

IN THE HIGH COURT OF SINDH, KARACHI

Suit No.66 of 2009

[Moin Us Samad Khan vs. Tanveer Qazi and another]

Date of hearing : 01.04.2022 and 08.04.2022

Moin-Us-Samad Khan
(Plaintiff) : Through M/s. Abdullah Azzam and
Waqar Ahmed, Advocates for the
Plaintiff.

Tanveer Qazi
(Defendant No.1) : Through M/s. Nasir J.R. Shaikh and
Faizan Nasir, Advocates.

Farooq Ghaffar Dana Wala
(Defendant No.2) : Nemo

Case law cited by learned counsel for Plaintiff

1. **2014 SCMR 1562**
[Sheikh Muhammad Shakeel vs. Sheikh Hafiz Muhammad Aslam]
2. **PLD 2001 Lahore 63**
[Khalil-ur-Rehman vs. Mst. Halim Khatoon]
3. **1991 MLD 1070 [Karachi]**
[Muhammad Din vs. Liaqat Ali]
4. **1986 SCMR 306**
[Dil Murad and others vs. Akbar Shah]
5. **2001 SCMR 1700**
[Muhammad Akhtar vs. Mst. Manna and 3 others]
6. **2018 YLR 1667 [Sindh]**
[Haroon Zia Malik vs. Mst. Fariha Razzak and others]
7. **2015 CLC 214 [Sindh]**
*[Musarratullah Siddiqui vs City District Government, Karachi
through Nazim-e-Ala and another]*
8. **PLD 1992 Karachi 46**
[Mst. Bakht-e-Rawida vs. Ghulam Habib and 2 others]
9. **2020 MLD 1166 [Lahore]**
[Ghulam Hussain vs. Muhammad Ali and another]

10. **1999 YLR 1518 [Lahore]**
[Mushtaq Ahmed through its Special Attorney Gulzar Ahmed vs. Shahid Hussain and 4 others]
11. **1991 MLD 1070 [Karachi]**
[Muhammad Din vs. Liaqat Ali]
12. **2014 YLR 1748 [Lahore]**
[Rashid Ahmad and others vs. Allah Ditta]
13. **PLD 2001 Lahore 63**
[Khalil-ur-Rehman vs. Mst. Halim Khatoon]
14. **1991 SCMR 2126**
[Zakaullah Khan vs. Muhammad Aslam and another]
15. **2020 YLR 1783 [Sindh]**
[Dr. Obaid-ur-Rehman and 2 others vs. Mrs. Neelofer Khalid and 10 others]

Case law relied upon by learned counsel for Defendant

1. **1995 SCMR 1237**
[Mst. Khurshid Begum and 6 others vs. Chiragh Muhammad]
2. **PLD 1994 Karachi 474**
[Abdul Aziz vs. Muhammad Rafiq Qureshi]
3. **1993 CLC 1779**
[Abdul Ghaffar vs. Muhammad Sharif]

- Law under discussion:
- (1). Code of Civil Procedure, 1908 (**CPC**).
 - (2). Qanoon-e-Shahadat Order, 1984.
[Evidence Law].
 - (3). Negotiable Instrument Act, 1881.

JUDGMENT

Muhammad Faisal Kamal Alam, J: The Plaintiff has filed the present *Lis* against the Defendants, seeking following relief_

- “1) *Pass a Judgment and Decree in favour of Plaintiff against the Defendant, directing the Defendant to pay an amount of Rs.62,16,000/- to Plaintiff?*

- II) Grant interest two percent above the prevailing bank rate per annum from the date of filing of the Suit till the full payment is made by the Defendant to Plaintiff.**
- III). Restrain the Defendant from selling Flats bearing No.A/1/510, SEA Castel Apartments-II, Block-4, Clifton, Karachi and Flat No.2, 1st Floor, constructed at Plot No.32-C, Street No.1, Badar Commercial Area, Phase-V, Extn. Defence Housing Authority Karachi, till the full amount is realised/paid by the Defendant.**
- IV) Cost of the suit.**
- V) Any other better relief as this Hon'ble Court may deem fit and proper in the matter.”**

