

THE HIGH COURT OF SINDH, KARACHI

Suit No. 1397 of 2008

[Iqbal v. Mst. Aziza Bai and others]

Plaintiffs : Iqbal son of Tahir Ali Admajee and three others through Mr. Muhammad Ashraf Khan Mughal, Advocate.

Defendant 1 : Mst. Aziza Bai wife of Haji Bashir through Mr. Ghulam Abbas Pishori, Advocate.

Defendant 2 : Feroze son of Tahir Ali Adamjee Babrawala (since deceased) through his Legal Heirs through Mr. Muhammad Irfan Haroon, Advocate.

Suit No. 800 of 2009

[Mst. Aziza Bai v. Iqbal and others]

Plaintiff : Mst. Aziza Bai wife of Haji Bashir through Mr. Ghulam Abbas Pishori, Advocate.

Defendants 1, 3-5 : Iqbal son of Tahir Ali Admajee and three others through Mr. Muhammad Ashraf Khan Mughal, Advocate.

Defendant 2 : Feroze (since deceased) through his Legal Heirs through Mr. Muhammad Irfan Haroon, Advocate.

Defendant 6 : Nemo.

Dates of hearing : 25-10-2023, 14-12-2023 & Re-hearing on 23-08-2024.

Date of decision : 19-09-2024

JUDGMENT

Adnan Iqbal Chaudhry J. - The subject matter of these suits is 829.27 square yards of a Commercial Plot bearing Sheet No.1/14, Survey Sheet No. LR-1, Lawrance Quarter, Karachi [**suit property**], which was the share of late Tahirbhai Adamjee Babrawala in an undivided plot measuring 1629.55 square yards, purchased by him along with others under a conveyance deed dated 27.02.1980. On the demise of Tahirbhai, the suit property (829.27 square yards) devolved on his

legal heirs namely Iqbal, Shahida, Farida, Nafisa and Feroz, hereinafter collectively referred to as 'the co-owners'. In 1999, the suit property was mutated to the names of said co-owners in the record of rights maintained at the City Survey Office South, Karachi.

2. It was an undisputed fact that by an agreement dated 10.08.2005, the co-owners agreed to sell the suit property to Aziza Bai for a sale consideration of Rs. 37,317,150/- and received an advance of Rs. 5,000,000/. Per clause-1 of the sale agreement, Aziza Bai was to pay Rs. 13,658,575/- within 1 month to complete 50% of the sale consideration, upon which the co-owners would deliver possession to her. Per clause-2, the remaining 50% amounting to Rs. 18,658,575/- was payable in monthly installments for which Aziza Bai was to furnish 9 post-dated cheques, each of Rs. 2,073,175/-.

Pleadings:

3. Suit No. 1397/2008 was by the co-owners against Aziza Bai. They pleaded that after making the advance of Rs. 5,000,000/- Aziza Bai did not make any further payment under the sale agreement dated 10.08.2005; that nevertheless, possession of the suit property was delivered to her on the assurance of third parties; that by legal notice dated 14.05.2008 the co-owners called upon Aziza Bai to perform the sale agreement but she refused; hence the suit for cancellation of the sale agreement, and for compensation and damages.

4. By written statement in Suit No. 1397/2008, Aziza Bai contended that she had made payments under the sale agreement to Shaikh Hussain Lakdawala, who was the arbitrator appointed by the co-owners for disputes over properties inherited by them, and who was also authorized by them to receive payments for the suit property; that by November 2005 she had paid 50% of the sale consideration amounting to Rs. 18,658,575/- to Lakdawala by cheques made payable to him, who distributed the amount amongst the

co-owners; that thereupon the co-owners delivered possession of the suit plot to Aziza Bai on 22.11.2005 and issued to her a possession certificate; that towards the remaining 50% of the sale consideration, 6 post-dated cheques made payable to Lakdawala were encashed by him and the amount disbursed to the co-owners, and 3 cheques amounting to Rs. 6,219,525/- were payable on the execution of the sale deed, clearance of bills and taxes of the suit plot and renewal of its lease.

