

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

**SUIT NO.261/2007**

Plaintiff : S. M. Shoaib Baghpati,  
through Mr. Muhammad Saleem Thepdawala  
Advocate.

Defendants : Umer Gul Aga, Mr. Siddiq Gul Aga &  
Muhammad Karim Gul Aga,  
through M/s Muhammad Idress Sukhera and  
Mohammad Shahid Qadeer advocates.

**SUIT NO.701/2007**

Plaintiffs : Umer Gul Aga, Mr. Siddiq Gul Aga &  
Muhammad Karim Gul Aga,  
through M/s Muhammad Idress Sukhera and  
Mohammad Shahid Qadeer advocates.

Defendant : S. M. Shoaib Baghpati,  
through Mr. Muhammad Saleem Thepdawala  
Advocate.

Date of hearing : 11.09.2014.

Date of Judgment : 01.12.2014.

**JUDGMENT**

**SALAHUDDIN PANHWAR, J.** Through the instant consolidated judgment, I am going to decide the above consolidated suit (s), filed by respective parties against each other (s). The suit No.261 of 2007 has been the leading suit which was filed by the plaintiff S.M Shoaib against the defendants for Declaration and Recovery for the following relief (s):-

- a) To declare that as per Clause-3 of the said Agreement dated 30.5.2006 the defendant No.1 to 3 are liable to pay the double of the advance payment to the plaintiff due to their failure to

comply with the contractual obligations as per agreed terms of the said agreements;

- b) To pass judgment & decree for the sum of Rs.70.00 Million against the defendant No.1 to 3 jointly and severally being double of the advance payment made by the plaintiff;
- c) To pass an order to allow the plaintiff to handover the possession of the one portion of said property which is presently in possession of the plaintiff to the Nazir of this Hon'able Court;
- d) Any other, further and better relief or relief's which this Hon'able Court may deem fit and proper in the circumstances of the case;
- e) Costs of the suit may also be granted;

2. Succinctly, relevant facts are that defendants No.1 to 3 have been owners of plot of Land bearing No.43/9-G, Block-6 having Survey Sheet No.35/P/1, admeasuring 2000Sq.yds with two independent Double storey Bungalows comprising of 07 & 03 Bed-rooms etc. respectively, situated in Block-6 Pakistan Employees Cooperative Housing Society, Karachi, having acquired by way of Gift deed duly registered with the Sub-Registrar T-Div.-XI, vide Registration No.426 of Book No.1 dated 24.02.1990, M.F. Roll No.1217 of photo-Registrar Karachi dated 03.3.1990 (hereinafter referred to as the "SUIT PROPERTY"). Suit property was mutated in name of the defendants No.1 to 3 in record of Ministry of Housing and Works through mutation letter No.F01/PEcHS/12328/2006, dated 12<sup>th</sup> August 2006. The defendant No.4 is a Broker (Estate Agent) through whom the transaction for purchase of the said property took place between the plaintiff and defendants No.1 to 3. Defendants No1. to 3 entered into an agreement to sell dated 31.5.2006 with plaintiff regarding sale of the suit property through defendant No.4 for a total sale consideration of Rs.100,000,000/-

(Rupees 100.00 Millions only). Plaintiff in compliance of the said agreement has paid a sum of Rs.10,000,00/- (Rupees Ten millions only) through cheques all drawn on Soneri Bank Ltd. Chandni Chowk Branch, Younus Plaza, Block-7 (Opp. Old Sabzi Mandi) Karachi, in favour of the defendants No.1 to 3 being advance part payment. The defendants No.1 to 3 have admitted and acknowledged the receipt of said amount in agreement and have also executed and issued a separate receipt dated 31.5.2006 for said amount in favour of the plaintiff.

3. It is further case of the plaintiff that as per Clause 2 of the said agreement the balance sale consideration of Rs.90,000,000/- (Rupees Ninety millions only) was required to be paid by the plaintiff to defendants No.1 to 3 at the time of handing over the vacant and peaceful physical possession of said property and completion of all formalities of agreement of sale including Registration of sale deed/General Power of Attorney in favour of the plaintiff or his nominees. It was agreed between parties that within a maximum period of six months from the date of signing of agreement i.e on or before 30.11.2006 all the formalities to finalize the transaction will be completed and meanwhile the defendants No.1 to 3 will take all necessary steps to obtain marketable and clear title of the said property in their favour prior to date of final payment by the plaintiff as at the time of execution of the said agreement the property was not mutated in the record of the Ministry of Housing & Works in favour of defendants No.1 to 3. The relevant portion of the said clause is reproduced here-in-below for ready reference:

“Clause-2....That balance and remaining payment of Rs.9,00,00,000/- (Rupees Nine Crore only) shall be paid by the Vendee to the Vendors at the time of handing over the vacant and peaceful physical possession of the said

property and completion of sale formalities including registration of Sale deed /General Power of Attorney in favour of the Vendee or his nominee (s) within a period of six (06) months from the date of signing of this agreement subject to obtaining of marketable and clear title by the Vendors in their names prior to date of final payment”

