

IN THE HIGH COURT OF SINDH, KARACHI

Suit No.1494 of 2001

BEFORE:

Mr. Justice Arshad Hussain Khan.

Azam Ahmad Khan

vs.

Muhammad Yakoob Khokhar and others

Plaintiff: Azam Ahmed Khan
Through Mr. Syed Abid Hussain Sheerazi, Advocate.

Defendant No.1: Muhammad Yaqoob Khokhar,
Through Mr. Mehboob Elahi Advocate.

Date of Hg and Judgment: 24.10.2017

ARSHAD HUSSAIN KHAN, J.- This suit was filed by the Plaintiff against Defendants 1 & 2 for Specific Performance of Contract, Declaration, Possession & Permanent Injunction with the following prayers:-

- A) To pass judgment and Decree for the specific performance of contract directing the Defendant No.1 to execute and register the sale deed in favour of the Plaintiff in respect of the immovable properties in question i.e. (i) Industrial Plot of land bearing No.L/10-C-1, measuring 675.27 Sq.Yds. and (ii) Industrial Plot of land bearing No.L/10-C-II, measuring 674.73 Sq.Yds. total of both plots measuring 1350 Sq.Yds. and both situated in Block-22, KDA Scheme No.16, Commercial / Industrial F.B.Area, Karachi, and to hand over the vacant and peaceful physical possession of the remaining one part / portion of plot No.L/10-C-II, stated above at present in possession of Defendant No.2 to the Plaintiff and on the failure of Defendants 1 & 2 to do so the Nazir of this Hon'ble Court be directed to execute and register sale deed in respect of said plots in favour of the Plaintiff and to hand over the physical possession of the remaining portion of Plot No.L/10-C-II to the Plaintiff accordingly.
- B) That declaration be granted in favour of the Plaintiff and against the Defendants specially the Defendant No.1 that the Agreement of Sale dated 10.03.2000 was lawfully entered into between the parties in respect of the properties mentioned above and that the Defendant No.1 is bound to fulfill and perform the said Agreement of Sale in favour of the Plaintiff and none else.

- C) That a permanent injunction may also be granted restraining the Defendants, their agents, representatives and any other person(s) acting under them from disturbing the physical possession of the portion of the total premises in question of the Plaintiff in any manner and / or transferring, alienating and disposing of the disputed plots / properties in question till the disposal of this suit to anyone else whatsoever except the Plaintiff.
- D) That the costs of the suit be granted to the Plaintiff.
- E) That any other relief or relief(s) which may be granted to the Plaintiff by this Hon'ble Court which may deem fit and proper under the facts and circumstances of this case.

2. Brief facts leading to the filing of the present case as stated in the Plaint are that Defendant No.1 entered into a sale transaction of his property i.e. two commercial industrial plots of land bearing No. No.L/10-C-1, and L/10-C-II, measuring 675.27 Sq.Yds. and 674.73 Sq.Yds., respectively, both plots situated in Block-22, KDA Scheme No.16, Commercial / Industrial F.B.Area, Karachi, [suit property] for a total sale consideration of Rs.53,000/- vide agreement dated 10.03.2000. The Plaintiff pursuant to the terms of the Agreement dated 30.08.2000 paid Rs.40,75,000/-. It is also stated that in the month of September, 2000, the Defendant settled the dispute with one of the tenants/ occupants of the property in question by making them full payment of Rs.7,00,000/-. The said payment was made through the Plaintiff from his bank account vide two cheques No.0021123 & 002124 for Rs.2,50,000/- respectively drawn on Allied Bank of Pakistan Ltd., Gulshan-e-Iqbal Branch, Karachi, adjustable towards the balance sale consideration. The Plaintiff after payment of Rs.7,00,000/- till filing of the case had paid Rs.47,75,000/- out of which sale consideration of Rs.53,00,000/- remaining the balance of payment of Rs.5,25,000/-. It is also stated that pursuant to the terms of the sale agreement, Defendant No.1 had to clear all outstanding, dues, arrears and charges of utility bills and taxes, however, Defendant No.1 despite various requests has failed to clear the outstanding dues which are in lacks of Rupees. Pursuant to the said terms, Defendant No.1 also required to make available the vacant possession of the second part of the property which was in possession of Defendant No.2. Since Defendants failed to comply with the terms of the Sale Agreement, the Plaintiff addressed a legal notice whereby he shown his willingness to

pay the balance sale consideration subject to the clearance of all outstanding dues and taxes in respect of the properties in question and vacant possession of the property. In reply to the said legal notice, Defendant No.1 denied to perform obligations under the sale agreement. Resultantly, the Plaintiff had no other option but to file the present suit.