5. On 28-05-2009, Aziza Bai filed Suit No. 800/2009 against the co-owners for specific performance of the sale agreement, for an injunction to renew the lease of the suit property, and for damages. Lakdawala was also arrayed as a defendant although no relief was sought against him. By written statement, the co-owners reiterated the stance taken by them in Suit No. 1397/2008. They further pleaded that Lakdawala was not authorized to receive any payment on their behalf, nor did he forward any amount to them.

6. Pending suits, one of the co-owners, namely Feroz, passed away. His legal heirs were brought on the record of both suits. On Feroz's behalf, pleadings in both suits had been signed by his brother Iqbal as his Attorney. By CMA No. 11867/2017, Feroz's legal heirs submitted that Feroz had not given such authority to Iqbal, and they prayed for permission to lead separate evidence. The application was dismissed as premature after observing that Feroz's legal heirs were free to file a separate pleading.

7. By order dated 25-04-2018, Feroz's legal heirs were transposed as defendants in Suit No. 1397/2008 after noting that they were supporting the case of the Defendant, Aziza Bai. It appears that due a typographical error in that order, the parties took that order to mean that Feroz's legal heirs were also transposed to plaintiffs in Suit No. 800/2009. That was clearly not intended. The error is hereby corrected in exercise of powers under section 152 CPC, and the **amended title dated 05.05.2018 filed in Suit No. 800/2009 is struck-**

off. Feroz's legal heirs continue to be Defendants 2(a) to 2(c) in Suit No. 800/2009.

8. By order dated 13-01-2021, Feroz's legal heirs were permitted to file a written statement in Suit No. 1397/2008. They pleaded that the Power of Attorney used by Iqbal to file pleadings for Feroz had been given in the year 1998 and not for the said suits; that Feroz was unaware of these suits and his legal heirs came to know of them when they incidentally met Lakdawala at an event. They supported the case of Aziza Bai and admitted that Lakdawala was authorized by the co-owners to receive payments of the suit property from Aziza Bai, which was duly disbursed by him to them, leaving behind 10% of the sale consideration which was payable to the co-owners on execution of the sale deed of the suit property.

Issues:

9. Issues were settled in Suit No. 1397/2008 on 05-04-2010. Thereafter, by order dated 11-10-2010, Suit No. 800/2009 was consolidated with Suit No. 1397/2008 and additional issues were settled to cater to Suit No. 800/2009. After Feroz's legal heirs filed written statement in Suit No. 1397/2008, another additional issue was settled on 03-09-2021. The issues settled in the respective suits are overlapping and are not framed as consolidated issues. The additional issue settled on 03.09.2021 in Suit No. 1397/2008 was whether the Plaintiffs of that suit caused loss to the legal heirs of Feroz. That issue was settled beyond the pleadings as the legal heirs of Feroz had not made any counterclaim for compensation or damages, nor did they lead any evidence in that regard. Therefore, in exercise of powers under Order XIV Rule 5 CPC, the issues are recast as follows:

1. *Whether Suit No. 800/2009 is time barred ?*
2. *Whether the co-owners of the suit property had authorized Shaikh Hussain Lakdawala to receive sale consideration of the suit property from Aziza Bai ?*

3. *Whether Aziza Bai paid a sum of Rs. 31,097,526/- towards the agreed sale consideration, and the balance of Rs. 6,219,525/- was payable on execution of a sale deed and removal of encumbrances on the suit property ?*
4. *Whether possession of the suit property was delivered to Aziza Bai in part performance of the sale agreement ?*
5. *To what relief are the parties entitled to ?*
6. *What should the decree be ?*

Submissions of counsel:

