

IN THE HIGH COURT OF SINDH AT KARACHI**Suit No. 1517 of 2014****Muhammad Amin-----Plaintiff****Versus****Mrs. Safena Tahir & another-----Defendants****Date of hearing: 20.12.2017****Date of Judgment 20.12.2017****Plaintiff: Through Mr. M.G. Dastagir, Advocate.****Defendant: Nemo.****J U D G M E N T**

Muhammad Junaid Ghaffar, J. This is a Suit for Declaration, Cancellation, Possession, Mesne Profits, Damages and Injunction and the Plaintiff has sought the following relief(s):-

- a) To adjudge and declare that the plaintiff being lawful owner of the premises viz apartment/Pen House bearing No.D-901, Block-D, 9th Floor, Chapal Ocean Centre, Block-4, Clifton, Karachi is entitled for the recovery of possession of the premises by ejection of the defendants and/or any other person claiming through or under her and pass decree for delivery of vacant and peaceful possession thereof to the plaintiff.
- b) To further adjudge and declare that since the defendant No.1 failed to abide by the terms and condition of the sale transaction and failed to pay the balance of sale consideration amount, therefore, the sale between parties (plaintiff and the said defendant is liable to and stands cancelled).
- c) Rs. 36,00,000/- (Rupees Thirty Six Lacs Only) be awarded to the plaintiff against the defendants as use and occupation charges up to the date of the suit and further use and occupation charges at the rate of Rs.60,000/- (Rupees Sixty Thousand Only) per month may be awarded to the plaintiff from the date of suit against the defendants till the delivery of vacant and peaceful possession of the premises by the defendants to the plaintiff.

- d) Rs.20,000,000/- (Rupees Two Crores Only) may be awarded as damages to the plaintiff against the defendants.
- e) Mark-up/profits at the prevailing Bank rate on the decretal amount may also be awarded to the plaintiff against the defendants.
- f) Perpetual injunction restraining the defendant from parting with the possession and creating any interest of any other party in the suit premises may also be granted.
- g) Cost of the suit may also be awarded to the plaintiff against the defendants.
- h) Any other relief or reliefs as this Hon'ble Court may deem fit and proper under the circumstances of the case may also be granted to the plaintiff against the defendant."

2. Summons were issued in the matter and both the Defendants were declared Ex-parte vide order dated 28.9.2015.

3. Learned Counsel for the Plaintiff submits that the Plaintiff entered into an Agreement of Sale (Exhibit PW-1/6) dated 20.8.2009 with the Defendants for a total sale consideration of Rs. 80,00,000/- (Eighty Lacs only) after giving a discount of Rs. 13,00,000/- (Thirteen Lacs only) out of which Rs. 10,00,000/- (Ten Lacs only) was paid by the Defendants and the remaining amount of Rs. 70,00,000/- was to be paid within two months from the date of signing of the agreement. Learned Counsel submits that the Plaintiff is a builder and the Defendants made a request to carry out some renovation work in the Suit property, and thereafter, they took possession of the same whereas, no further payments were made hence, instant Suit. Learned Counsel submits that the Defendants have failed to rebut the averments of the Plaintiff and therefore, Suit be decreed as prayed except prayer clause (d) which the Plaintiff does not wish to press upon.

4. I have heard the learned Counsel and perused the record including the evidence file. Admittedly, the Defendants have been

declared Ex-parte and no one has turn up to assist the Court on behalf of the Defendants. The Plaintiff led its evidence by filing Affidavit in Evidence for Ex-parte Proof and has exhibited various documents including original agreement and the schedule of payment so agreed upon. The Plaintiff has also examined a supporting witness namely Rashid Mehboob S/O Mehboob Hussain Shaikh who is an attesting witness to **PW-1/6** and **PW-1/7** and his examination in chief reads as under:-

“I have filed my Affidavit in Evidence as PW-3. I produce my Affidavit in Evidence as Exhibit PW-1/1, which bears my signatures. I have seen original Exhibit PW-1/6 (Original Agreement) and I confirm that Defendant No. 1 has signed the said document during my presence. I am the attesting witness No. 2. The attesting witness No. 1 is Syed Hassan Tahir (Defendant No. 2), who also signed in my presence. Exhibit PW-1/7 is Undertaking for the schedule of payment, was also signed in my presence by Defendant No. 1 and 2 (Syed Hassan Safdar) and myself.

Cross examination of Defendants is marked as “Nil”.”

5. It further appears that the Plaintiff filed an application under Order 16 Rule 1 CPC and summoned Defendant No. 2 as a witness in this matter who is an attesting witness of PW-1/6 and PW-1/7. The witness was confronted with both these exhibits and his cross examination to the learned Counsel for the Plaintiff which reads as under:-

“It is incorrect to suggest that the signatures appended to Ex. PW/1/6 are mine. It is correct to suggest that the signatures appended to Ex. PW/1/7 are mine.”

6. From perusal of the aforesaid evidence led on behalf of the Plaintiff, it appears that the attesting witness of exhibits **PW-1/6** and **PW-1/7** namely Rashid Mehboob has confirmed that the agreement was signed by the Defendant No. 1 in presence of Defendant No. 2 and the signatures on both these documents were affixed in his presence.

7. On the other hand, though the Defendant No. 2 has been declared Ex-parte but was summoned as a witness and has denied his signatures on **PW-1/6** but has confirmed the same on Exhibit **PW-1/7**. This stance of the said witness appears to be contradictory and not confidence inspiring as both these documents relate to one and other. One is the agreement and the other is the payment schedule of the same apartment, whereas, on a bare perusal the signatures appear to be more or less similar.

8. In view of the facts and circumstances of this case, since the Defendants have been declared Ex-parte and they have failed to contest this case, (notwithstanding that Defendant No.2 was summoned as a witness and even after appearing before the Court has not made any effort to contest the Suit), whereas, the evidence of the witness summoned on behalf of the Plaintiff does not support the Defendant's case therefore, instant Suit is decreed to the extent of prayer clause "**a, b & c**". The Plaintiff shall also be entitled for markup / profit on the decretal amount at the prevailing bank rates during the said period from the date of filing of Suit till its realization. Suit stands decreed as above. Office is directed to prepare decree accordingly.

J U D G E