

IN THE HIGH COURT OF SINDH AT KARACHI**Suit No.1291 of 2009****Tasneem Jahan ----- Plaintiff****Versus****Ashiq Ali & another -----Defendants****Dates of hearing: 17.01.2017 & 26.01.2017.****Date of Judgment: 24.02.2017.****Plaintiff: Through Mr. Mirza Asif Baig, Advocate****Defendant No.1: Through Mr. Badar Alam alongwith Mr. M. Kashif Badar, Advocate.****Defendant No.2: Through Mr. Rehman Aziz Malik, Advocate.****J U D G M E N T**

Muhammad Junaid Ghaffar, J. This is a Suit for Recovery of Rs.40,00,000/- as damages. The plaintiff's case is that she is owner of a Plot bearing No.A-403, Plot 15, measuring 240 Sq. Yds, Gulistan-e-Jauhar, Karachi (**Suit Property**) and entered into an oral agreement with defendants in December, 2006 for construction of a one unit house i.e ground plus Ist floor on a total lump sum amount of Rs.32,00,000/- with all material and labour with further condition to have it completed within a period of one year. It is further stated that though the defendants received a sum of Rs.64,00,000/- yet the house was not completed and the plaintiff had to spend an extra sum of Rs.14,59,492/- on various materials and notwithstanding this, the defendants demanded Rs.500,000/- for completing the Project. It is further stated that even otherwise the construction standard was very low (B-Class Level) which resulted a loss of Rs.40,00,000/- as the plaintiff and her family received physical and mental loss/injury due to

defendants' negligence, fraud and cheating and breach of trust, hence instant Suit.

2. After issuances of summons and notices, written statements were filed by defendants No.1 & 2, whereas, defendant No.1 has also filed a counter claim of Rs. 555,208/- against the Plaintiff as outstanding amount of unpaid bills, and vide Order dated 16.05.2011, the following Issues were settled as Court Issues.

1. Whether there is any unconcluded work by the defendant on behalf of the plaintiff at the cost of Rs.3.2 Millions for undertaking construction work of bungalow?
2. Whether terms and conditions of such contract have been violated and if so because of such violation what amount of damages have been caused by the defendant to the plaintiff?
3. Whether time was the essence of the contract?
4. Whether the defendant No.2 being an architect/civil engineer and family friend of the plaintiff rendered his voluntary and gratuitous assistance to the plaintiff, without any consideration, in respect of construction of her house by the defendant No.1?
5. Whether the defendant No.1 is entitled to counter claim as raised by him in his written statement, which is to the extent of damages and recovery of Rs.5,55,208/- on account of balance outstanding amount?
6. Whether the present suit is maintainable in its present form?
7. What should the decree be?

3. Evidence was recorded through Commissioner and plaintiff led her evidence through herself and her son Mirza Anus Baig and one other witness namely Mr. Imtiaz Hussain, whereas, defendant Nos.1 & 2 appeared as witnesses to defend the case.

4. Learned Counsel for the Plaintiff has contended that as per Agreement, the construction was to be completed within a period of one year of payment of Rs.32,00,000/-, however, the defendants could not honour their commitment, which resulted in incurring extra expenditures on the completion of the house and further

caused mental agony and torture to the plaintiff for which plaintiff claims an amount of Rs.40,00,000/- as damages. Learned Counsel has referred to the evidence of witnesses P.W-1, P.W-2 & P.W-3 and the evidence of defendants in support of his contention.

5. On the other hand, learned Counsel for defendant No.1 has contended that all seventeen (17) running bills were issued to the plaintiff through defendant No.2 and after verification the entire amount except an amount of Rs.555,208 has been paid by the plaintiff and for this there is a counter claim of defendant No.1 in this matter. Per learned Counsel the defendant No.1 was engaged through defendant No.2 and had in fact no direct contract with the plaintiff nor there was any such agreement as alleged. In the circumstances, he has prayed for dismissal of instant Suit and for a decree of the counter claim of defendant No.1.