2. Controversy in a nutshell as averred in the plaint is that Plaintiff had lent an amount of Rs.5,550,000/- (*rupees million five hundred fifty thousand*) in the year 2006 to Defendant No.1 for purchase of an Apartment No.A/1/510, Sea Castel Apartment-II, Block-4, Clifton Karachi-**Subject Apartment**, from its owner, namely, Farooque Ghaffar Danawala, who is impleaded as Defendant No.2 in view of the observation made in the Order dated 21.01.2009. It is stated that instead of returning the above amount to Plaintiff, Defendant No.1 after selling her another Apartment/Flat No.D-701, Chapel Ocean Apartments, Clifton, Karachi, in the month of 2008, diverted the funds for purchase of yet another Unit/Flat No.2, First Floor in a Building constructed at Plot No.32-C, Street No.1, Badar Commercial Area, Phase-V, Extension-DHA, Karachi. Despite request and notice, amount was never paid back to Plaintiff. In this regard, Defendant No.1 has also executed an Agreement dated 12.09.2006 (*appended with the plaint as Annexure-B/5*) so also a Promissory Note dated 12.09.2006 for the above amount, which is filed as Annexure “C” with the plaint. It is apprehended that Defendant No.1 intends to dispose of her above mentioned properties, to settle abroad and usurp the amount of Plaintiff.

3. Whereas in the Written Statement, filed by contesting Defendant No.1, she has denied the claim of Plaintiff, and has specifically stated that both the above documents/instrument, viz. Annexure “B/5” and Annexure “C” are bogus and fabricated documents, bearing forged signature of Defendant No.1. It is averred that the suit is an afterthought, as in the intervening period matrimonial relationship between the son of Defendant No.1 and daughter of Plaintiff had ended after obtaining a Khula Decree from the Court.

4. Defendant No.2 did not file the Written Statement.

5. Vide Order dated 20.12.2010, following Issues were settled by the Court_

- “1. Whether the Defendant No.1 ever executed Annexure B/5 and Annexure C to the plaint in favour of Defendant No.1 and the Plaintiff respectively where from consideration of the suit property flows and on which basis leave was also granted by this Court?”***
- 2. Who was the real owner, competent to convey the title of the suit property in favour of the Plaintiff?”***
- 3. What should the Decree be?”***

6. Mr. Nasir Shaikh, Advocate for Defendant No.1 has referred to the Orders dated 17.05.2010, 31.08.2018 and 23.08.2019, to fortify his arguments that the claim of Plaintiff is bogus and the above two documents are forged and the documents produced in the evidence lacks genuineness. The gist of the three Orders is that in the Order dated 17.05.2010 a conditional Leave to Defend the Suit was granted to Defendant No.1, and the Court made a tentative assessment that signature on Annexure “A” and in the Affidavit in support of the listed Application (*for Leave to Defend*) appears to be similar but the flow creates doubt; whereas, in the Order dated 31.08.2018, learned counsel for the Plaintiff was directed to produce original documents, which were exhibited as

Exhibits P/11 to P/16 on next date of hearing. The Order dated 23.08.2019 mentions the Statement of Plaintiff's Advocate, that he was unable to obtain above original documents from his client/Plaintiff, who resides in USA and is terminally ill.

Learned counsel for Defendant No.1 argues that Plaintiff's witness could not have been produced the originals of Exhibits P-14 and P-15 (*ibid*) as Exhibit-P/14 is the Notice dated 02.06.2008 by Plaintiff to Defendant No.1 for payment of above Rs.5.5 million and Exhibit P-15 is a formal Legal Notice dated 28.11.2008, addressed by the counsel of Plaintiff to Defendant No.1; the original of both these documents are with Defendant No.1, because usually such correspondences are sent in original to the adversary of a claimant. The learned Advocate from this argument draws a further analogy, that it shows that learned Commissioner has not recorded the evidence properly and the entire proceeding has lost its veracity. In support of his arguments, he has cited the Case Law as referred in the opening part of this Decision.

7. Arguments heard and record perused.

8. As far as contention of Advocate for Defendant No.1 with regard to observation of this Court about signatures is concerned, such contention is misconceived in nature, because it is specifically mentioned in the Order dated 17.05.2010 itself that the assessment is of tentative nature, which means that this Issue is to be decided at this stage.

9. Crux of the Case Law cited by learned counsel for Defendant No.1 is, when a defendant alleges that sale agreement and receipts are fake in respect of a sale transaction of the property, and at the Trial, plaintiff / respondent did not produce the original agreement or the receipts on the plea that they had been lost; the evidence with regard to loss of documents should have been produced first and then plaintiff could lead the secondary evidence and if the loss of documents is not proved, then the secondary evidence would become useless.