10. Mr. Ashraf Mughal, learned counsel for the Plaintiffs of Suit No. 1397/2008 (also defendants in Suit No. 800/2009), submitted that possession of the suit property was delivered by the co-owners to Aziza Bai on the assurance of third parties; that after the advance of Rs. 5,000,000/- no further payment was made by Aziza Bai; that the possession certificate produced as Exhibit D/17 by Nadeem Bashir (DW-1) was a fabricated document; that the documents produced by Lakdawala (DW-2) were inadmissible evidence as those were not part of the pleadings and Lakdawala was not arrayed by Aziza Bai in the list of witnesses; that Lakdawala was not authorized to receive the sale consideration from Aziza Bai; and that no document was produced by Aziza Bai to show payments directly to the co-owners.

11. Mr. Ghulam Abbas Peshori, learned counsel for Aziza Bai in both suits submitted that the possession certificate (Exhibit D/17) was genuine and proved that the co-owners had received 50% of the sale consideration when they delivered possession to Aziza Bai; that the remaining amount was secured by post-dated cheques; that the documents produced by Lakdawala proved that 6 post-dated cheques were encashed by him and distributed amongst the co-owners, leaving only a balance of 10% which was payable on execution of the sale deed. Mr. Irfan Haroon, learned counsel for the legal heirs of Feroz, supported the arguments advanced by Mr. Peshori. He added that Iqbal was never authorized by Feroz to file pleadings on his behalf in the two suits.

12. Heard learned counsel and perused the evidence.

Issue No.1:

13. Suit No. 800/2009 by Aziza Bai is for specific performance of the sale agreement dated 10.08.2005. The sale agreement did not fix a date for its performance. Therefore, limitation would be governed by the second part of Article 113 of the Limitation Act, 1908 where the period of three years runs from the date the plaintiff has notice of refusal. It is alleged by Defendants 1, 3, 4 and 5 (of Suit No. 800/2009) that they had sent a legal notice dated 14.05.2008 to Aziza Bai that if she did not make payment the agreement would stand cancelled. Though Aziza Bai denies receipt of such legal notice, but even if that legal notice is taken as notice of refusal, the suit was filed by her on 28.05.2009 *i.e.* within one year, therefore well within limitation. Issue No.1 is answered in the negative.

Objection to the evidence of Lakdawala (DW-2):

14. Owing to an objection by the counsel for the Plaintiffs of Suit No. 1397/2008, the documents produced by Lakdawala (DW-2) were not exhibited by the Commissioner who recorded evidence. Those documents were taken on record subject to the Court's decision on their admissibility. Therefore, it is imperative to decide that objection first. The objection was that Aziza Bai had neither filed a list of witnesses nor sought permission of the Court under Order XVI Rule 1 CPC to summon Lakdawala as a witness, and therefore his evidence was inadmissible.

15. It is correct that the record does not reflect a list of witnesses by Aziza Bai. However, Lakdawala was already party to the proceedings. He was a defendant in Suit No. 800/2009. Since no relief was sought against him, he did not file written statement. In such circumstances, on 13-01-2011, Aziza Bai moved an application to summon him as a witness. The application was apparently allowed by the Assistant Registrar (D-1) under Rule 14 of the Sindh Chief

Court Rules (O.S.). Summons were issued to Lakdawala on 15-01-2011 and pursuant thereto he stepped into the witness box. It is therefore important to note that Aziza Bai, acting as the plaintiff of Suit No. 800/2009, had summoned Lakdawala for evidence as a defendant of that suit.

16. The 'list of witnesses' in sub-rules (1) and (2) of Rule 1 of Order XVI CPC is not intended for all witnesses, but only for those whom a 'party' intends to 'call' under the authority of the Court.¹ By implication, that excludes the party acting as his own witness, so also a witness who may appear voluntarily with the party. Similarly, it is also not the intent of Rule 1 of Order XVI CPC to require a party to include within his list of witnesses a person who is already a plaintiff or defendant. The scenario where a party may require the other party to give evidence is dealt separately by Order XVI Rule 21 CPC, which reads:

“Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable.”