6. Similarly, Counsel for defendant No.2 has contended that the defendant No.2 is a close family friend and relative of the plaintiff and had offered his services as a consultant without any consideration, whereas, no agreement or contract was ever entered into between the plaintiff and defendants. He has further contended that the plaintiff had miserably failed to prove any breach of contract as no agreement has been proved and insofar as defendant No.2 is concerned there was no question of any consideration between the parties. Per learned Counsel according to defendant No.1 an amount of Rs.500,000/- approximately was payable to defendant No.1 and perhaps as a counter claim instant Suit has been filed to deny the legitimate claim of defendant No.1. Learned Counsel has referred to the evidence led by the Plaintiff and has contended that neither any agreement is proved through evidence nor any evidence has been led as to the suffering as well as mental agony for claiming either general or special damages. Per learned Counsel the house was handed over duly constructed and has referred to photographs filed along with the written statement as well as the cross-examination of defendant No.2 and has contended that this piece of evidence has gone unchallenged, and therefore, the Suit of the plaintiff is liable to be dismissed. He has

further contended that though this is a Suit only for the claim of damages, however, even otherwise the plaintiff has failed to establish through any evidence that they incurred extra expenditures in completing the house as alleged. In support of his contention learned Counsel has relied upon the cases reported as **PLD 1981 Karachi 170** (*Ali Muhammad Khan (represented by his heirs v. Riazuddin Khera)*), **NLR 1997 CLJ 323** (*Khayaban-e-Iqbal (Pvt.) Ltd. ETC. v. Mustafa Haji Muhammad*), **1987 CLC 552** (*Haji Muhammad Usman through his Legal Heirs v. Muhamad Paryal*), **2010 SCMR 829** (*Messrs Kamran Construction (Pvt.) Ltd. v. Nazir Talib*), **2002 CLC 96** (*Mrs. Rahat Ali v. Dr. Saeeda Rehman*), **PLD 1996 SC 737** (*Sufi Muhammad Ishaque v. The Metropolitan Corporation, Lahore through Mayor*), **2013 SCMR 507** (*Malik Gul Muhammad Awan v. Federation of Pakistan through Secretary M/o Finance and others*), **PLD 2013 Sindh 290** (*Arabian Sea Enterprises Limited v. Abid Amin Bhatti*), **2008 CLC 965** (*Messrs Klb-e-Karachi and Company (Pvt.) Ltd. through Chief Executive v. National Bank of Pakistan through President and 3 others*), **2001 CLC 1922** (*Abdur Rehman v. Sher Wadood and others*), **1992 SCMR 2439** (*Haj Muhammad Khan and 2 others v. Islamic Republic of Pakistan and 2 others*), **PLD 2001 Lah 63** (*Khalil-ur-Rehman v. Mst. Halim Khatoon*).

7. I have heard all the learned Counsel and perused the record with their able assistance and my Issue-wise findings are as under:-

ISSUE No.1

8. The plaintiff's case is that firstly an oral agreement was entered into between the plaintiff and the defendants for construction of a house for an amount of Rs.3.2 Million, which according to the plaintiff was not done and the house was handed over in an incomplete condition, and therefore, the plaintiff has claimed damages through instant Suit. Insofar as, this issue is concerned, it would be relevant to refer to the evidence of the plaintiff P.W-1, who in cross-examination states that ***"It is correct that I have not specifically stated in the plaint that the***

defendant No.1 will construct the house at the cost of Rs.32 lacs". She further states in reply to a question that ***"It is incorrect to suggest that the defendant No.1 failed to complete the construction of the house"*** and again she states that ***"I do not know whether the defendant No.1 submitted 17 running bills of total sum of Rs.56,05,208/- to the defendant No.2. I paid total of Rs.64 lacs to the defendant No.1. It is correct to suggest that my said statement is false. It may be correct that I paid only a sum of Rs.50,50,600/- to the defendant No.1"***. From perusal of the aforesaid evidence led on behalf of the plaintiff, it appears that the plaintiff has given contradictory answers to relevant questions and has miserably failed to led any cogent or positive evidence in support of the aforesaid Issue, therefore, the Issue is answered in negative.

