

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1291 of 2003

Plaintiff : Mrs. Sana Rizwan
through Mr. Abdur Rehman, Advocate.

Defendant No.1 : Mrs. Amna Fahim
Defendant No.2 : Muhammad Farooq
through Mr. Habib-ur-Rehman, Advocate
and Mr. Ghulam Mujtaba, Advocate.

Defendant No.3 : The Administrator,
Pakistan Defence Officers Housing Authority,
through Mr. Ejaz Khattak, Advocate.

Suit No.10 of 2004

Plaintiff : Mrs. Sana Rizwan
through Mr. Abdur Rehman, Advocate.

Defendant No.1 : Mrs. Amna Fahim
Defendant No.2 : Muhammad Farooq
through Mr. Habib-ur-Rehman, Advocate
and Mr. Ghulam Mujtaba, Advocate.

Defendant No.3 : The Administrator
Pakistan Defence Officers Housing Authority,
through Mr. Ejaz Khattak, Advocate.

Date of Hearing : 05.12.2014

JUDGMENT

NAZAR AKBAR, J. By this common judgment, I intend to dispose of Suit No.1291/2003 and Suit No.10/2004. Both suits were filed by the Plaintiff namely Mrs. Sana Rizwan against the Defendants, namely Mrs. Amna Fahim and others involving two different contracts of sale dated **30.06.2003** and **18.7.2003** in respect of two different set of properties viz Plot No.E-4 Darakhshan Villa, DHA Phase-VI Karachi, measuring 260 sq.yards (through **Suit No.1291/2003**) and residential Plot No.117 Popular Avenue, Phase-VI, DHA, Karachi, measuring 2000 and commercial Plot No.6-C, Kh-

e-Bukhari, Phase-VI, DHA, Karachi measuring 200 sq.yards (through **Suit No.10/2004**). Suit No.1291/2003 was filed on **24.11.2003** and Suit No.10/2004 was filed on **07.01.2004** and in both the cases the Plaintiff has alleged that Defendant No.1 through Defendant N.2, her attorney Muhammad Farooq, has entered into contracts of sale of the aforesaid suit properties and in both the suits the Plaintiff beside claiming the specific performance of the contract of sale has also prayed for damage. Damages to the tune of Rs.50 Million and Rs.60 Million have been claimed in suit No.1291/2003 and suit No.10/2004 respectively. Defendant No.1 & 2 filed their joint written statement in suit No.1291/2003 and beside raising preliminary legal objection contended that the Plaintiff has failed to pay sale consideration within stipulated period as mentioned in the agreement to sell dated **30.6.2003** consequently, the said agreement was cancelled and even public at large was notified through publication in the daily "The News" dated **8.10.2003**. Therefore, no cause of action has accrued to the Plaintiff after cancellation of the agreement to sell. In suit No.10/2004 Defendant No.1 filed her separate written statement and denied the authority of Defendant No.2 as attorney to enter into agreement of sale on her behalf with the Plaintiff in respect of the suit properties mentioned in plaint of suit No.10/2004. Defendant No.2 also filed his written statement in Suit No.10/2004 and denied the very execution of agreement of sale dated **18.7.2003** on behalf of Defendant No.1. The Defendant No.3 Defence Officers Housing Authority was proforma Defendant in both the suits and they were debarred from filing written statement on 27.8.2004.

I have heard learned counsel for the parties and perused the record with their assistance. The learned counsel for Defendant No.1 has drawn my attention to CMA No.12447/2012 under Order VII Rule 11 CPC and to the following orders passed in suit No.10/2004; Order dated 16.01.2004;

“Ms. Rizwana, Advocate for the Plaintiff.

According to Ms. Rizwana an agreement purchasing the two plots was entered into by the Plaintiff with Defendant No.1 through Defendant No.2 for the time being as an interim measure the Defendant Nos.1 & 2 shall not create any third party interest. Ms. Rizwana shall also satisfy this Court as to how the suit is maintainable in respect of two distinct properties. **Ms. Rizwana undertakes that on the date of final hearing of this application she will make payment of the balance sale consideration subject to handing over possession.**

Order dated 22.11.2004;

“Ms. Rizwana Ismail, Advocate for the Plaintiff.
Mr. S.M. Siddiqui, Advocate for the Defendant.
Mr. Khalid Mahmood Dhoon, Advocate for Defendant No.3.

