

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO.1475/2010

Plaintiff : Nanney Khan,
through M/s. Abdul Majeed Shughil & Masood
Ahmed Ausaf advocates.

Defendants : Muhammad Dawood Khan & another,

Date of hearing : 17.10.2014.

J U D G M E N T

NAZAR AKBAR, J. Plaintiff has filed this suit for specific performance of an agreement to sell dated **29.06.2009** against Defendant No.1 (Muhammad Dawood Khan) owner and Defendant No.2 an estate agent namely Naeem Ahmed proprietor of M/s.Hakeem & Company in respect of property bearing House No.R-1740, measuring 120 sq. yards, Block NO.15, Khudadad Colony, Gulshan-e-Mustafa, Federal B Area, Karachi, (hereinafter the suit property) and in the alternate to compensate the plaintiff and his attorney by an amount of Rs.800,000/- as penalty agreed under renewal of agreement of sale dated **21.12.2009**.

2. Brief facts of the case are that the plaintiff entered into an agreement to sell dated 29.06.2009 to purchase the suit property of defendant No.1 which was negotiated through defendant No.2 who is a real estate agent and 10% advance of Rs.370,000/- was paid to Defendant No.2 on **28.6.2009** against a receipt issued by Defendant No.2 and next day it was acknowledged by defendant No.1 through a separate receipt dated **29.6.2009** and copies of documents were received by the plaintiff. It is alleged that at the time of agreement the defendants assured that the suit property was free from all encumbrances, charges, mortgages etc. and the property will be

handed over to the plaintiff on or before **13.07.2009** on completion of documentation but said condition could not be met and balance payment date was first extended to **30.07.2009** at the request of Defendant No.2 by his letter dated **11.07.2009** and then further time was extended to **31.08.2009** as per note at original agreement to sell added by defendant No.2, the estate agent. It was also averred that in the meanwhile, the defendants agreed to hand over physical possession of the suit property to the plaintiff who took over the same on **15.8.2009** and still continues. Even after extended date sale deed could not be made however a renewal of agreement of sale was executed on **21.12.2009** with further time of 90 days and the reason of delay disclosed by defendant No.1 was that original title documents were submitted by him as surety in export guarantee of ADB project and defendant agreed to finalize the sale with the bank clearance certificate and redemption deed and in case he fails he would pay Rs.800,000/- as penalty. IN terms of renewal of agreement of sale period of 90 days expired on **21.3.2010** and despite notice dated **8.3.2010** by the plaintiff to both the defendants, the deal has not been finalized as yet and it further came into notice of the plaintiff from the office of the Sub-Registrar, Gulburg Town, Karachi, that the suit property is falling in the banned list of their office. The plaintiff is the benami purchaser of the property as his son Alam Nawaz Khan is the actual purchaser and paid advance payment to defendant and would further make payment of balance amount at the time of registration of sale deed and other legal heirs have no concern or interest the in said deal.

3. The Additional Registrar (O.S) diaries shows that Defendant No.2, broker was served on first date and real owner, Defendant No.1 was not served. For next date i.e **20.1.2011**

summons to Defendant No.1 were not issued as **cost was not paid**. Then again summons for **30.8.2011** and **6.3.2012** could not be issued as '**cost was not paid**' and plaint against Defendant No.1 was struck off. Thereafter, Plaint was restored on **06.5.2012** and summons were issued for **28.5.2012** for which date a dubious report of bailiff was obtained that the house was locked and nobody agreed to act as witness and service through publication was made in newspaper for **3.6.2012** without obtaining TCS report for service as no consignment of summons through TCS was even returned to the Court. Nor service through pasting was ever ordered by the Additional Registrar (O.S).

4. Therefore, only Defendant No.2 filed his written statement and alleged that the vendor (defendant No.1) had not brought the true facts of the property to the knowledge of the plaintiff as such agreement to sell dated **29.6.2009** could not reflect true picture. Defendant No.2 further alleged that it was due to the concealment of facts by defendant No.1 and not by defendant No.2, however, to satisfy the plaintiff he compelled defendant No.1 to execute the renewal of agreement of sale and due to failure of defendant No.1, renewal of agreement of sale could not be implemented and he has no objection if prayer of plaintiff is allowed.