4. As per clause 3 of the agreement it was agreed between the plaintiff and the defendants No.1 to 3 that in case of failure of the defendants No.1 to 3 to comply with the required formalities as mentioned hereinabove within the stipulated period, the defendants No.1 to 3 shall be liable to refund the double of the part payment received by them from the plaintiff. In the same manner it was also agreed that if the plaintiff fails to perform his part of obligations, the defendants No.1 to 3 shall be entitled to forfeit the amount of advance payment made by the plaintiff. The clause 3 of the said agreement is:-

Clause-3 ...That if due to any circumstances the, Vendors fails to complete the sale formalities and to provide the marketable clear title documents for transfer of title of the said property in favour of the Vendee or his nominee (s) in such event, the Vendors shall be liable to refund the double of part payment received under Clause-1 above and similarly if the Vendee fails to make the balance payment within stipulated period in such case the Vendors shall be entitled to forfeit the amount of advance payment’

5. As per clause 11 of the said agreement, it was further agreed between the parties viz. *that on receiving 33 % of sale consideration, the Vendors (defendant No1. to 3) shall handover the vacant & peaceful physical possession of One Unit Bungalow measuring 700 sq.yds, out of the said property to the Vendee (plaintiff)*. It was also agreed between the parties in Clause 10 of the said agreement whereby defendants No.1 to 3 had undertaken and agreed to fully indemnify the plaintiff for all losses, litigations, suits, claims,

objection, disputes whatsoever in case of any impediment found in the transfer of the said property in favour of the plaintiff. Plaintiff in compliance of the Clause 11 of the said agreement, arranged to pay a further sum of Rs.25,00 Million to the defendants No.1 to 3 for getting peaceful vacant physical possession of the one portion of the said property measuring 700 sq.yds, and in this regard both the parties signed/executed a supplementary agreement of sale dated 10.10.2006 in continuity of the said Agreement. Thus, total amount for the said portion of 700 Sq.yds, at the rate of Rs.50,000/- per sq. yards was determined at Rs.35.0 Millions, out of which the sum of Rs.10.00 Million had already been paid through said agreement and a further sum of Rs.25.00 Million was paid through three cheques ; all drawn at Soneri Bank. Ltd. Chandni chowk Branch, Karachi, receipt whereof has duly been acknowledged by defendants No.1 to 3 in the said supplementary agreement and have also executed a separate receipt for the same in favour of the plaintiff. Upon total payment of Rs.35.00 Millions the defendants No.1 to 3 have handed over the peaceful vacant physical possession of one portion of the said property which was required to be 700 sq. yds with all furniture & fixtures and fittings as agreed between the parties and in this regard the defendants No.1 to 3 have also executed a Loan Affidavit and Possession letter dated 10.10.2006. Defendants No.1 to 3 while handing over possession of said portion plaintiff, committed certain illegalities and irregularities in performance of the contractual obligations. As there was difference in area, and in addition to this the defendants No.1 to 3 have also with malafide intention removed most of the furniture and other articles available therein including fancy Electric fittings etc and this bitter fact was revealed when plaintiff reached to get possession thereof along-with the defendants

No.1 to 3 and the Estate Agents namely (1) Syed Jawad Karrar Naqvi and (ii) Jahangir s/o Safdar Hussain which were required to be delivered to plaintiff and thereby defendants No.1 to 3 were not authorized to remove. Plaintiff as well as said broker Mr. Jahangir, constantly approached defendants No.1 to 3 in order to get the explanation of the said illegality and irregularity committed by them but they always gave a deaf ear and kept plaintiff on assurances only to provide /return the said furniture & fixtures and fancy electric fittings etc. Plaintiff through letter dated 11.10.2006 called upon defendants No. 1 to 3 for illegalities / irregularities committed by them that at the time of handing over the physical possession of the one portion upon payment of 35.00 million and categorically emphasized upon misstatement made by defendants No.1 to 3 regarding lesser area of the said portion and illegal and unauthorized removal of the furniture, fixtures and fancy electric fittings etc. which were available in the said portion. However, the defendants No.1 to 3 as per their normal routine and practice neither responded the said letter in writing nor complied with their assurances verbally given to the plaintiff in presence of the said two witnesses /brokers.

6. Defendants No.1 to 3 failed, neglected and avoided to comply with the agreed terms of agreement without assigning any rational and lawful justification, the plaintiff vide its letter dated 20.11.2006 called upon defendants No.1 to 3 to transfer said portion in favour of the plaintiff in terms of clause-2 of the said supplementary agreement and also direct them to provide / return the furniture, fixtures and fancy electric fittings, removed by defendants No.1 to 3 illegally and un-authorisedly from said portion and also directed to finalize the deal / transaction on or before 30.11.2006 and in case of failure of the defendants, the plaintiff will have full rights and legal authority to

revoke the said transaction and to claim the refund of the double of the part payment made by the plaintiff. Relevant portion of clause 2 of said supplementary agreement is:

*Clause-2...thus all the above sums making together an aggregate sum of Rs.3,50,00,000/- (Rupees Three Crore Fifty Lac only) being the full and final payment of above portion measuring 700 square yards receipt of which the Vendors (defendants) doth hereby admit and acknowledge separately. Upon receiving the full and final payment the Vendors (defendants) named above are bound to transfer the portion of 700 sq.yds. of the property in favour of vendee (plaintiff) named above.*

