

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1205 of 2005

[Hasan Ahmad vs. Muhammad Farooq and another]

Dates of hearing : 28.03.2022, 26.04.2022 and
13.05.2022

Plaintiff
[Hasan Ahmad] : Through Ms. Shumaila Saghir,
Advocate.

Defendant No.1
[Muhammad Farooq] since
deceased, through his legal
heirs-Defendant No.1(i) to (ix) : Through Syed Nadeem-ul-Haq,
Advocate.

Defendant No.2
[Abdul Qadeer Khan] : Nemo

JUDGMENT

Muhammad Faisal Kamal Alam, J: Present *Lis* is filed by Plaintiff,
inter alia, for the specific performance, in respect of a House No.152, Moinabad
Extension Model Colony, Malir, Karachi, measuring 120 Square Yards-the “**Suit
Property**”. Following Prayer Clause is mentioned in the plaint_

*“a) to pass Judgment and Decree in favour of the
Plaintiff and against the Defendant thereby declaring that
the Plaintiff is the bona fide purchaser of the Property
bearing No.152, Moinabad Extension Model Colony Malir,
Karachi, measuring 120 Square Yards consisting upon
Ground plus One:*

*b) to pass Judgment and Decree in favour of the
Plaintiff against the Defendant thereby directing the
Defendant to execute Sale Deed in favour of the Plaintiff in
respect of the Property bearing No.152, Moinabad*

Extension, Model Colony, Malir, Karachi, in part performance of the Agreement of Sale, on his failure then Nazir of this Honourable Court may be empowered to execute the Sale Deed on his behalf in favour of the Plaintiff before the concerned Registrar:

c) to pass Judgment and Decree in favour of the Plaintiff against the Defendant thereby granting Damages in the sum of Rs.25,00,000/- on account of mental torture as well as on breaking the Agreement of Sale:

d) to pass Judgment and Decree in favour of the Plaintiff against the Defendant thereby restraining him from creating third party interest in the said Property No.152, Moinabad Extension, Model Colony, Malir, Karachi, through sale, transfer, gift or in any other mode till the disposal of the present Suit, in any manner whatsoever nature.

e) Cost of the proceedings be awarded.

f) Any other relief(s) which this Honourable Court may deems fit and proper under the circumstances of this Suit.”

2. Upon receiving Summons, Written Statement is filed by Defendant No.1, who has denied the sale transaction, by averring that the Suit Property could not have been sold by him [Defendant No.1], as it was mortgaged. Stance of Defendant No.1 is that no Sale Agreement has been signed, as alleged by the Plaintiff, who has filed the Agreement as Annexure “C” with the plaint and exhibited as “P/5” in the evidence. Defendant No.1 has disputed the existence of any sale transaction about the Suit Property with Plaintiff; *whereas*, Defendant No.2 has maintained that it is a dispute between Plaintiff and Defendant No.1 because earlier the Suit Property was sold by Defendant No.2 to Defendant No.1 and thus the former has no concern with the Suit Property. Paragraph-12 of the plaint is also referred (by Defendant No.2 in his Written Statement) that the latter

has been impleaded as a formal Defendant and no relief is claimed against him.

3. In the intervening period Defendant No.1 has passed away and his legal heirs have been impleaded, who are represented by Mr. Naveed-ul-Haq, Advocate.

4. Representative of HBFC filed the Reply to Show Cause Notice along with the Accounts Status, according to which an amount of Rs.115,541/- [*rupees one hundred fifteen thousand five hundred forty-one only*] was still payable upto 31.03.2021.

5. From the pleadings, following Issues were settled by the Court and the Parties led the evidence.

- “1. Whether the Suit as framed is maintainable under the law?**
- 2. Whether the Plaintiff is entitled to the Specific Performance of Agreement dated 06.06.2005?**
- 3. Whether the Plaintiff is entitled to damages as claimed?**
- 4. What should the Decree be?”**

6. By the Order dated 21.11.2008, Plaintiff was directed to deposit an amount of Rs.1,450,000/- [*rupees one million four hundred fifty thousand only*] being the balance of sale consideration, which was complied with, as confirmed by the Nazir's Report dated 21.10.2016, the same was taken on record on 11.01.2017. In the said Report, it is further mentioned that the amount has been deposited in a Special Saving Certificates.

