

IN THE HIGH COURT OF SINDH KARACHI

**Suit No. 689 of 2003**

Syed Hashim Ali Hassan	.....	Plaintiff
versus		
Jalaluddin Malik & others	.....	Defendants

None present for the plaintiff.  
Khawaja Saif-ul-Islam, Advocate for defendant No.1.

Date of hearing : 17.10.2024

Date of Judgment : 25.10.2024

**JUDGMENT**

**Omar Sial, J.:** Jalaluddin Malik (Defendant No. 1) owns Plot No. 82 on 33<sup>rd</sup> Street of DHA Phase 5 Extension. It is a 600-square-yard tract of land. Syed Hashim Ali Hasan (Plaintiff) alleges that the Estate Agent working on behalf of Malik on 19.05.2003 had orally agreed to sell the Plot to Hasan and consequently had also given the Estate Agent an advance of Rs. 150,000 out of the total sale consideration of Rs. 5,000,000. Hasan further claimed that the remaining sale consideration was to be paid by him to Malik within 15 days. Hasan was ready and willing to pay the remaining amount within the specified period and requested Malik to consummate the transaction (the last such request being made on 05.06.2003; but Malik, on one pretext or another, declined to effect the transfer. This Suit was filed by Hasan on 10.06.2003 seeking specific performance of the agreement to sell and a consequent permanent injunction.

2. In response to Hasan's allegations and claims, Malik said that the Estate Agent had sent him a cheque and a receipt to be signed. Malik did not sign the receipt but had asked for some amendments, which the Estate Agent had assured him would be done. The receipt was not issued to Hasan but to Nayyer Malik, who was the supposed

purchaser of the Plot. He says he never signed the receipt in the presence of the witnesses shown on the receipt, nor had he ever handed over the title documents to the Estate Agent or Hasan.

3. On 14.03.2005, the following issues were settled:

- (i) Whether the parties agreed to the sale and transfer of Plot No. 82, Street No. 33, Phase 5 Extension, DHA, Karachi, measuring 600 square yards. If so, for what consideration?
- (ii) Whether the plaintiff is entitled to specific contract performance.
- (iii) What should the decree be?

4. On 02.03.2020, a Commissioner was appointed to record evidence of the parties. In his report dated 14.06.2021, the Commissioner reported that despite notices, none had appeared to record evidence on behalf of Malik. On 20.08.2022, i.e., more than a year later, Malik filed an application praying that he be allowed to cross-examine the Plaintiff's witnesses. This application was allowed by this Court on 26.09.2022.

5. The case came up for final arguments this morning; however, the Plaintiff's counsel remained absent. No indulgence was shown as this is a twenty-one-year-old case, and counsels were informed that old cases would be heard first by this court and no adjournments would be allowed. Despite that, neither counsel appeared nor was any intimation sent. I have heard from Mr. Khawaja Saif-ul-Islam and have gone through the record with his assistance. My observations and findings are as follows.

6. It is an admitted position that Malik owned the Plot. At trial, he produced the original transfer order. It is also accepted that no formal written agreement was executed between the parties. Hasan relies upon a receipt dated 19.05.2003 to claim a deal had been reached between the two individuals. Even though the receipt appears dubious, the factual position is that Malik denies having signed it. Article 61 of the Qanun-e-Shahadat Order, 1984 provides that "when the Court has to form an opinion as to the person by whom any

document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or it was not written or signed by that person, is a relevant fact.” Article 78 of the Order provides that “if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person’s handwriting must be proved to be in his handwriting.”<sup>1</sup> Hasan did not produce evidence at trial to support his claim that Malik had signed the receipt. Article 84 of the Order says that to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.<sup>2</sup> I have examined Malik’s signature on the written statement he filed and his U.S. Passport No. 555391801. When compared with the signature on the Receipt, it is abundantly clear that Malik’s signature does not resemble that of Malik on the written statement and Passport. It was open to Hasan to bring as witnesses the two individuals (whose signatures are on the receipt, but there are no further details given) and in whose presence he says that Malik signed the receipt. Even in the Affidavit-in-Evidence sworn by Hasan,

