

**IN THE HIGH COURT OF SINDH AT KARACHI**

**HCA No. 103 of 1988**

**Present:-**

**Mr. Justice Sajjad Ali Shah C.J.**

**Mr. Justice Muhammad Junaid Ghaffar.**

**Dr. Zaki Hassan & others ----- Appellants**

**Versus**

**Mst. Hajra Bai Mohammad**

**through L.Rs.----- Respondents**

**Date of hearing: 19.01.2016.**

**Date of judgment: 19.01.2016**

**Appellants: Through Mr. Abid S. Zuberi Advocate.**

**Respondent: Through Mr. Asim Mansoor Khan Advocate.**

**J U D G M E N T**

**Muhammad Junaid Ghaffar, J.** Through instant appeal the appellant has impugned judgment and decree both dated 5.7.1988, passed by a learned Single Judge of this Court on the Original side, whereby, the Suit filed by the respondent for Specific Performance of Agreement dated 31.10.1977 in respect of property bearing Plot No. 713/1, Adjacent to Fatima Masjid, situated at Dr. Jackson Road, off Jamshed Road, Fatima Jinnah Colony, Karachi admeasuring 1000 square yards ("**Suit Property**") has been decreed.

2. Precisely, the facts as stated are that in September 1977 the predecessor in interest of the respondent ("**Respondent**") came in contact with the predecessor in interest of the appellant ("**Appellant**") through one

Mr. Ameen Haroon and Thaver & Sons, a property broker and an oral agreement was entered into by the parties for a total sale consideration of Rs. 4,60,000/- in respect of the Suit property. The said agreement was arrived at in presence of Ameen Haroon, Arif Hussain, the respondent and the appellant. After settlement of terms and conditions as stated orally, the respondent paid earnest money of Rs. 5,000/- as agreed upon on 3.11.1977 to the appellant through cheque, whereafter, a receipt was issued by the appellant in presence of Ameen Haroon and Arif Hussain. It is further stated that thereafter a draft agreement was prepared by the respondent and was sent to the appellant, who avoided to sign the agreement and also refused to accept payment and instead demanded enhanced payment, whereafter the respondent filed Suit for Specific Performance on 9.1.1978. The Suit was contested on behalf of the appellant by filing Written Statement and after filing of an amended plaint, issues were framed and evidence was led by the parties. A learned Single Judge of this Court vide impugned judgment and decree dated 5.7.1988 has been pleased to order Specific Performance of the Agreement in question by directing the appellant to execute the Sale deed in favor of the respondent, hence instant appeal.

3. Counsel for the appellant has contended that in fact only a receipt was executed, whereas, no formal agreement was signed by the parties; therefore, the learned Single Judge has failed to appreciate that no Specific Performance of any agreement could be granted. He has further contended that the receipt in question itself refers to execution of formal agreement which admittedly was never executed, therefore, no question of any specific performance arises. Learned Counsel also contended that the respondent had filed an amended plaint, whereby, she had himself admitted that there was a difference in price which belies the pleadings of

respondent, inferring that there was no concluded contract between the parties. Learned Counsel has also referred to order dated 12.8.1978 and 21.8.1983 and submits that through these orders the respondent was directed to deposit the balance sale consideration, whereas, instead of depositing it, the respondent had impugned the orders up to the Hon'ble Supreme Court but could not succeed which reflects that the respondent was never agreeable to perform her part of the agreement, and therefore, cannot seek any Specific Performance of the same. Learned Counsel has referred to the evidence led on behalf of the appellant through Mr. Arif Hassan D.W.1, Syed Nasir Hussain D.W.2, and Dr. Zaki Hassan D.W.3. He has further contended that firstly there was no concluded contract between the parties, whereas, the receipt in question which has been treated as an agreement by the learned Single Judge does, not detail out the complete terms and conditions, and thirdly that the amount agreed upon was Rs. 6,60,000/- therefore, no Specific Performance could have been sought by the respondent in absence of a concluded contract between the parties. He has further submitted that relief of Specific Performance is a discretionary relief, and while granting such relief, the Court must always ensure that no unfair advantage is given to any party. Learned Counsel has further contended that the conduct of the respondent does not entitle her for grant of any Specific Performance on the basis of merely a receipt. In support of his contention learned Counsel has relied upon the cases reported as *Farzand Ali and another V. Khuda Bakhsh and others (PLD 2015 SC 187)*, *Shakeel Ahmed V. Mst. Shaheen Kousar (2010 SCMR 1507)* and *Amjad Ikram V. Mst. Asiya Kausar and 2 others (2015 SCMR 1)*.

