

## IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.248 of 2008

### Gulzar Ahmed and Another v. Muhammad Zaman and Another

Plaintiff No.1 : Gulzar Ahmed s/o Nazar Muhammad, and  
Plaintiff No.2 : Muhammad Anar s/o Sher Muhammad,  
through Barrister Muhammad Sarmad  
Khan and Mr Muhammad Qasim Iqbal,  
Advocates

Defendant No.1 : Muhammad Zaman s/o Muhammad  
Abdul, through Mr Nayyar Ziauddin,  
Advocate

Defendant No.2 : Agricultural Development Bank of  
Pakistan Limited through Mr Sanaullah  
Noor Ghouri, Advocate

Dates of Hearing : 04.10,2023, 13.12.2023 and 16.12.2023

Date of Announcement  
Decision : 15.03.2024

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

Jawad Akbar Sarwana, J.: On 22.01.2008, the Plaintiffs, Gulzar Ahmed s/o Nazar Muhammad (“Plaintiff No.1”) and Muhammad Anar s/o Sher Muhammad (Plaintiff No.2)(severally and jointly referred to as “the Plaintiffs”) filed the above-titled suit for Specific Performance, Damages and Permanent Injunction against Defendants, Muhammad Zaman s/o Muhammad Abdul (Defendant No.1)(hereinafter referred to as “MZ”) and Agricultural Development Bank of Pakistan Limited (formerly known as “Zarai Tarkiat Bank Ltd.”)(Defendant No.2)(hereinafter referred to as either “ADBPL” or “Zarai Tarkiat Bank” interchangeably, as the case may be). The Plaintiffs prayed for the following reliefs against MZ and ADBPL:

- “(a) Directing the Defendant No.1 to execute the Sale Deed in respect of house bearing No.1038, Khyber Colony, Orangi Town, Karachi and in case of refusal by him the Nazir of this Hon'ble Court may be appointed for the execution of the Sale Deed in respect of the said house in favour of the Plaintiffs.

- (b) Directing the Defendant No.1 to pay the amount of Rs.185,000/- which the Plaintiffs have paid to the Defendant No.2 on behalf of Defendant No.1 as bank loan and also pay the damages to the extent of Rs.5,000,000/- (Rupees Fifty Lac only) to both the Plaintiffs.
- (c) Directing the Defendant No.2 to deposit the original title documents in respect of the said property before the Nazir of this Hon'ble Court on the ground that the entire bank loan has been paid by the Plaintiffs to them. Restraining the Defendant No.2 to hand over the title documents to Defendant No.1.
- (d) Further restraining the Defendant No.1 to his nominees, agents, attorneys to create third party interest or to dispossess the Plaintiffs from the property in question without due course of law.
- (e) Restraining the Defendant No.2 to transfer the above said property in the name of any person.
- (f) Cost of the suit.
- (g) Any other relief which this Hon'ble Court deem fit and proper under the circumstances of the case.”

2. The brief facts of the case are that on 06.06.2003, Plaintiffs, agreed to a sale transaction with Defendant No.1, MZ, in respect of a bungalow on plot bearing no.1038, Sector 4/F, Khyber Colony, Orangi Town, Karachi, ad-measuring 150 sq. yards (hereinafter referred to as “the Suit Property”). After the agreement of sale, the Plaintiffs allegedly paid in cash to Defendant No.1/MZ, the entire sale consideration of Rs.450,000 and obtained receipt of the same from the latter. Defendant No.1/MZ denied receipt of the amount towards sale consideration and contended that in December 2002 he had rented out the bungalow to Plaintiff No.1, his tenant, on a monthly rent of Rs.4,000 without any security deposit and formal rental agreement. He claimed that physical possession of the bungalow was handed over to Plaintiff No.1 in the third week of December 2002, whereafter the brother-in-law of Plaintiff No.1, i.e. Plaintiff No.2, moved into the said bungalow.