3. Upon notice of this case, Defendant No.1 filed written statement wherein while denying the allegations leveled in the Plaint has stated that though the sale agreement was executed, however, no specific date for final payment was mentioned in the agreement and it was kept blank and the date i.e. 31.08.2001 was subsequently filled in by the Plaintiff on his own. It has also been stated that out of total sale consideration of Rs.53,00,000/-, the Plaintiff had paid only Rs.40,75,000/- and have deposited an amount of Rs.7,00,000/- which the Plaintiff claims to have been paid by him. In the written statement the total outstanding was mentioned as Rs.12,25,000/-. It is also stated that it is the Plaintiff who had violated the terms of the Sale Agreement and took over the possession of the property through illegal and unlawful means without prior payment of the balance sale consideration and further after violation of the terms and conditions of the sale agreement, the Plaintiff has no right whatsoever of any nature for claiming relief against the Defendants. It is also stated that the Plaintiff has approached this Court with unclean hands and he himself breached and disregarded the terms and conditions of the Sale Agreement, hence he is not entitled to the reliefs claim in the suit and the suit is liable to be dismissed.

4. Out of the pleadings of the parties, following issues were framed :-

1. Whether Plaintiff & Defendant No.1 entered into agreement of sale dated 10.03.2000 in respect of property bearing No.L-10/C-I and L-10/C-II ?
2. Whether time was essence of the agreement of sale dated 10.03.2000 ?
3. Whether the Plaintiff has interpolated with the agreement of sale dated 10.03.200-0, if so it effect ?

4. Whether Plaintiff has paid any amount under the agreement of sale dated 10.03.2000, if so what amount and to whom ?
5. Which of the party to the suit has committed breach of agreement of sale ?
6. Whether the agreement of sale is enforceable under law ?
7. To what relief, if any parties are entitled to ?

After framing of the issues by the Court, upon request of the parties, the Commissioner was appointed for recording of the parties who after completion of the commission filed his Report dated 11.10.2004.

5. From the perusal of the record, it reveals that the Plaintiff in support of his stance in the case has examined 04 witnesses namely;

- i) Azam Ahmed Khan, witnesses No.1 (Exh.5)
- ii) Muhammad Parvez, witness No.2 (Exh.6)
- iii) Muhammad Nusrat Khan, witness No.3 (Exh.7)
- iv) Abdul Qayyum, witness No.4 (Exh.8)

The said witnesses were subsequently cross-examined by the Advocate for the Defendants. After the evidence of the Plaintiff, Defendant No.1 examined two witnesses namely;

- i) Muhammad Yaqub Khokar, witness No.1 (Exh.9)
- ii) Muhammad Shahid Khokar, witness No.2 (Exh.10)

And the said witnesses were also cross-examined by the Advocate for the Plaintiff and Defendant No.2. Whereas Defendant No.2 did not lead any evidence in the matter.

6. Learned counsel for the Plaintiff argued that the sale agreement executed between the Plaintiff and Defendant No.1 is not disputed nor the total sale consideration was disputed. As regards the payment of sale consideration is concerned, learned counsel stated that Rs.40,75,000 has been admitted by Defendant No.1 in his evidence. Whereas the payment of Rs.700,000/- is reflected from Exh P-5/3 and the remaining balance of Rs.5,25,000/- has already been deposited with

the Nazir pursuant to the directions of this Court dated 20.05.2002. Besides above, a solvent surety of Rs.700,000/- is also lying with the Nazir pursuant to the directions of this Court dated 20.05.2002.

7. I have heard the learned counsel for the parties and perused the material available on the record as well as the evidence of the parties; my findings on the above issues are as follows :-

ISSUES NO. 1,2 & 4: All these issues pertain to the sale agreement in question, which relates to the whole controversy in the matter, hence the same are taken up together.

From the perusal of the examination-in-chief of Defendant No.1, it appears that Defendant No.1 entered into a sale agreement which he has also produced as Exh.D/1 whereby a sale transaction in respect of the properties in question for a total sale consideration of Rs.53,00,000/- was made. He also admitted that he has received out of total sale consideration Rs.43,75,000/-. From the Plaintiff's evidence, it is also appears that the only dispute between the parties is with reference to the balance sale consideration of Rs.12,25,000/- whereas according to the Plaintiff, the balance sale consideration was Rs.5,25,000/- as he had paid Rs.700,000/- on behalf of Defendant No.1 to the tenants/occupants towards the settlement to vacate the suit property, which was to be adjusted towards the sale consideration.