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<sup>1</sup> 2007 SCMR 1884, *Syed Shabbir Hussain & others v. Asghar Hussain Shah & others*, “According to Article 78 of the Qanun-e-Shahadat, 1984, execution of a document is to be proved to be in the handwriting or signature or thumb-mark of the alleged executant, which would mean signing or putting thumb-mark over a document as consenting party thereto. Execution of document would not only mean mere signing or putting thumb-impression but something more than mere signing or putting thumb-impression by the executant. It must be proved that thumb-mark was made in the presence of witness in whose presence the document was written and read over and it was understood by the vendor and would not only be limited to merely signing a name or placing thumb-impression upon a blank sheet of paper so as to prove the document to have been executed whose identification should also be proved by reliable and authentic evidence that a person who has affixed thumb-mark or signature was the same person who owned the land and sold the same to the vendee. Execution would mean series of acts; which would complete the execution. Mere signing or putting thumb-mark would not amount to execution in terms of Article 78 of Qanun-e-Shahadat, 1984.”

<sup>2</sup> 2024 SCMR 1271, *Mst Nazeeran v. Ali Bux*, “Even otherwise, the Court, in certain eventualities, enjoins plenary powers to itself compare the signature along with other relevant material to effectively resolve the main controversy as observed by this Court in the cases of *Zar Wali Shah v. Yousaf Ali Shah and 9 others* (1992 SCMR 1778); *Ahmed Hassan Khan v. Naveed Abbas and another* (1998 SCMR 346) and *Messrs Waqas Enterprises and others v. Allied Bank of Pakistan and 2 others* (1999 SCMR 85). Thus, the visual comparison conducted by the trial court is in consonance with the law declared by this Court in the above cases.”

he did not identify who these individuals were, let alone bring them to trial to testify in his favor.

7. It is pertinent to mention that the other witness brought by the Plaintiff was Nayyar Saleem. This witness claimed that he was one of the signatories on the receipt. A comparison of the witness signatures on the receipt and Nayyar's signature on his Affidavit-in-Evidence shows that the two signatures are incomparable. I have not delved into the intricacies of the contract law to determine whether the receipt can even be termed an agreement, let alone the privity of contract between the parties, if any. For the sake of brevity, I have done this as even if the receipt is considered, Hasan failed to prove that Malik had signed it.

8. During his cross-examination at trial, Hasan agreed that he had filed a case seeking the performance of a contract when a contract did not exist. He also decided that he had not issued any notice to Malik asking him to consummate the transaction. He agreed that he had made no further payments to Malik. He agreed he had not deposited the balance consideration in court or attempted to do so, the deposit of which would have demonstrated his bona fide.<sup>3</sup> While claiming that he had given the advance money to Malik, he expressed his inability to identify the account from which payment had been made. No evidence was produced at trial to show that the initial advance money was given to Malik by Hasan.

9. Hasan completely failed to establish his claim. On the contrary, the action was motivated by malafide. The Suit is dismissed. Rs. 1,000,000 cost is imposed on Plaintiff to be paid to Defendant No. 1 within thirty days of this judgment.

**JUDGE**

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<sup>3</sup> 2024 SCMR 168, Masood Ahmed Bhatti v. Khan Badshah, "Even otherwise, it is now well settled that where the vendor refuses to accept the sale consideration amount, the vendee seeking a specific performance of the agreement to sell is essentially required to deposit the amount in the Court. The vendee has to demonstrate that he has been at all relevant times ready and willing to pay the amount and to show the availability of the amount with him. A vendee cannot seek enforcement of reciprocal obligation of the vendor unless he is able to demonstrate that not only his willingness but also his capability to fulfil his obligations under the contract."