Despite lapse of more than two months of failure of defendants No.1 to 3 to comply with the agreed terms of the agreement dated 31.5.2006 and continuous un-responding attitude on the part of the defendants No.1 to 3 and attitude to give a deaf ear upon all the bonafide requests and approaches of the plaintiff. However, defendants No.1 to 3 failed / neglected and avoided to comply with agreed terms and meanwhile market prices of said property reduced from Rs.50,000/- per sq. yds to Rs.35,000/- per sq. yds. And thereby the plaintiff will suffer heavy monetary losses due to unreasonable, unjustified and irrational delay on part of the defendants No.1 to 3 for which defendants No.1 to 3 are liable and responsible to compensate and indemnify the plaintiff. Plaintiff, when, found all above bonafide efforts to settle the issue in amicable manner, unfruitful got served a legal notice dated 01.02.2007 to the defendants No.1 to 3 through his counsel, wherein the plaintiff besides high-lighting the irregularities and illegalities in performance of their contractual obligations also informed about the revocation of the said agreement dated 31.5.2006 and 10.10.2006 by the plaintiff and thereby also directed the defendants No.1 to 3 to refund the sum of Rs.70.00 Millions (double of part payment of Rs.35.00 Millions) in

compliance of clause-3 of the agreement dated 31.5.2006. Defendants No.1 to 3 through their Advocate's letter dated 07.2.2007 replied the Legal Notice of the plaintiff but badly failed to properly reply any of the allegations leveled in the said legal notice. On the contrary fictitious and concocted pleas has been taken which having no substance and truth.

7. Summons and notices were issued to the defendants, pursuant thereto the Defendants No.1 to 3 caused their appearance, however, the defendants No.4, despite service, not appeared so he was declared ex-parte vide order dated 13.8.2007.

8. In jointly filed written statement the defendants No.1 to 3 wherein admitted contents of the paras-1 to 11 but with addition that:

*According to the terms and conditions of sale agreement dated 31.5.2006 suit property was mutated in the names of the defendant No.1 to 3 from PECH Society on 12.8.2006 within the stipulated time period fixed between the parties hence they obtained their clear and marketable title for transfer of the same in favour of plaintiff. They got mutation in their favour within stipulated period as admitted by plaintiff in para-2 of the plaint. The defendant No.1 to 3 had a good clear marketable title in their favour for alienation of suit property in favour of plaintiff. It was pleaded that plaintiff failed to observe terms and conditions of Clause 3 of the sale agreement dated 31.5.2006 so defendants, while exercising their power, forfeited earnest money, paid by plaintiff.*

Defendants denied contents of para-12 to 14 while asserting that they after receiving 33 % of sale consideration handed over physical peaceful vacant possession of 700 sq. yards as settled between parties by fresh sale agreement dated 10.10.2006 and possession letter was also executed between parties at the time of handing over the physical and peaceful possession of one unit Bungalow of 700 sq. yards, of the suit property. Plaintiff has himself admitted in Para 8 and 10 of the plaint that defendants No.1 to 3 were obliged to deliver



vacant and physical possession of 700 sq. yds to the plaintiff but it is surprising that plaintiff has manufactured and concocted story that defendants were obliged to deliver possession with fittings and fixtures to the plaintiff. It is against the terms and conditions of both sale agreements. Neither it was settled between parties nor did defendants commit any illegality in delivery of possession of 700 sq. yds to plaintiff. Undertaking given by Mr. Jehangir and Syed Jawad Tarar Naqvi are false and fabricated. They have themselves witnessed the sale agreement dated 10.10.2006 and possession letter dated 10.10.2006 wherein it is specifically mentioned that the Vendors shall deliver vacant and peaceful possession of 700 sq. yds to the plaintiff which the defendants did. Denying the para 15 of the plaint the defendants pleaded that they never received any letter dated 11.10.2006. They, however, pleaded to have committed no illegality in handing over 1/3<sup>rd</sup> portion of the property so the allegations. Paras- 16 and 17 of plaint were denied with claim that they never received any notice dated 20.11.2006 from plaintiff, however, plaintiff was obliged to show his readiness and willingness to perform the contract after execution of sale agreement dated 31.5.2006 within stipulated period of six months from date of execution of sale agreement. Plaintiff neither prepared memo of sale deed and publication nor got prepared pay order for remaining sale consideration which shows malafide on part of the plaintiff. The suit property was purchased by plaintiff at prevailing market rate and plaintiff was obliged to get execution of sale deed within prescribed time of six months and if market rate of suit property had been reduced it is only due to the act of the plaintiff the defendant are not obliged to suffer losses of decrease in rate of the suit property which have been done due to negligence of the plaintiff. It was further pleaded that if the

