

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1261 of 2003

[Mr. Bashir Ibrahim....v....Faiza Qureshi & others]

Dates of Hearing : 10.09.2021

Plaintiffs through : None present.

Defendants through : Defendant Nos. 1 and 2 are ex parte.

Mr. Farjad Ali Khan, Advocate for Defendant No.3.

JUDGMENT

Zulfiqar Ahmad Khan, J:-Per the plaint, the present lis filed by the plaintiff seeking specific performance of agreement in respect of an immovable property and alternatively seeks damages.

2. Facts of the case taken from the plaint are that the plaintiff is an individual who in the month of October 2000 entered into an Oral Agreement with the Defendant No.1 who agreed to sell, transfer, convey and assign property bearing Plot bearing No. CID-27, measuring 1000 Square yards, situated in Sector No. 16, Korangi Industrial Area, Karachi (“said plot”) to the Plaintiff for a total consideration of Rs. 25,00,000/- (twenty five lakhs only). The plaintiff stated that he had paid Rs. 50,000/- (fifty thousand only) as part payment/ sale consideration to the Defendant No.1 who upon part payment agreed to transfer the said plot in the name of the Plaintiff within the records of the Defendant No.2 and to complete the sale in a reasonable time in accordance with the law, rules and procedure. The Plaintiff further stated that the Defendant No.1 subsequently confirmed the said oral agreement by way of issuing a

receipt/confirmation dated 28.10.200 annexed with the plaint as annexure "A" and subsequently the Defendant No.1 handed over the Plaintiff photostats of (a) NIC of the Defendant No.1 annexed as B/1, (b) Letter dated 03.1.1996 from Defendant No.2 to Defendant No.1 annexed as B/2 (c) Acknowledgement of possession order dated 05.11.1995 annexed as annexure B/3 (d) Site Plan annexed as annexure B/4. The Plaint also records that the Defendant No.1 also handed over to the Plaintiff a letter dated 28.10.200 addressed to the Assistant Director of the Defendant No.2 inter alia informing him about the said agreement to sell in favour of Plaintiff and confirming of handing over photostats of documents to the Plaintiff and inquired about any outstanding dues from the Defendant No.2. The Plaint does state that the Plaintiff on the basis of the letter dated 28.10.2000 inspected the file of the said plot where he found out that said plot was included in the list of plots for which transfer was frozen by the Defendant No.2. The Plaintiff inquired from the Defendant No.1 about the status of the said plot and as inferred in the plaint used to inquire from time to time about the sale agreement from the Defendant No.1. In about February 2003, the Plaintiff became aware that the Defendant No.1 was selling the said plot to a third party. Upon such information the Plaintiff wrote a letter dated 01.03.2003 annexed as annexure D, to the Defendant No.2 intimating the same about the prior oral agreement and requested the Defendant No.2 not to transfer the said plot in favour of any third party. The Plaintiff further stated that he was shocked to know about existence of some agreement entered into October 2003 pertaining to the said plot after reading a public notice dated 16.08.2003 in the daily Dawn newspaper annexed as annexure E. The Plaintiff thereafter wrote letters to the advocate who had issued the said public notice and had

annexed the same as annexure F and again issued notice dated 20.08.2003 annexed as annexure E to the Defendant No.2 requesting the same not to transfer the said plot to any third party. Thus the Plaintiff being aggrieved by the actions of the Defendants thereafter, filed this suit making the following prayers:-

- a. To direct the Defendant No.1 to get the said plot defreezed and its allotment regularized/restored in accordance with Sind Ordinance No. III of 2001 and then for specific performance by directing the Defendant No.1 to get the said plot transferred to the name of the Plaintiff in the records of Defendant No,2 in accordance with the rules, regulations and procedures as prescribed by the Defendant No.2 and handover vacant physical possession of the said plot to the Plaintiff and receive from the Plaintiff the balance sale consideration of Rs. 24,50,000/- (Rupees twenty four lacs and fifty thousand only);
- b. On the Defendant No.1's failure/ refusal to do so transfer the said plot as mentioned in clause (a) above, this Hon'ble Court may be pleased to direct the Nazir or any other officer of this Hon'ble Court to transfer the said plot in favour of the Plaintiff in the records of Defendant No.2 and handover possession thereof to the Plaintiff to receive the balance sale consideration of Rs. Rs. 24,50,000/- (Rupees twenty four lacs and fifty thousand only);
- c. Alternatively but without prejudice a decree for Rs. 50,00,000/- (rupees fifty lacs only) being difference between the contract price and market price plus Rs. 50,000/- paid to the Defendant No.1 as part payment be passed against the Defendant No.1 and in favour of the Plaintiff;
- d. Cost of the suit may be awarded to the Plaintiff and
- e. Any other which this Hon'ble Court may deem fit and proper under the and circumstances of the case may be granted."