ISSUES No.2 & 3:

9. Both these Issues are taken up together as they are interrelated. As discussed hereinabove, it is the plaintiff who has alleged that there was an oral agreement between the parties and time i.e. one (1) year period was essence of the contract. The plaintiff in the Plaint has failed to give any specific date of agreement and has merely stated that it was entered into in December, 2006. It is settled law that to prove an oral agreement, which is though permissible, but requires a very high degree of evidence. The plaintiff did not produce any witness in support of her oral claim as to the existence of the agreement, and if so, then its violation. The plaintiff has made her case on the basis of the oral agreement and alleges violation thereof, therefore, before any violation can be alleged, the plaintiff was required to prove existence of an oral agreement between the parties with certain terms and conditions as claimed. However, in the entire evidence, the plaintiff has not been able to substantiate her claim as alleged in the Plaint. It is also important to note which is surprising as well that Plaintiff has filed instant Suit only for recovery of damages but not for recovery of extra amount of Rs. 14,59,492/- as stated in the plaint. The Plaintiff's entire claim is based on suffering mental

torture and agony for breach of an oral agreement for which no evidence was led. Suffering of damages has been claimed as a consequence to breach of oral agreement which the plaintiff has miserably failed to prove. In her cross-examination she has stated that ***“It is not in my knowledge whether the defendant No.1 had submitted the item rates for the construction of my house to the defendant No.2. Voluntarily stated that the defendant No.1 had informed me that I will construct the house at the total cost of Rs.30,00,000/- and Kalam had stated that I will complete the house with the cost of Rs.32 lacs.”*** She further states that ***“I paid total of Rs.64 Lacs to the defendant No.1. It is correct to suggest that my said statement is false, it may be correct that I paid only a sum of Rs.50,50,600/- to defendant No.1”***.

10. In view of hereinabove facts and evidence led by the plaintiff, I am of the view that neither the plaintiff has been able to prove existence of either any contract or any such violation as alleged. In the circumstances Issues No.2 & 3 are answered in negative.

ISSUE No.4:

11. The claim of defendant No.2 is that he only rendered his assistance in the construction of the house to the plaintiff being a family friend and hired the services of defendant No.1 for such purposes, whereas, plaintiffs case is that defendant No.2 as well as defendant No.1, received extra amount over and above the agreed amount, and therefore, they are liable to compensate the plaintiff for damages so sustained. In the evidence the plaintiff has not been able to establish either existence of a contract between the parties, nor it has been proved that any consideration was being paid to defendant No.2 for his services as a consultant. In the circumstances, Issue No.4 is answered in the affirmative.

ISSUE No.5:

12. Though the defendant No.1 has filed a counter claim in this matter for Rs.555,208/-, which according to defendant No.1 is outstanding against the plaintiff. However, on perusal of the

evidence led by defendant No.1, I am of the view that this claim has not been substantiated through any positive evidence. In his cross-examination, he has stated that ***“It is correct that the Defendant No.1 & 2 did not issue any completion certificate to the Plaintiff. It is correct to say that I have not given any bills of Rs.5,55,208/- to the Plaintiff. The witness says that I have given the bills approved by the Defendant No.2. It is correct that I have not demanded the amount from the Plaintiff. Voluntarily says I demand verbally the amount of Rs.555,208/- from the Plaintiff. It is correct that I have not given the account to the Plaintiff”***. The aforesaid evidence led by defendant No.1 does not substantiate that any amount was outstanding, whereas, even otherwise it is the case of defendant No.1 that there was no written agreement or for that matter oral agreement between the parties. Accordingly Issue No.5 is answered in negative.

ISSUE No.6:

13. No legal objections have been raised by the defendants in this regard, whereas, a counter claim is also on record on behalf of defendant No.1, therefore, this Issue is answered in affirmative by holding that the Suit is maintainable.

ISSUE No.7:

14. In view of hereinabove facts and circumstances of the case, since the plaintiff has failed to substantiate her claim through any positive, cogent and confidence inspiring evidence in respect of existence of any agreement and the alleged violation, whereas, the claim of damages has also not been proved, therefore, instant Suit is dismissed, however, with no order as to costs.

Similarly Insofar as, the counter claim of defendant No.1 is concerned, the same is also dismissed.

Dated: 24.02.2017

JUDGE

Ayaz