defendants failed in performing their part the plaintiff was obliged to have filed suit for Specific Performance of contract and not to revoke the sale agreement on frivolous grounds while legal notice dated 01.2.2007 issued by his counsel after expiry of the prescribed time of execution of sale agreement. Since plaintiff himself has violated the terms and condition of the sale agreement, so not entitled to refund of double of part payment of sale instead defendants are entitled to forfeit the earnest money. Defendants claimed that at the demand of the plaintiff they applied for bifurcation of the plot into 2 portion of 1000 sq.yds each to the authorities and it was never settled between the parties that 700 sq. yds shall be got bifurcated from whole plot and it was also never assured that defendants shall transfer one portion of 700 sq. yds in favour of plaintiff. The defendants also claimed that plaintiff never attempted to finalize the sale within stipulated period so defendants forfeited the advance money. It was also claimed that plaintiff was required to have hand over the possession immediately hence they claimed mesne profit at rate of Rs.50,000/- per month form date of delivery of possession i.e 10.10.2006 till possession is handed over to defendants. Besides above, the defendants also raised legal obligations to maintainability of suit of the plaintiff and that he (plaintiff) had no cause of action.

9. The defendants of the leading suit No.261 of 2007 also filed their own civil suit No.701 of 2007 against the plaintiff of leading suit for following relieves :-

- a) Declaration to the effect that the defendant has violated the terms and conditions of the sale agreement dated 31.5.2006 and 10.10.2006, so the plaintiffs are entitled to forfeit the earnest money of Rs.3,50,00,000/- received by them from the defendant;

- b) Declaration to the effect that because the defendant has committed the violation of terms and conditions of sale agreement so he is not entitled to claim the refund double amount of earnest money;
- c) Declaration to the effect that the decrease of market price has been occurred by the negligence on the part of the defendant so the plaintiffs are entitled to receive a sum of Rs.3 crores on account of losses in decrease of sale price from the defendant;
- d) Direct the defendant to deliver the peaceful vacant and physical possession of a portion of Bungalow of 700 sq. yds. situated at plot No.43/9-G , Block 6, Survey Sheet No.35/P/1 out of 2000 sq. yds situated at PECH Society, Karachi;
- e) Direct the defendant to pay mesne profit at the rate of Rs.50,000/- per month as prevailing market rent of the premises of the area of 700 sq. yds w.e.f 10.10.2006 till the possession is delivered by the defendant to the Plaintiffs;
- f) Permanent injunction against the defendant his nominees, agents and assignees from creating 3<sup>rd</sup> party interest or impart possession of 700 sq. yds which is in his possession;
- g) Any other relief which this Hon'ble court may deems fit and proper in the circumstances of the case;
- h) Costs of the suit;

10. While the pleadings in this suit were almost same as that came surface in leading suit, therefore, the same needs not be re-mentioned again. Out of the pleadings of the parties the following consolidated issues were framed:

1. Who has violated the terms and conditions of Clause 3 of sale agreement dated 31.5.2006, what result?
2. Whether the Vendee was given possession as per Clause 11 of sale agreement dated 31.5.2006 from 10.8.2006?
3. Whether the Vendors have cleared their marketable title within the stipulated time as per Clause 2 of sale agreement?

4. Whether the Vendee cancelled the sale agreement after the stipulated time i.e on 01.2.2007?
5. Whether the possession of the Vendee on suit property becomes illegal and as encroacher after the date of delivery of possession and the plaintiff is entitled to receive mesne profit at the rate of Rs.50,000/- per month of 700 sq. Yds. Which is prevailing market rate of rent of the area from 10.8.2006 till the possession is handed over to the Vendors?
6. Whether the decrease of value of suit property from Rs.50,000/- per Sqr. Yd. to Rs.35,000/- per Sqr. Yd admitted by plaintiff/ Vendee in para No.18 of the suit No.261 of 2007. The Vendors /defendants are entitled to receive amount of difference of value Rs.3 Crores from the Vendee?
7. Whether the Vendors are entitled for recovery of possession of the suit property from the Vendee?
8. What should the decree be?

11. The matter was referred to the Commissioner for recording of evidence and in compliance whereof plaintiff S.M. Shoib and defendant M. Karim Gul Aga appeared before the learned Commissioner; filed their respective affidavit-in-evidence (s).

12. The evidence of the plaintiff was recorded as PW-1 wherein he produced his affidavit-in-evidence as Exh.PW.1/1 and produced following documents:-

1. *Mutation letter dated 12.8.2006 as Exh.PW.1/2*
2. *Sale Agreement dated 31.5.2006 as Exh.PW.1/3*
3. *Receipt dated 31.5.2006 as Exh.PW.1/4*
4. *Photo copy of Supplementary Agreement dated 10.10.2006 as Exh.PW.1/5*
5. *Receipt dated 10.10.2006 as Exh.PW.1/6*
6. *Letter of possession dated 10.10.2006 as Exh.PW.1/7*
7. *Loan Affidavit dated 05.8.2006 as Exh.PW.1/8*
8. *Photo copy of undertaking by Naqui son of Syed Karrar Hussain as Exh.PW.1/9*
9. *Photo copy of undertaking by Jehangir as Exh.PW.1/10*
10. *Plaintiff's letter dated 11.10.2006 as Exh.PW.1/11, alongwith courier Ack. receipt as Exh.PW.1/11-A*

11. *Plaintiff's letter dated 20.11.2006 as Exh.PW.1/12 alongwith courier receipt as Exh.PW.1/12-A*
12. *Legal Notice dated 01.2.2007 issued by Salim Thepdawala & Co. as Exh.PW.1/13*
13. *Reply of legal notice dated 07.2.2007 issued by Idrees Law Associates as Exh.PW.1/14*
14. *P.E.C.H.S letter dated 30.12.2006 as Exh.PW.1/15*
15. *Newspaper clipping dated 14.12.2006 published in daily 'JANG' Karachi as Exh.PW.1/16*

13. Defendants' on their turn, filed affidavit-in-evidence of defendant Muhammad Karim Gul and during his examination he produced the same and special power of attorney on behalf of defendants No.1 and 2.

