

HIGH COURT OF SINDH AT KARACHI

Suit No.1320 of 2004

Present:
Mr. Justice Nazar Akbar

Plaintiff: Muhammad Ayub through Mr. Zia Awan,
Advocate.

Defendant Miss.Ambreen Naz through Mr. M. Qutub-
uz-Zaman, Advocate (absent)

Date of Hearing 18.12.2014

JUDGEMET

Nazar Akbar, J. This judgment will dispose of suit for specific performance of contract of sale of immovable property, declaration, permanent injunction, possession and damages.

2. Brief facts of the case are that the Plaintiff entered into an agreement of Sale dated **28.5.2004** with the Defendant to purchase, acquire lease hold rights of a single story corner Bungalow No.A-452, measuring 240 sq.yds, Block No.5, KDA Scheme No.24, Gulshan-e-Iqbal, Karachi (hereinafter the suit property) for a total sale consideration of **Rs.45,00,000/=**. The Plaintiff paid a sum of **Rs.4,50,000/-** at the time of signing of the agreement of Sale and the remaining sum of **Rs.40,50,000/-** was to be paid on or before **1.1.2005**. The Defendant in the last week of September 2004 sent a legal notice to the Plaintiff claiming that he has failed to pay an additional amount of Rs.20,00,000/- by the end of June 2004 which he had **verbally** agreed, therefore, sale agreement stand revoked and the amount of Rs.450,000/- towards advance is returned through a cheque enclosed. The Plaintiff promptly replied the said legal notice

denying any oral agreement and claiming that none of the party could back out from his/her commitments on one pretext or the other and the cheque sent alongwith the legal notice is being retained uncashed for handing over at the time of signing of the of the sale deed in accordance with the terms of the written agreement of sale. The Plaintiff showed his readiness to perform his part of the agreement at any time during the current month and also caused a Public notice published in the Daily Jang Karachi on **6.10.2004** informing the public in general and intending purchaser in particular to refrain from dealing with the Defendant in respect of the suit property. The Plaintiff has further averred that due to non-performance of the contract by the Defendant he has faced multiple hardships, financial losses, mental torture and agony and therefore he claimed additional amount of Rs.20,00,000/- as damages.

3. The suit was filed on **20.11.2004** and after service of summons the Defendant on **22.3.2005** filed her written statement wherein she raised preliminary objections and denied the contents of the plaint. She claimed that the total sale consideration agreed to be paid by the Plaintiff to the Defendant was **Rs.65,00,000/-** but only **Rs.45,00,000/-** were written in the sale agreement dated 28.5.2004 on the persistent request / demand of the Plaintiff as he wished to conceal the black money he so earned. The Defendant owing to the non-performance of contract by the Plaintiff sent a legal notice and revoked the sale agreement and returned the advance part payment amounting to Rs.4,50,000/- through cheque # 0541549 dated **21.9.2004**, drawn on Habib Bank Ltd, Gulshan-e-Iqbal Branch Karachi. It was further averred by the Defendant that after entering

into sale agreement with the Plaintiff she entered into a sale agreement with the owners of a constructed house bearing No.R-1558, measuring 120 sq.yds situated in Block-15, F.B. Area Karachi and paid them Rs.40,00,000/- after obtaining loan on **23.12.2004**, through promissory note. She also published a notice of revocation of the sale agreement in two newspapers and further averred that she has lost Rs.5,00,000/- due to the cancellation of sale agreement with the owners of the house No.1558, Block-15, F.B. Area, Karachi. Therefore, she is not prepared to sale the suit property at any cost due to nonfulfillment of promise by the Plaintiff.

4. On **12.12.2005** following issues were framed from the pleadings of the parties,.

- i. Whether the suit as framed is maintainable?
- ii. Whether the parties entered into an Agreement of Sale dated 28.5.2004 in respect of bungalow bearing No.A-452, measuring 240 Sq. Yds. Block-5 situated at KDA Scheme No.24, Gulshan-e-Iqbal, Karachi?
- iii. Whether the Plaintiff has performed his part of obligation?
- iv. Which of the party to the Agreement has committed breach? If so, to what effect.
- v. Whether the Defendant revoked the sale agreement? If so, to what effect.
- vi. Whether the agreement is capable for specific performance?
- vii. To what relief, if any, the Plaintiff is entitled to?

5. Plaintiff examined himself and produced his affidavit-in-evidence as Exh.P-1, Agreement of Sale dated 28.05.2004 as Exh.P-1/1, Receipt dated 28.05.2004 as Exh.P-1/2, Photostat copy of mutation letter as Exh.P-1/3, copy of legal notice as Exh.P-1/4, copy

of envelope as Exh.P-1/5, reply to notice alongwith receipt dated 02.10.2004 as photocopy as Exh.P-1/6, general notice for public information dated 06.10.2004 as Exh.P-1/7, photocopy of report No.26 dated 19.10.2004 as Exh.P-1/8, photocopy of letter dated 18.10.2004 as Exh.P-1/9, photocopy of cheque dated 21.09.2004 as Exh.P-1/10, photocopy of courier receipt as Exh.P-1/11. Plaintiff also examined Abdul Wahab who produced his affidavit-in-evidence as Exh.P-2. The Defendant was examined through Ziaul-Haq Usmani, attorney of defendant who filed his affidavit-in-evidence as EXh.D/1 alongwith 9 documents as Exh.D-1/1 to D-1/9 and also of a witness Abdul-Haq as Exh.D-2.