It has been argued that the properties which are subject matter of this suit have been agreed to be purchased through **one sale agreement** and therefore, both the properties can be made subject matter of one suit by joining the cause under order II Rule 3 CPC. Prima facie, the arguments of the learned counsel carry weight this issue however, is deferred and shall be framed at the time of framing of issues.”

Order dated 03.10.2005;

“Ms. Rizwana Ismail, advocate for Plaintiff.
Mr. Ali Gohar Maroof, advocate for Defendant No.2.
Mr. S.U Farooqui, holding brief for Mr. Masood Tariq, advocate for Defendant No.1.

The learned advocate for the Plaintiff states that this suit may be tagged with Suit No.1291/2005, **as both the suit**

are outcome of one and same agreement. The other side has no objection. Order accordingly.”

According to Ms. Habib-ur-Rehman, learned counsel for Defendant No.1, on 3.10.2005 counsel for Defendant No.1 was not present and on the mis-statement of learned counsel for Plaintiff two different suits were tagged together, therefore, he had preferred an application under Order VII Rule 11 CPC which was deferred by order dated **19.12.2012** to be taken up at the time of final argument. Irrespective of the grievance of the Defendants as spelt out on appreciating the above orders, the fact remains that on **3.10.2005** both the suits were tagged and on **19.12.2005**, again in absence of Defendants, following issues were framed by the Court.

- i. Whether the Plaintiff failed to fulfill the terms and conditions of the sale agreement dated 30th June 2003, deliberately and intentionally within the stipulated period?
- ii. Whether the Defendants have cancelled the agreement dated 30th June 2003?
- iii. Whether the Plaintiff is entitled to specific performance of the agreements dated 30th June 2003, and 18th July 2003?
- iv. What should the decree be?

The parties have led their evidence and no request for amendment in these issues was made since 2005. Consolidated evidence has been recorded by the Commissioner for recording evidence and final arguments have been advanced, therefore, I am not inclined to examine the application under Order VII Rule 11 CPC to dismiss suit No.10/2004 on any technical ground when enough material is available to decide both the suits on merit.

The Plaintiff was examined through her attorney namely Iqbal Mirza Nazar as Ex-PW-5/1. He produced his affidavit-in-evidence as Ex.P-5/2 and the following documents:-

1. Photostat copy of letter dated 14.02.2002 under objection of counsel for Defendants No.1 & 2 that it is neither original nor a certified copy. (as O/1).
2. Photostat copy of application for Heirship certificate dated Nil as Ex.P-5/3.
3. Photostat copy of heirship certificate issued by Mukhtiarkar Rawalpindi as Ex.P-5/4.
4. Photostat copies of statements of witnesses recorded by Mukhtiarkar, Rawalpindi in support of heirship certificate under objection of defence counsel that it is not certified copy. (as O/2).
5. Photostat copy of minute sheet in respect of Property No.E-4, measuring 260 sq. yards, phase-VI, under objection from the counsel for Defendants No.1 & 2 that it is neither original nor certified copy. (as O/3).
6. Photostat copy of minute sheet in respect of Plot No.117, Popular Avenue, measuring 2000 sq. yards under objection from counsel for Defendants No.1 & 2 that it is not original or certified copy. (as O/4).
7. Photostat copy of minute sheet in respect of Plot No.6-G, measuring 200 sq. yards, phase-VI, Karachi under objection from counsel for Defendants No.1 & 2 that it is not original or certified copy. (as O/5).
8. Photostat copy of General Power of Attorney of Defendant Amna Akhtar (Amna Fahim) as Ex.P-5/5.
9. Photostat copy of transfer order (legal heir) as Ex.P-5/6.
10. Original agreement of sale dated 30.06.2003 alongwith customer's copy of pay order for Rs.500,000/- (original seen and returned at the request of plaintiff's counsel and its Photostat copy placed on record under same exhibit number) as Ex.P-5/7.
11. Photostat copy of letter dated 03.02.2003 from Major (R) Shahid Malik to Pakistan D.O.H.A. as Ex.P-5/8.
12. Photostat copy of pay order dated 18.07.2003 for Rs.500,000/- as Ex.P-5/9.

