title and interest available in the above said Suit bungalow.
- iv) A decree of sum of Rs.5,00,000/- in favour of the plaintiff in respect of token compensation and damages caused to the plaintiff due to the illegal malafide acts and activities of the defendants in respect of one unit bungalow No.C-8, measuring 150 Sq. yards in the Project of Defendants known as Ruffi Green Land situated at Sector 13-A, Off, Abul Hassan Ispahani Road, Deh Gujro, KDA Scheme No.33, Karachi for the mental torture, agony, defamation and damages caused to the plaintiff by the defendants.
- v) Restraining the defendants, their legal representatives, successors, nominees, attorneys, agents, employees/servants, workers, and/or anybody else who works or claims to work on their behalf, through permanent/perpetual injunction from transferring, mutating, mortgaging, making gift, alienating or creating any third party interest in any case in the above said bungalow one unit bungalow No.C-8, measuring 150 Sq. Yds in the Project of Defendant known as Ruffi Green Land situated at Sector 13-A, Off, Abul Hassan Ispahani Road, Deh Gujro, KDA Scheme No.33, Karachi and from doing any illegality and acting without the due course of law.
- vi) Award the costs of the Suit.
- vii) Grant any other or further relief(s), which this Honourable Court in the prevailing circumstances of the case deems fit and proper.

2. Precisely the stated facts are that plaintiff entered into an agreement for purchase of one unit Bungalow bearing No. C-8 measuring 150 Sq. Yds in the project of defendant known as Ruffi Green Land situated at Sector 13-A of Abul Hasan Isfahani Road Deh Gujro, KDA Scheme No.33, Karachi. It is further stated that another Bungalow bearing NO.C-9 also measuring 150 Sq. Yds was also booked in the name of Abdul Rehman Panjwani, first cousin of the plaintiff and first payment was made on 2-5-1997 where after allotment letter was issued on 15-7-1997. It is further stated that the plaintiff paid the total sale consideration of Rs.19,50,000/- in installments and thereafter on 19-11-1998 one out of the two Bungalows i.e Bungalow No. C-9 was surrendered

and the payments made for it were adjusted towards Suit property in question by the office of the defendant. Thereafter maintenance charges were claimed by the defendant on 14-6-2003 and the plaintiff paid Rs.100,000/- on account of maintenance charges. It is further stated through Letter dated 11-6-2003 it was acknowledged by the defendant that entire sale consideration has been received including charges of lease and connection charges for gas, electricity, water & sewerage and maintenance. Thereafter, according to the plaintiff the defendant was approached on several occasions after payment of entire sale consideration, but the possession was not handed over and somewhere in 2007 it came to the knowledge of the plaintiff that the said Bungalow has been rented out by the Defendant to someone else, hence instant Suit for seeking the aforesaid prayers.

3. Written Statement was filed in this matter, whereas, on 01.03.2010 an interim order was passed, whereby, the Defendant was directed not to create any charge over the property in question and the said order was confirmed on 17.05.2011 and the following Issues were also framed on the said date:-

1. Whether the Suit is not maintainable under the law?
2. Whether the Suit is barred by limitation?
3. Whether the plaintiff has not paid total sale consideration of Rs.19,50,000/- with maintenance charges of Rs.100,000/- and documentation charges for lease and connection charges for gas, electricity, Water & Sewerage including maintenance charges against the subject bungalow to the defendant?
4. Whether the plaintiff is entitled for specific performance against the defendants in respect of bungalow No.C-8, measuring 150 Sq. Yds in the Project of Defendant known as Ruffi Green Land situated at Sector 13-A, Off, Abul Hassan Isphani Road, Deh Gujro, KDA Scheme No.33, Karachi.

5. Whether the plaintiff is entitled for mesne profit at the rate of Rs.20,000/- per month with effect from June 2007 till handing over the subject bungalow to the plaintiff?
6. Whether the plaintiff is entitled for a decree in the sum of Rs.500,000/- as token compensation and damages caused to the plaintiff due to the illegal and malafide act of the defendants?
7. Whether the plaintiff is entitled for the relief claimed?
8. What should the decree be?