5. On **23.09.2013** case against defendant No.1 was proceeded exparte and on **09.10.2013** the Plaintiff filed the following proposed issues:-

- i. Whether the Defendant No.1 executed Agreement to Sell dated 29.06.2009 and its renewal dated 21.12.2009 in favour of the Plaintiff?
- ii. Whether Plaintiff paid an amount of Rs.3,70,000/- being 10% of the total agreed sale consideration and the balance Rs.33,30,000/- is payable by the Plaintiff to the Defendant?

- iii. Whether the Defendant No.1 failed to execute the Sale Deed / Conveyance Deed in favour of the Plaintiff despite requests from the Plaintiff?
- iv. Whether the Plaintiff is entitled to the prayer as made in the Suit?
- v. What should the decree be?

The Plaintiff on the same day (09.10.2013) also filed a statement that since Defendant No.1 has been exparte and Defendant No2 has filed written statement and fully endorsed the claim of the Plaintiff and has no objection if the suit property is transferred in the name of Alam Nawaz son of the Plaintiff this Hon'ble Court may direct the Nazir to execute the sale deed in favour of Mr. Alam Nawaz son of the Plaintiff on receipt of the balance sale consideration. Then on **26.5.2014** Plaintiff filed another statement in Court whereby he dropped the proceeding against Defendant No.2 as he has no claim against Defendant No.2 and the Court directed the office to assign CMA number to the said statement dated **26.5.2014** and treat as an application under Order XXIII Rule 1 CPC and dismissed the suit against the Defendant No.2 as not pressed by the Plaintiff.

6. The Plaintiff filed his affidavit in expare proof through attorney and his evidence was recorded on **22.10.2014**. The counsel after examining the sole witness of Plaintiff submitted in writing that the Plaintiff does not want to produce any other witness and closed the side of the Plaintiff.

7. I have heard learned counsel for the plaintiff and perused the evidence and the record.

8. The burden of all the four issues was on Plaintiff which he was supposed to discharge in accordance with the Qanoon-e-Shahdat Order, 1984. I have examined the evidence and found that the Plaintiff has failed to discharge initial burden of establishing that

the Plaintiff has entered into a valid contract with Defendant No.1, the lawful owner of the suit property. Plaintiff himself has not appeared in the witness box and he has been examined through his attorney. The Plaintiff has not called any attesting witness of the execution of the agreement of sale as well as receipt in accordance with **Articles 17 and 79** of the Qanun-e-Shahadat Order, 1984. The agreement of sale (**Ex.P-1/2**) alongwith payment receipt (**Ex.P-1/3**) produced by him was required to be proved by two independent witnesses. It is strange that one of the attesting witness namely Naseem Ahmed was made a party as Defendant No.2 in the suit since he was estate agent through whom the Plaintiff had negotiated the deal. Even the said estate agent / Defendant No.2 has not appeared in the witness box to testify the execution of agreement to sell. The receipt of payment of so called token money / advance was issued by Defendant No.2, the estate agent, as admitted by the Plaintiff's witness and produced as Ex.P-1/3. This receipt of advance was issued on **28.6.2009** and the perusal of receipt shows that it was a payment by cheque from Mr. Nannay Khan son of Hassan Khan, the Plaintiff himself, who handed it over to the estate agent, Defendant No.2 one day prior to the execution of sale agreement dated **29.6.2009**. This cheque was a bearer cheque and not a cross-cheque in favour of the owner of the suit property, Defendant No.1. The receipt dated **29.6.2009** (**Ex.P-1/4**) is allegedly said to have been issued by Defendant No.1 is not witnessed by anyone. Even the witnesses of agreement to sell dated 29.6.2009 (**Ex.P-1/2**) have not witnessed the receipt issued by Defendant No.1 though the said receipt **Ex.P-1/4** and the agreement to sell **Ex.P-1/2** are both dated 29.6.2009. This confirms that the witness of Plaintiff was not present at the time of execution of sale agreement and receipt of advance