13. Original agreement of sale dated 18.07.2003 alongwith original customer's copy of pay order dated 18.07.2003 for Rs.500,000/- Original seen and returned. (as Ex.P-5/10).
14. Office copy of my letter dated 02.09.2003 addressed to Defendant Muhammad Farooq alongwith TCS receipt as Ex.P-5/11.
15. Office copy of letter of Plaintiff dated 27.09.2003 addressed to Defendant Muhammad Farooq alongwith its TCS receipt as Ex.P-5/12.
16. Three office copies of letters of Plaintiff dated 25.10.2003 addressed to Administrator DHA as Ex.P-5/13, P-5/14 & P-5/15.
17. Original clipping of public notice published in Daily Jang, Karachi in its issue of 06.11.2003 as Ex.P-5/16.
18. Original clipping of public notice about Corrigendum in Ex.P-5/16 as Ex.P-5/17.
19. Photostat copy of plaint in Suit No.256/2003 filed by Defendant Muhammad Farooq in the Court of Senior Civil Judge, Rawalpindi as Ex.P-5/18.
20. Certified copy of order of Senior Civil Judge, Rawalpindi in Suit No.256/2003 as Ex.P-5/19.
21. Original postal envelope dated 06.03.2004 (original seen & returned) (as Ex.P-5/20).
22. Original summon form of the Court of Civil Judge Rawalpindi for appearance of Plaintiff in his Court on 10.03.2004 in the case of Muhammad Farooq vs. Sana Rizwan (original seen & returned & its Photostat copy kept on record under same exhibit number) as Ex.P-5/21.

The Defendant No.1 produced her evidence through her attorney Tariq Hussain **DW-1**, who produced his affidavit-in-evidence and produced the following documents;

1. Special Power of Attorney as Ex.D-1/1.
2. Affidavit-in-evidence in Suit No1291/2003 and 10/2004 as Ex.D-1/2 and D-1/3.

3. Original newspaper cutting daily "The News" dated 07. .2003, as Ex.D-1/4.

Defendant No.2 also called and produced witness namely Ghulam Hussain, Assistant from the office of the DHA Karachi as **DW-2** who produced record of suit properties

1. Original of family details, copy of which was produced as O/1 (original is seen and returned; its certified copy is placed on record and marked as Ex.D-2/1.
2. Original minute sheets, copy of which were produced in this case and marked as O/3, O/4 and O/5. (originals are seen and returned; their certified copies are placed on record as Ex.D-2/2, D-2/3 and D-2/4.

Defendant No.2 was examined as witness **DW-3**. He produced his affidavit-in-evidence in both suits viz. No.1291/2003 and No.10/2004 as Ex.D-3/1 & 2. The counsel for the parties thoroughly cross examined these witnesses.

Only three issues were framed for disposal of both the suits and out of them, **issues No.1 and 2** covers the dispute between the parties in Suit No.1291/2003 regarding specific performance of contract dated **30.06.2003** in respect of property bearing House No.E-4, Darakhshan Villas, DHA, Phase-VI, Karachi measuring 260 sq. yards. **Issue No.3** is the only issue which touches upon the dispute between the parties in Suit No.10/2014 regarding the specific performance of contract dated **18.07.2003** in respect of other two properties viz. (1) Plot No.117, Popular Avenue, DHA, Phase-VI, Karachi measuring 2000 sq. and (2) Plot No.6-C, Kh-e-Bukhari measuring 200 sq. yards.