4. Evidence was recorded through commissioner, where the plaintiff examined himself by filing Affidavit-in-Evidence and documents and he was cross-examined on behalf of the defendant. The defendant filed Affidavit-in-Evidence of one Muhammad Hussain son of Muhammad Munir purportedly an attorney but he never turned up for his cross-examination. Thereafter his side was closed and matter was listed for final arguments. On several dates none came forward to assist the Court on behalf of the defendant and through Order dated 16-9-2014 the Vakalatanama of Mr. Ramesh Kumar, the then Counsel appearing on behalf of the defendant was discharged and subsequently of Mr. Shafaqat Tanoli and Muhammad Bisharat Advocates had filed their Vakalatnamas on 19-11-2014. Again on 3-2-2017 none was in attendance on behalf of the defendant and again intimation notice was issued to the Counsel for the defendant but no one appeared. The matter was then partly heard on 16-3-2017 and finally on 18-10-2017.

5. Learned Counsel for the plaintiff has contended that insofar as payment of Rs.19,50,000/- is concerned the same has been admitted by the defendant in its written statement and Affidavit-in-Evidence of its witness and thereafter the defendant has no case to contest. He has further contended that the plaintiff has led its evidence and he was subjected to cross-examination, whereas, his

testimony has not been shaken and therefore instant Suit may be decreed. Regarding objection of maintainability learned Counsel has referred to Article 113 of the Limitation Act and submits that instant matter would fall in the Second Part of Article 113 (ibid) as the limitation would be counted from the date of refusal by the defendant to specifically perform his part of the agreement. He has further contended that since the defendants have failed to lead their evidence, the facts so asserted by them cannot be believed, whereas, the plaintiff has proved its case and therefore plaintiff is entitled for a Judgment and Decree as prayed. In support of his contention he has relied upon the cases reported as **1986 MLD 243** (*Mst. Sarwat Jehan Begum v. Syed Usman and another*), **2001 SCMR 1700** (*Muhammad Akhtar v. Mst. Manna and 3 others*) and **2004 CLC 378** (*Saeedur Rehman and others v. Assistant Commissioner/Collector Acquisition Swabi*).

6. I have heard learned Counsel and perused the record including evidence file. My Issue wise findings are as under:-

**ISSUE NOS.1 & 2.**

7. Both these issues have been framed on the objection of the defendant, wherein, it is asserted that firstly the Suit is not maintainable; and secondly the Suit is barred by Limitation. It is the case of the defendant that since Bungalow in question has been sold out after cancellation of the plaintiff's allotment on 19.11.1998 and therefore no specific performance can be claimed, whereas, compensation and damages is an adequate relief, which the plaintiff has already claimed, therefore, specific performance of the contract cannot be enforced. Insofar as the question of limitation in this matter is concerned though a vague objection has

been raised but the defendant has failed to mention or disclose any date in its written statement from which it could be ascertained by the Court as to when specific performance was refused, though in the written statement it has been stated that allotment was cancelled in 1998, however, no document of whatsoever nature has been placed on record for perusal of this Court. Since the defendant has failed to lead any evidence, and has even not come up with any supporting material; therefore, in the given facts and circumstances of this case, the objection regarding limitation cannot be sustained. Whereas, the Suit is also held to be maintainable as neither the agreement in question has been denied nor the payments made by the plaintiff. In view of such position Issue Nos. 1 & 2 are answered in negative in favor of the plaintiff and against the defendant.

**ISSUE NO.3.**

8. Insofar as this issue is concerned in the written statement as well as affidavit-in-evidence, the defendant has categorically admitted at least an amount of Rs.19,50,000/- as against the amount of Rs. 20,50,000/- being claimed by the plaintiff. However, according to the defendant an amount of Rs.380,000/- was outstanding and therefore upon this failure the allotment was cancelled. The plaintiff has filed its affidavit-in-evidence and has exhibited all Receipts as Ex.P-5/7 to P-5/41 and in the cross-examination the defendant's Counsel has not been able to make any suggestion so as to rebut the contention of the plaintiff. Moreover, it is categorically admitted in the written statement as well as in the affidavit-in-evidence that payment was made. Insofar as non-payment of Rs. 380,000/- is concerned, the defendant has

neither led any evidence to that effect; nor any supporting material has been placed on record to justify this contention. In the circumstances, Issue No.3 is answered in negative and it is held that plaintiff has paid the entire sale consideration of Rs. 19,50,000/- plus Rs. 100,000/- against maintenance charges.