6. Heard learned counsel for the Plaintiff and the Defendant and examined written synopsis of their arguments as well as record and evidence. My issue-wise findings are as follow:-

7. **Issues No.1, 2 & 3.** These issues can conveniently be answered jointly. The burden of these three issues was on the Plaintiff. The Plaintiff has filed this suit for specific performance of a contract dated 28.4.2005 with the Defendant in respect of Bungalow No.A-452, measuring 240 sq.yds Block-5, KDA Scheme No.24, Gulshan-e-Iqbal, Karachi. He produced original written agreement of sale (Ex-P-1/1) duly executed by and between the Plaintiff and the Defendant. He also produced receipt of down payment (Ex-P-1/2). The witness of the Defendant in cross-examination has admitted the execution of agreement to sell. The attorney of the Defendant (DW-1) in his cross-examination has made the following admissions.

“It is correct to suggest that Defendant and Plaintiff entered into agreement of sale in writing dated 28.5.2004, voluntarily says there are two agreements one

in writing and other is oral agreement. I see sale agreement dated 28.5.2004 it bears signature of Plaintiff, defendant and witnesses. It is correct to suggest that I read and understand the agreement. It is correct that in agreement dated 28.5.2004 sale consideration written as 45,00,000/-.”

He further confirmed the contents of agreement and receipt of token money when he stated as under:-

“I read the contents of Para-2 of the agreement and state that it is true. All the contents of agreement exhibited as P-1/1 are true. It is correct to suggest that on receipt dated 28.5.2004 pertaining to the payment of Rs.4,50,000/- bears the signature of Defendant.”

The above admissions of the Defendant’s witness and unshaken evidence of the plaintiff confirm that the suit is maintainable since Plaintiff had no alternate except to approach the Court once he found that the Defendant is not willing to honor her commitment. There has been exchange of correspondence prior to filing of the suit and down payment has also been admitted and acknowledged by the Defendant. In terms of the agreement the cutout date for full and final payment was **01.01.2005** and after filing of the suit, the Plaintiff pursuant to the following order dated **20.12.2014** has deposited the entire balance sale consideration in Court:-

“The Plaintiff shall deposit the balance sale consideration with the Nazir of this Court within **three** days from today, which amount on deposit would be deposited in any profit bearing scheme **for the ultimate benefit of the party succeeding** in these proceedings”.

The aforesaid order was complied with by the Plaintiff on or before **22.12.2004**. These facts precisely prove that the Plaintiff has always been ready to perform his part of the contract and he performed so within stipulated time. Therefore, I hold that the suit was maintainable, the parties have entered into a valid contract and the

Plaintiff has performed his part of the contract. All the three issues are answered in affirmative.

8. **Issue No.4.** The burden of proof of this issue was even on both the parties to prove by positive evidence that they have not breached the terms and condition of the agreement. The discussion and my findings on issues No.1, 2 & 3 above leads to inescapable conclusion that there was no breach of contract on the part of the Plaintiff. However the Defendant was unable to establish that she has not breached the agreement. The Defendant by asserting an oral agreement of payment of Rs.20,00,000/- with the plaintiff in addition to the consideration of Rs.45,00,000/- has practically refused to acknowledge the written agreement. She, under the cover of alleged oral agreement, has attempted to wriggle out of the agreement. The Plaintiff has denied entering into oral agreement with the Defendant. The burden of proof of the alleged oral agreement was on the Defendant. It is claimed by the Defendant that an oral agreement was entered into by and between the Plaintiff and the Defendant in presence of the witnesses. Mr. Ziaul Haq Usmani, who had signed and filed written statement as attorney on behalf of the Defendant has not disclosed name of the witnesses in whose presence an oral agreement was entered into. The Defendant herself has not appeared in the witness box to state on oath that there has been an oral agreement between the Plaintiff and the Defendant. The attorney alone has claimed that he was witness to the oral agreement and he has not given the name of the other witness of oral agreement even in his affidavit-in-evidence. However, without disclosing the name of the witnesses of oral agreement he has produced one Abdul Haq Usmani,

his own real brother to support the claim of oral agreement. A written agreement cannot be defeated by an oral agreement. The provision of **Article 103** of the Qanoon-e-Shahadat Order, 1984, does not allow the Court to give any preference to an oral assertion over a written contract. **Article 103** of the Qanoon-e-Shahadat Order, 1984, reads as under:-

“103. Exclusion of evidence of oral agreement: When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last Article, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives-in-interest, for the purpose of contradicting, varying, adding to or subtracting from, its terms:

In this context I find support from the two pronouncements of the Hon'ble Supreme Court reported in **2014 SCMR 1217** and **2002 SCMR 326** which squarely covers the facts and circumstances of the case in hand. The relevant observations of the Hon'ble Supreme Court from the said judgments are reproduced below:-

2014 SCMR 1217 (Elahi Bakhsh through Legal Heirs and other..Vs..Muhammad Iqbal and another). Relevant page 1221 side note B, C & D.

