

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 733 of 2003

BEFORE:

Mr. Justice Arshad Hussain Khan

Cdr. (Retd.) Muhammad Sharif

Vs.

Lt. Col. (Retd.) Ghulam Farid & PDOHA

Plaintiff: Cdr. (Retd.) Muhammad Sharif
Through Mr. Muhammad Idrees Sukhera, Advocate.

Defendant No.1: Lt. Col. (Retd.) Ghulam Farid
Through Ms. Farkhunda Shaheen Advocate along with
Barrister Yousuf Advocate.

Defendant No.2: Nemo

Date of Hg: 28.01.2020, 06.02.2020 & 10.03.2020

JUDGMENT

ARSHAD HUSSAIN KHAN, J. This suit was filed on 25.06.2003 against the Defendants for Specific Performance, Possession, Damages and Injunction with the following prayers:-

- a. To direct defendant No.1, to perform his part of contract/agreement dated 12.5.2003 regarding the sale of plot of land bearing No.338-A, 38 Street, Phase-8, measuring 1000 Sq. Yds., DHA, Karachi, and transfer this plot in favour of the plaintiff or his nominee by executing and signing the necessary documents before the concerned officer of defendant No.2, and in the event defendant No.1 fails to execute the requisite documents as prayed, learned Nazir of this Court may be appointed with the directions to complete necessary documents and or register sale deed of said plot in the name of plaintiff and or his nominee as agreed by defendant No.1 subject to allowing the plaintiff to deposit the balance sale consideration of Rs.35,00,000/- with the Nazir of this Court.
- b. To restrain the defendants permanently, their representatives, attorneys, workers, employees, agents and or any person acting under them or on their behalf from selling, transferring, handing over possession or creating a third party interest in the suit plot in any manner whatsoever except the plaintiff or his nominee.
- c. Award a sum of Rs.25,00,000/- as damages as defendant No.1 has given mental torture, stress, agony and financial loss to the plaintiff by refusing the completion of transaction of sale of the suit plot in favour of the plaintiff or his nominee.
- d. To award cost of the suit.
- e. Any other relief which this Court deems fit and proper under the circumstances of the case may also be granted in the interest of justice.

2. Briefly stated the facts of the present case as narrated in the plaint are that the plaintiff entered into an agreement to sell for plot No.338-A, 38th Street, Phase-VIII, measuring 1000 Sq. Yds., or thereabout situated in Pakistan Defence Officers Housing Authority, Karachi, [suit property] with defendant No.1 for a total sale consideration of Rs.40,00,000/- on 12.05.2003, at Karachi. The plaintiff paid to defendant No.1 a sum of Rs.5,00,000/- by way of advance part-payment towards sale consideration of the aforesaid plot for which defendant No.1 also issue separate payment receipt dated 12.05.2003. The balance sale consideration was to be paid by the plaintiff to defendant No.1 on or before 13.06.2003 at the time of execution of requisite documents before the concerned officer of defendant No.2 Pakistan Defence Officers Housing Authority Karachi (PDOHA) for transfer of the suit property in favour of the plaintiff or his nominee. It is stated that a set of documents for transfer of suit plot was submitted in DHA office in favour of the plaintiff's nominee Mr. Muhammad Ishaque Subhani son of Abdul Rehman Subhani, which was given serial No.52 for signing before the concerned officer of defendant No.2 on 12.06.2003 and the balance sale consideration in the shape of demand drafts were presented to him, however, defendant No.1 refused to accept demand drafts of the balance sale consideration and so also to sign the transfer papers. He demanded more money from the plaintiff as according to him the price of the suit property had been increased considerably since signing of the sale agreement. The plaintiff requested him to honour his written commitment as per terms of the sale agreement but he refused to hear anything and left the DHA office in utter disregard of his contractual obligations and moral responsibility. The plaintiff has called upon defendant No.1, through legal notice dated 14.06.2003 to fulfill his commitment and execute transfer documents of suit property in favour of the Plaintiff's nominee but he failed to do so. Hence this suit.

3. Upon notice of the present suit, defendant No.1 has filed his written statement and has taken the preliminary legal objections viz. That there is no lawful and concluded agreement of sale between defendant No.1 and plaintiff or between defendant No.1 and Muhammad Ishaque Subhani in respect of suit property and so-called

agreement is not enforceable as such the suit as framed and filed is not maintainable in law; That the suit is bad for non joinder / misjoinder of necessary and proper parties as such the suit is liable to be dismissed; That the plaintiff has not come with clean hands and has concealed the material facts from this Court hence he is not entitled for any relief.