14. The learned counsel for the plaintiff has argued that the defendant failed in getting his title clear for purpose of executing registered document of the property under sale , therefore, he breached the term of the contract hence liable to compensate the plaintiff; it was a matter of record that the defendant, within stipulated period, was not having the marketable title for making a legal register sale deed in favour of the plaintiff therefore, within stipulated period he failed to make the title of the plaintiff perfect. He, therefore, prayed for decree of the suit of the plaintiff while relying on the case laws reported as HAKIM GHULAM RASOOL v. SH. IMDAD HUSSAIN [PLD 1968 Lah. 501]; MUSSARAT SHAUKAT ALI v. SAFIA KHATOON [1994 SCMR 2189]; DADA STEEL MILLS v. METAL EXPORT [2009 CLD 1524]; SIGALLO ASIA LIMITED v. AKBAR ENTERPRISES (PVT.) LIMITED [2001 CLC 660] and MAHMOODA KHATOON v. SYED ZAINUL HASNAIN RIZVI [PLD 1958 150].

15. On the other hand, the learned counsel for the defendant has argued that defendant cleared the title within time and was ready to perform his part but the plaintiff did not come forward to get the title

though time was essence of agreement. After expiry of the period for execution of sale agreement i.e 30.11.2006 the plaintiff served a notice for revocation of sale agreement though there was no such term for revocation of the agreement and even the plaintiff admitted about decrease in value of the property. He, having concluded so, prayed for decree in favour of the defendant. He has placed reliance on the case laws, reported as PLD 1968 SC 497, Iqbal Ahmed vs. Col. Abdul Kabeer [SBLR 2005 Sindh 625]; SUNSHINE ENTERPRISES (PVT.) LTD. v. WEST PAKISTAN TANK TERMINAL (PVT.) LTD. [2002 YLR 3815 Karachi], MUBARIK ALI v. TULA KHAN [1985 SCMR 236], MUHAMMAD SHARIF v. FAJJI [1998 SCMR 2485]; MUHAMMAD SHARIF SANDHU v. DISTRICT ACCOUNTS OFFICER [2011 SCMR 1287 SC]; MUHAMMAD YAR v. MUHAMMAD TAHIR [2003 YLR 3066 (Pesh)]; BASHIR HUSSAIN SIDDIQUI v. PAN-ISLAMIC STEAMSHIP CO. LTD [PLD 1967 Karachi-222].

16. Heard learned counsel (s) for plaintiff and defendants and have also meticulously examined the available material. My findings on the issues with reasoning are as under:-

### **FINDINGS**

Issue No.1	‘As discussed’
Issue No.2	‘affirmative’
Issue No.3	‘affirmative’
Issue No.4	as discussed.
Issue No.5	Negative
Issue No.6	Not proved
Issue No.7	affirmative
Issue No.8	suit of plaintiff is partly decreed and is dismissed for remaining prayers while that of defendants is partly decreed.

17. **ISSUE NO.2**

2. Whether the Vendee was given possession as per Clause 11 of sale agreement dated 31.5.2006 from 10.8.2006?

This issue needs not be addressed as it is an admitted position even per the pleading of the plaintiff that possession of one unit bungalow area about 700 Sq. yards was handed over by the defendants No.1 to 3; such Loan Affidavit and Possession letter dated 10.10.2006 were duly executed between the parties which fact is admitted in the plaint and even cross-examination of the plaintiff. The plaintiff admitted in his cross examination that:

**It is correct that according to possession letter Exh.PW 1/7, I was delivered the possession of 700Sq.Yds.**

However, since the plaintiff alleged in his plaint that the defendants were also required to deliver possession, along-with fixture but they removed the same illegally and even area of one unit bungalow, handed over to plaintiff, was found less. With reference to such the plaintiff attempted to say that undisputedly handed over possession of one unit bungalow was not strictly within spirit of agreement.

Let's examine this aspect. To make it further clear let's see what came through cross-examination of the plaintiff in this respect which is:-

**“It is correct to suggest that in both the agreements Exh.PW 1/ 3 and PW 1/5 and PW 1/7, it is not mentioned that the possession of one portion of suit property of 700 sq. yds which was delivered to the plaintiff shall include fittings and fixtures.** Voluntarily says that it was orally settled by the agents of the parties that the possession shall be handed over alongwith fittings and fixtures as it is basis.