3. From the file it appears that summons/notices were issued to the defendants to contest the matter and file their stance by way of written statement. The defendant No.2 filed its respective written statement on 15.04.2004 denying *inter alia* the cause of action of the

Plaintiff and claim over said plot. While considerable time was given to the defendant No. 1 the matter was ordered to proceed ex- parte against the defendant No.1 vide order dated 27.09.2004, the record reveals that the Defendant No.3 though was not initially impleaded as a party to the present lis, however, by way of order dated 16.10.2006 was thereafter joined as a defendant No.3. The defendant no.3 filed his respective written statement and contested the matter thereby denying reliefs sought by the Plaintiff and denied any existence of privity of contract between the plaintiff. The defendant no.3 states through his written statement that on 02.08.1999 the said defendant entered into a Sale transaction with the Defendant No. 1 for the purchase of the said plot and it was agreed between the Defendant no.3 and the Defendant No. 1, that the said plot would be sold to the Defendant no.3 for a total sale consideration of Rs.4,000,000/- (Rupees Four Million Only). The Defendant no.3 paid an amount of Rs.200,000/- to the Defendant No.1 towards the advance part sale consideration of the said plot through recognized negotiable instrument being a Pay Order No. PAB/2,931030/812 dated 02.08.1999 issued by the Muslim Commercial Bank, DHA Phase IV Branch, Karachi and the Defendant No.1 issued a receipt dated 02.08.1999 thereof. The sale transaction was fully completed when the Defendant no.3 and the Defendant No.1 signed an Agreement to Sell with possession on October 4, 2003 and the Defendant no.3 paid to the Defendant No.1 a sum of Rs.250,000/- (Rupees Two Hundred and Fifty Thousand Only) by recognized negotiable instrument being cheque having reference no. CKC 0393218 dated 11.08.2003 drawn on Habib Bank Ag Zurich, Uzma Arcade Branch, Clifton, Karachi being part payment for the sale and transfer of the said plot. Whereafter the Defendant no.3, out of the balance sale consideration amounting

to Rs.3,750,000/- (Rupees three million seven hundred fifty thousand only), also paid a sum of Rs.3,650,000/- (Rupees three million six hundred fifty thousand only), by pay order No. HBZCK 0031940 dated October 3, 2003, issued by Habib Bank AG Zurich, Uzma Arcade Branch, Clifton, Karachi, as further payment and further performance of the Agreement of Sale with Possession dated October 4, 2003 and it was mutually agreed in terms of the said Agreement (between the Defendant No.1 and the Defendant No.3) that the balance sale consideration of Rs.100,000/- would be paid by the Defendant No.3 to the Defendant No.1 on or before June 30, 2004. That in terms of the aforesaid Agreement of Sale with Possession, the Defendant No.1, on receipt of the full and final sale consideration from the Defendant No.3 executed a registered General Power of Attorney with consideration on October 4, 2003, bearing registration No.904 of Book No.IV, Sub-Registrar, T. Division No.IV, Karachi, M.F. Roll No.U-68761/1505, Photo-Registrar, Karachi, dated 16.10.2003, in favour of the Defendant No.3, in respect of the said plot and handed over the vacant physical possession and original title documents of the Said plot to the Defendant No.3, therefore, the Defendant No.3 became the legal owner and in possession of the said plot. Record further reveals that the plaintiff failed to file reply to the written statement even after being afforded numerous opportunities.

4. Record also shows that on 24.10.2010 upon pleadings of the parties issues were framed by this court and matter was referred to Commissioner for recording evidence. The issues settled by this court are as under:-

“1. Whether the defendant no.1 sold out the suit property i.e. Plot No. CID -27, measuring 1000 square yards, situated in sector 16, Korangi

Industrial Area, Karachi to the defendant no.3 for Rs.4,000,000/- and received the entire consideration?