7. Plaintiff examined himself as well as witnesses, namely, Faheemuddin and Muzaffar Khan, who corroborated the version of Plaintiff in support of the subject sale transaction; *whereas*, Defendant No.1 himself led the evidence

8. Plaintiff in his evidence has stated that total sale price for the Suit Property was agreed as Rs.15,00,000/- (*rupees fifteen hundred thousand only*), and Rs.50,000/- (*rupees fifty thousand only*) as part consideration was paid on 06.06.2005, against issuance of a **Receipt [the Receipt]**, produced by the Plaintiff as **Exhibit-P/4**. He deposed that Agreement of Sale [Exhibit P/5, original whereof is available, showing the Signature of Plaintiff only] was prepared on 10.06.2005 through Mr. Eijaz Ahmed Khan, the Estate Broker and one of the witnesses of the above Receipt. Sale Agreement was handed over to the said Eijaz Ahmed Khan for obtaining signature of Defendant No.1 (*Seller*), who did not sign the same, followed by the **Legal Notice sent by Plaintiff** through his Advocate to Defendant No.1, which he **produced in the evidence as Exhibit-P/6**, page-49 of the Evidence File. Plaintiff stated in his evidence that he later came to know that since the Suit Property is mortgaged with the Housing Building Finance Corporation (**HBFC**), therefore, he asked the Defendant No.1 to redeem the Suit Property and till such time he will not make further payment, but the Defendant No.1 did not perform any of his contractual obligations. With regard to claim of damages, he has stated that since sale transaction was not completed, resultantly Plaintiff had to go hardship, which caused his health to decline and he became a Cardiac Patient. He has produced the Medical Reports with his testimony as Exhibits P/12 to P/28.

In his cross-examination, Plaintiff reiterated that the Defendant No.1 signed the above Receipt five times; he answered to a question that he had no knowledge that the Suit Property was mortgaged with HBFC. He reiterated that he offered to pay Balance Sale consideration and denied the suggestion that the said Receipt is a forged document or signature of defendant number one on it is forged. It is relevant to mention that Plaintiff was not cross-examined that due to acts of Defendant No.1, health of Plaintiff deteriorated and became a cardiac patient. It means that this version

of the testimony of Plaintiff has been accepted by the Defendant No.1. It is an established rule of evidence, that if an opponent is not cross-examined on a material part of his assertion/deposition, then it is deemed to be accepted by the adversary.

9. The second witness of the Plaintiff is Faheemuddin, who has witnessed the above Receipt-Exhibit P/4. He has testified that Defendant No.1 offered to sell the Suit Property in his presence and in presence of another witness-deceased Eijaz Ahmed Khan, who was the Estate Broker. Total sale consideration was Rs.15,00,000/- (*rupees fifteen hundred thousand only*) and Plaintiff paid Rs.50,000/- (*rupees fifty thousand only*) as part payment on 06.06.2005 and Defendant No.1 issued a Receipt in favour of Plaintiff in his presence and that of Aijaz Ahmed Khan and both of them signed the Exhibit-P/4 as witnesses.

10. In his cross-examination, he has admitted that he is relative of Plaintiff and has signed as a witness on Exhibit-P/4 at the House of Defendant No.1. He has stated that Defendant No.1 has signed the Exhibit P/4 on their Revenue Ticket and he was paid a cash of Rs.50,000/- (*rupees fifty thousand only*) by Plaintiff. To a specific question, he stated that he did not know the date of signing the Exhibit-P/4. To another question he has stated that it was around Maghrib time. He has denied the suggestion that neither Exhibit-P/4 was signed nor any payment was made to Defendant No.1.

11. The other witness is Muzaffar Khan, who has corroborated the version of Plaintiff. He has stated that he was Partner of Aijaz Ahmed, the Estate Broker, who was the second witness of above document-Exhibit-P/4. The said witness-Muzaffar Khan has deposed that Defendant No.1 offered to sell the Suit Property in his presence to Plaintiff as well as in the presence of deceased-Aijaz Ahmed Khan. He has deposed that Sale

Agreement (Exhibit-P/4) was prepared by Plaintiff and was signed in presence of Aijaz Ahmed and was handed over to the latter for obtaining signature of Defendant No.1, but unfortunately it was not signed by the Defendant No.1.