4. On the other hand, learned Counsel for respondent has supported the impugned judgment and submitted that the entire terms and

conditions of the agreement were recorded in the receipt, whereas, the witness of the appellant namely Dr. Zaki Hassan D.W. 3 while responding to a question confirmed that the receipt was signed by the plaintiff. He has further contended that all the ingredients of a binding contract were recorded in the receipt and even if no further or formal agreement was executed by the parties, the receipt itself contained the entire terms and conditions which receipt has been admitted by the appellant, therefore, the learned Single Judge was justified in decreeing the Suit of the respondent. As to non-deposit of the balance sale consideration the learned Counsel submitted that on the basis of admission made in the written statement, the respondent had filed an application under Order 12 Rule 6 CPC for passing of judgment and decree which was resisted on behalf of the appellant and therefore, the respondent at that juncture avoided deposit of the balance sale consideration, however, subsequently the respondent deposited even the enhanced price claimed by the appellant.

5. We have heard both the learned Counsel and perused the record including R & P. After exchange of pleadings, amended plaint and written statements, the parties filed two separate sets of consent Issues on 28.10.1978 and 13.11.1983, out of which Court considered the following issues for deciding the controversy.

1. Does the receipt constitute a concluded agreement enforceable by law?
2. In view of the offer of sale consideration to Rs. 6,60,000/- by the Plaintiff, the plaintiff is entitled for specific performance of the contract. If so, its effects?
3. Whether the plaintiff has given undertaking to recover the arrears of rent from N.C.C. accumulating amounting to Rs. 1,26,000/- for the defendants as one of the terms of the agreement of sale of the property in dispute? If so, its effects?

6. Perusal of the record reflects that the respondent came into contact with the appellant somewhere in September 1977 in respect of purchase of the Suit property and such arrangement was arrived at in presence of Mr. Amin Haroon, Mr. Arif Hussain, besides the appellant and respondent. Thereafter a receipt dated 3.11.1977 to such effect was issued which is not disputed, whereby, payment of Rs. 5,000/- was acknowledged by the appellant in respect of part payment of sale of property in question through cheque No SBM 474745 dated 3.11.1977 which was admittedly en-cashed by the appellant, though belatedly. The said receipt was duly signed in presence of two witnesses and the same was produced as Exhibit 5/2, which reads as under:-

“Received Rs. 5,000/- (Five thousand only) vide cheque No. SBM 474745 dated 3.11.1977 drawn on Habib Bank Ltd from Mst. Hajra Bai Mohamed towards part payment of sale consideration of Rs. 4,60,000/- (Four lacs sixty thousand only) of my property bearing Plot No. 713/1 adjacent to Fatmi Masjid, situated on Dr. Jackson Road, Off Jamshed Road, Fatima Jinnah Colony, Karachi, admeasuring 1000 (one thousand square yards) for which a separate agreement of sale will be executed later on within a week thereof.”