8. For the sake of ready reference, the relevant excerpts of the Examination-in-Chief and cross-examination of DW-1, Yakoob Khokar, (Exh.9) DW-2 Muhammad Shahid (Exh.10) respectively are reproduced as under :-

Examination of Chief of DW-1

“I have sold out the property in suit to plaintiff Azam Ahmed Khan for total sale consideration of Rs.53,00,000/- (Rupees Fifty Three Laks Only). I have received an amount of Rs.40,75,000/- (Rupees Forty Laks and Seventy Five Thousands only) out of the sale consideration. The balance amount of Rs.12,25,000/- (Rupees Twelve Laks and Twenty Five Thousands Only) is due against the plaintiff Azam Ahmed Khan. There was sale agreement executed between me and plaintiff and the photocopy of said sale agreement was delivered to me. I produce photocopy of sale agreement which was delivered to me

as Exh.D/1..... I was told by my son Shahid Khokar that his signature was obtained on Exh.P-5/3 by force on gunpoint, on using abusive language and beating. My son Muhammad Shahid Khokar lodged report of said incident with police station Federal "B" Area, Karachi. I produce photo copy of report dated 17.10.2000, as Exh.D/2.

RO & AC

Sd/-

Riazuddin 04.09.2004

Advocate/Commissioner to record evidence.

CROSS TO MR. S.A. JALIB ADVOCATE FOR THE PLAINTIFF

I see Exh. P-5/2 and say that the receipt is for the amount of Rs.40,75,000/(Rupees Forty Laks and Seventy Five Thousands Only) which I have signed in the presence of two witnesses. It is fact that the said payment of Rs.40,75,000/- (Rupees Forty Laks and Seventy Five Thousands Only) was made in 20 installments on different dates. It is fact that the payment of Exh.P-5/2 out of the twenty installments only one installment of Rs.50,000/- (Rupees Fifty Thousands Only) was made in cash on 24.12.1999 and remaining 19 installments were made through cheques. It is correct that all the counter foils of 19 cheques were signed by my son Muhammad Shahid Khokar on my behalf. It is correct that first installment of Rs.50,000/- (Rupees Fifty Thousands Only) was made on 26.12.1998, and 15 installments were made in the year 1999, on different dates. It is also fact that last 3 installments were made in the year 2000. I see Exh P-5/1 and say that it is the same sale agreement which was executed between me and Azam Ahmed Khan. It is fact that verbal agreement was arrived in 1998 between me and the plaintiff Azam Ahmed Khan and Azam Ahmed Khan started making payment by way of installments and subsequently written agreement of sale Exh.P-5/1 was executed in the year 2000. It is correct that the said sale agreement between me and plaintiff was executed on 10.03.2000. It is incorrect to suggest that there was finalization date i.e. 31.08.2001 was fixed in the said sale agreement. I see Exh -P/1 and say that on page No.2 in sale agreement in front of paragraph 2 in marginal space there is my signature. It is correct that in respect of paragraph 2 of the sale agreement Azam Ahmed Khan has also signed. It is incorrect to suggest that the date 31.08.2001 was written by mutual consent of the parties to the sale agreement and both of us put our signature on the said date. I see Exh.P-5/6 and say that it was received by me whereby the plaintiff Azam Ahmed Khan has intimated to me that he is prepared to make payment of balance sale consideration of Rs.5,25,000 (Rupees Five Laks Twenty Five Thousands Only) and further requested to me to execute sale deed in his favour..... It is fact that in paragraph 1 and 2 of my written statement I have not denied and disputed the date of execution of sale agreement i.e. 10.03.2000 and I have only disputed of finalization of sale

transaction i.e. 31.08.2001. It is fact that there was dispute between me and deceased tenant Riaz Hazarvi regarding utilities bills and rent amounting to about Rs.6,50,000 (Rupees Six Laks Fifty Thousands Only). It is in my knowledge that witness Nusrat Khan, Parvez Ahmed and Abdul Qayyum have recorded their statement in evidence that there was dispute of amount of Rs.12,00000/- (Rupees Twelve Laks Only) between the tenants and me, but their statement is not correct. It is correct to suggest that I have not mentioned in my written statement nor in my examination in chief that a sum of Rs.6,50,000/- (Rupees Six Laks Fifty Thousands Only) were due against my said tenants. It is fact that in respect of dispute between me and my said tenants a sum of Rs.7,00,000/- (Rupees Seven Laks Only) was decided to pay by me to my tenants in accordance of Jirga decision dated 20.09.2000, but the said decision of Jirga was taken by force. I see Exh.P-5/3 on which page 1 and 2 there is signature of my son Shahid Khokar, but the said signature was obtained by force. It is fact that in Jirga decision Exh.P-5/3 dated 20.09.2000 the name of party No.1 is Muhammad Shahid Khokar son of Muhammad Yakoob Khokar owner of the property and the name of second party is Abdul Wahab Khan and Riaz Hazarvi business partners/tenants. It is fact that from the date of execution of decision of Jirga dated 20.09.2000 neither I have issued any legal notice nor initiated any Court proceedings in respect of obtaining signature of my son by force. It is fact that as per decision of Jirga the amount of Rs.7,00,000/- (Rupees Seven Laks Only) was paid to the tenants by Azam Ahmed Khan through two cheques of counter foils of which Exh.P-5/16 and Exh.P-5/17 were signed by my son Shahid Khokar, but the said signatures of my son Shahid Khokar were obtained forcibly. It is fact that neither my son Shahid Khokar nor I myself has filed any Court proceedings in respect of obtaining signatures on Exh.P-5/16 and Exh P-/17 but my son has given application in police station..... It is fact that I have not filed any case against the Plaintiff in any Court to take back the possession of portion in possession of the Plaintiff and as well as for the recovery of articles valued of Rs.2,00,00,000/- (Rupees Two Crores Only). It is fact that I have not mentioned in my examination in chief about taking of my articles by Azam Ahmed Khan of valued of Rs.2,00,000/- (Rupees Two Crores Only).