It is correct that Exh. PW 1/9 and PW 1/ 10 and PW 1/11 do not contain the date of execution, the names of witnesses and attestation. **It is correct that these documents do not specify the less area of the suit property which was delivered to me. It is also correct that the details of fittings and fixtures was not mentioned in the documents, which are missing.**

nothing has been brought on record to prove oral settlement hence in absence thereof the parties shall be bound by admitted document (s), therefore, the plea of the plaintiff that fitting and fixtures were included cannot be allowed to prevail over written term whereby the defendants were required to hand over vacant and peaceful possession. Thus, I am of the considered view that this issue entitles for an answer in '**affirmation**' which is done so by answering it in '**affirmative**'.

18. **ISSUE NO.3**

3. Whether the Vendors have cleared their marketable title within the stipulated time as per Clause 2 of sale agreement?

The burden to prove this issue was upon either sides but since the title and legal character and status of the defendants No.1 to 3 as owner(s) of the subject matter was never disputed by the plaintiff hence it was the plaintiff to first prove that the defendants were not having clear marketable title within stipulated time. It is not the case of the plaintiff that the defendants No.1 to 3 are / were neither the owners of the subject matter but he had alleged that at particular time the defendants No.1 to 3 did not have clear marketable title so as to make a perfect title in favour of the plaintiff i.e ***in respect of one unit bungalow of 700 Sq.yards out of total area the possession whereof was admittedly delivered by the defendants No.1 to 3 to plaintiff.*** Let's see what the plaintiff himself stated in his cross examination in this respect which is:-



**“It is correct that the defendants got cleared their marketable title of the suit property within six months from the date of execution of sale agreement dated 31.5.2006’**

**“It is correct to suggest that both the sale agreements were executed by the three co-owners jointly and possession of one portion of suit property was handed over jointly by the co-owners’**

From above and even per the pleading of the plaint it is very much clear that title and authority of the defendants No.1 to 3 as lawful owner (s) of the subject matter was not disputed. The plaintiff himself has admitted in his cross-examination that the defendants No.1 to 3 had clear marketable title in their favour before due date. It is necessary to mention here that an owner of 2000 Sq.yards are quite competent and legally authorized to execute a legal, valid and lawful sale deed in respect of any area / portion of such lawfully owned property / area. Here a reference to Section 7 of the Transfer of Property Act would be relevant and proper which is as follows:-

***7. Persons competent to transfer.***---Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property ***either wholly or in part, and either absolutely or conditionally,*** in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force’.

The competence for transfer is subject to two conditions that either the person, making it, should have a clear title or is authorized by the person so competent. Since undisputedly the defendants No.1 to 3 were the joint owners of the whole property hence their competence is above question. Since per above section of the Transfer of Property Act a valid and legal transfer can either be for **whole or in part** therefore, admittedly clear marketable title of whole property i.e 2000 Sq.yards in favour of the defendants No.1 to 3 before stipulated

period is sufficient to show that these defendants were competent at relevant time to execute a legal transfer of one Unit Bungalow i.e 700 Sq.yards out of total area of 2000 Sq.yards. Accordingly, I answer this issue in **'affirmative'**.

19. **ISSUE NO.4**

4. Whether the Vendee cancelled the sale agreement after the stipulated time i.e on 01.2.2007?

It is a matter of record that the plaintiff had pleaded in his plaint that after stipulated time he served a legal notice upon the defendants No.1 to 3 whereby revoking the agreement and confining his claim to recovery of his advance money alongwith penal amount with reference to penal clause of the agreement. Therefore, this issue needs not be addressed any further.

20. **ISSUE NO.6**

6. Whether the decrease of value of suit property from Rs.50,000/- per Sqr. Yd. to Rs.35,000/- per Sqr. Yd admitted by plaintiff/ Vendee in para No.18 of the suit No.261 of 2007. The Vendors /defendants are entitled to receive amount of difference of value Rs.3 Crores from the Vendee?

As regard the above issue, it would be material to make it clear here that ***a party can legally maintain his right to claim damages with reference to a breach of contract but such right would not be available for the party with reference to natural, local or international changes causing effect upon value of the subject of contract particularly when this is not so mentioned in the agreement.***

It is not the claim of the defendants that the plaintiff did any such thing which materially reduced the value of the subject matter or that because of breach of contract by plaintiff, the defendants suffered losses rather the defendants have claimed that on failure of the plaintiff to get title within time they (defendants) forfeited the advance money. In an agreement to sell the purchaser can competently seek relief of Specific Performance of Contract so also for damages in addition or as substitution but since the seller himself confines his / her rights to extent of forfeiture of advance amount therefore, he is normally entitled for such right. Needless to add here that a seller can also bring a suit for specific performance of contract wherein he can claim damages in addition too but such damages should be specifically pleaded but should be proved and mere words of decreased in market value would not be sufficient to entitle him / her for such damages. Even otherwise, the burden was upon the defendants to prove their claim of damages but they brought nothing on record except a reference to admission of the plaintiff that market value of the property reduced.

In absence of any evidence to substantiate the claim of the defendants, the defendants cannot be hold entitled for damages with reference to reduction in market value alone. This issue is accordingly answered as not proved.