Apart from the above objections, defendant No.1 in his written statement has stated that the so-called agreement to sell is a forged, fabricated as neither defendant No.1 has entered into any sale agreement with the plaintiff or his nominee Mr. Muhammad Ishaque Subhani, nor he has received any amount from the plaintiff as advance payment towards the so-called sale consideration of suit property. It has been specifically denied that any sale agreement in respect of suit property has been signed or executed by defendant No.1 at Karachi. It has been stated that on 12.05.2003, when the purported sale agreement was executed defendant No.1 was not present in Karachi and he was in Rawalpindi on the said date. It has been further stated that the alleged sale agreement does not show the stamp of stamp vendor on first page of said stamp papers from whom the said stamp papers have been purchased. As a matter of fact, one Muhammad Aslam, who is an estate agent having office at Chaklala Scheme No.3 Rawalpindi, had promised with defendant No.1 to get the suit property sold at a maximum high price of Rs.70,00,000/-. However, said Muhammad Aslam has obtained the signatures of defendant No.1 in his office at Rawalpindi on two stamp papers of Rs.50/- each on a printed "Agreement to sell a plot" wherein no name of the purchaser was mentioned, no name of any vendee or witnesses was mentioned and on the second page of the said so-called sale agreement, no signatures of any vendee or the witnesses were there on the said stamp papers. The said draft agreement was a stereotype document, various columns thereof were blank. This was merely a formality and a draft agreement to show the buyer that he was holding a document duly signed by the seller and after agreeing to the proposed sale price of the plot at Rs.70,00,000/-, a proper sale agreement will be signed by both the parties in presence of the witnesses. It is further stated that the said Muhammad Aslam in collusion with the plaintiff and Muhammad Ishaque Subhani has cheated and de-frauded defendant No.1 and they

have obtained his signatures on the said document by inducement and on false promises. Moreover, the said blank document has subsequently been filled in by the persons named above unauthorisedly, illegally and without the consent of defendant No.1. Hence, the said document is liable to be cancelled. It has been stated that the defendant was supposed to arrive at Karachi for completion of the formalities for transfer of the suit property if there has been a lawful concluded agreement of sale between the parties. It was only an incomplete draft agreement signed by the defendant at Rawalpindi containing no name of vendee or the witnesses or even the terms for sale of the suit property. It has been stated that the defendant had visited Karachi at the instance of the above named Muhammad Aslam, who accompanied answering defendant from Rawalpindi to Karachi. However, the terms of sale were not finalized due to the reason that said Muhammad Aslam insisted upon the answering defendant to sell the suit property at the price of Rs.40,00,000/- instead of price of Rs.70,00,000/- as offered by him on 12th May, 2003 at Rawalpindi. It has been denied that the plaintiff or Muhammad Ishaque Subhani had offered to make payment of the so-called balance sale consideration to the defendant and further that any breach of terms of contract has been committed by the defendant. It has been stated that insofar as receipt of Rs.5,00,000/- is concerned, the same has been paid to the defendant by Muhammad Aslam on the assurance that he will get the suit property sold at the price of Rs.70,00,000/- to a prospective buyer and that too with written consent of defendant. It has been further stated that due to any act of the answering defendant the plaintiff has suffered any loss. On the contrary, the plaintiff and above named Muhammad Aslam and Muhammad Ishaque Subhani in collusion with each other have caused mental torture and financial loss to the answering defendant, which torture and financial loss is continuous. Besides causing loss to the reputation of the answering defendant, who is a retired Colonel of Pakistan Army having good reputation and self-respect in the eyes of his family members, friends and colleagues and as such the defendant is entitled to claim compensation and damages at least Rs.50,00,000/-.

4. On **31.10.2005** out of the pleadings of the parties following issues were settled by the Court:

1. Whether there is lawfully concluded and binding agreement of sale between the plaintiff and defendant No.1 in respect of the property in question ?
2. Whether defendant No.1 has committed any breach of said agreement, if so, to what extent ?
3. Whether certain blanks were left in the agreement which were lawfully and actually filled in by the estate agent of defendant No.1 ?
4. So what relief, if any, the plaintiff is entitled to ?
5. What should the decree be ?

Then on **27.02.2008**, commissioner was appointed to record evidence of the parties, who after completing the commission submitted his report, which was taken on the record on 21.09.2009.