My findings on these issues are as follows:-

Issues No.1

Mr. Abdur Rehman, learned counsel for the Plaintiff has contended that the Plaintiff has bonafidely been pursuing her right to acquire the property through the sale agreements and has always been ready and willing to perform her part of contract. It was only Defendant No.1 who has failed to appear before Defence Housing Authority to do the needful. He has referred to Order dated **25.11.2003** in Suit No.1291/2003 whereby the Plaintiff was directed to deposit balance sale consideration amounting to Rs.25 lacs with the Nazir within 15 days and the said order was complied with on **16.12.2003**. The learned counsel has further contended that it was the Defendants No.1 and 2 who have breached the trust of the Plaintiff by failing to get property transferred in the name of Defendant No.1 in the record of DHA, Karachi within time as she was required to appear before relevant authorities but she did not appear. He has referred to Ex.P-5/8 which is dated **02.03.2003** showing that Defendant No.1 was required to visit Pakistan Defence Officers Housing Authority which she has not. The counsel for the Plaintiff has also referred to the evidence of the Plaintiff particularly para 7 to 10 of the affidavit-in-evidence of the Plaintiff which, according to learned counsel, has gone un rebutted since no question in cross examination was put to the witness to deny or dispute the contents of the said averments of the affidavit-in-evidence. In this piece of evidence, the Plaintiff has attempted to show that how through Ex.P-5/8 she got the telephone numbers of Defendant No.1 who was then in Saudi Arab and made a verbal offer to purchase her other

properties on phone which was accepted and thereafter another sum of Rs.500,000/- were paid to the Defendant No.1 on **18.07.2003** towards part payment of second agreement of sale i.e. **Ex.P-5/10**. He has relied on **Article 129** illustration (g) of the Qanoon-e-Shahadat, Order 1984 and **Section 41** of the Transfer of Property Act, 1882 and the provisions of **Section 55** of the Contract Act, 1872 in support of his contention that after verbal agreement of sale dated 28.07.2003 Defendant No.2 as ostensible owner by virtue of power of attorney available with him executed the sale agreement dated 18.07.2003 on behalf of Defendant No.1. He has also contended that the time was not essence of the contract in the given facts and circumstances of the case. According to him unless the Defendant No.1 was available to be present before the relevant officer of Defence Housing Authority, the time could not have begun to start against the plaintiff. To sum up his arguments he has relied on the following case laws:-

1. PLD 2014 SC 506 (Liaquat Ali Khan & others ...Vs... Falak Sher & others)
2. PLD 1981 Karachi 170 (Ali Muhammad Khan (Represented by his Heirs ...Vs... Riazuddin Khera)
3. 2014 YLR 1927 (Malik Muhammad Yaseen ...Vs... Syed Raza Hyder)
4. 1984 SCMR 1454 (Choghata ...Vs... Fazal Din)
5. PLD 1983 SC 53 (Kanwal Nain & 3 others ...Vs... Fateh Khan & others).
6. 1996 SCMR 137 (Sughran Bibi ...Vs... Mst. Aziz Begum & 4 others)

In reply Mr. Habib-ur-Rehman, learned counsel for Defendant No.1 has contended that the Plaintiff has never been serious in performing her part of the contract. Defendant No.1 through

Defendant No.2 entered into only one agreement of sale dated **30.06.2003** (Ex.P-5/7) in which time was essence of contract and the other agreement dated **17.07.2003** (Ex.P-5/10) has never been executed by Defendant No.1 or under her authority, if any, by Defendant No.2. Even Defendant No.2 has denied the execution of the same. It is by all means a false and fabricated document to blackmail Defendant No.1. He has read out/referred to the schedule of payment mentioned in (Ex.P-5/7) agreement to sell dated 30.06.2003, wherein 90 days' time was mentioned and referred to the evidence of the Plaintiff wherein the witness has admitted that the Plaintiff has failed to comply with the condition of payment within stipulated time. The relevant cross examination be referred to is as follows:-

“I see page 2 of Ex.P-5/7 and say that it is correct that it is mentioned on it that “balance amount shall be paid on transfer but not later than 90 days from the date of signing of the agreement. It is correct that the condition of the agreement was not complied with. Voluntarily states that this condition was changed and it can be ascertained from the certified copy of the order of Civil Judge, Rawalpindi dated 05.10.2004 passed in Civil Suit No.256/2003”

The Commissioner for recording evidence after going through the said order has noted that:-

“Note: The order does not show that the condition was changed.”