3. Subsequently, according to the pleadings, Defendant No.1/MZ applied for and obtained a loan of Rs 200,000 from and mortgaged the Suit Property to Defendant No.2/ADBPL. By 2007, Defendant No.1/MZ had defaulted on the loan, and Defendant No.2/ADBPL initiated proceedings to attach and sell the Suit Property. Plaintiffs claim this is when they discovered that the Suit Property sold to them by Defendant No.1/MZ, had allegedly been mortgaged to the Bank. At the time, Defendant No.1/MZ had apparently paid a sum of Rs.50,000~60,000 to Defendant No.2/ADBPL, and allegedly, a payment of Rs.184,000~Rs.204,000 was outstanding against the former, which the Plaintiffs claimed they had paid to the Bank.

4. On 23.07.2007, the Counsel for Plaintiffs served a legal notice on Defendant No.1/MZ claiming specific performance of the agreement of sale dated 06.06.2003 with a copy to Defendant No.2/ADBPL. The Counsel for Defendant No.1/MZ responded to the said letter, denied the existence of any sale agreement, and sought a copy of the same.

5. On 22.01.2008, Plaintiffs filed the titled suit against Defendants, praying for the reliefs as set out in paragraph 1 above.

6. On 10.03.2008, the High Court passed an ex-parte, ad-interim Order restraining Defendant No.1/MZ from dispossessing the Plaintiffs and directing Defendant No.2/ADBPL to deposit with the Nazir of this Court the original title documents relating to the Suit Property. Eventually, this Court confirmed the said ad-interim Order by its Order dated 18.04.2018.

7. Defendant No. 1/MZ filed his written statement on 29.11.2010. He claimed that the Plaintiffs' suit was not maintainable under the law. He contended that there was no sale transaction, and the Plaintiffs were his tenants. He claimed ownership of the Suit Property and that it had been mortgaged with ADBPL and that he had made part-payment of the

loan amount to ADBPL when Plaintiffs with malafide paid the entire remaining outstanding loan amount.

8. Defendant No.2/ADBPL filed their Written Statement on 01.08.2008 (earlier in time compared to Defendant No.1/MZ). The bank confirmed the loan of Rs.200,000 availed by the customer, Defendant No.1/MZ and that prior to the bank commencing auction proceedings, the latter had paid a sum of Rs.50,000 only. However, following the notices of auction proceedings, the Plaintiffs on behalf of Defendant No.1/MZ had settled the entire outstanding amount, and the mortgaged property stood redeemed.

9. On 18.04.2018, the Court settled the following issues (as proposed by the Plaintiffs on 24.01.2018):

- 1) Whether the Plaintiff had entered into agreement of Sale with Defendant No.1 in the year 2003, in respect of house bearing No.1038, Orangi Town, Karachi against total sale consideration of Rs.450,000/- if so its affect?
- 2) Whether the Plaintiff paid the entire amount of sale consideration to the Defendant No.1, which was duly received by him if so, its affect?
- 3) Whether after full payment physical peaceful vacant possession of the suit property was handed over to the Plaintiff by both the Defendants, if so, its affect?
- 4) Whether the terms and conditions of Agreement of Sale are binding upon Defendant No.1, if so, its affect?
- 5) Whether the Plaintiff taken bank loan from the Defendant No.1 if so, its affect?
- 6) Whether the Defendant No.1 at the time of agreement of sale disclosed that the property documents were mortgaged by him in the office of Defendant No.2 and loan was sanctioned in favour of Defendant No.1, if so, its affect?

- 7) Whether the Plaintiff paid entire amount of the bank loan and thereafter the property documents as per order passed by this Court were deposited before Nazir of this Court, if so its affect?
- 8) Whether the Defendant No.1 played fraud with the Plaintiff if so, its affect?
- 9) Whether the Plaintiff is entitled to recover the amount of Rs.185,0-00/- (Bank Loan) paid to Defendant No.1, Plaintiff is entitled to claim damages to the extent of Rs.5,000,000/- if so its affect?
- 10) What should the decree be?