A signature or writing may be proved by adducing the evidence of a person or persons conversant or acquainted with such signature, alternatively the signature or writing be examined by an expert and in failure to do so, the burden is not shifted to the other side and the suit should fail; in terms of the Article 84 of the Qanoon-e-Shahadat Order, 1984, Court can itself ascertain whether a handwriting or signature is genuine or not, by comparing the disputed handwriting or signature with the admitted signatures and then arrive at its own findings.

Gist of the Case Law cited on behalf of Plaintiff is_

One who pleads fraud, onus is on him to prove the same and mere statement is not sufficient. For a Promissory Note, attestation is not a legal requirement as envisaged in Article 17(2)(a) of the Qanoon Shahadat Order, 1984. It is not mandatory to refer the documents and signatures to handwriting expert, particularly in a situation where respondent did not deny his signatures on number of documents. Witness not cross-examined on material part of evidence, then that part of the testimony is considered to be admitted. If in his cross-examination a witness states "*it is not within my knowledge*", means that witness is not sure about his assertions.

10. Findings on the above Issues are as under:-

ISSUE NO.1	Affirmative.
ISSUE NO.2	As under.
ISSUE NO.3.	Suit partly decreed.

REASONS

ISSUE NO.1

11. Plaintiff has given evidence through his Attorney, namely, Khawaja Faiyaz Alam son of Khawaja Shafiq Alam, who filed his Affidavit-in-Evidence. He has deposed in his cross-examination that Plaintiff was in United

States of America. He has denied the suggestion that signature on Exhibits-P/12 and 13 (*Annexures "B/5" and "C" of plaint*) are forged, while reiterating that signatures were made in his [Attorney's] presence. He has denied the suggestion of counsel of Defendant No.1 that Plaintiff made payment out of the amount given to him by the husband of Defendant No.1. In the Affidavit-in-Evidence / Examination-in-chief, it has been specifically mentioned that payment to Defendant No.2 / Seller of the Subject Apartment was made from the Bank Account of Plaintiff, which he was maintaining with Faysal Bank Limited at its Mohammad Ali Society Branch and Habib Bank A.G Zurich at its Shahrah-e-Faisal, Karachi Branch. The said witness has produced a Certificate from Habib Metropolitan Bank, as **Exhibit P/11**, mentioning the fact that Pay Orders have been issued by the Bank in favour of Defendant No.2 [the above owner of the Subject Apartment] from the Account maintained by Plaintiff. Two Agreements of Sale between Defendants are exhibited as Exhibits-P/3 and P/5, respectively, of 19.08.2006 and 11.09.2006, ***which are admitted Documents***, as deposed by Defendant No.1 in Paragraph 4 of her Affidavit-in-Evidence/Examination-in-Chief; copy of the Cheque 0092168 dated 11.08.2006 drawn on Faysal Bank Limited for the cash amount of Rs.100,000/- (*rupees one hundred thousand only*) as Exhibit P/7 , **which is mentioned in the Receipt dated 19-8-2006 [Exhibit P/4] issued by the Defendant No2 and admitted in Paragraph 5 of her [Defendant No.1] Affidavit-in-Evidence/Examination-in-Chief.** Pay Orders No.HBZKSF 0028594 dated 19.08.2006 as Exhibit P/8; Pay Order No.HBZKSF 0029232 dated 08.09.2006 as Exhibit P/9; another Pay Order No.HBZKSF 0029234 dated 08.09.2006 as Exhibit P/10; copy of the Agreement between Plaintiff and Defendant Dated 12.09.2006 as Exhibit P/12; Promissory Note of Rs.55,50,000/- dated 12.09.2006 as Exhibit P/13; copy of Letter written by Plaintiff to Defendant as Exhibit P/14; copy of the Legal Notice dated 28.11.2008 as Exhibit P/15, Newspaper Dawn dated 17.01.2009 as Exhibit P/16.

On these material aspects in which Plaintiff has specifically led the oral as well as documentary evidence, he was not subjected to cross-examination, rather some of the fact are admitted [as mentioned in the preceding Paragraph], which means that version to this extent as deposed by the Attorney has been accepted by the Defendant No.1.