payment by Defendant No.1. There is no evidence of the fact that this cheque was handed over by Defendant No.2 to Defendant No.1. Therefore, even the receipt of payment of token money / advance is not proved in accordance with the requirement of **Article 17, 72 and 79** of Qanoon-e-Shahdat Order, 1984. The Court has specifically asked a question to the witness that the so called cheque issue towards advance payment of Rs.3,70,000/-was ever encashed from his bank account and despite the fact that there was no witness of the payment or delivery of even the cheque to Defendant No.1 the witness has answered that he has not checked from his account. The Plaintiff has not produced any certificate from his bank that the cheque of advance payment was credited into the account of Defendant No.1 or it was encashed by him at the counter. The photocopy of the cheque as (**Ex.P-1/6**) clearly shows that it was not crossed in the name of Defendant No.1. However, when confronted with the photocopy of **Ex.P-1/6**, the witness says that the cheque was crossed and claimed that in the Photostat the mark of cross is missing owing to defect in photocopier.

9. The witness could not even testify the execution of the agreement as he did not know whether the sale agreement was executed in his presence or not. In cross to the Court he admitted;

- i. I do not remember I am witness of the sale agreement or not.
- ii. I do not remember who signed as witness in the 2nd agreement.

The agreement of sale has cutting, addition and alteration in the hand writing of estate agent and it was admitted by the sole witness of the Plaintiff in his cross-examination to the Court when he said.

“It is correct that untyped writing on sale agreement is made by estate agent regarding extension of time for execution of sale deed. It is correct that request for

extension of time was made by estate agent on his own letterhead”.

The estate agent not only made addition and alteration in the terms and condition of sale agreement dated **29.6.2009** but he has also handed over possession of the suit premises to the Plaintiff on **15.8.2009** at his own through Ex.P-1/8. The handing over and taking over of the suit property was not done pursuant to any agreement with Defendant No.1 the actual owner and therefore, possession of the Plaintiff over suit property cannot be deemed to have been a possession in terms of the so-called agreement to sell. The acknowledgment of possession (Ex.P-1/8) shows that the suit property was handed over with all fitting and fixtures in presence of two witnesses showing electric meter reading and gas meter reading but none of these two witnesses were examined by the Plaintiff in support of his right to seek specific performance of the contract of sale. The most strange piece of evidence with reference to the so called possession obtained by the Plaintiff / buyer is that the actual owner / Defendant No.1 was not present on the date of handing over possession of the suit property and his request for further payment of advance from the balance payment as consideration for putting the Plaintiff in possession of the suit property pending registration of sale deed was turned down by the Plaintiff. The Plaintiff's witness categorically stated in Court as follows:-

“despite possession given to the Plaintiff we refused to make further payment to Defendant No.1 as he has not executed title documents no further advance payment was made at the time of 2nd agreement” .

The perusal of so called 2nd agreement of sale / renewal of agreement of sale dated **21.12.2009** (Ex.P-1/9) shows that it was witnessed by the same estate agent namely Naeem Ahmed who is Defendant No.2

and one Mr. Shafi Muhammad son of Nannay Khan (Plaintiff). Neither any of these two marginal witnesses appeared in the witness box to confirm the execution of 2nd agreement nor Plaintiff's witness / attorney could confirm the same as he was not present at the time of execution of 2nd / renewal agreement. The Plaintiff without any excuse has not appeared in the witness box. Therefore, 2nd agreement (**Ex.P-1/9**) too has not been proved. The evidence discussed above clearly indicates that the Plaintiff failed to discharge his initial burden of proof of issue No.1 & 2 i.e. execution of agreement to sell dated 29.06.2009 (**Ex.P-1/2**) and advance payment receipt (**Ex.P-1/3**). Both the issues are, therefore, decided in negative. Consequently, the issues No.3 and 4 are also answered in negative as it was not the failure of Defendant No.1 to execute conveyance deed since Defendant No.1 was not under any obligation to convey the suit property to the Plaintiff and therefore the Plaintiff is not entitled to the relief claimed in the suit.