10. On 08.02.2019, the Court appointed a Commissioner for Recording Evidence.

11. On 20.05.2019, Gulzar Ahmed (Plaintiff No.1) appeared as a witness for himself and as an attorney of Plaintiff No.2. He filed his affidavit-in-evidence and was cross-examined on the same date. He produced a copy of the Sale Agreement dated 06.06.2003, marked as "Exhibit P/3", a copy of the Receipt dated 06.06.2003 marked as "Exhibit. P/4", a copy the legal notice dated 23.07.2007 marked as "Exhibit. P/5", a copy of the reply of the legal notice dated 15.08.2007 marked as "Exhibit. P/6", a copy of the debit cash voucher dated 27.12.2007 marked as "Exhibit P/7, and a copy of the payment of Rs.1,000,000/- to ADBPL by the Plaintiffs on 29.11.2007 marked as "Exhibit P/8".

12. Meanwhile, a photocopy of the indenture of lease of Karachi Metropolitan Corporation dated 23.09.1998 was marked as "Annexure-X/1" along with challan dated 30.10.1997, the copy of the FIR No.132/2007 and Criminal Case No.1163/2007 of the Court No.IX Civil Judge/Judicial Magistrate was marked as "Annexure-X/2", the copy of the charge sheet N.107/2007 was marked as "Annexure-X/3", the photocopy of the cheque No.1916419 of the National Bank of

Pakistan was marked as “Annexure-X/4”, the copy of the transfer voucher of Zarai Taraqiati Bank Ltd. dated 19.05.2007 was marked as “Annexure-X/5”, the photocopy of the auction notice of Zarai Taraqiati Bank Ltd. marked as “Annexure-X/6”, and the copy of the release of documents to Manager dated 08.12.2007 was marked as “Annexure-X/7”.

13. Subsequently, the Plaintiffs also produced the two marginal witnesses to the Agreement of Sale dated 06.06.2003, namely, Plaintiffs’ witness No.2, Muhammad Mubeen (“PW-2”), who filed his Affidavit in Evidence on 20.05.2019 and was cross-examined by the Counsel of Defendant No. 1 on the even date. Plaintiffs also produced Allah Rakha Babar (“PW-3”), who filed his Affidavit in Evidence and was cross-examined by the Counsel of Defendant No.1 on 20.05.2019.

14. Defendant No.1/MZ filed his Affidavit in Evidence on 02.08.2019 and was cross-examined by the Counsel of Plaintiffs on the same date. He produced the copy of the Zarai Taraqiati Bank Ltd., Fish Harbour Branch, deposit slips dated 31.12.2004 in the sum of Rs.2,000/- and 30.12.2005 in the sum of Rs.5,000/- marked as “Exhibit D/2”, a copy of the order passed in Cr. Case No.1163/2007 dated 04.03.2010 marked as “Exhibit D/3”, and the copy of the Examination-in-Chief of Mr. Gulzar Ahmed in suit/case No.1163/2007 marked as “Exhibit D/4”. Meanwhile, the photocopy of the Examination-in-Chief in Suit No.1163/2007 was marked as “Annexure-X-1”, the photocopy of the deposition of Mr. Muhammad Anar was marked as “Annexure-X-2”, and the photocopy of the Examination-in-Chief of Mr. Allah Rakha was marked as “Annexure-X-3”.

15. On 06.08.2019, Defendant No.1/MZ also produced his second witness, Muhammad Hassan s/o Muhammad Yaqoob Khan (“DW/1”), who claimed to be an eye-witness to a verbal tenancy agreement between the Plaintiffs and Defendant No.1/MZ in December 2002 and

deposed that there was no Agreement of Sale between Plaintiffs and Defendant No.1/MZ in respect of the Suit Property.

16. The evidence of Defendant No.2/ADBPL was not recorded, and on 25.09.2019, the Commissioner for Recording Evidence submitted his Report dated 12.09.2019, returning his Commission to the Court, which was taken on record. Thereafter, the matter was listed for final arguments.