21. **ISSUE NO.7**

“Whether the Vendors are entitled for recovery of possession of the suit property from the Vendee?”

This issue needs no further discussion for the simple reason that either parties i.e plaintiff or defendants are not insisting for enforcement of the sale agreement (s) rather both are claiming that agreement came to an end on count of breach, alleged against each

other. Since the ownership of the subject matter is not disputed and possession of the subject matter with plaintiff was with reference to part performance of sale agreement which, per both parties, came to an end hence the vendors (owners) are entitled for possession of their property. Accordingly, the issue is answered in **'affirmative'**.

22. **ISSUE NO.1**

1. Who has violated the terms and conditions of Clause 3 of sale agreement dated 31.5.2006, what result?

This is the crucial issue the burden whereof lies equally upon plaintiff and defendants. It would be proper to refer the clause-3 of the agreement being material which reads as under:-

Clause-3 ...That if due to any circumstances the, Vendors fails to complete the sale formalities and to provide the marketable clear title documents for transfer of title of the said property in favour of the Vendee or his nominee (s) in such event, the Vendors shall be liable to refund the double of part payment received under Clause-1 above and similarly if the Vendee fails to make the balance payment within stipulated period in such case the Vendors shall be entitled to forfeit the amount of advance payment'

The reading of the clause-3 shows that vendors were required to :

***'provide complete the sale formalities and to provide the marketable clear title documents for transfer of title of the said property in favour of the Vendee or his nominee (s)'***

Before going further, it would be proper and relevant to make it clear here that the section 54 of the Transfer of Property Act defines **'sale how made' i.e.:-**

***Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards,***

***or in the case of a reversion or other intangible thing, can be made only by a registered instrument.***

***In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.***

***Delivery of tangible immovable property takes place when the seller places the buyer or such person as he directs, in possession of the property'***

This means that delivery of the possession and change of ownership through a registered document (in respect of tangible immovable property of value one hundred rupees and upward) shall complete the sale. Needless to add here that to execute a legal register sale deed one should possess a clear title in his favour and should be capable to put buyer into possession of property.

In the instant matter the ownership of the defendants No.1 to 3 is never disputed or questioned by the plaintiff and even the authority of the defendants to put him (plaintiff) into possession of subject matter is also admitted. Thus, it can safely be said that status of lawful owners of defendants No.1 to 3 was, at all times admitted.

Now, the only question remains is whether the defendants No.1 to 3 had got the clear marketable title in their favour within stipulated period or otherwise enabling them to execute register sale deed (document) in favour of the plaintiff or his nominee ?. In this regard it would be sufficient to refer the admission of the plaintiff himself that:

***"It is correct that the defendants got cleared their marketable title of the suit property within six months from the date of execution of sale agreement dated 31.5.2006'***

The above admission is sufficient to establish that defendants No.1 to 3 were capable of executing the title of the plaintiff perfect within stipulated period in respect of the property the possession whereof already stood delivered to the plaintiff.

Let's examine the case of the defendants from another angle. I am also in agreement with the proposition that it is the conduct of the party which is to be considered for a future work to be done by that party. It is a matter of record that the defendants within agreed time put the plaintiff into vacant possession of the property in question and even got their marketable clear title before due date for execution of the register sale deed hence such conduct of the defendants No.1 to 3 also make circumstances favouring to the defendants No.1 to 3.

Since the clause-3 has equal binding effect upon the plaintiff therefore, it would be significant to examine the case of the plaintiff. The plaintiff has admitted in his cross examination that:

**It is correct that I never prepared pay order of sale deed or asked the defendants to come forward for execution of sale deed after the execution of sale agreement but I was fully prepared and asked them for registration of sale deed. I never served a legal notice for this purpose because the defendants were failed to transfer the suit property in our favour from KDA/PECHS that is why I restrained to proceed further.**

From the above admission of the plaintiff it is clear that he neither got prepared pay order for getting sale deed nor asked the defendants to come forward for execution of sale deed and even the plaintiff has admitted that he never served a legal notice in this regard. The plaintiff, however, claimed that he was prepared but because of failure of defendants he (plaintiff) restrained to proceed further. It is quite strange that when he had never served any notice nor had

asked the defendants to come forward for execution of register deed then how he (plaintiff) concluded that defendants No.1 to 3 failed.

To properly evaluate the position, it would be quite essential to refer to provisions of Section 51 and 52 of the Contract Act 1872 which speak about '**performance of reciprocal promises**'.

**51. Promisor not bound to perform, unless reciprocal promise ready and willing to perform.**—When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promise is ready and willing to perform his reciprocal promise.

ILLUSTRATIONS:

- a) A and B contract that A shall deliver goods to B to be paid for by B on delivery.

A need not deliver the goods, unless B is ready and willing to pay the goods on delivery;

B need not pay for the goods, unless A is ready and willing to deliver them on payment

- b) A and B contract that A shall deliver goods to B at a price to be paid by installments, the first installment to be paid on delivery.

A need not deliver, unless B is ready and willing to pay the first installment on delivery

B need not pay the first installment, unless A is ready and willing to deliver the goods on payment of the first installment.