7. It further appears that though the case of the appellant is that since no formal agreement was entered into by the parties thereafter, this receipt is no agreement of which the Specific Performance could be granted. The entire case set up by the plaintiff in the evidence is to this effect. However, while filing its written statement it was stated on behalf of the appellant that the appellant was always ready and willing to sell the property on the agreed price of Rs. 6,60,000/-. The appellant in the written statement in Para 9 pleaded as under:-

“The allegations of Para 9 are also false. The defendant was always ready and willing to sell the property on the agreed price of Rs. 6,60,000/- along with other terms mentioned above and she has always been [ready] to convey the property on those terms. The

plaintiff's husband with the active conspiracy and support of broker Amin Haroon wanted to play a fraud on the defendant and knowing that she was an old, infirm, ailing, not much educated woman would fall (sic) in their trap and they will be able to get the property for Rs. 4,60,000/- and thus reap the fruit of their deceitful and fraudulent conduct. Having been frustrated in their evil design they resorted to this malafide suit simply with a view to harass, coerce and intimidate the defendant."

8. Perusal of the aforesaid Para of written statement filed on behalf of the appellant reflects that insofar as the agreement to sell the property is concerned, the same has not been denied specifically, rather, the agreement has been admitted, however, the same did not materialized into a written document. This would in other sense means that at least there was an oral agreement between the parties. In fact the dispute is only to the effect that whether the agreed Sale price was Rs. 6,60,000/- or Rs. 4,60,000/- as pleaded by the respondent. The other issue as raised on behalf of the appellant was in respect of recovery of arrears of rent as stated in issue No.2 hereinabove. Perusal of the record further reflects that on the basis of this admission on the part of the appellant, the respondent on 13.12.1979 had also filed an application under Order 12 Rule 6 CPC (CMA No. 4787/1999) for passing of judgment and decree as in such situation the respondent was willing to pay the enhanced price of Rs. 6,60,000/- as claimed by the appellant, without prejudice. Though no judgment and decree was passed on such an application, however, the respondent was directed to deposit the said amount in Court, and initially after depositing such amount, the respondent thereafter with the permission of the Court, withdrew it as no judgment and decree as solicited in terms of Order 12 Rule 6 CPC was passed by the learned Single Judge and the matter was listed for evidence of the parties. In the circumstances the contention of the learned Counsel for the appellant that respondent had avoided deposit of the balance sale consideration does not appears to be based on facts as available on record. It may also

be noted that during the entire period of litigation including the one starting from the date of deposit of balance sale consideration and its withdrawal, and thereafter, the respondent was never put into possession of the property which at present is also with the appellant as stated. Therefore, the question that whether or not there was a formal agreement between the parties is immaterial and the dispute is only to the extent of the agreed price as discussed hereinabove. In the circumstances, it was on the plaintiff to prove that an agreement for Rs. 6,60,000/- was made and not for Rs. 4,60,000/- The learned Single Judge while passing the impugned judgment has specifically dealt with this issue in the following manner:-

(510)

“According to the plaintiff at the time of execution of Ext. 5/2, there was an oral agreement between her and the original defendant. The original defendant agreed to sell the property in suit for total sale consideration of Rs. 4,60,000/-The original defendant averred in Para 4 of the written statement that the plaintiff’s husband made a proposal to purchase the property in Suit for Rs. 6,60,000/- besides an undertaking that he would recover the arrears of rent and pay the same to her. He however, suggested that the sale deed shall be executed and registered for Rs. 4,60,000/- and Rs. 2,00,000/- will be paid in cash at the time of possession and in this way he will be able to save stamp duty and registration charges and the defendant would get the benefit of paying less as Gain Tax and Property Tax as the amount of Rs. 2,00,000/- which will be paid at the time of delivery of possession shall not be included in the sale consideration of the deed. In Para 9 of the written statement the defendant averred that she was always ready and willing to sell the property on the agreed price of Rs. 6,60,000/- along with other terms mentioned above and she has always been [ready] to convey the property on these terms. (pg:69-71)

(550)