17. The learned Counsel for the Plaintiffs submitted that Plaintiffs had paid the entire sale consideration mentioned in the Agreement of Sale dated 06.06.2003 and completed their part of the bargain. The Plaintiffs also produced marginal witnesses to the Agreement of Sale and the handing over of the possession of the Suit Property by the Defendant No.1/MZ to the Plaintiffs which was not denied except that Defendant No.1/MZ contended that the Plaintiffs were his tenant but did not produce any documentary evidence in support of this defence. He argued that after receiving notice from Defendant No.2/ADBPL by way of the Auction Notice pasted on Suit Property, they paid off the loan advanced by ADBPL to Defendant No.1/MZ which Defendant No. 1/MZ did not deny. He argued that the Agreement of Sale dated 06.06.2003 did not mention the completion date of execution/registration of the sale deed; hence, under Article 113 of the Limitation Act 1908, the period of limitation for specific performance of a contract was three years from the date fixed for the performance or if no such date is fixed when the Plaintiff has notice that performance is refused. Plaintiffs Counsel argued that no date was fixed in the agreement. Therefore, the period of limitation commenced when Defendant No.1/MZ refused the performance of the contract, and this was in the year 2007. The Plaintiffs were always ready to perform, but Defendant, with malafide intention, got the property mortgaged to ADBPL. The Plaintiffs claimed that they only found out about the mortgage in 2006 when an auction notice was pasted on the Suit Property, and they approached Defendant

No.1/MZ. The Plaintiffs eventually paid off his (Defendant No.1/MZ) loan amount to ADBPL. As such, the suit was filed within time.

18. The Counsel of Defendant No.1/MZ denied the existence of the Agreement of Sale. He claimed that the Plaintiffs were tenants based on a verbal tenancy agreement and that the Plaintiffs manipulated the events such that they were now claiming to have purchased his residence. He argued that even if the Agreement of Sale was to be believed as having been executed on 06.06.2003, the titled Suit filed on 22.01.2008 was already time-barred under Article 113 of the Limitation Act, 1908.

19. I have heard the learned Counsels for the parties, read the material/evidence available on the record, and considered the applicable law, and my findings on the above issues, along with reasons, are as follows:

### REASONS

#### **Issue No. (i)**

20. Issue no. (i) requires the Court to determine whether the Plaintiffs had entered into an Agreement of Sale with Defendant No.1/MZ on 06.06.2003 in respect of the Suit Property. The Plaintiffs produced the Agreement of Sale along with the marginal witnesses, Muhammad Mubeen and Allah Rakha Babar, who corroborated the Plaintiffs' claim that they had executed an agreement of sale with Defendant No.1/MZ. Plaintiff Nos.1 and 2 signed the Agreement of Sale as "Vendee" and "Vendee-1", respectively. The Plaintiffs also produced the cash receipt of Rs.450,000. Defendant No.1/MZ denied the existence of the Agreement of Sale but did not put any question in his cross-examination, which arguably could shake the Plaintiffs' version, in particular as Defendant No. 1/MZ did not deny that the Plaintiffs had possession of the Suit Property, which was surprising if no payment had been made. Further, Defendant No.1/MZ's contention that the Plaintiffs

were his tenants was not supported by any contemporaneous evidence. He produced no evidence in support of the receipt of rent or tenancy agreement.

21. Based on the evidence produced by the Plaintiffs, it has come on record that through the Plaintiffs' Witness (himself) as a signatory and the two attesting witnesses fulfilling the requirements of Article 17 and 79 of the Qanoon-e-Shahadat Order, 1984 the Plaintiffs and Defendant No.1/MZ entered into an agreement of sale in respect of the sale of the Suit Property on 06.06.2003. The evidence led by the Plaintiffs has gone unchallenged. The Agreement/Payment Receipt of the entire sale consideration mentioned in the Agreement of Sale has also not been dislodged in the cross-examination. Defendant No.1/MZ produced no positive evidence to rebut and controvert the Plaintiffs' contentions. Defendant No.1/MZ denied his signature on the Agreement of Sale but took this defence very casually. After the Plaintiffs had closed its side, and even otherwise, after reviewing the issues settled by the Court, Defendant No.1/MZ's, knew that if he had to prove that he had never signed the Agreement of Sale, the burden was on him to prove his defence. He should have provided evidence in support of this contention, but he did not do so. No expert was called, nor was the examination-in-chief set up to support his contentions in this regard such that without cross-examination by Plaintiffs' Counsel, he could take benefit of such default and prove that he did not sign the Agreement of Sale or at least be in a position to argue purposively that there was no Agreement of Sale and get the issue settled by the Court decided in his favor. Yet no such evidence is available on record for me to find that Issue No.1 may be decided in the negative.