In his cross-examination, he has accepted that he did not file any proof that he is an Estate Agent and partner of Aijaz Ahmed. However, he has reiterated that payment of Rs.50,000/- (*rupees fifty thousand only*) was given to Defendant No.1 by Plaintiff at the House of former (*Defendant No.1*). To a question, he has reiterated that payment was made on 06.06.2005 in the evening time. Further stated that Defendant No.1 signed the Exhibit-P/4 more than six times.

12. Defendant No.1-Muhammad Farooq in his testimony has stated that the Suit Property was mortgaged with HBFC for obtaining loan of Rs.3,00,000/- (*rupees three hundred thousand only*) since 01.08.2005, and he is paying the monthly installments as per schedule. Denied that neither any Agreement for Sale of the Suit Property was done with the Plaintiff, nor any amount is received by Defendant No.1 and the Exhibit-P/4 is a forged document. In his cross-examination, he has admitted that one of the witnesses, the above named Aijaz Ahmed was a witness in the earlier Sale Agreement between Defendant No.1 and the earlier owner- Abdul Qadeer (present Defendant No.2). He has denied the suggestion that he received a sum of Rs.50,000/- (*rupees fifty thousand only*) as part of sale consideration from Plaintiff. He has not disputed that his name and NIC are correctly mentioned on Exhibit-P/4, but he denied his signatures. He has denied the suggestion that Aijaz Ahmed prepared the Exhibit-P/4, but did not dispute that he was the Estate Broker. He also denied that Sale Agreement dated 10.06.2005-Exhibit P/5, was given to him by [the late] Aijaz Ahmed for signatures. However, he has admitted that he received the Legal Notice

(Exhibit P/6) from Plaintiff and he did not reply the same. To a question about his allegation of fraud, he has admitted that he has not lodged any Criminal Case against Plaintiff. He has acknowledged that the Suit Property was mortgaged with HBFC in the month of June, 2005 and the Suit Property is still mortgaged.

13. In the said Legal Notice (Exhibit-P/6), the present stance of Plaintiff is mentioned, that sale price of the Suit Property was agreed to be Rs.15,00,000/- (rupees fifteen hundred thousand only) and Rs.50,000/- (rupees fifty thousand only) was paid as part sale price on 06.06.2005 against issuance of Receipt. Other terms of sale transaction is also mentioned, couple with the fact that Agreement of Sale was signed by Plaintiff in presence of Aijaz Ahmed Khan, the Estate Broker, and the same was handed over to Defendant No.1, but he failed to sign the same. It is also mentioned in Paragraph-5 of the said Legal Notice, that in the last week of August, 2005, the Plaintiff asked the Defendant No.1 to redeem the Suit Property from HBFC, where after he is willing to purchase the same. Admission of Defendant No1, that he received the Legal Notice {*ibid*} and did not reply the same, in the present circumstances, is to be construed against the stance of Defendant No.1, *inter alia*, because the Legal Notice is very specific and it should have been replied to, although in certain cases legal notices are not replied if they contain bald allegations.

14. It is argued by Mr. Naveed-ul-Haq, the learned counsel for Defendant No.1[i] to [ix], that no specific performance can be awarded in respect of the subject sale transaction, because the requirement of two witnesses for such a transaction is lacking in this case, couple with the fact that one of the alleged witnesses-Faheemuddin, is the relative of Plaintiff and he is an interested witness.

15. The above contention of counsel for Defendant No.1, cannot be accepted, because, *firstly* just because Faheemuddin is a relative of Plaintiff, his testimony cannot be discarded, but the quality of testimony is to be evaluated in the light of overall deposition available in the record.