The counsel for Defendant No.1 has also referred to the **Ex.P-5/12** which is a letter dated **27.09.2003** addressed to Defendant No.2 by the Plaintiff herself in which she has accepted that **30 September 2003** was the agreed date for completion of transfer of suit property i.e. Darakhshan Villas No.E-4 (property in Suit No.1291/2003) and

also admitted that an advance of Rs.10 Lacs was paid. According to the learned counsel for Defendant No.1, the Plaintiff three days prior to the completion of the period of 90 days has disclosed her intentions that she was not will to perform her obligation of payment of sale consideration under the agreement to sale dated 30.06.2003 and want delivery of possession of suit property merely against the payment of token money of Rs.10,00,000/-. This letter is reproduce below:-

“September 27 2003

Mr. Muhammad Farooq
Darkhshan Villa No.E-4,
Phase-6, Defence Housing Authority,
Karachi 75500

Dear Mr. Muhammad Farooq,

The agreed date for completion of the transfer is 30 September 2003 in respect of the property for which I have already paid you an advance of Rupees Ten lacs (Rs.10,00,000.00). For this you have told me that the personal presence of the owner Mrs. Amna Faheem is required in the office of the DHA Karachi.

You also said that Mrs. Amna Faheem is recuperating from Caesarian Section and the transfer will be completed by October 15, 2003.

I have also obtained a copy of an agreement signed by you with Mr. Tahir Raza Qidwai dated 19 August 2003 for Darakhshan Villa No.E-4, which is in contravention of the law. You have told me that you have cancelled this agreement.

In order to settle the matters, I propose that you hand over the possession of Darakhshan Villa No.E-4 to me immediately without further payment. Thereafter the last date can be extended.

I look forward to your handing over possession to me by October 1, 2003.

Yours Truly,

Sana Rizwan

House No.89, Block 7/8 (KMCHS)
Near hill Park
KARACHI”

After having read the aforesaid letter, counsel for Defendant No.1 further contended that since the Plaintiff has demanded possession of the Villas No.E-4 without further payment on or before 01.10.2003, Defendant No.1 had no option except to publically cancel the agreement of sale after informing her as the Plaintiff has failed to comply with the time bound schedule of payment of sale consideration. The Plaintiff instead of complying with the terms and conditions of the agreement, started pressurizing Defendant No.1 by sending letters to the Administrator Defence Housing Authority, Karachi to prevent her from selling the suit property of Suit No.1291/2003. She went to the extent of forging another agreement of sale showing date as **18.07.2003** which does not even bear signature of the alleged attorney as the attorney has denied its execution. He has contended that beside the fact that it has not been executed by Defendant No.1 or Defendant No.2, the contents of the said agreement stand contradicted on perusal of the agreement of sale dated 18.07.2003 (**Ex.P-5/10**). He has referred to the first page of the said agreement (Ex.P-5/10) and pointed out that it refers to the power of attorney in favor of Defendant No.2 showing registration

No.222729, book-IV, Volume 442, page 43 dated 20.8.1998 at the office of Joint Registrar, Islamabad and the copy of said power of attorney has been produced by the Plaintiff's witness as **Ex.P-5/5** which is not in respect of the properties mentioned in the said agreement of sale. On perusal we find that it does not refer to any of the two properties mentioned in **Ex.P-5/10** dated 18.07.2003. He further contended that even otherwise the Plaintiff has not produced any marginal witness of the disputed agreement of sale, therefore, besides the facts that Defendant No.2 had no authority to act on behalf of Defendant No.1 in respect of the properties mentioned in said agreement of sale it has not been proved in terms of **Section of 17 and 79** of Qanoon-e-Shahadat Order, 1984. The learned counsel has relied on the following case laws:-

1. 1995 SCMR 1431 (Sandoz Limited & another ...Vs...Federal of Pakistan & others).
2. 1998 SCMR 2485 (Muhammad Sharif ...Vs... Mst. Fauji alias Phaji Begum through Legal Heirs & another).