22. Finally, even if this Court believed that Defendant No.1/MZ neither signed nor executed the Agreement of Sale, the point of the matter was that there was an agreement by conduct between the Plaintiffs and Defendant No.1/MZ. When Defendant No.1/MZ decided

to remain silent and took no action to agitate his right to the property, and did not even bother to send a legal notice to the Plaintiffs claiming his rights and instead remaining indolent, the same arguably constituted an acceptance of status-quo, i.e. he had accepted and conceded that the Suit Property had been sold and he was simply buying time to see how matters could unfold and he may wriggle out of his obligation of performance..

23. In view of the above, Issue No. (i) is answered in the affirmative and in favour of the Plaintiffs.

**Issue Nos. (ii)**

24. The issue no. (ii) involves the determination by this Court whether the Plaintiffs paid the entire amount of sale consideration of Rs.450,000 to Defendant No.1/MZ, which he duly received.

25. The Plaintiffs, as required under Articles 17 and 79 of the Qanun-e-Shahdat Order, 1984, mandating that in case of financial instruments, the execution of the same ought to be corroborated by two male witnesses produced two marginal witnesses of the Agreement of Sale and the Payment Receipts in support thereof, evidencing full and final payment of Rs.450,000. The learned Counsel for Defendant No.1/MZ did not cross-examine these marginal witnesses, to deny the receipt of the entire sale consideration. Both the witnesses confirmed the payment in cash of Rs.450,000 to Defendant No.1/MZ; thus, issue no.(ii) is answered in the affirmative in favor of the Plaintiffs.

**Issue Nos. (iii)**

26. Issue No.(iii.) involves the determination of whether, after full payment of the sale consideration, Defendant No.1/MZ handed physical

peaceful possession of the Suit Property. It is an admitted position that the Plaintiffs have had physical possession of the Suit Property since 2002. This fact is and has not been denied by Defendant No.1/MZ in his evidence. Defendant No.1/MZ claims that the Plaintiffs were handed possession of the Suit Property in December 2002 (albeit as a tenant), whereas, according to Clause 3 of the Agreement of Sale, the physical possession of the Suit Property was handed by Defendant No.1/MZ to the Plaintiffs on 06.06.2003. In either event, physical peaceful possession of the Suit Property of Plaintiffs is not denied.

27. In view of the above, Issue No.(iii.) is answered in the affirmative and decided in favor of the Plaintiffs.

**Issue No.(iv)**

28. Issue No.(iv.) requires this Court to determine whether the terms and conditions of the Agreement of Sale are binding upon Defendant No.1 and, if so, its effect. The Defendant No.1/MZ has denied the Agreement of Sale dated 06.06.2003. He claimed that he neither signed nor executed the said agreement. He denied that he received any payment, yet at the same time, he contended that the Plaintiffs were his tenants. If this were true and correct, Defendant No.1/MZ would have produced at least something in support of his contention. He neither produced any copy of the tenancy agreement nor submitted any proof of payment of rent to him, and if the Plaintiffs defaulted, then he did not file any evidence of either rent recovery or eviction proceedings for default of payment of rent against the Plaintiffs, nor did he file any action for possession/dispossession against the Plaintiffs nor any claim for mesne profit against the Plaintiffs. Instead, he did nothing positive in support of his contention that the Plaintiffs were allegedly his tenants. Indeed, if the Plaintiffs were, in fact, his tenants, then he should have deposed some evidence in support of such contention, but there was nothing available on the record of this Court.