17. Had Rule 1 of Order XVI CPC intended that a party should include the other party in his list of witnesses if he wanted to summon him, then there would have been no need for Rule 21. The argument that all preceding Rules in Order XVI are attracted to such a witness, is preempted by Rule 21 itself in stating 'so far as they are applicable'. In my view, the words in Rule 21 that 'provisions as to witnesses shall apply to him', refer to those Rules of Order XVI that are provided for summoning a witness and regulating his attendance, and not to the filing of list of witnesses under Rule 1. Therefore, the testimony of Lakdawala (DW-2) and documents produced by him in original are admissible evidence. The objection of the Plaintiffs' counsel is overruled. The documents produced by Lakdawala and marked by the Commissioner as X/1, X/2, X/3/1 to X/3/13 are hereby taken as Exhibits. However, the document marked as X/4 is

¹ *Musarrat Bibi v. Tariq Mahmood Tariq* (1999 SCMR 799).

not exhibited, for that is a bank statement of account which is not certified as per the Bankers' Books Evidence Act, 1891.

Issue No. 2, 3 and 4:

18. The evidence on Issues 2, 3 and 4 is common. Therefore, these issues are determined together.

19. As discussed above, the sale agreement dated 10-08-2005 was an admitted document. It was also admitted by the Plaintiffs of Suit No. 1397/2008 (defendants in Suit No. 800/2009) that they had delivered possession of the suit property to Aziza Bai on 22.11.2005 *albeit* it was denied by them that possession was delivered on receiving 50% of the sale consideration.

20. For the Plaintiffs of Suit No. 1397/2008 (not including Feroz's legal heirs who were transposed as defendants), evidence was led by Farida. She was also the Attorney of the Plaintiffs 1 and 2, i.e. Iqbal and Shahida. No evidence was led by Nafisa, the Plaintiff No.4. As already stated, the legal heirs of Feroz were supporting Aziza Bai. Therefore, out of the 5 co-owners of the suit property who had executed the sale agreement, only 3 of them were contesting the case of Aziza Bai at trial.

21. The Plaintiffs of Suit No. 1397/2008 (defendants in Suit No. 800/2009) had admitted receipt of an advance of Rs. 5,000,000/- from Aziza Bai. On cross-examination, Farida (PW-1) further admitted: *"It is correct that the cheque of advance money was given to Hussain Lakdawala to ensure that all the legal heirs should receive the money of their share. We trusted Hussain Lakdawala that he would distribute the money to the legal heirs as per their respective share."* On cross-examination, Adnan (PW-2) admitted: *"An advance of Rs. 50 lacs, through a cheque in the name of Hussain Lakdawala was given to him. Hussain had distributed the said amount to the plaintiffs as per their share."*

22. It was the case of Aziza Bai that by November 2005 she paid a further sum of Rs. 13,658,575/- by cheques to Lakdawala to complete 50% of the sale consideration (Rs. 18,658,575); and that such sum was also distributed by Lakdawala to the co-owners. To prove that payment, Nadeem Bashir (DW-1) who was the son and Attorney of Aziza Bai, produced receipts dated 11.11.2005 issued/signed by Lakdawala for cheques amounting to Rs. 13,658,575/-. Those receipts by Lakdawala, produced as Exhibits D/6, D/8, D/9 to D/16, recited that the cheques were being received towards the sale consideration of the suit property "*as being Arbitrator on behalf of Mr. Iqbal Tahir Ali & others (the co-owners) and Mr. Shabbir Hussain Ali Bhai Babarwala*". Insia Feroz (D2-W/1), the widow of Feroz, explained in her affidavit-in-evidence that Shabbir was Feroz's cousin, and pursuant to a family settlement between the co-owners and other family members, Shabbir was allocated a share of 244 sq. yds. in the suit property.