From the perusal of the **commissioner's report**, it appears that the Plaintiff in support of his case besides himself he examined Khawaja Maqsood Aslam (PW-2), Muhammad Aslam (PW-3), Muhammad Siddik (PW-4) and Major R. Sajjad Sipra (PW-5). The plaintiff during his deposition [Exh.P] has produced the following documents:

DESCRIPTIONS	EXHIBITS
Affidavit in evidence	P/1
Original Agreement to Sell dated 12.03.2003	P/2
Original Receipt / Acknowledgement dated 12.5.2003	P/3
Photocopy of Demand Draft 7.6.2003	X/1 Under objection
Photocopy of Demand Draft of Rs.14,50,000/-	X/2 Under objection
Photocopy of Demand Draft of Rs.10,00,000/-	X/3 Under objection
Photocopy of legal notice dated 14.6.2003	X/4 Under objection
Affidavit (<i>Biyān Halafī</i>) of Khawaja Maqsood attested on 06.05.2004	P/4
Affidavit (<i>Biyān Halafī</i>) of Muhammad Aslam attested on 6.5.2004	P/5
Affidavit (<i>Biyān Halafī</i>) of Hafiz Hussain attested on 29.03.2004	P/6

Whereas **Khawaja Maqsood Aslam** as Exh.P/7 produced his affidavit-in-evidence as Exh P/8. **Muhammad Aslam** as Exh.P/10, produced his Affidavit in evidence as Exh.P/11. **Muhammad Siddique** was exhibited as P/12, who produced his affidavit-in-evidence as Exh.

P/13, hotel bills in original in the name of Khawaja Maqsood as Exh. P/14, publication bill as Exh P/15 and two publications as Exh. P/16 and P/17. Lastly, **Major (Retd.) Sajid Sipra** was exhibited as P/18, who produced his affidavit in evidence as Exh P/19. All the witnesses were cross-examined by the defendant's counsel.

5. On the other hand, Defendant No.1, **Col. (Retd.) Ghulam Fareed** was examined as Exh.D before the Commissioner, who produced the following documents:-

DESCRIPTIONS	EXHIBITS
Affidavit in evidence	D/1
Photocopy Agreement to Sell dated 12.05.2003	X
Photocopy of Receipt dated 12.05.2003	X-1
Photocopy of Affidavit dated 20.08.2003 of Hafiz Azmat	D/2
Photocopy of Reply dated 25.06.2003 to legal notice	D/3
Photocopy of TCS Receipt	D/4

The Defendant No.1 was cross-examined by the plaintiff's counsel. Defendant No.1 in support of his stance also examined **Hafiz Azmat Hussain** (DW-2) as Exh.D/5, who during his examination produced his affidavit-in-evidence as Exh.D/6, copy of CNIC as Exh.D/7, receipt showing the deposit of register relating to business as stamp vendor as Exh.D/8. Photocopy of licence dated 09.09.1999 for selling the stamps Exh.D/9 and pages of register maintained for selling the stamp papers as Exh.D/10 & D/11. The said witness was cross-examined by the plaintiff's counsel. After conclusion of the evidence the matter has come up for arguments.

6. During the course of arguments, learned counsel for the Plaintiff while reiterating the contents of the Plaint has argued that the plaintiff, vide agreement to sell [Exh. P/2], entered into sale transaction with defendant No.1 to purchase the suit property for a total sale consideration of Rs.40,00,000/- out of which he paid to defendant No.1 a sum of Rs.5,00,000/- being advance part payment towards sale consideration of the suit property for which a separate payment receipt [Exh.P/3] was also issued and whereas the balance sale consideration was to be paid to defendant No.1 on or before 13.06.2003 at the time of

execution of the requisite documents before defendant No.2 for transfer of the suit property in favour of the plaintiff or his nominee. The plaintiff in order to fulfill his part of obligation under the terms of the agreement got prepared transfer documents for execution of the same before the concerned officer in DHA office and had also prepared demand drafts [X/1, X/2 and X/3] of the balance sale consideration in the name of defendant No.1. However, on 12.06.2003 when the demand drafts of balance sale consideration were presented to defendant No.1 in DHA Office, he refused to accept the same and to sign the transfer documents. He demanded more money as according to him the price of the suit property had been increased considerably. The plaintiff though requested the defendant to honour his commitment under the terms of the agreement of sale, however, he did not pay any heed to such request and left the DHA office. Consequently, legal notice dated 14.06.2003 [X/4] was sent to the defendant whereby he was called upon to fulfill his part of obligation under the agreement and execute transfer documents in favour of the plaintiff but no response was received. Resultantly, the plaintiff filed the present case on 25.06.2003. It has been further argued that the willingness and readiness of the plaintiff to fulfill his part of obligation under the terms of agreement can be gauged from the fact that he had not only prepared the demand draft of the balance sale consideration within the time stipulated in the agreement but after filing of the present case he had deposited the entire balance sale consideration in this Court. It has been contended that the defendant upon receiving advance part payment towards sale consideration and execution of the sale agreement cannot resile from his commitment by claiming the agreement as forged and fabricated document. It has been contended that the defendant did not dispute his signature and thumb impression on the agreement of sale [Exh.P/2] and as such the agreement cannot be termed as forged, fabricated. Conversely, for all practical and legal purposes the agreement of sale is a concluded contract and its terms are binding upon the parties. It has been further argued that if the agreement was a forged and fabricated document, the defendant was required to file a suit for cancellation of agreement against the plaintiff but he did not file the same which action on the part of defendant clearly reflects that he had admitted the contents of the sale agreement. Learned counsel