**CROSS TO MR. AKBAR FARUKH ADVOCATE FOR
DEFENDANT No.2**

It is fact that my tenant Kamran Rauf the defendant No.2 is still my tenant. It is fact that I have not given any notice to my tenant the defendant No.2 in respect of sale of tenement in occupation of said tenants. It is fact that even in my legal notice dated 18.03.2000, I have not mentioned about sale of the property to the Plaintiff. It is fact that my son Shahid Khokar is authorized by me to deal with the tenants and my son also signed on sale agreement as witness.

RO & AC

Sd/-

Riazuddin 08.09.2004.

Advocate / Commissioner to record the evidence.

Excerpts from Cross of DW-2, Muhammad Shahid Khokar

“.....It is incorrect to suggest that there was settlement arrived between my father and above said tenants and a sum of Rs.7,00,000/- (Rupees Seven Laks were paid to them on our request through two cheques of Rs.2,00,000/- (Rupees Two Laks) and Rs.5,00,000/- (Rupees Five Laks). It is fact that both the above two cheques were handed over and issued in the name of Nusrat Khan and counter foils of both the cheques were signed by me. It is incorrect to suggest that I have not lodged any specific complaint with reference to Jirga decision dated 20.09.2000, with police station nor I have filed any criminal complaint in Court. It is correct to suggest that in respect of obtaining my signatures on counter foils of two cheques of Rs.2,00,000/- (Rupees Two Laks) and Rs.5,00,000/- (Rupees Five Lakhs) neither I have filed any complaint nor filed any case in Court against the tenants and Azam Ahmed Khan. It is correct to suggest that my father has not filed any case against Azam Ahmed Khan for the recovery of possession and mesne profits in respect of portion in occupation of plaintiff. It is incorrect to suggest that the Plaintiff is in possession in part performance of the contract as he has already paid a sum of Rs.40,75,000/- (Rupees Forty Laks and Seventy Five Thousands). It is with in my knowledge that Azam Ahmed Khan has deposited a sum of Rs.5,25,000/- (Rupees Five Laks and Twenty Five Thousands) in Court.....”

RO & AC

Sd/-

Riazuddin 18.09.2004

Advocate / Commissioner

To record the evidence.

9. From the perusal of the above evidence, it is apparent that the agreement of sale was executed in between the parties and the total sale consideration had been paid by the Plaintiff and in this respect the evidence of the Plaintiff as well his witnesses have not been shaken in the cross-examination. From the perusal of the above evidence, it also appears that the Plaintiff has performed his part of obligation under the said Agreement of Sale and hence he is entitled to Specific Performance of the Contract. Accordingly, all the above issues 1,2 and 4 are answered in affirmative.

ISSUES No. 3, 5 & 6: In view of the findings of the Issues 1,2 & 4, these issues need not be discussed

10. ISSUE NO.7: In the circumstances and in terms of the above findings, I am of the considered view that in the instant matter the plaintiff's version is supported through his evidence while the defendants have failed to substantiate their stance in the case. Accordingly, the suit of the plaintiff is decreed and defendants are directed to specifically perform agreement of sale, dated 10.03.2000, and execute proper conveyance deed in favour of the plaintiff while the amount of balance sale consideration so deposited by the plaintiff with Nazir of this Court in terms of order 20.05.2002 shall be kept with the Nazir and shall be disbursed to the defendants along with profit accrued thereon, after execution of conveyance deed in favour of the plaintiff. In the event, the defendants fail to perform their part of obligation within a period of one month then Nazir to execute the required conveyance deed at the expenses of the plaintiff in his favour and in consequence thereto, to take possession of the subject property, if not taken it earlier, and hand over it to the plaintiff. Nazir also to obtain duplicate title documents of the suit property from the concerned authority, in the event defendants fail to provide/handover the original title documents of the same to the plaintiff. For the entire exercise, the Nazir's fee is fixed at Rs.40,000/- to be paid by the plaintiff. The security furnished by the plaintiff in terms of order 20.05.2002, shall be released to the plaintiff.

JUDGE

Jamil**