Defendant No.1/MZ produced his work colleague, Muhammad Hassan, to depose that the Plaintiffs were tenants, that the tenancy agreement was verbal, and there was no Agreement of Sale. This was hardly credible evidence given the surrounding facts and circumstances which had been brought on record by the Plaintiffs' evidence. On the parole evidence rule, the oral testimony of Muhammad Hassan stood nowhere in the background of the documentary evidence led by the Plaintiffs and after the production of the marginal witnesses. The Defendant No.1/MZ plea that the Notary Public was not produced, although material, was neither here nor there, given the available evidence. Thus, based on the evidence brought on record, given the matchup between the evidence of the Agreement of Sale and the verbal tenancy agreement, Defendant No.1/MZ had no case to assert Plaintiffs were his tenants and not vendees.

29. In view of the above, Issue No.(iv.) is decided in the affirmative and in favour of the Plaintiffs.

**Issue Nos. (v), (vi) and (vii)**

30. Issue Nos. (v.), (vi.), and (vii.) all relate to whether Defendant No.1/MZ had taken a bank loan from ADBPL, whether the Suit Property was mortgaged with the bank in connection with the loan at the time of the agreement of sale dated 06.06.2003, whether the Plaintiffs paid any amount of the bank loan; and, whether the title and other property documents of the Suit Property were deposited with the Nazir of this Court.

31. During the cross-examination, Defendant No.1/MZ admitted that:

“It is correct to suggest that I had taken the loan of Rs.200,000/- and mortgage the property with the bank of the Defendant No.2. It is correct to suggest that I have not informed to the Plaintiff that the suit property is mortgaged

with the Defendant No.2 (Bank). It is not in my knowledge that the Plaintiff came to know in the month of April, 2007 that the suit property was mortgaged and leased out. It is correct to suggest that the bank advertised the publication in Jang for attachment of the suit property. It is correct to suggest that the officers of the bank reached at the suit property to attach the property.”

The aforementioned admissions by Defendant No.1/MZ confirm that Defendant No.1/MZ had taken a bank loan from ADBPL. It was no one's case that the Plaintiffs had taken a loan from Defendant No.1. To this extent Issue No.(v.) was perhaps not framed properly and is reframed by the Court to read:

“Issue No.(v.) – Whether the Defendant No.1/MZ [had] taken bank loan from the Defendant No.2/ADBPL, if so, its affect?”

It may be mentioned here that paragraph 6 of the Affidavit in Evidence of Defendant No.1/MZ states that:

“I had obtained the loan from Zarai Tarkiati Bank on 09.09.2003 and mortgaged the said house with bank. I had deposited the 8/9 installments of loan but thereafter I could not pay the installments of loan amount to bank.”

Although no one stepped into the witness box on behalf of ABDPL, as per the Written Statement filed by the bank, as available in the suit file, the bank claimed in its prayer clause of the Written Statement that Defendant No.1/MZ had mortgaged the Suit Property with the Bank and had executed a loan agreement with the Bank on 18.03.2004. This confirmed that Defendant No.1/MZ had taken a loan from Defendant No2/ADBPL and the Suit Property was mortgaged with the Bank after the Agreement of Sale dated 06.06.2003, either from September 2003 onwards (according to Defendant No.1/MZ's version) or from March 2004 onwards (according to the Bank's Written Statement).

Therefore, the above amended Issue No.(v.) is answered in the affirmative.

32. Issue No.(vi.) concerned the determination by the Court whether Defendant No.1/MZ at the time of the agreement of sale disclosed that he mortgaged the Suit Property documents in the office of Defendant No.2/ADBPL, and the loan was sanctioned in favour of Defendant No.1/MZ if so its effect. Based on the examination in chief and cross-examination of Defendant No.1/MZ, and the Written Statement filed by Defendant No.2/ADBPL, reproduced hereinabove in paragraph 28 above, it is apparent that at the time of Agreement of Sale dated 06.06.2003, neither the Suit Property had been mortgaged with the bank nor any loan had been availed by Defendant No.1/MZ from Defendant No.2/ADBPL. Be that as it may, as a result of the bank loan, and because the Suit Property had not been conveyed in a manner whereby the rights in the Suit Property stood transferred in favor of the Plaintiffs, the creation of the equitable mortgage in favor of the bank, meant that the Defendant No.2/ADBPL had a lien/charge on the Suit Property until the loan was redeemed.

