

HIGH COURT OF SINDH, AT KARACHI

Suit No.513 of 2004

Plaintiff : Salahuddin through Mr.Yousuf Moulvi
advocate

Defendant No.1 : Mrs.Razia Sultana through Syed Zahir Hussain
Chishti advocate

Defendant No.2 : Union Bank through Mr.Khalid Ahmed Siddiqui
advocate

Date of hearing : 07-11-2013

J U D G E M E N T

NAZAR AKBAR---J.,Through this common judgment I intend to dispose of Suit No. 513 of 2004 and Suit No. 72 of 2005. Briefly stated the suit No.513 of 2004 was filed by Salahuddin is a suit for Specific Performance of an agreement of sale dated 31.08.2002 whereby; defendant Razia Sultana has agreed to sell her mortgaged property bearing House No.C-53, Block-H, North Nazimabad, Karachi, measuring 600 Sq.Yds., with construction thereon against the total sale consideration of Rs.50,00,000/= (Rupees Five Million Only). The Plaintiff claimed that they have paid Rs.20,00,000 (Rupees Two Million Only) in cash and Rs.10,00,000/= (Rupees One Million Only) through pay order dated 30.08.2002 and two separate receipts were issued by the defendant on 31.08.2002. The original title documents of the subject property were lying in the Union Bank of Middle East Limited and they were also impleaded as one of the defendants, since the property was mortgaged with the said Bank. The Plaintiff was required to deposit balance amount of Rs.20,00,000/=(Rupees Two Million Only) with the Union Bank for release of the mortgage within one year but it could not be done as consent of the defendant Razia Sultana was required and she avoided. Therefore, on 13.05.2004 the Plaintiff filed suit No. 513 of 2004 and also claimed

meanse profits at the rate of Rs.35,000/= (Thirty Five Thousand Only) per month from September, 2003.

2. The defendant Razia Sultana in her written statement raised several preliminarily issues and disputed the terms and conditions of the agreement and denied the receipt of cash payment of Rs.20,00,000 (Rupees Two Million Only). She claimed that the cash amount was never paid to her. Soon-after filing of the written statement on 19-01-2005 she filed Suit No. 72 of 2005 for cancellation of agreement of sale dated 31-08-2002 and cash receipt of Rs.20,00,000/= (Rupees Two Million Only) as forged and fabricated. The Plaintiff of Suit No. 513 of 2004 Salahuddin was impleaded as main defendant in Suit No. 72 of 2005 filed by Razia Sultana. Mr.Salahuddin filed his written statement in the Suit No. 72 of 2005. He mostly reiterated his claim from Suit No. 513 of 2004 and denied the averments of Suit No. 72 of 2005. The Court on 08-08-2005 consolidated both the suits and following consolidated issues were framed:-

- 1) Whether the Agreement of Sale dated 31-08-2002 was entered into between the plaintiff and defendant No.1, if so, in what terms?
- 2) Whether the cash receipt dated 31-08-2002 showing payment of Rs.20,00,000/= is forged and fabricated document?
- 3) Whether the plaintiff has performed his part of obligation, if so, what is its effect?
- 4) Whether the suit is barred under section 58 of the Transfer of the Property Act?
- 5) What is the effect of Iqrar Nama executed on 30.08.2002 on the agreement of sale?
- 6) What should the decree be?

And suit No.513 of 2004 was declared leading suit. By order dated 12.09.2005 commissioner was appointed for recording of evidence. The

plaintiff of leading suit examined himself and produced one marginal witness of the agreement of sale dated 30.08.2002 namely Mr.Muhammad Iftikhar son of Rahim Bux. Both the witnesses were thoroughly cross examined by Mr.Zaheeruddin Chishti advocate for the defendant No.1. The defendant No.1 did not come forward as witness and sent her son Imran Khan as her attorney and witness. He was cross examined by the learned counsel for the plaintiff. On completion of the evidence, the commissioner submitted his report along with evidence file on 30.10.2006.

3. After the evidence was recorded, the main defendant Razia Sultana and her learned counsel gave-up the contest and proceedings took a new turn on 04.12.2008 when for the first time learned counsel of defendant No.2 namely Union Bank of Middle East limited appeared in Court and informed that the defendant No.2 on 12-09-2008 has obtained decree in Banking Suit No. 274 of 2005 against defendant No.1 in respect of the mortgaged suit property. The learned counsel for the Plaintiff claimed that the Plaintiff on 07-07-2004 has already deposited a sum of Rs.20,00,000/= (Rupees Two Million Only) with the Nazir of this Court to safeguard the interest of defendant No.2 namely Union Bank Limited and agreed to clear any further liability of the Bank in terms of decree of Banking Court. Thereafter by order dated 06.05.2010 the Plaintiffs were directed to deposit a sum of Rs.50,76,277/= with the Nazir of this Court towards the satisfaction of the obligation of the Bank. The Plaintiff deposited the said amount with the Nazir of the Court. Consequently original title documents of mortgaged property were called by the Nazir of this Court from the Banking Court No.1 where Execution No. 12 of 2008 was pending for the satisfaction of decree of defendant No.2 and kept in his custody pending this case.

4. In view of the above facts subsequent to the recording of evidence it is quite clear that the Plaintiff has not only shown his willingness to purchase the suit property but also he even paid more than the agreed sale consideration by and between the Plaintiff and the defendant No.1 in terms of the agreement of sale dated 30.08.2002. It was not denied and disputed by the defendant No.1 that the total sale consideration was Rs.50,00,000/= (Rupees Five Million Only) as per agreement of sale dated 22.08.2002 and she has admitted that she has received an amount of Rs.10,00,000 (Rupees One Million Only) through pay order. Therefore, once the Plaintiff deposited an amount of Rs.5,90,845/= in Court towards redemption of the mortgage liability on the suit property, the total sum of money paid by the plaintiff against the purchase of suit property comes to Rs.60,90,845/= irrespective of the fact that the defendant No.1 has or has not received Rs.20,00,000/= (Rupees Two Million Only) cash against receipt. Therefore, in view of these facts without going into the details of evidence from either side, it is established that the Plaintiff has paid by all means more than the agreed sale consideration to claim his right to acquire ownership rights of the suit property. The defendants counsel is not attending the Court for the last more than four years and the Court record shows that the learned counsel for the defendant No.1 lastly appeared on 06.10.2010. No arguments have been advanced by the defendant's counsel nor written synopsis have been filed by him.

5. In view of the changed circumstances of the case particularly after the decree obtained by the defendant No.2 against the defendant No.1 and the decree has been satisfied by the plaintiff to redeem the subject property, I am not required to record my findings on any of the issue No.1 to 5. Only issue No.6, i.e. What should be the decree be? is answered as follows:-

The suit No.513 of 2004 is decreed to the extent that the defendant No.1 should execute a registered sale deed in respect of suit property bearing plot No.C-54, Block-H, North Nazimabad, K.D.A Scheme No.2, Karachi, in favour of the Plaintiff within fifteen days of passing of this judgment and decree and in case of her failure the Nazir of this Court is directed to execute the relevant documents to transfer title of suit property in the name of Plaintiff and he should hand over not only the original title documents but also ensure handing over of peaceful vacant possession of suit premises to the Plaintiff. The suit No. 72 of 2005 is dismissed. Parties are left to bear their own cost.

J U D G E

Karachi.
Dated:_____._____._____