Besides appreciating the above contentions of the learned counsel of the parties I have also examined the case law relied upon by them. The case law reported in PLD 1981 Karachi 170, 2014 YLR 1927 and PLD 2014 SC 506 are all dealing with the provisions of **Section 12 and 22** of the Specific Relief Act, 1877 and are therefore not relevant in the context of the controversy in these two suit. In the facts of the two suits dealt with hereinabove, the issue of refusing or accepting the claim of Specific Performance of the Plaintiff in terms of **Section 22** of the Specific Relief Act, 1877 is not required to be examined by this Court. I am primarily concerned with the issue that

who has breached the contract from either of the two parties as issue No.1 is to the effect that whether the Plaintiff has failed to fulfill the terms and conditions of the sale agreement dated 30.06.2003 deliberately or intentionally. In the evidence adduced by the parties and thoroughly examined by me I have to see the preponderance of the evidence on the point that who is guilty of breach of terms and condition of the contract dated 30.6.2003 (Ex.P-5/7). It must be clarified that only the contract of sale dated **30.06.2003** is admitted contract and not the second contract dated **18.07.2003** since its execution has been denied by Defendants No.1 and 2.

The evidence of the Plaintiff and her letter dated 27.09.2003 (Ex.P-5/12) has been reproduced above is more than enough to safely concluded that the Plaintiff has breached the terms of contract of sale dated 30.06.2003 (Ex.P-5/7). As rightly contended by counsel for the Defendant, the Plaintiff even before the completion of 90 days time has started changing her position. I have examined the agreement of sale dated 30.06.2003 and noticed that in terms of **clause 2**, the second installment of Rs.15,00,000/- was payable by the Plaintiff to Defendant No.1 within 7 days after the publication of advertisement inviting objections to the sale. The Plaintiff has never published any public notice in newspaper inviting objection to her intended purchaser of the suit property during the said 90 days period of time and, therefore, she did not offer to make the payment of second installment in breach of **clause 2** of the said agreement. To the contrary, through letter dated 27.09.2003 she proposed that the Defendants should hand over possession of the suit property

immediately without further payment. The intention and the conduct were going in the directions which cannot be termed as anything except an intended breach of the terms and condition of the agreement of sale dated 30.06.2003. Therefore, the case law mentioned hereinabove on the provisions of **Section 12 and 22** of the Specific Relief Act, 1877 is not relevant in the context of refusal or grant of prayer for specific performance of contract in the cases in hand. The above discussion and the detailed analysis of the facts and case law leads to inescapable conclusion that the Plaintiff has breached the contract of sale dated 30.6.2003. Therefore, **issue No.1** is decided in affirmative.

Issue No.2

Irrespective of the facts that the agreement of sale dated 30.06.2003 was cancelled through publication in newspaper or otherwise it can safely be deemed to have been cancelled by the Plaintiff herself when she sent letter dated **27.9.2003** (Ex.P-5/12) wherein she alleged that the Defendant No.2 has cancelled the said agreement. In fact she herself has refused to abide by the terms of the agreement when in the last paragraph of her letter she claimed that the suit property may be handed over to her without further payment. It was breach of the promise of **clause-2** of the said agreement to seek possession of the suit property without payment. She never offered to tender the sale consideration as promised nor even committed herself about payment of sale consideration even in future. The proposal in the said letter was change of terms and conditions of an existing agreement and if it be treated as justified, it

amounted to fresh agreement or novation of the contract dated 30.06.2003. The letter from the Plaintiff was by itself cancellation of the agreement sought to be enforced through Suit No.1291/2003. Therefore, **issue No.2** is also decided against the Plaintiff.

Issue No.3.

The counsel for the Plaintiff while referring to the execution of second sale agreement (Ex.P-5/10) has also relied on the case law reported in **PLD 1983 SC 53** and **1984 SCMR 1454**. In these cases the Hon'ble Supreme Court has examined the condition necessary for application of **Section 41** of Transfer of Property Act, 1882. In both the suits, the issue of title of real owner was not in dispute. The authority of Defendant No.2 to entered into an agreement in respect of property involved in Suit No.1291/2003 through the attorney was also not in dispute. The authority of Defendant No.2 to act as ostensible owner and enter into the second agreement dated 18.07.2003 with the plaintiff was challenged as bogus and fabricated but ownership or title of Defendant No.1 was again not in dispute. The so-called power of attorney referred to in the agreement of sale dated 18.07.2003 (Ex.P-5/10) ought to have been examined by the Plaintiff at the time of entering into an agreement with Defendant No.2 as an ostensible owner by virtue of power of attorney mentioned at page 1 of the said agreement of sale. Since the said power of attorney which is mentioned on the first page of the agreement of sale itself does not authorize the attorney to enter into sale of the properties mentioned in said agreement, it cannot be believed that the Plaintiff has acted in good faith and taken reasonable care to

ascertain that the authority of executants was bonafidely believable to claim benefit of **Section 41** of Transfer of Property Act, 1882.

