IN THE HIGH COURT OF SINDH AT KARACHI

HCA No. 111 of 2015
HCA No. 112 of 2015

Before : **Mr. Justice Irfan Saadat Khan**
Mr. Justice Fahim Ahmed Siddiqui

Mrs. Sana Rizwan. ….. Appellant

Versus

Mrs. Amna Fahim & others. ….. Respondents

Dates of Hearing: **21.08.2019, 25.09.2019, 16.10.2019 and 02.12.2019.**

Date of Judgment : _____

Appellant Mrs. Sana Rizwan through Ms. Rizwana Ismail, advocate.

Respondents Nos. 1&2 Mrs. Amna Fahim and Muhammad Farooq respectively through Mr. Ghulam Mujtaba Phul, advocate.

Respondent No.3 the Administrator, Pakistan Defence Housing Authority through Mr. Asif Rasheed, advocate.

J U D G M E N T

FAHIM AHMED SIDDIQUI, J:- This judgment will dispose of the aforementioned two High Court Appeals in which impugned is the consolidated judgment and decree dated 20-03-2015 passed in Suit No. 1291/2003 and Suit No. 10/2004. Through the impugned judgment and decree, the learned Single Judge was pleased to dismiss both the said Suits filed by the appellant against the respondents in respect of some properties for which she allegedly entered into a sale agreement as a vendee.

2. The contextuality of the case is that the appellant allegedly entered into two different agreements with respondent No. 1 (Mrs. Amna Faheem) through respondent No. 2 (Muhammad Farooq-attorney of Mrs. Amna Faheem). Amongst the two agreements, one was in respect of a house bearing No. E-4, measuring 250 square yards situated at the Darakshan Villa, Phase-VI, DHA, Karachi for an agreed price of Rs. 30,00,000/- payable as per the agreed schedule mentioned in the sale agreement. The other agreement was in respect of Plot No. 117, Popular Avenue, Phase-VI, DHA, Karachi (measuring 2000 square yards) and commercial Plot No. 6-C, Khayaban-e-Bukhari, Phase-VI, DHA, Karachi (measuring 200 square yards) for Rs. 60,00,000/- payable as per the agreed terms and conditions.

3. We have heard the learned counsel for the parties and have gone through the available material.

4. Ms. Rizwana Ismail, the learned counsel for the appellant, opens the arguments by the recital of the impugned judgment. Thereafter she enters into detailed deliberation regarding the impugned judgment. She submits that at the time of agreements, the properties in question were not mutated in the name of the respondent No. 1 but she being ostensible owner was able to enter into the agreement. According to her, an amount of Rs.10,00,000/- was paid as part payment for the Darakshan Villa property, while an amount of Rs. 5,00,000/- was paid as part payment towards the other plots. She submits that it was agreed between the parties that the remaining payments will be made at the time of execution of the sale deed. She contends that the delay in payment was attributed to the respondents, as respondents could not perform their part of the obligation in respect of the agreements settled between the parties. According to her, respondent No. 1 had failed to get the properties transferred in her name, as such she could not execute the sale deed and without such execution, no question of payment of the remaining amount arose. She submits that there were reciprocal promises in the contracts

and unless the respondents would be ready to perform their promise, the appellant could not perform her part of contracts. She further submits that as per the doctrine of mutual obligations, both the parties were required to perform their parts of promises simultaneously, and without performance by the respondent No.1 i.e. mutation of the properties in her name, neither the sale deed could be executed nor the same could be transferred in the name of the appellant. After drawing our attention towards some letters, she submits that since it was communicated that the respondent No. 1 was unable to come to Karachi and to appear before the DHA Authorities; therefore, an oral and implied novation of the contracts has taken place and the time of the performance was extended uptil the arrival of the respondent No.1 and mutation of the properties in her name first. According to her, over the time, the worth of the properties escalated and due to greed, the respondents became dishonest and tried to back out of the agreements. She submits that the appellant has already paid considerable amounts but the properties could not be transferred due to the non-availability of respondent No.1; therefore, the appellant has proposed to the respondents for handing over the possession of the properties to the appellant till the arrival of the respondent No. 1 and execution of the documents. She further submits that instead of giving some rational reply, the respondents at once cancelled the agreements; which, according to her, they could not do as per the agreed covenant between the parties. She submits that even no notice for cancellation of the agreements was given or published by the respondents, who started negotiations with other persons. She further submits that the respondents were bent upon to tease the appellant up to that extent that they managed to register a false F.I.R. in which the husband of the appellant was arrested and remained in custody during the festivities of Eid. She submits that respondent No. 2 has filed a Suit regarding the subject properties in Rawalpindi with false allegations but in the same, the respondents

admitted the execution of the agreements for the sale of properties in question. According to her, after an appearance by the appellant, the said Suit filed at Rawalpindi was disposed of by way of returning the plaint. While further elaborating on the merits of the case, she submits that in the impugned judgment the fact of novation was not addressed properly. She claims that both the respondents were sailing in the same boat and through conducting cross they complement each other and in this way tried to improve their case. She further submits that the contents of the Suit filed at Rawalpindi itself fortified the appellant's case. She submits that the falsification of respondents was very much clear from the fact that respondent No.2 in cross-examination not only denied the agreement regarding the properties C-6 and 117, Popular Avenue and receipts of payment, which was previously admitted but also he denied the signature on judicial record of his case filed in the Civil Court of Rawalpindi. According to her, the respondents became greedy due to the escalation in the prices of the properties and their greed is established from the fact that the respondents entered into sale agreements with three other persons. In support of her contentions, the counsel for the appellant refers to different portions of the affidavit-in-evidence and cross-examination also.