**ISSUE NO.4.**

8. Insofar as this Issue is concerned, it may be observed that though the plaintiff has claimed compensation charges as well as specific performance of the agreement, however, on perusal of the record and specially the stance taken by the defendant, it appears to be an admitted position that the plaintiff had booked the said Bungalow with the defendant and paid the entire sale consideration in installments. Though it has been asserted by the Defendant that on 18.11.1998 the allotment was cancelled as the entire sale consideration was not paid, however, the record reflects that on this very date the amount of Rs.900,000/- was adjusted from the payment made in respect of Bungalow No.C-9 and a receipt dated 19.11.1998 to that effect was issued as Ex.No.P-5/39. Now if according to the defendant the allotment was cancelled and no specific performance can be enforced then as to how subsequently the payments were received from the Plaintiff. This in fact negates and demolishes the case of the defendant and the stance taken by it. On the one hand they have opposed the specific performance of the agreement and on the other they have taken payments thereafter.

Though the above discussion leads to the conclusion that an agreement was entered into and ordinarily it ought to be ordered to be specifically enforced. But this is not true in every case. The

Court is still competent to refuse the specific performance of an agreement if the situation so warrants, as this relief being discretionary in nature, can always be refused. It is not that the Court was bound to grant such relief merely on the basis that it was lawful to do so. See ***Liaqat Ali Khan v Falak Sher* (PLD 2015 SC 506)**. Even in case where the agreement to sell was validly proved by the plaintiff, the Courts may refuse to allow the relief of specific performance as the Court was neither obliged to grant the relief of specific performance nor could the plaintiff claim it as a matter of right. See ***Farzand Ali and another v Khuda Baksh* (PLD 2015 SC 187)**. Such relief can also be refused though there may not be any fraud or misrepresentation on the part of the plaintiff. See ***Shakeel Ahmed v Mst. Shaheen Kousar* (2010 SCMR 1507)**.

In this case though the defendant has not led any evidence; but one thing has been asserted and that is; the Suit property according to the defendant has been sold to someone else. The Plaintiff even after such assertion has not bothered to implead the new owner or occupant of the Suit property. It is not before the Court that whether any valid legal instrument has been executed in favor of the said occupant and or owner. It would be too harsh and extremely unjustified to pass any decree of specific performance against the defendant in respect of a property which purportedly has been sold out by the defendant. The Plaintiff has also come to this Court belatedly, as the last payment was made by him in 2003, and he has filed this Suit on the basis of alleged refusal for specific performance in 2007. This gap has not been explained; but since the defendant has also not led any evidence nor has assisted the Court in any manner, no further deliberation can be made on this aspect of the case and it has been already

held that the Suit is not barred in law including limitation. But this in no manner can warrant ordering specific performance of the agreement in question. Therefore it is held that in the peculiar facts and circumstances of this case, the plaintiff may well be entitled for any other relief, but the relief of specific performance cannot be granted. Accordingly Issue No. 4 is answered in negative.

**ISSUE NO.5.**

9. Again it is an admitted position that Plaintiff has paid the entire sale consideration and such fact is admitted in the written statement as well as affidavit-in-evidence, however, neither the possession has been handed over nor the amount so paid by the plaintiff has been refunded and further no serious effort has even been made by the defendant to come forward and deposit the same before this Court. In the circumstances, the plaintiff appears to be entitled for mesne profit. Accordingly, Issue No.5 is answered in the affirmative.

**ISSUE NO.6.**

10. Insofar as this Issue is concerned the Plaintiff has though made a claim to this effect of damages, however, no substantial evidence has been led so as to grant any damages. In the circumstances, this issue is answered in negative.

**ISSUE NO.7 & 6.**

11. In view of hereinabove facts and circumstances of this case, I have come to the conclusion that the plaintiff has proved its case and is, therefore, entitled for relief, but as discussed the relief of

specific performance cannot be granted and it would be just and fair that plaintiff be compensated instead by the defendant who is in fact a builder. Therefore insofar as prayer clauses (i) & (ii) are concerned the plaintiffs Suit is decreed to the extent that either the defendant shall allot and hand over peaceful vacant possession of another identical Bungalow in the same vicinity with clear title duly executed in the name of the plaintiff OR in the alternative, shall pay the market price of the property in question prevailing on the date of this judgment to the plaintiff. From today onwards the plaintiff will also be entitled for interest @6% per anum on this market price till it is paid and realized. Whereas, the Suit is also decreed in respect of prayer clause (iii) as prayed, and it is dismissed in respect of remaining prayers.

12. The Suit stands decreed in the above terms.

Dated: 25.10.2017

**Judge**