2. Whether the defendant no.1 had entered into a sale arrangement in respect of the suit property with the defendant no.3 prior to the plaintiff?

3. Whether the possession of the suit property is transferred/ handed over to the defendant no.3?

4. Whether the power of attorney executed in favour of the defendant no.3 by defendant no.1 in respect of the suit property was with consideration, if so its effect?"

5. Whether the agreement of sale dated 04.09.2003 executed between the defendants No. 1 and 3 is collusive one?

6. Whether the claim of defendant No.3 is barred by limitation?

7. Whether the defendant No.1 has delivered the possession to defendant No.3 according to law?

5. The record also reveals that Mr. Raja Aftab was engaged as counsel by the plaintiff, the diary reflects that the present suit has been contested by both the plaintiff in person and by his counsel. I have minutely gone through the pleadings, case diaries, evidence led and the commissioner reports and after having gone through the same the penultimate adjudicating issue is whether the plaintiff is entitled to a decree for the specific relief of performance of the Oral agreement against the defendant no.2.

6. The present matter has been coming for final arguments since 22.05.2015 alongwith CMA Nos. 19, 20 & 21 of 2015 where for more than six times none effected appearance on behalf of the plaintiff. Even twice opportunity was given to the learned counsel for the plaintiff to file written synopsis, however, compliance was not made. Today being 20th date for final arguments neither the plaintiff nor his counsel is present even at the second round of calling. Nonetheless,

the Court is under sacred duty to decide the suit taking into consideration the evidence and all connected effects of the case. Words “Court has to decide the suit” as used in CPC mean that material and evidence brought on the record is to be considered in order to decide a suit. Where the evidence of the plaintiff was recorded and from several issues framed burden of some was put on the plaintiff and when side of the defendant was closed as they failed to bring their witnesses on the date of hearing, it is mandatory for the Court to examine all the evidence brought on the record per judgment of the Apex Court in the case of *Amanullah Khan v. Mst. Akhtar Begum reported in 1993 SCMR 504*.

7. The lis in hand was extensively argued by the learned counsel for the defendant no.3. At the very outset he contended that the plaintiff was not entitled to any relief whatsoever let alone an equitable relief as the plaintiff has neither approached the court with clean hands and has failed to discharge his burden on the balance of probabilities. He further argued that plaintiff’s claim towards the said plot is ill-founded “*as he who seeks equity must do equity*” but the plaintiff has been rather evading to contest the present litigation after being unable to lead evidence to corroborate his claim. The counsel brought my attention to the Order dated 27.03.2013 wherein after repeated absenteeism this court cautioned the Plaintiff to proceed with the listed applications failure to which the Court shall dismiss the applications for non-prosecution. He further invited my attention to the order dated 03.10.2013 wherein the Plaintiff was given the same last chance to proceed with the listed applications and the order dated on 27.02.2014, this Hon’ble Court imposed cost upon the Plaintiff (in person) amounting to Rs.10,000/- for his

delaying antics. It was also noted in the Order in case the Plaintiff counsel fails to cross examine the witness on 08.03.2014 the side of the Plaintiff will be closed for cross examination of the said witness. The Learned Commissioner was also directed not to give any further opportunities to the Plaintiff and submit report on 10.03.2014 and the counsel for the defendant no.3 invited my attention to the commissioner report dated 10.03.2014 too.

8. Heard the arguments at length and perused the entire record.

9. Issues No.1 and 2 are interconnected and can be addressed jointly. The record, submissions raised at bar and evidence establishes that the defendant no.3 has indeed transacted with the defendant no.1 for the purchase of the said plot. By large the burden of proof to affirm or deny existence of a conveyance instrument lies on the parties seeking reliance upon the same. The counsel for the defendant no.3 invited the attention to the excerpts of the cross examination and to the Commissioner Report dated 09.04.2015 taken on record vide order dated 22.05.2015 wherein the Learned Commissioner has affirmed that he has perused, seen and returned the original documents referred to by the Defendant No.3 in support of his contentions and the actuality of the sale transaction pertaining to the said plot. The attention was brought onto the relevant portion of the cross examination of the Plaintiff dated 24.09.2010. The relevant part is reproduced herein under;

“It is correct to suggest that I have only mentioned a month and not the date in the plaint in para 1 of the Plaint. It is correct that area mentioned in plaint was 1000 sq. yards but I have mentioned in affidavit in evidence 1006 sq yards.”