23. Nadeem Bashir (DW-1) further deposed that he was the one who received possession of the suit property on behalf of his mother, Aziza Bai. In that regard he produced a 'Possession Certificate' dated 22.11.2005 (Exhibit D/17) signed by Iqbal (Plaintiff No.1 of Suit No. 1397/2008) for the co-owners. The Possession Certificate acknowledged receipt of 50% of the sale consideration and recited that the remaining 50% was payable by 9 cheques of Rs. 2,073,175/- each, post-dated to successive months. To show that 6 of those post-dated cheques were also delivered to Lakdawala, Nadeem Bashir (DW-1) produced receipts signed by Lakdawala on 25.06.2006 (Exhibit D/18 to Exhibit D/23). These receipts add up to Rs. 12,439,050/-.

24. Mr. Ashraf Khan Mughal Advocate had submitted that the Possession Certificate produced as Exhibit D/17 was a fabricated document. This submission was premised on the fact that cheque numbers of the last 3 post-dated cheques mentioned in said certificate were the same numbers. But, from Exhibits X/1 and X/2 discussed *infra*, it appears that the last three post-dated cheques were only

mentioned to represent the remaining balance of Rs. 6,219,525/- which was payable upon execution of a sale deed of the suit property, and that such cheques were not made ready at the time of the Possession Certificate dated 22.11.2005. In fact, Aziza Bai had pleaded that cheques for the balance of Rs. 6,219,525/- were intended upon execution of the sale deed.

25. The receipts produced by Nadeem Bashir (DW-1) as Exhibits D/6, D/8, D/9 to D/16, and Exhibits D/18 to D/23, add up to Rs. 26,097,625. With the addition of the admitted advance of Rs. 5,000,000/, Nadeem had brought evidence to show that within the time contemplated in the sale agreement, Aziza Bai had made payment of Rs. 31,097,625 to Lakdawala towards the sale consideration of the suit property, leaving a balance of Rs. 6,219,525/- only.

26. The evidence of Nadeem Bashir (DW-1) was reinforced by the evidence of Lakdawala (DW-2), who testified that he was arbitrator appointed by the co-owners for distribution of their properties; that in such capacity the sale consideration of the suit property was also received by him from Aziza Bai; that he distributed the share of each co-owner to him/her by crossed cheques; that on receipt of 50% of the sale consideration, possession of the suit property was delivered by the co-owners to Aziza Bai in this presence along with a possession certificate signed by Iqbal and received by Nadeem; and that, as regards the remaining 50%, he had encashed 6 post-dated cheques and paid the co-owners their respective shares.

27. To support his testimony, Lakdawala (DW-2) produced a document dated 30.11.2005 (Exhibit X/1) signed by the co-owners and Shabbir, whereby they acknowledged having received their respective shares in 50% of the sale consideration. He also produced a similar acknowledgment dated 16-10-2006 (Exhibit X/2) for the 6 post-dated cheques disbursed by him to the co-owners and Shabbir towards the other 50% of the sale consideration. The latter

acknowledgment by the co-owners also recited that only a sum of Rs. 6,219,525 remained payable by Aziza Bai which is “*receivable at the time of conveyance deed registration before Registrar.*”

28. To prove disbursement of the aforesaid monies to the co-owners, Lakdawala (DW-2) produced ‘*cash vouchers*’ signed by each of the co-owners on receipt of cheques of their respective shares in the amount set-out in Exhibits X/1 and X/2. Those cash vouchers were produced as Exhibit X/3/4 to Exhibit X/3/12.

29. Insia Feroz (D2-W/1), the widow of Feroz, the latter being one of the co-owners, also deposed that the co-owners had authorized Lakdawala to receive sale consideration of the suit property from Aziza Bai; that the co-owners including Feroz had received their share in the sale consideration from Lakdawala; and that only 10% of the sale consideration was receivable upon the execution of the sale deed.