10. It is admitted position that the Plaintiff has taken over possession of suit property through Defendant No.2 who was never authorized nor even otherwise entitled to handover possession to Defendant No.1. Therefore, the possession of Defendant No.1 is illegal unlawful and he is liable to be ejected from the premises which he has occupied in connivance with Defendant No.2. It appears that the actual owner of the property is probably not available and taking advantage of his absence the estate agent namely the Defendant No.2 created story of sale of this property and forged two sale agreements. The Plaintiff's attorney is also in connivance with him and attempted to purchase this property as benami owner by showing the agreement of sale between untraceable actual owner through Defendant No.2 and his father. The concept of benami is also alien for the preposition

as mere executant of sale agreement by a person who has not even tendered the down payment to the owner / seller of the property. The theory of benami purchase was not available in the original agreement dated **29.6.2009** (Ex.P-1/2) and it has been introduced in subsequent / renewal of sale agreement dated **21.12.2009** (Ex.P-1/9). Therefore, if this theory of benami purchase is to be accepted, the suit should have been filed by the attorney himself as an ostensible buyer executant of sale agreement. The theory of benami is second agreement between the same parties was a case of total departure from the terms and condition of 1st agreement thus the agreement of sale dated 29.6.2009 (**Ex.P-1/2**) was hit by the provisions of **Section 62** of the Contract Act, 1972. In the renewal agreement even the beneficiary of agreement was changed. Be that as it may, as discussed above both the agreements have not been proved in evidence in the manner the same are required to be proved in terms of **Article 17, 72, 117 & 119** of Qanoon-e-Shahdat Order, 1984, therefore, the suit must fail, amongst other, on the ground that it is settled principal of law that in order to succeed in a Court of law for specific performance of an agreement, the Plaintiff has to prove execution of agreement through a strong, consistent and cogent evidence independently and he cannot succeed in obtaining a decree solely on the basis of weakness, lacuna and total absence in or of the defence. In this context (**1992 CLC 2524**) Chilya Corrugated Board Mills Ltd., ..Vs.. M. Ismail, (**2002 CLC 22**) Muhammad Aslam Khan ..VS.. Muhammad Anwar Khan are direct citation on this settle principal of law. Since Plaintiff is not entitled to claim specific performance of contract dated 29.6.2009, he has lost his right to retain the possession of the suit property.

11. In the peculiar facts and circumstances of this case while the Plaintiff has to be removed from the possession of the suit property, it is duty of the Court to ensure that unscrupulous estate agent like Defendant No.2 should not meddle with the suit property or for that matter with any other immoveable property on realizing that the whereabouts of actual owners of the said property are not available and the property in a way is unclaimed or abandoned or it has really become ownerless. The Court cannot be oblivion of the present state of affairs in the society which at times compels owners of immoveable properties to temporarily settle outside Pakistan without making proper arrangement for protection of their properties back in Pakistan and they either fell terminally ill while in exile and later on died and their legal heirs keeping in view the law and order situation and corruption are not in a position to immediately come forward to lay their hand to such properties. Defendant No.1 is an **Ahmadi** by religion and unfortunately the prevailing state of affairs of our society for a member of minority community becomes even more serious. In a situation like this, I am of the considered opinion that it is the duty of the Court that once it is found that none is available to claim ownership of immoveable property in his own right or by means of inheritance the property would be treated as an ownerless property. And once the Court is satisfied that the property is rendered ownerless, it would be escheated to the Government in terms of **Article 172** of the Constitution of Pakistan, 1973. It is the duty of the State to protect all such properties of its citizens in terms of **Article 24** of the constitution of Islamic Republic of Pakistan, 1973 and of course the Court is the custodian of fundamental rights of the citizen under the constitution. Even the State would be allowed to take possession of such property under **Article 24 clause 3(d)** of the

constitution of 1973 for a limited period to protect it for the benefit of its owner. **Article 24(3)(d)** & **Article 172** are reproduced hereinbelow:-

Article 24. Protection of property rights. (1).

(2).

(3) Nothing in this Article shall affect the validity of ____

(a).

(b).

(c).

(d) any law providing for the **taking over** of the management of any property **by the State for a limited period**, either in the public interest or in order to secure the proper management of the property, or **for the benefit of its owner**, or

Article 172. Ownerless property. (1) Any property which has no rightful owner shall, if located in a Province, vest in the Government of that Province, and in every other case, in the Federal Government.