5. Conversely, Mr. Ghulam Mujtaba Phul, learned counsel for the respondents supports the impugned judgment. He submits that it is not correct that the Suit properties were not transferred in the name of Mrs. Amna Faheem but the factual position is that the same has already been transferred. According to him, after the agreements, the appellant could not fulfil her part of obligation within the stipulated time, as such the appellant has breached the contract. Per him, it is not the correct position that the remaining payment was to be made at the time of transfer but the fact is that the remaining payment was to be made at the time of transfer or within three months. According to him, the three months was the maximum time for payment, as such time was the essence of the

agreement and its violation was a clear-cut breach of the agreements/contracts. He further submits that after the breach of contracts, there was no novation either by words or in writing. After referring to the relevant portion of deposition, he submits that the second contract was never admitted by the respondents and the same was a fabrication by the appellant and it indicated that not the respondents but the appellant is dishonest. He submits that the breach of contract was established from the fact that the appellant in her letter demanded the possession of the property without payment of the remaining amount. He further submits that when the contracts were already breached by the appellant, the respondents were not required to publish a notice for cancellation of the contracts but even then publication was made. In support of his arguments, the learned counsel for the appellant relied upon the following judgments.

a) Bootay Khan through LRs vs Muhammad Rafique (PLD 2003 Supreme Court 518).

b) Hafiz Tassaduq Hussain vs Muhammad Din through LRs (PLD 2011 Supreme Court 241).

c) Notice to Police Constable Khizer Hayat (PLD 2019 Supreme Court 527).

6. Mr. Asif Rasheed Advocate has appeared for the respondent No.3 and has supported and adopted the arguments of Mr Ghulam Mujtaba Phul Advocate and further stated that whatever order is passed by this Court would be complied with in letter and spirit.

7. We have noted that it is the case of the appellant that she entered into two agreements with the respondents. Amongst them, one is for the properties, which are the subject matter of HCA No. 111/2015 i.e. Plot No. 117, Popular Avenue, DHA, Phase-VI, Karachi measuring 2000 square yards and Plot No. 6-C, Khayaban-e-Bukhari, DHA, Phase-VI, Karachi

measuring 200 square yards. The other agreement pertains to the property which is the subject matter of HCA 112/2015 i.e. Plot No. E-4, Darakhshan Villa, DHA, Phase-VI, Karachi measuring 260 square yards. It is worth noting that the agreement pertains to the properties of HCA No. 111/2015 is denied by the respondents in toto, however, regarding the agreement in respect of the properties, which are the subject matter of HCA No. 112/2015, their contention is that the same was vitiated on account of breach of the vital terms of the agreement i.e. non-payment of the remaining amount within the three months' time period.

8. First of all, we deem it appropriate to deal with the position of the parties in respect of the first agreement. When there is only an assertion about a fact from one side and solely denial from the other side, the objectivity and factuality both loose their prominence as evidentially, one party is not telling the truth. Now, it is the duty of the party, who asserts to establish the fact on the established norms of evidence. In such a situation, the agreement can only be proved as per the procedure laid down under Articles 17, 72 and 79 of the Qanoon-e-Shahadat, in which the appellant miserably failed during the trial.

9. Another aspect is also considerable. It is alleged that the appellant enters into this agreement for properties bearing Plot No. 117, Popular Avenue, and Plot No. 6-C, Khayaban-e-Bukhari,of DHA, Phase-VI, Karachi with the attorney of Mrs. Amna Faheem the respondent No.1 through her attorney Muhammad Farooq, the respondent No.2 but it is also admitted position that the power of attorney (Exhibit P-5/5) pertains to the property of Darakhshan Villa, hence question arises how the appellant can enter into sale agreement with attorney for the properties regarding which no power was executed in favour of respondent No.2. Even if without a power of attorney, the appellant preferred to enter into the sale agreement then on the well-known rule of 'caveat emptor', she was

responsible for the consequences of her negligence. In such a situation, we have no hesitation in holding that the appellant could not establish that she has entered into an agreement of sale regarding the properties of HCA No. 111/2015.