16. Requirement of Article-79 of the Qanoon-e-Shahadat Order, 1984 [the Evidence Law], is that at least two witnesses of a document be called for proving its execution, *inter alia*, if they are alive. One of the witnesses is Faheemuddin, who has corroborated the version of Plaintiff, with specific details, viz. that an amount of Rs.50,000/- (*rupees fifty thousand only*) was paid to Defendant No.1 at his residence, who signed the Exhibit-P/4; whereas, the second witness, Aijaz Ahmed the Estate Broker, at the relevant time, when the Evidence was recorded, was admittedly not alive [also admitted by Defendant No1 in his evidence]. Defendant No.1, himself has acknowledged this fact, that earlier, the same Aijaz Ahmed was one of the witnesses in the Sale Agreement between Defendants No.1 and 2 in respect of the Suit Property; this is a relevant fact in terms of Article 46 of the Evidence Law, favouring the version of Plaintiff, *inter alia*, as it proves that the said Aijaz Ahmed [Late] actually witnessed the said Receipt [supra] as a Marginal Witness from the side of Defendant No.1.

17. The second witness of Plaintiff, Muzaffar Khan (*ibid*) although was not a witness to the document but he has categorically stated that he was present when the sale transaction had happened; his reply in cross-examination is quite familiar with other witness and of Plaintiff on material facts, that payment of Rs.50,000/- (*rupees fifty thousand only*) was given to Defendant No.1 by Plaintiff at the House of Defendant No.1, in the evening time.

18. Appraisal of the evidence shows that there is no contradiction in the evidence of Plaintiff and his Witnesses on material aspect of the case.

Defendant No.1 is unable to impeach the credibility of Plaintiff's Witnesses. It is not logical that a stranger to a transaction would send a Legal Notice [as sent by Plaintiff, *ibid*] with such specific details, which was never disputed/denied by the Defendant No.1. The judgement cited by Ms. Shumaila Saghir, the Plaintiff's counsel, in support of her arguments, viz. *Nazir Ahmad and another versus M. Muzaffar Hussain- 2008 SCMR 1639*, is relevant. In this case law, one of the defendants/co-owner, denied the sale of property and stated that the requirement of Article 17 (2) (a) of the Evidence Law has not been fulfilled. The Honourable Supreme Court, disagreed with the arguments, *inter alia*, on the ground that the sale agreement was witnessed by the two persons, who have also deposed in favour of purchaser and the decree for specific performance as granted by the High Court was maintained; besides, repelling the seller's contention about the inadequacy of sale price of the property [involved in the reported case].

19. In addition to the above, signatures of Defendant No.1 on Written Statement, Affidavit-in-Evidence, Exhibit-P/2, which is an admitted document, viz. Conveyance Deed between Defendants No.1 and 2 [produced by the Plaintiff] so also Exhibit-D/2 (*Deed of Assignment and Partnership with HBFC*) produced by Defendant No.1, are compared. There is similarity of signatures on these admitted documents and that on Exhibit-P/4-**the said Receipt**. Conclusion is that Exhibit-P/4 has been signed by Defendant No.1, in respect of the subject sale transaction, witnessed by the above named two persons.

20. Issue wise determination is as follows_

ISSUE NO.1.

21. The upshot of the above discussion is that the present Suit is maintainable.

ISSUE NO.2.

22. Since sale transaction in respect of the Suit Property has been proved by Plaintiff, therefore, Specific Performance can be granted, but, in the terms mentioned in the following Paragraphs.

ISSUE NO.3.

23. Since the Prayer of Specific Performance is granted to Plaintiff, therefore, the claim with regard to damages has become infructuous.

ISSUE NO.4.

24. Relief of specific performance of a contract is a discretionary one. Thus, Court can mould the relief, where the facts and circumstances so permit. Present litigation is quite old and in these years property prices in Karachi has enormously increased; consequently, the present *Lis* is decreed in terms of Prayer Clauses (a), (b) and (d). The learned Nazir will release the above amount deposited along with all the accruals to the legal heirs of Defendant No.1 towards sale consideration. But, Plaintiff will redeem the Suit Property at his own cost and expense, if, till date it has not already been redeemed by Defendant No.1 or his Legal Heirs. Payments made so far by the Defendant No.1 to the HBFC shall be adjusted in the present liability, if any, and after paying the remaining amount by Plaintiff, the title documents along with other documents shall be released by HBFC to the learned Nazir for onward delivery to Plaintiff.

25. Parties to bear their respective costs.

JUDGE

Karachi.

Dated:11.01.2023.

M.JavidP.A.