12. The Defendant No.1, who herself testified in support of her claim, while denying that of Plaintiff, in her cross-examination has admitted her signature on Exhibit-P/3, which is the first Agreement of Sale between the Defendants. She has also not denied the payment of Rs.1.5 Million and 3.5 Million made by different Pay Orders by Plaintiff from his Accounts; she further admitted in her cross-examination that the said Attorney (K. Fayyaz Alam) is the witness of Agreement of Sale dated 11.09.2006 (Exhibit-P/3).

13. Learned counsel for Plaintiff, in order to impeach the credibility of Defendant No.1, has referred to her testimony. In Paragraph-5 of the Affidavit-in-Evidence of Defendant No.1, she has specifically stated that the Subject Apartment was purchased from the financing provided by her late husband, which completely contradicts her reply in the cross-examination, where she has not denied the suggestion that Plaintiff paid a sum of rupees fifteen lacs and thirty five lacs from his account.

14. It is also an undeniable fact that earlier Plaintiff's daughter and son of Defendant No.1 were husband and wife, which relationship subsequently ended. The conclusion is that stance of Plaintiff that the Subject Apartment was purchased from the funds of Plaintiff, has been proved. The counter argument of learned Advocate of Defendant No.1 is that the **Receipts** issued by the Defendant No.2 (Exhibits-P/4 and P/6) produced by the Plaintiff's Attorney in evidence, are admittedly in the name of Defendant No.1, which means that the latter [Defendant No.1] herself from her own funds purchased the Apartment, is of no consequence, for the simple reason that admittedly both

Sale Agreements were executed by in between Defendants *inter se*, and, therefore, Receipts are supposed to be in the name of Defendant No.1, but in view of her above evidence, in which she has not denied the specific question about payments made through the Bank Accounts of Plaintiff, the said Receipts (*ibid*) could not lend any support to the case of Defendant No.1. More so, the said Receipts contain Cheque and Pay Order numbers which are from the Bank Account of Plaintiff, which further disproved the stance of Defendant No.1.

15. Both documents in question, that is, Agreement dated 12.09.2006 [Exhibit P/12] between Plaintiff and Defendant No.1, so also the Promissory Note of same date (Exhibit P/13) have been perused. It is the stance of Defendant No.1 that her signatures on both these documents are forged and these documents are result of fraud. **Firstly**, both these documents are witnessed by same Khawaja Fayyaz Alam, present / witness Attorney of Plaintiff, who is also the witness in the earlier two Agreements (*ibid*) between the Defendants. The said witness has produced these documents and have testified in their favour. **Secondly**, her signature is compared with other documents, particularly her Affidavit-in-Evidence, which is latest in line. There is no mark difference in signatures put on the above two impugned documents and other documents. **Thirdly**, in view of her testimony discussed in the preceding paragraphs, stance of Defendant No.1 is further weakened with regard to comparison of signature and non-production of Exhibits P/11 to P/16; particularly, when she has admitted the main Agreement between herself and Defendant No.2 in respect of the sale of Subject Apartment.

The contention of Defendant No.1 about the evidential value of the copies of these documents have also lost significance in view of the above discussion and the Case Law cited by him are distinguishable.

16. Consequently, **Issue No.1 is answered in Affirmative**, that Annexure “B/5” and Annexure “C” of the plaint, which have been produced along with

the plaint viz. Agreement of Sale dated 12.09.2006 between Plaintiff and Defendant No.1 so also the Promissory Note (Exhibits-P/12 and P/13, respectively), were executed by Defendant No.1 in favour of Plaintiff.

17. Consequently, the evidence that has come on record, it is an undeniable fact that Defendant No.2 is real owner of the Subject Apartment. Since Plaintiff is not claiming any ostensible ownership in the Subject Apartment, therefore, the second part of the Issue No.2, about conveying the title of the property of Plaintiff, is irrelevant.

ISSUE NO.3

18. The upshot of the above discussion is that Subject Apartments were purchased from the funds of Plaintiff, that is, of Rs.5.5 Million, which was acknowledged by Defendant No.1 in the above two documents-Exhibits P-12 and P-13, therefore, she is liable to pay this amount to Plaintiff with 10% (*percent*) markup from the date of filing of the Suit till realization of the amount.

19. In the above terms, Suit is decreed.

20. Parties to bear their respective costs.

Karachi.

Dated: 22.08.2022.

MJavid.PA

JUDGE