The plaintiff accepted the amount of Rs. 6,60,000/- as pleaded by the original defendant in her written statement. It is not the case of the original defendant that the value of the property in suit is much more than the sale consideration agreed upon between the parties. It has come in evidence that during the pendency of the suit, the tenants, namely, National Construction Company had already handed over possession of the property in suit to the defendant. As the original defendant did not execute any power of attorney in favor of the plaintiff, or her husband or M/s.Thaver & Sons. In any case D.W.3 gave an evasive reply about the arrears of rent. (pg: 71-73)

(560)

The burden was on the defendants to prove that the plaintiff gave an undertaking to recover the arrears of rent from National Construction Company. This burden was not discharged by the defendants. I have gone through the evidence of the parties carefully and I have come to the

conclusion that the plaintiff never gave any undertaking to recover the arrears of rent as alleged by the defendants.

From the circumstances, established in the present case, it is difficult to see how the plaintiff obtained any unfair advantage over the original defendant or in what manner the performance of the contract would involve any hardship to the original defendant which she could not have foreseen." (Pg: 73)

9. Moreover, on perusal of the evidence led on behalf of the appellant we are of the view that nothing has been brought on record through such evidence that the agreed price in respect of the Suit property was Rs. 6,60,000/-. Since the receipt in question has not been specifically denied, whereas, the only question raised on behalf of the appellant is that the agreed price was Rs. 6,60,000/- which the appellant had miserably failed to substantiate with any iota of evidence, therefore, in the circumstances, the learned Single Judge was justified in allowing specific performance on the basis of receipt i.e. Exhibit 5/2, which itself detailed out the entire contract between the parties, and even if further terms and conditions were not mentioned or stated in the form of a formal agreement, the same would not have any bearing on the validity of the receipt in question. The requirement of an agreement i.e. offer, acceptance and consideration are fulfilled in the receipt in question therefore, the receipt itself forms a binding contract between the parties from which they could not resile in such a manner. The inference to be drawn with regard to the intention of the parties is deducible from the manner and language used in the agreement (receipt in question), and we have no iota of doubt in our minds that it constituted a binding agreement between the parties for which specific performance could be granted by the Court. As discussed earlier the appellant could not establish from the evidence that the agreed price was Rs. 6,60,000/- and not Rs. 4,60,000/-. The appellant's witness namely Mr. Arif Hassan (D.W.1) who was also a signatory to the receipt Exhibit 5/2, was put a



specific question with regard to the dispute in the amount of the agreed sale price in the following manner:-

“Question: Can you give any reason why you did not endorse as corrections to this agreement when the draft was sent to you by the deft?”

Answer: I did not make any endorsement because the idea was that the sum of Rs. 2,00,000/- which was to be paid as “over money’ was not to be mentioned in the agreement.”

10. Perusal of the aforesaid response by D.W.1, reflects that insofar as the signing of formal agreement is concerned, the same was to be made on the agreed sale price of Rs. 4,60,000/- and not for Rs. 6,60,000/- as suggested by the D.W.1. In the circumstances, the stance of the appellant that the receipt in question does not fulfill the entire terms and conditions of the agreement is also belied as it is the case of the appellant that no further amount was required to be mentioned in the agreement. Hence, in fact there was no agreement to follow insofar as the dispute in the amount of sale is concerned. Whereas, no considerable evidence was led on behalf of the appellant to the effect that actual sale consideration was Rs. 6,60,000/- and not Rs. 4,60,000/-. It may further be observed that the respondent without prejudice to her case on merits, had even agreed to pay the Sale consideration of Rs. 6,60,000/-, as suggested by the appellant, subject to passing of judgment and decree in terms of Order 12 Rule 6 CPC, to resolve the controversy, however, the same was not consented to by the appellant and the matter had to be decided on the basis of evidence led by the parties. Therefore, in the circumstances, the appellant by taking divergent and contradictory stance has in fact tried to avoid the specific performance of the agreement even on the Sale price suggested by it.