“41. Transfer by ostensible owner. Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.”

Reference to **Section 41** of Transfer of Property Act, 1882 in absence of any proof of execution of the document in terms of **Section 17 and 79** of the Qanoon-e-Shahadat Order, 1984 is immaterial and can be of no help for the Plaintiff. He has even otherwise failed to prove execution of the document in accordance with the provisions of **Section 72** of the Qanoon-e-Shahadat Order, 1984.

Learned counsel for the Plaintiff has also relied on **1996 SCMR 137 SUGHRAN BIBI.VS.. Mst. AZIZ BEGUM and 4 others**, while trying to take the benefit of **Article 129 illustration (g)** of Qanoon-e-Shahadat Order, 1984 which deals with the powers of the Court to presume existence of certain facts.

“129. Court may presume existence of certain facts.---The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular.

Illustrations

(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

In this context he has referred to paragraphs No.7 to 10 of affidavit-in-evidence of Plaintiff which has gone un-rebutted. Indeed we may presume it to be true that the Plaintiff had made verbal offer to Defendant No.1 which was accepted and she was required to make payment to Defendant No.2 which according to him, his client did at the time of entering into sale agreement dated 18.07.2003. However, this is not sufficient proof. The recital of agreement shows that “Mr. Faheem Siddiqui husband of Mrs. Amna Fahim has conveyed the acceptance of his wife on telephone from Saudi Arabia”. Even, said Mr. Fahim has not attested the said agreement as witness, nor he was produced to confirm the contents of the said agreement. Interestingly enough the acceptance of offer of Plaintiff as suggested in the said agreement is hear-say and not by the owner herself. The contents of para 9 of the Plaintiff’s affidavit-in-evidence are contradicted by the contents of agreement. In affidavit, Plaintiff’s attorney says that offer was directed given to Defendant No.1 and acceptance received from her. And the agreement says that acceptance was conveyed by her husband. Since the Plaintiff has asserted facts beyond this verbal agreement and the said oral agreement had been reduced into writing, therefore, in presence of document in writing the burden was to be discharged by the Plaintiff in terms of **Section 72 read with Section 17 and 79** of the Qanoon-e-Shahadat Order, 1984. The perusal of agreement shows that the same is not even attested by two witnesses as required in terms of **Section 17(2) (a)** of Qanoon-e-Shahadat Order, 1984. It reads:-

“17. Competence and number of witness.”-(1) The competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Quran and Sunnah.

(2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law,

(a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary and evidence shall be led accordingly; and”

In any case since the requirement of **Section 17 and 79** of Qanoon-e-Shahadat Order, 1984 to prove the execution of contract by producing two attesting witnesses has not been done, the reference to **Article 129 illustration (g)** of Qanoon-e-Shahadat Order, 1984 is misconceived. It is the Plaintiff herself who failed to produce the best evidence without explaining the circumstances of her failure. Had there been no agreement in writing, in my humble view, such contention could have little weight. I am not convinced with the argument of the Plaintiff’s counsel that the failure of Defendant to cross-examine the Plaintiff on the paragraphs No.7 to 10 of the affidavit-in-evidence was enough to prove through presumption the execution of an agreement dated 18.7.2003 (Ex.P-5/10). In view of the facts and circumstances of the two cases in hand, the reliance placed by the counsel for the Plaintiff on PLD 1983 SC 53, 1984 SCMR 1454 and 1996 SCMR 137 is not relevant.

In view of the reasoning on issues No.1 & 2 and also for the reason that the Plaintiff has miserably failed to prove execution of sale agreement dated 18.7.2003, issue No.3 is decided in negative.

Plaintiff is not entitled to seek specific performance of any of the two agreements.

Issue No.4.

In view of the above discussion and my findings on issues No.1 to 3, both the suits are dismissed with no order as to cost.

Karachi

Dated:_____

J U D G E