However, this is possible only when the Court is satisfied that none is known to the Court for having any right or entitlement in the said property. In a situation like the one in hand the court is required to find out the actual owner and / or his/her legal heirs before holding that the suit property is escheatable. In addition to Section **151 CPC** to meet the ends of justice, the other enabling provisions of law to protect the suit property pending the rightful owner or claimants of the property comes forward to the Court are **Section 269** read with **Section 300** of the **Succession Act, 1925** which deal with the proposition that when and how the Court can interfere for protection of property even prior to grant of any probate or letter of administration. These two enabling sections are reproduced below:-

269. When and how District Judge to interfere for protection of property.-(1) Until probate is granted of the will of a deceased person, or an administrator of his estate is constituted, the District Judge, within whose

jurisdiction any part of the property of the deceased person is situate, is authorized and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, **and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he thinks fit, to appoint an officer to take and keep possession of the property.** (Emphasis provided)

300. Concurrent jurisdiction of High Court.-(1) The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

12. In the case in hand though it is not a case requiring interference for protection of the property of a deceased person pending grant of probate or letter of administration, one thing is clear that there is “**risk of loss or damage**” to the suit property and the phrase “and in all other cases” enlarges the scope of authority of Court to cover cases of every property at the risk of incurring loss or damage. Therefore, as an immediate measure to protect the suit property from further damage the Nazir of this Court is directed to immediately visit the suit property within 48 hours and take photographs from inside the suit premises to preserve the status of the fitting and fixtures of the suit as according to the evidence of the Plaintiff himself through **Ex.P-1/8** the suit premises was handed over to the Plaintiff on **15.8.2009** by Defendant No.2, the estate agent, with all fitting and fixture and complete in all respect with two electric meter showing reading at 0011550 and 9714 and gas meter showing reading 9635. The Nazir should ensure that all the dues of electricity and sui gas are cleared and the peaceful possession is handed over to him by the Plaintiff within 15 days. In case of any resistance or if the suit property is found locked the Nazir is authorized to remove locks and prepare an inventory of all the items lying therein and place his locks and seal on each door of the suit property. The area police should also be informed in advance so that

if police aid is needed, it should be available readily and no fresh order to break open the locks or police force to eject the Plaintiff from the suit property is required.

13. However, Nazir is not supposed to retain the possession of the suit property of a missing owner for an indefinite period. Therefore, Nazir is further directed to approach NADRA authorities in locating the actual owner namely Muhammad Dawood Khan son of Abdul Sami Khan whose CNIC No.42301-1012648-7 and another CNIC No.101-62-537022 are available in evidence file (Ex.P-1/2) & (Ex.P-1/5) and also try to locate his legal heirs through the B-form of NADRA, if any was issue to the said Muhammad Dawood Khan. In this context computerized identification branch of High Court may also be able to extend valuable assistance. I have notice from the title of plaint and the conveyance deed (Ex.P-1/5) that unfortunately Defendant No.1 belongs to AHMADI community. Nazir may even seek help from some of the senior lawyers who are also Ahmadi practicing in Karachi in locating Defendant No.1 or his legal heirs. Since Defendant No.1 belongs to minority community of Pakistan, I believe, it has become even more serious duty of the State and the Court to extend maximum protection to safeguard the legitimate right and interest of Defendant No.1, a duty of protection of minorities enjoined on us by **Article 36** of the Constitution of Pakistan, 1973.

14. Nazir should complete the exercise within six months and he should also put up a board in front of the property stating that property is in possession of the High Court and if anybody knows whereabouts of the owner or claimant may approach the Nazir of this Court and in case nobody turns up to claim his title to the suit property within six months the suit property shall be deemed to have been escheated to the State in terms of **Article 172** of the

Constitution of Pakistan, 1973 and Nazir should handover possession of suit property to the Deputy Commissioner (Central) Karachi in whose jurisdiction the property is situated under a proper documentation.

15. In view of the above facts and the law, the suit is dismissed with cost of Rs.100,000/- to be borne by the Plaintiff who is in illegal possession of the suit property since August 2009. The cost is to be paid by the Plaintiff within 07 days and in case the cost is not paid the Nazir while taking over possession may attach moveable properties of the Plaintiff to the extent of Rs.100,000/- and sale the same towards recovery of cost. Once the cost is recovered, Rs.25000/- shall be appropriated toward Nazir's fee for the exercise of recovery of possession of suit property and cost and Rs.25000/- each may be given to the High Court Clinic, High Court Employees' Benevolent Funds and Library of Sindh High Court Bar Association.

J U D G E

Karachi
Dated 20th January, 2015.