30. Therefore, as discussed in paras 22 to 29 *supra*, there is overwhelming evidence that proves that Lakdawala was authorized by the co-owners to receive the sale consideration of the suit property from Aziza Bai; that Aziza Bai made payments to Lakdawala adding up to Rs. 31,097,625/-; that Lakdawala disbursed that amount amongst the co-owners as per their family arrangement; and that it had been agreed between the parties that the balance of Rs. 6,219,525/- was payable by Aziza Bai on conveyance of the suit property to her.

Though it had also been pleaded by Aziza Bai that the aforesaid balance was subject to setting-off certain encumbrances on the suit property, no evidence was produced by Aziza Bai with regards to those encumbrances. At final arguments, Mr. Peshori also did not press that part of the claim made by Aziza Bai.

31. Against the aforesaid evidence brought by Aziza Bai, the case of the Plaintiffs of Suit No. 1397/2008 was only a bald denial. The

receipts and Possession Certificate produced by Nadeem Bashir (DW-1) in evidence, were also annexures to the pleadings of Aziza Bai. Yet, the Plaintiffs' witness Farida (PW-1) had not made a single statement in her affidavit-in-evidence as regards those documents. The other witness for the Plaintiffs, namely Adnan (PW-2), who was the son of Plaintiff No.1 (Iqbal), admitted on cross-examination that he did not have knowledge of further payments under the sale agreement. His statement that his father did not sign the Possession Certificate was of no consequence coming from a person who was not party to that Certificate. Iqbal chose not to step in the witness box and expose himself to cross-examination.

32. In view of the foregoing and with those observations, Issues No. 2, 3 and 4 are answered in the affirmative in favor of Aziza Bai.

Issue No. 5:

33. Since all issues are decided against the Plaintiffs of Suit No. 1397/2008, they are not entitled to any relief. In view of the discussion above, Suit No. 1397/2008 was clearly false to the knowledge of the Plaintiffs. By written statement, the Defendant No.1 had also pleaded that the suit was false, frivolous and vexatious. The Defendant No.1 is therefore also entitled to compensatory costs under section 35A CPC.

As regards Suit No. 800/2009, learned counsel for the Plaintiff pressed only the relief for specific performance of the sale agreement to the extent of conveyance of the suit property. In view of the discussion on the issues above, the Plaintiff demonstrates that she was ready and willing at all times to pay the balance sale consideration to the co-owners of the suit property and is therefore entitled to relief of specific performance.

Issue No.6:

34. Suit No. 1397/2008 is dismissed. Cost of the suit under section 35 CPC is awarded to the Defendant No.1 along with markup @ 6%

per annum from the date of suit to the date of decree. Compensatory costs are also awarded to the Defendant No.1 under section 35A CPC to the maximum of Rs. 25,000/-. Said costs shall be recoverable from the Plaintiffs jointly and severally by attachment and/or sale of their properties.

35. Suit No. 800/2009 is decreed in favor of the Plaintiff for the relief of specific performance of the sale agreement dated 10-08-2005 as follows:

- (i) The Plaintiff shall deposit the balance sale consideration of Rs. 6,219,525/- with the Nazir of this Court within 25 days, whereupon the Defendants 1 to 5 shall execute a registered deed to transfer the suit property (829.27 square yards of Plot bearing Sheet No.1/14, Survey Sheet No. LR-1, Lawrance Quarter, Karachi) to the Plaintiff. Thereafter, the Nazir shall release said balance to the Defendants 1 to 5, or to a person duly authorized by them, as per their share in the suit property; provided that the share of the Defendants 1, 3, 4 and 5 shall be attached to the extent of costs awarded to Aziza Bai in this suit and in Suit No. 1397/2008, which shall be paid to her.
- (ii) Cost of the suit under section 35 CPC is awarded to the Plaintiff against the Defendants 1, 3, 4 and 5 along with markup @ 6% per annum from the date of suit to the date of decree, recoverable from said Defendants jointly and severally.

JUDGE

Karachi:
Dated: 19-09-2024