10. Let us further see, what is the situation in respect of the other property i.e. Plot No. E-4, Darakhshan Villa, DHA, Phase-VI, which is the subject matter of HCA No. 112/2015. The respondents admitted this agreement but they contended that the time was essence of the agreement and the remaining payment was to be made within three months. On the other hand, the appellant claimed that the material condition of the agreement was that the payment should be made at the time of transfer i.e. execution of the sale deed but the same was not done as it was informed to the appellant that the respondent No.1, who is residing abroad, was unable to visit Karachi for mutation of the property. This aspect of the case was denied by the respondents and they contended that in any case, the appellant was required to pay the remaining amount within three months. Per contra, it was claimed that the time was not the essence of the agreement and if it was, then a novation of contract by conduct has taken place on account of communication that the respondent No.1 was unable to visit Karachi and without her presence transfer of DHA properties were not possible. However, the learned counsel for the appellant contends that the breach of contract was eventually established from the letter of the appellant in which a demand was made to hand over the possession of the property without the remaining payment. The said letter is exhibited as 'Exhibit P-9/12' and the same was written on September 27, 2003, which indicated that at that point of time the agreement was already cancelled. The relevant portion of the said letter is reproduced as under :-

> *"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 Cesarean 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 Darakhsah 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 Darakhsah Villa No. E-4 to me immediately without further payment. There after the last date can be extended."*

The above letter is an admitted document and from its contents the following important aspects of the case may be highlighted.

- It is very much clear from the letter that the last date of the payment of the remaining amount was September 30, 2003.

- A beforehand information was given that Mrs. Amna Faheem has gone to some Cesarean Section due to which transfer will be completed by October 15, 2003.

- The appellant was not ready to give any payment and without payment, she was demanding possession of the property.

11. In the existing position of affairs, it becomes evident that the time was the essence of the agreement. This fact is also further elaborated from the last clause of the schedule of payment mentioned in the agreement between the parties dated June 30, 2003, which reads as under :-

> *"i.e. Balance amount shall be paid on transfer, but not later than 90 days from the date of signing of this agreement"*

12. We are of the view that now there remains no ambiguity that the time was the essence of the contract and the appellant has to perform her part of the contract either at the time of the transfer in any way (i.e. due to any reason transfer could not be done), the remaining payment should be made within 90 days of the signing of the agreement. We are of the view for deciding that the time is the essence of the agreement, even fixing of a date is material and in this respect, reliance may be placed on a case reported as Bootay Khan (supra), wherein the Hon'ble Supreme Court has held as under :-

> *" It may be observed that each case is decided on its own merits keeping in view the attending circumstances and the Court is required in each case to explore and find out what was intended by the parties. Even if date fixed in the agreement in the circumstances if held to be not the essence of the contract but it has repeatedly been held by the superior Courts that even the fixation of a date is material bearing upon the question whether a party was ready and not to perform its part of the contract."*

13. It is also important to note that from the above-referred clause of the agreement the remaining amount was to be paid not later than 90 days from the date of the signature of the instrument. Not only from the said clause of the agreement but also from the contents of the letter dated September 27, 2003, it is clear that the last date for the performance by the appellant i.e. payment of the remaining amount was 30-09-2003. We are of the view that only three days before the stipulated date writing a letter by the appellant to the respondents by placing a condition for handing over the possession without any further payment, itself indicates that she was not ready to fulfill her obligations towards the agreement. Although it is not established from the contents of the letter, it appears that perhaps some oral suggestion was made by the appellant for the extension of time. It is worth noting that the contents of the said letter are silent about the mode, style, and place of giving such suggestion, as such making of any such suggestion itself becomes dubious. However, if for the

sake of the argument, it is admitted that some oral suggestion was made even then it will not improve the case of the appellant, as in the same letter the said supposedly offer of extension of time was point blankly refused and by placing some allegation upon the respondent, the possession of the property was demanded without any further payment. Even the letter does not indicate that the remaining payment will be made at any future time, which is quite astonishing. We are of the view that the said letter was sufficient to presume that the appellant had already shut the door of further communication unless possession of the property was given to her.

14. Although, it is not established from some material evidence that any suggestion for extension of time was made from the respondent but since a slight possibility of such suggestion may be presumed from the above letter; therefore, we would like to see whether there is any possibility of novation of contract is accrued due to some suggestion. In this respect, it would not be out of place to point out that nothing is available in the plaint regarding novation of contract. It is settled law that if something is not pleaded, the same cannot be argued. Nevertheless, as we have highlighted, the plaint does not plead a novation of the written agreement by any oral suggestion. Now we will see in such a situation what is the legal outcome for the appellant. In fact, the appellant was under the obligation to plead and prove about 'animus contrahendi' clearly and explicitly to establish the existence of new collateral and legal contract in the variation of the initial term in which the appellant has miserably failed. It is also the rule of law that when a thing is not pleaded then any evidence or argument regarding the same is not confidence-inspiring. Besides, the novation of the written agreement by an oral agreement is *ex facie* hit by the bar contained in Article 103 of the Qanoon-e-Shahadat. As a result of all these discussions, the plea of novation or modification of the contract raised by the learned counsel for the appellant is also unacceptable.

15. For the reasons aforementioned, we are of the opinion that there is no infirmity in the impugned judgment. Resultantly, both of these appeals alongwith the listed applications are dismissed with no order as to costs.

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