“I see original receipt Ex. 6 and say it is written’ In case Buyer not keeping commitment of receiving 10% i.e. two lacs within 10 days of this amount Rs. 50,000/- is forfeited”

“It is correct to suggest that I have never paid the amount of Rs. 200,000/- as mentioned in Ex.6 within 10 days with effect from 28.10.2000.”

Recalled and reaffirmed on 07.08.2010;

“It is correct to suggest that upon exhibits 8 to 10 do not appear signatures of Defendant No.1 which authenticate that documents Ex.8 to 10 are handed over to the Plaintiff”.

“I see clause-2 of my plaint, the date of receipt is mentioned 28.10.2002. Voluntarily says that is mentioned in the Plaint but there is a mistake actual date is 28.10.2000. I see para 17 of the plaint it is correct tht in cause of action arose to the Plaintiff- October 2002 when the Defendant No.1 orally agreed to sell the said plot to Plaintiff. Voluntarily says it is a mistake. It is incorrect to suggest that Defendant No.1 had issues any receipt or orally agreed in the year 2000 or thereafter. I see Ex. P/6 it is correct that in para 2 of my affidavit in evidence is mentioned that oral agreement was held on 25.10.2000.”

It is correct that no names of the witnesses were mentioned neither in plaint nor affidavit in evidence and also it is correct I have not made/file any list of such witnesses of oral agreement in this case. It is correct that CNIC of witnesses appearing on Ex. P/6 are not mentioned and also have not called these two witnesses to indicate Ex. P/6”.

Recalled and reaffirmed on 11.08.2010;

“It is correct that no public notice in respect of purchase of Said plot was given by me because said plot was freeze. I see para 3 of my affidavit in evidence and say that there is no letter in writing pr confirmation from Defendant No.1 for further payments in respect of said plot but voluntarily says that the Defendant No.1 verbally agreed. It is agreed before some persons present at that time when Defendant No.1 orally agreed for non payment of further amount in respect of said plot but I do not remember exactly as it was dine long time has sine passed. It is correct that I have not made any request in writing to Defendant No.1 for completion of sale or to de-freeze the said plot from period commenced from 2000 to 2003. I see E/x P/7 and P/9 and it is correct that these letters were not marked copies to Defendant No.1 of E/x P/7 and P/9. It is correct that possession of said plot is with Defendant No.3..”

Recalled and reaffirmed on 09.10.2010;

“I see Ex.P/6 and say that the fact of oral agreement is not mentioned therein. I see para 2, page 2 of my affidavit in evidence and after going through the same. It is correct to suggest that I have not mentioned exact date of handing over documents by Defendant No.1 and it is also correct that it is not mentioned in para 2 of page 2 of my affidavit in evidence on what date letter dated 28.10.2000 was handed over to me by Defendant No.1. I see para 3 of my

affidavit in evidence and say it is correct to suggest that I have not produced any evidence in support of my claim. I see para of my affidavit in evidence and say it is correct to suggest that I have no proof of my such meeting with Assistant Director in such regard.

it is correct that I have not produced any acknowledgement receipt. It is correct that I know the version of Defendant No.1 regarding sale of said plot to me which according to her that she has never entered any agreement of sale with me.”

10. In addition to reading the excerpts of the cross examination, the counsel further argued that it was the plaintiff's burden to discharge on balance of probabilities, the existence of any oral sale agreement and to support the same by bringing forth strong credible evidence which carries far greater weightage than ordinary burden of proof. This argument merits consideration as it appears that the Plaintiff has failed to discharge his burden to prime facie establish as per article 17 and 79 of the Qanoon-e-Shahdat Order 1984, that the Defendant No.1 has transacted to sale the said plot to Plaintiff prior to selling the same to the Defendant No.3. The Plaintiff has also been unable to bring forth any marginal attesting witnesses to corroborate his claims and payment of his alleged part consideration. Furthermore copies of the title documents filed by the Plaintiff state “office copy” or “O/c” at the top which means that the same have been procured from the KDA otherwise upon alleged purchase, the Plaintiff ought to have received the original documents and not office copies which are as procured from the KDA only to file the instant suit. The learned counsel reiterated the contents of the written statement and the annexures annexed in support of it to show that the defendant no.1 and defendant no.3 have entered into a sale transaction for the purchase of the said plot and a total sale consideration of Rs.4,000,000/- (Rupees Four Million Only) with the defendant no.1 and the payments have been made through registered