33. In view of the above, Issue No.(vi.) in two parts is answered in the first part in the negative to the extent that Defendant No.1, at the time of the agreement of sale, did not disclose that he had mortgaged the Suit Property documents in the office of Defendant No.2/ADBPL. This is because there was no bank loan on 06.06.2003 and none existed; therefore there was no need for any disclosure to be made and Defendant No. 1/MZ disclosed nothing.

34. The second part of Issue No.(vi.), is answered in the affirmative to the extent that it is confirmed that Defendant No. 2/ADBPL sanctioned a loan in favor of Defendant No.1/MZ.

35. With regard to Issue No.(vii.), it has been brought on record by Defendant No.1/MZ in his evidence that he had made a partial payment towards the settlement of his loan amount with Defendant No.2/ADBPL and that Plaintiffs paid the balance outstanding amount to Defendant

No.2/ADBPL. The cross-examination of Defendant No.1/MZ confirms as follows:

“It is incorrect to suggest that the Plaintiff have not contracted me for the purpose of the payment of the final payment. It is correct to suggest that I have not filed any proof of the payment of the bank with my Affidavit-in-Evidence as well as Written Statement. It is correct to suggest that I paid the loan of Rs.60,000/- to the bank and the balance payment was made to the bank by the Plaintiff. It is not in my knowledge that the Plaintiff made the payment of Rs.283,753/- to the Defendant bank. It is correct to suggest that the contents of the Affidavit-in-Evidence and the plaint was read over to me by my advocate. It is correct to suggest that the payment was made to the bank and receipts are attached with the Affidavit-in-Evidence of the Plaintiff. . . .It is incorrect to suggest that I have committed fraud with the Plaintiff that the suit property was mortgage when it was sold out. It is correct to suggest that I have not paid any amount of the bank which was paid by the Plaintiffs. It is correct to suggest that the payment was not made to the bank then the property will be sold out. Voluntarily says that the official of bank stated that the suit property will be auctioned and the amount of the bank will be deducted and balance amount to be paid to the Defendant No.1. It is correct to suggest that the full payment was made to the bank by the Plaintiff and thereafter the mortgage documents were deposited with the Nazir of the Hon'ble High Court. It is correct to suggest that the Defendant No.2 bank has stated in his Written Statement that the bank has received the entire amount. It is not in my knowledge that the bank has issued any NOC/Clearance Certificate to the Plaintiffs.”

36. It is evident from the cross-examination of Defendant No.1/MZ that he did not pay the entire amount of the loan and made only partial payment of Rs.60,000. Defendant No.1/MZ did not deny that Plaintiffs had paid the balance of the loan to Defendant No.2/ADBPL. Therefore, the first part of Issue No.(vii.) is answered in the negative to the extent that the Plaintiffs paid the entire bank loan amount. Clearly, the Plaintiffs did not pay the entire amount; however, the Plaintiffs paid about 75% of the loan amount to the bank. The second part of the two part Issue No.(vii.) is answered in the affirmative that the Suit Property documents

as per the Order passed by this Court were deposited before the Nazir of this Court by Defendant No.2/ADBPL.

**Issue No. (viii)**

37. The matter to be determined in Issue No.(viii.) is whether Defendant No.1/MZ played fraud with the Plaintiffs. Based on the evidence brought on record, no fraud appears to have been played by Defendant No.1/MZ on Plaintiffs. There may be a change of mind, perhaps, to renege on the Agreement of Sale by Defendant No.1/MZ, but the Plaintiffs have proved no fraud on the part of Defendant No.1/MZ. Accordingly, I am inclined to decide Issue No. (viii.) in the negative.