11. The Counsel for the appellant has vehemently pressed upon the proposition that though insofar as the receipt in respect of sale of the Suit property is concerned, the same has not been denied, however, since no formal agreement was admittedly executed between the parties thereafter, no specific performance of the said receipt could have been ordered by the learned Single Judge by treating the same as an independent agreement in itself. However, we are of the view that the contention of the learned Counsel for the appellant in this regard is misconceived. It is a settled proposition of law that specific performance can be ordered even in case of an oral agreement, whereas, in the instant matter a proper receipt has been admitted to have been issued by the appellant, which otherwise in our view is a complete agreement in itself and does not require any further execution of terms and conditions and can be specifically enforced. The Hon'ble Supreme Court in the case of Mrs. Mussarat Ali V. Mrs. Safia Khatoon and others (1991 SCMR 2189) while dealing in a more or less similar situation, wherein, only a receipt was issued in respect of part payment of a property and no further formal agreement was executed between the parties, observed that the buyer in the presence of an admitted receipt can always plead an oral agreement between the parties, and further, that absence of details of other terms and conditions of the agreement would not render an oral agreement as void and the buyer was entitled to prove the terms of sale by reading oral evidence in the circumstances. The relevant observations are as under:-

“The learned Counsel for the respondents, however, argued that there was no satisfactory evidence on record to reach the conclusion that there was any concluded contract between the parties in respect of the sale of the suit property by the deceased in favour of the appellant. The learned Counsel for the respondents argued that according to Exh. P-1, which is the only document in support of the alleged sale agreement, only a sum of Rs. 25,000 was paid by the appellant to the deceased but neither the sale consideration of the suit property nor other terms and conditions of sale are ascertainable from this document. It is accordingly, contended that such a document did not constitute a valid agreement of sale capable of being enforced specifically. The argument of the learned counsel for the respondent overlooked the fact that the appellant had

not relied on Exh.P-1 as the agreement of sale between her and the deceased. The appellant's case, throughout, was that the agreement of sale between her and the deceased was oral and she tendered the receipt Exh. P-1 in evidence to prove payment of part of sale consideration in pursuance of the oral sale agreement. Therefore, absence of the details of the other terms and conditions of sale in Exh.P.1 were of no significance and the appellant was entitled to prove the terms of sale by leading oral evidence in the circumstances of the case. The learned counsel for the respondents are unable to point out any provision of law or precedent which prohibited an oral agreement to sell of any immovable property. The trial Court as well as the learned Judges of the High Court while dealing with the question of existence of agreement of sale between the appellants and the deceased relied on the evidence of Mr. S.B. Raza, Advocate, who was a disinterested and independent witness, and categorically stated before the Court on oath that the sale price was settled as Rs. 3,00,000 and out of this agreed sale consideration a sum of Rs. 25,000 was paid towards part payment of the consideration through a cheque which was duly received by the deceased. This witness was a marginal witness of the document Exh.P.1 and the 2 Court's below have relied on the evidence of this witness to hold that there was an agreement of sale between the appellant and the deceased to convey the suit property in favour of the appellant against the consideration of Rs. 3,00,000. This concurrent finding of fact by the two Courts below is neither contrary to the evidence on record nor suffers from any misreading of the evidence. We, therefore, find no substance in the contention of the respondents that there was no concluded agreement of sale between the parties in respect of the suit property which could be specifically enforced."

12. In view of hereinabove facts and circumstances of the instant case, and on perusal of the impugned judgment and decree and so also the evidence led by the parties, we are of the view that there appears to be no illegality of such nature with which this Court could interfere as according to us the appellant has failed to establish that the agreement in question was for an amount of Rs. 6,60,000/- and not for Rs. 4,60,000/-, whereas, the judgment impugned is correct in facts and law and no exception can be drawn against it. Accordingly, in view of such position, on 19.1.2016 by means of a short order we had dismissed the appeal by upholding the impugned judgment and decree and these are the reasons for the same.

J U D G E

CHIEF JUSTICE