instruments. The counsel for the defendants no.3 relied upon 2003 MLD 131, 2013 YLR 903, 2009 SCMR 740, 2006 YLR 1093, 2005 YLR 2655 in support of these assertions. The issue No.1 is accordingly decided as **affirmative** while the issue no.2 is decided as **negative** as the defendant no.3 appears to have transacted with the defendant no.1 to acquire the said plot while the plaintiff has failed to lead satisfactory material or bring forth cogent evidence to establish substantiality of his oral agreement with the defendant no.1.

11. Issue No.3 and 4 are addressed jointly as both are interconnected. By and large, the burden of proving of handing over physical possession of the said plot pursuant to the culmination of the sale transaction between the defendant no.1 and 3 lied with the defendant no.3 while the express duty to deny the same lied with the plaintiff. It appears from the appreciation of the record that in terms of the agreement of Sale with Possession, the Defendant No.1, on receipt of the full and final sale consideration from the Defendant no.3, executed, admitted and registered a General Power of Attorney with consideration on October 4, 2003, bearing registration No.904 of Book No.IV, Sub-Registrar, T. Division No.IV, Karachi, M.F. Roll No.U-68761/1505, Photo-Registrar, Karachi, dated 16.10.2003, in favour of the Defendant no.3, in respect of the said plot and handed over the complete vacant physical possession and original title documents of the said plot to the Defendant no.3, therefore, the Defendant no.3 is in possession of the said plot since and that fact is not disputed. The probe whether the acquisition has been made in accordance with law depends on the evidence led and intention of the parties at the epoch of acquisitions. The litmus test for resolving the character of transactions is obviously the recognized instruments which may not in

certain situation be conclusive and significant, however in the present case, there appears to be no extraordinary material available or evidence led by the plaintiff to deny the legality of the acquisition from the recognized titleholder. All these important physical characteristics depend on the facts of each case separately which requires concrete evidence to prove. It appears from the record that the Defendant No.1 has also put on record duly signed undertaking dated 04.10.2003 proving the fact that she was the transferee of the said plot and have sold, transferred, granted and assigned the said plot to the Defendant no.3 for the sale consideration mentioned in the Sale Agreement. Furthermore, the Defendant No.1 also confirmed that she has received the entire amount of sale consideration from the Defendant no.3 and then handed over the peaceful and vacant possession of the said plot to the Defendant no.3. The above undertaking has been exhibited before the Commissioner and the Plaintiff has been unable to deny the authenticity of the same. Furthermore, the Receipt dated 04.10.2003 also duly acknowledges the payment of entire sale consideration and handing over possession of the said plot by the Defendant No.1 to the Defendant no.3. It may also be pertinent to reiterate that all material documents were duly exhibited before the Learned Commissioner who vide his report dated 09.05.2015 submitted before this Court that he has seen and returned the originals including but not limited to Agreement of Sale dated 04.10.2003, Registered General Power of Attorney dated 04.10.2003, Receipt dated 04.10.2003, Undertaking dated 04.10.2003, Allotment Order dated 25.09.1995, Acknowledgement of possession dated 02.11.1995. It appears from the perusal of the record that the Defendant no.3 has been peacefully possessing and maintaining the said plot ever since the exercise of handing over has culminated and

the Plaintiff has been unable to discharge his burden to rebut the same, rather the Plaintiff acknowledged (as stated above) that the said plot was in possession of the Defendant no.3. It appears from the perusal of the record that the Plaintiff till date has not sought cancellation of the General Power of Attorney and the same still holds its authenticity. It is noted that the Plaintiff has premised his entire case based on unverified documents, credibility whereof have not been corroborated by leading compelling evidence. These issues are thus answered in **affirmative**.