**Issue Nos. (ix)**

38. Issue No.(ix.) has two parts. The first part concerns Plaintiffs' entitlement to recover the amount of Rs.185,000 (bank loan) paid by Plaintiffs to Defendant No.2/ADBPL to redeem the mortgage loan and secure the Suit Property currently owned by Defendant No.1/MZ. The second part of the Issue No. (ix.) is in relation to Plaintiffs' entitlement to claim damages to the extent of Rs.5,000,000 and if so its effect.

39. In order to determine the quantum of the amount payable to the Plaintiffs by Defendant No.1/MZ, if any, arising from the payment made by Plaintiffs to Defendant No.2/ADBPL, I have reviewed the evidence brought on record and found that the following position emerges. First, Defendant No.2/MZ stated in his Affidavit in Evidence that he had obtained a loan from Zarai Tarkiat Bank on 09.09.2003 and had repaid Rs.50,000/-to the Bank. In his cross-examination, Defendant No.2/MZ stated under oath that he had taken a loan of Rs.200,000 and had paid a sum of Rs.60,000 of this loan directly to the Bank. Additionally, the Plaintiffs got a Bank Auction Notice published in an Urdu Newspaper

indicating that as of 05.12.2007, Defendant No.1/MZ owed the bank a sum of Rs.254,000. If I had to make an assessment based on the evidence of Defendant No.1/MZ's and that of the Plaintiffs', it would appear that Defendant No.1/MZ, as of 05.12.2007, owed the bank a sum of Rs.194,000 to Rs.204,000. Therefore, at the very least, the Plaintiffs had to pay off the bank an amount within the above-mentioned range between Rs.194,000 and Rs.204,000 of the loan amount. The Plaintiffs produced the original deposit slip dated 29.11.2007 in the sum of Rs.100,000 deposited by them with Defendant No.2/ADBPL marked as "Exhibit "P/8". The Plaintiffs also stated in paragraph 18 of their Affidavit in Evidence that they had paid a sum of Rs.195,000 to Defendant No.2/ABDPL and claimed the said amount in the suit. Finally, it is understood from the Written Statement filed by Defendant No.2/ADBPL (no one gave evidence on their behalf) that the Plaintiffs had approached the bank and, on behalf of Defendant No.1/MZ, deposited the entire outstanding amount with the bank. Yet Plaintiff's Counsel in his cross-examination of Defendant No.1/MZ put an entirely different figure to Defendant No.1/MZ. Plaintiffs' Counsel asked if he (Defendant No.1/MZ, knew that the Plaintiffs had paid Rs.283,753/- to the Defendant No.2/ADBPL. Therefore, given the varying amounts being claimed by the Plaintiffs, and the uncertainty, I am unable to arrive at a definite figure towards a claim against Defendant No.1/MZ as payable to Plaintiffs. Therefore, for lack of certainty, I do not find any amount is due and payable by the Defendants to the Plaintiffs, although I acknowledge that there is some amount. Yet, exercising my discretion to bring this lengthy litigation to a realistic end and to give parties space to move on with their lives, respectively, no payment is awarded by me as recoverable from Defendant No.1/MZ.

40. Plaintiffs did not provide any evidence to prove their claim for damages to the extent of Rs.5,000,000. Nothing was brought on record to prove any claim for either general or special damages. Accordingly,

I have decided Plaintiffs' claim for damages against Defendants in the negative.

Issue No.(x.)

41. In view of the above, I am of the view that the Plaintiffs have proved their case and are entitled to the relief of specific performance of the agreement of sale between the Plaintiffs and Defendant No.1/MZ in respect of the Suit Property in terms of Prayer Clauses (a), (c), (d) and (e). Further, the Nazir is directed to handover the Original title and other property documents of the Suit Property submitted by Defendant No.2/ADBPL to the Plaintiffs for eventual transfer and mutation of the Suit Property in their names.

42. For reasons discussed hereinabove, no case is made out for prayer clause (b) and the said prayer is dismissed.

43. Parties to bear their own costs of the suit.

44. The Suit stands decreed in the above terms. Office to prepare decree accordingly.

Larkana;  
Dated: 13.03.2024

J U D G E

Announced by me in Karachi on 15.03.2024,

J U D G E