The question that arises for the adjudication of this Court is whether an oral statement of a party to an instrument which varies or tends to vary its terms could be admitted into evidence? The answer to this question is a plumb no because Article 103 of Qanun-e-Shahadat Order 10 of 1984 excludes oral statement as between the parties to any such instrument or their representatives. The rationale behind this Article is that inferior evidence is excluded in the presence of superior evidence; that an agreement finding expression in writing is an outcome of deliberate and well thought out settlement; that a party acknowledging a fact in writing is precluded to dispute it and that an agreement reduced into writing is immune from mischief, failure and lapse of memory. It, therefore, follows that oral statements of P.W.1 and P.W.2 which tend to vary the terms of the deed mentioned above are inadmissible in evidence. No conclusion could be drawn much less a judgment rendered on the basis of these statements.

2002 SCMR 326 (Mst. Baswar Sultan...Vs...Mst. Adeeba Alvi).
Relevant page 332 side note D.

The next contention of the learned counsel for the appellant that the respondent cannot be permitted to adduce oral agreement or statement to contradict or vary the terms of proved agreement executed by the respondent/defendant in favour of the appellant/Plaintiff has force and merit.

In view of the above discussion the Defendant has failed to prove the factum of oral agreement in accordance with the requirement of **section 117** of the Qanun-e-Shahdat Order, 1984 and she is stopped by section **102 & 103** of the Qanun-e-Shahdat Order, 1984 to alleged and claim anything orally settled by and between the Plaintiff and her contrary to the written commitments. Therefore, I hold that the Defendant has breached the agreement. The issue is answered accordingly.

9. **Issue No.5.** The burden of this issue was on the Defendant. He has failed to advance any lawful justification for claiming that by simple legal notice dated **29.9.2004** of cancellation of agreement of sale dated 28.05.2004, the agreement stand revoked. The contents of notice produced by the witness as Exhibit P-1/4 are not showing any ingredients of revocation of a proposal. There is no concept of revocation of a validly concluded agreement. **Section 5** of the Contract Act, 1872 clearly bars revocation of proposals and acceptances once its communication is completed. **Section 5** of the Contract Act, 1872 stipulates as follows:-

“5. Revocation of proposals and acceptances.--A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

10. The contents of the notice (Ex.P-1/4) from the Defendant clearly indicate that the agreement has been concluded and the offer of sale of the property was accepted by the plaintiff by performing the condition of payment of 10% of sale consideration in advance. The receipt of advance payment by the Defendant has confirmed that her offer of sale of suit property was accepted by the Plaintiff much before the legal notice and even the acceptance was fully communicated to Defendant. The communication of proposal by the Defendant and its acceptance was completed when the advance / token amount of sale consideration was paid by the Plaintiff and the Defendant issued receipt of part payment in writing. Thus the communication of both the proposal and its acceptance has been completed by either parties to each other four months prior to the so-called revocation through legal notice. Therefore, neither there was any occasion to revoke the offer nor the legal notice dated **21.9.2004** (Ex. P-1/4) after the completion of communication can be treated as revocation. Therefore, this issue is answered accordingly.

11. **Issues No.6 & 7** In view of the above discussion the agreement is capable of specific performance and the Plaintiff is entitled to the relief claimed. It is, therefore, ordered that Plaintiff's suit is decreed as prayed except prayer clause (iii). The Plaintiff has already deposited balance sale consideration in Court. The Defendant is directed to execute proper sale deed in respect of Bungalow No.A-452, measuring 240 sq.yds, Block No.5, KDA Scheme No.24, Gulshan-e-Iqbal, Karachi, in favour of the Plaintiff within 30 days and she should immediately put the Plaintiff in possession of the suit premises on execution of the sale deed and hand over all original title

documents to the Plaintiff. In case of her failure the Nazir of this Court should execute a proper sale deed in favour of the Plaintiff and ensure delivery of possession of suit property to the Plaintiff. The Defendant may realize the balance sale consideration amounting to Rs.40,50,000/- from the office of the Nazir of this Court on execution of sale deed and putting the Plaintiff in possession of suit property alongwith original title documents. The profit accrued to the balance sale consideration deposited by the Plaintiff in Court shall be given by the Nazir to the Plaintiff in terms of the order dated 20.12.2004 as succeeding party and also on the ground that the Plaintiff was out of possession and the Defendant without lawful excuse was in breach of the contract and enjoyed possession of suit property. The cost shall also be borne by the Defendant.

Karachi
Dated:_____

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