**S. 52. Order of performance of reciprocal promises.**—Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order, and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction require

ILLUSTRATIONS.

- (a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it;
- (b) A and B contract that A shall make over his stock-in-trade to B at a fixed price and B promises to give security for the payment of the money. A's promise need not be performed until the security is given for the nature of the transaction requires that A should have security before he delivers up his stock.

From the above it is clear that in instant matter the liability of the defendants No.1 to 3 was to proceed when the plaintiff would have arranged remaining amount and would have informed the defendants No.1 to 3 about his readiness and since admittedly the plaintiff neither arranged the amount nor asked the defendants No.1 to 3 about his readiness hence he (plaintiff) cannot come with a plea of failure of the defendants No.1 to 3 without first establishing performance or least readiness of performance of his duties / obligations.

23. In view of above discussion, I am of the clear in my view that the plaintiff failed in establishing that he had prepared himself for obtaining title on relevant date from the defendants No.1 to 3 who admittedly had clear marketable title. Thus, the defendants No.1 to 3 within meaning of Section 55 of the Contract Act, 1872 were competent to resort to penal clause of the agreement i.e forfeiting the advance money. At this juncture it is necessary to mention here that **'advance money'** in the instant matter was Rs.1,00,00,000/- (Ten Millions) as is evident from mentioning made at the bottom of clause-1 of the first agreement which is as:

*'thus all the above sums making together an aggregate sum of Rs.1,00,00,000/- (Rupees One Crore only) being **the advance part-payment towards sale consideration** of the said property, receipt of which the Vendors doth hereby fully admit and acknowledge separately'*



And the clause-3 of the first agreement has entitled the defendants (Vendors) to forfeit the amount of advance payment. The Second agreement in clause-1 thereof also confirms the advance as:-

***'1. That the vendors have already received from the Vendee a sum of Rs.1,00,00,000/- (Rupees One Crore Only) as an advance and .....***

Thus, the defendants were legally entitled to forfeit such amount only and not the other payment subsequently made by the plaintiff as part payment because the agreement only permits forfeiture of **'advance money'** not whole payment made towards sale consideration. The second agreement does not change the **'status and nature of the advance money'** thus the defendants are legally bound to return the amount so received by them after deducting Rs.1,00,00,000/- i.e **'advance money'**.

However, as regard the plea of the plaintiff that defendants No.1 to 3 had applied for bifurcation of the property in two portions i.e 1000 Sq.yards each but such move was much later to the stipulated period hence cannot be insisted as a ground to make defendants No.1 to 3 on default. The issue is answered accordingly.

24. **ISSUE NO.5**

Whether the possession of the Vendee on suit property becomes illegal and as encroacher after the date of delivery of possession and the plaintiff is entitled to receive mesne profit at the rate of Rs.50,000/- per month of 700 sq. Yds. Which is prevailing market rate of rent of the area from 10.8.2006 till the possession is handed over to the Vendors?

The burden was upon the defendants to prove this issue. It is a matter of record that the plaintiff was no more interested in

continuing with possession of the subject matter rather he had a specific prayer i.e prayer clause ( c ) to the effect that :

(c ) To pass an order to allow the plaintiff to handover the possession of the one portion of said property which is presently in possession of the plaintiff to the Nazir of this Hon'able Court;

The defendants No.1 to 3 despite such position and willingness of the plaintiff to deliver possession never moved for taking possession of the subject matter nor even showed their willingness. The possession of the plaintiff onto subject matter was not illegal or unauthorized but he was put in possession in part performance of the agreement thus the possession cannot be said to be illegal and unauthorized. The failure of the defendants to take the possession or asked the plaintiff to deliver possession who, otherwise, was ready to deliver the possession is such a fact which is sufficient to disentitle the defendants No.1 to 3 for mesne profit because for entitlement of mesne profit two things are necessary to be established that **owner was unauthorizedly kept out of the possession of the property** . The defendants have brought nothing on record to substantiate this aspect which is mandatory to claim entitlement for mesne profit. Thus this issue is answered in negative.

25. **ISSUE NO.8**

8. What should the decree be?’

In view of the above discussion and findings, the suit of the plaintiff (Suit No. 261/2007) is hereby partially decreed to the extent that plaintiff is entitled to receive the amount, which was paid in pursuance of 2<sup>nd</sup> agreement, whereas for rest of prayers, suit is dismissed; hence defendants after deduction of ‘**advance money**’ i.e. 1,00,00,000/- (Rupees Ten Million only) shall return the remaining amount. While the suit of the defendants (Suit No. 701/2007) is also

partially decreed for relief of possession and, thus it is hereby ordered that the plaintiff shall deliver the peaceful vacant and physical possession of a portion of Bungalow of 700 Sq.yards, which is in possession of plaintiff (plot No.43/9-G , Block 6, Survey Sheet No.35/P/1 out of 2000 sq. yds situated at PECHO Society, Karachi) to defendant without any further delay, whereas for rest of prayers, suit is dismissed. The parties shall bear their own costs. Let such decree be drawn.

**Imran/PA**

**J U D G E**

Announced by me.

SD/-  
01.12.2014