12. Issue No.5; The litmus test to seek specific enforcement or performance of an agreement is to demonstrate willingness to be diligent to deposit the balance sale consideration to show availability of funds. Upon perusal of the records, pleadings and the evidence led, it is very difficult for me to pen the willingness of the plaintiff, it is a well settled latin maxim that he who seek equity must firstly do equity, meaning thereby that one's conduct must be such which entitles to an equitable relief. While the record reflects that the Plaintiff till date has not deposited the balance sale consideration nor has he applied to do so, the litigation has rather been stretched unnecessarily. At this juncture it is relevant to peruse the cautions given by this court directing the plaintiff to expedite the litigation categorically through order dated 27.02.2014, wherein the court imposed cost upon the Plaintiff (in person) amounting to Rs.10,000/-. It could also be noted from the aforesaid order that in case the Plaintiff counsel failed to cross examine the witness on 08.03.2014 the side of the Plaintiff was to be closed for cross examination of the said witness. The Commissioner was also directed not to give any further opportunities to the Plaintiff and submit report on

10.03.2014. Moreover on 26.09.2014, this Court noted that the Plaintiff failed to cross examine the witness of Defendant No.2 and that the matter is pending since 2003. Thereafter on 19.11.2014, the Plaintiff chose to remain absent and the Court while noting the delaying antics of the Plaintiff and after perusing the diary sheets, dismissed listed applications of the Plaintiff for non-prosecution. Furthermore, orders dated 28.04.2016, 16.01.2017, 07.09.2017, 29.05.2018 and 27.08.2018 have noted the constant delaying tactics of the Plaintiff. The counsel appearing for the defendant no.3 argued that in light of the referred orders the Plaintiff through his antics and conduct has disqualified himself from getting any discretionary and equitable relief hence the remaining applications moved by the plaintiff be dismissed as such.

13. At this juncture it is important to refer to the dictum laid by the Hon'ble Supreme Court of Pakistan in 2003 SCMR 953, whereby the Hon'ble Supreme Court has held that it is elementary for the party seeking to enforce a sale arrangement to deposit balance sale consideration, failure to which will be fatal to his cause. This however is not the latest view of the Hon'ble Supreme Court, however, in the present case, it is an admitted fact that the amount of balance sale consideration was not deposited by the Plaintiff neither has there been any suggestion to that effect. The Plaintiff has on the contrary sought shelter behind filing one application after another. There has never been any serious effort by the Plaintiff to entitle him any discretionary relief for more than a decade. In a suit for specific performance, it is always of paramount consideration that a plaintiff, seeking equitable remedy of specific performance must be always willing and ready to perform his part of contract.

Conduct of the Plaintiff unfortunately however unequivocally tends to reflect that he has been protracting the litigation on one or the other ground and has been successful so far on untenable grounds. This court is also fortified by well settled judgments cited at bar by the counsel for the defendant no.3, 2003 SCMR 953 , 2017 SCMR 2022, 2020 SCMR 171, 2017 SCMR 1696, 2020 YLR 2024. This issue is accordingly answered in **affirmative** as no other view can be taken by this court in the absence of any evidence to the contrary yielding agreement between defendant No.3 as conclusive.

14. Issues Nos. 6 and 7 are adjudicated together too. No such admission of delay or adverse findings have been brought on record by the Plaintiff which bars the Defendant no.3's claim. It may also be pertinent to mention that the Defendant no.3 is the actual owner of the said plot and has been in legal occupancy of the said plot since 04.10.2003. From perusal of the record and evidence led that the Defendant no.3 was made party to the instant suit by way of order dated 16.10.2006 wherein the Plaintiff gave his no objection for the Defendant no.3 to be impleaded as a necessary party and no such objection was raised thereon. The Defendant no.3 approached this Hon'ble Court as soon as he was made aware of the pendency of the instant lis. The issue no.6 is thus answered to as **negative** while the issue no.7 is answered to as **affirmative**.

15. In view of the reasoning and rationale encapsulated hereinabove and based on the material available on record and assistance afforded to me by the counsel, from the sanguine to the set of circumstances and ramification as well as connotation of statues, case laws relied to the prayers and relief sought by the Plaintiff merits no consideration in both law and equity. Thus the

instant suit is hereby dismissed with no order as to cost. Let a decree be drawn accordingly.

16. Resultantly application being CMA Nos. 19/2015, 20/2015 and No.21/2015 became infructuous and the same are dismissed as such.

JUDGE

Karachi
Dated 11.03.2022

Aadil Arab