also argued that defendant No.1 has not only signed the sale agreement and receipt but he had also affixed his thumb impression on each and every page of the sale agreement and on the receipt and the witnesses in whose presence the sale agreement was executed have also sworn their respective affidavits for the execution of the sale agreement and transaction of sale between the plaintiff and defendant No.1 which is sufficient proof of the execution of the sale agreement. It is also argued that due to the defendants' non-fulfillment of his part of obligation under the terms of agreement to sell, the plaintiff suffered losses and as such the plaintiff is also entitled to the damages of Rs.25,00,000/-. It is also argued that the plaintiff through evidence has substantiated his claim hence the suit may be decreed as prayed. In support of his stance, learned counsel has relied upon the cases of Abdul Wali Khan through Legal Heirs and others v. Muhammad Saleh [1998 SCMR 760], Muhammad Yaqub v. Muhammad Nasrullah and others [PLD 1986 SC 497], and Mst. Mushraf Begum and another v. Abdul Wahab [1997 MLD 1975].

7. On the other hand, learned counsel for defendant No.1 while reiterating the contents of the written statement and the affidavit-in-evidence of defendant No.1 has argued that Muhammad Aslam, property dealer at Rawalpindi to whom the defendant assigned the task to sell the suit property has got the stamp paper and payment receipt, which though were typed but there was no name and signature of the purchaser, signed from him in his office on the assurance that the agreement will be concluded on the prevailing market rate. However, when the defendant reached at DHA on 12.06.2003, he was told by Mr. Aslam that earlier the purchaser was Cdr. Sharif and now the purchaser is some other party, who is not ready to conclude agreement on the prevailing market rate. Hence, the defendant returned back to Rawalpindi without concluding or entering into any agreement, though the other property dealers were ready to purchase the suit property at the prevailing market rate. It has been argued that the so-called agreement to sell is a forged, fabricated and illegal document and it is not a concluded agreement and as such the same is not enforceable in law. It is also argued that neither the defendant entered into any sale agreement with the plaintiff nor he had received any amount from the

plaintiff as advance money towards the so-called sale consideration in respect of the suit property. Even, no sale agreement in respect of the suit property had ever been signed or executed by the defendant at Karachi. Learned counsel emphasized that on 12.05.2003, which is the date of so-called agreement, the defendant was not present in Karachi and he was in Rawalpindi. Learned counsel further argued that the photocopy of the alleged sale agreement shows that there is no stamp of stamp-vendor on the first page of the said stamp paper from whom the said stamp paper has been purchased, which amounts to fraud being committed by the plaintiff. Even otherwise, it is not attested by any of the Notary Public or by any other competent authority. It is further argued that, in fact, said Muhammad Aslam had obtained the signatures of defendant No.1 in his office in Rawalpindi on two stamp papers of Rs.50/- each on a printed agreement to sell wherein no name of the purchaser was mentioned as well as on the second page of the said agreement no signatures of any vendee or the witnesses were there on the said stamp papers; it was just a stereotype document and the said Muhammad Aslam informed the defendant that it was merely a formality and a draft document to show the buyer that he was holding a document duly signed by the seller and after agreeing to the maximum market sale price of the suit property a proper sale agreement will be signed by both the parties in presence of the witnesses, hence the defendant was cheated at the hands of the said Muhammad Aslam in collusion with the plaintiff. It has been further argued that defendant upon receipt of the plaintiff's legal notice immediately replied the same through reply legal notice dated 25.06.2003 [Exh.D/3] and as such the plaintiff cannot claim alleged losses besides the plaintiff has also failed to place on record any proof regarding his alleged claim of losses. On the contrary, it is the defendant who suffered losses as his valuable property has been stuck-up due to the present case and as such the defendant is entitled to claim damages of Rs.50,00,000/-. Learned counsel further argued that the alleged agreement is liable to be cancelled in the facts and circumstances of the case and the suit is liable to be dismissed. In support of his stance, learned counsel has relied upon the cases of *Sher Shah v. Muhammad Suleman and 2 others* [2013 YLR 1017], *Mst. Gulshan Hamid v. Kh. Abdul Rehman and others* [2010 SCMR 334], *Rashid Ahmed Khokhar and 2 others v. Sana Ullah*

and another [1997 CLC 1159], *Abdul Hameed v. Mst. Aisha Bibi and another* [2007 SCMR 1808], *Hafiz Tassaduq v. Muhammad Din through legal heirs and others* [PLD 2011 SC 241] and *Shaukat Ali v. Muhammad Razzaq* [2018 CLC 1624].

8. I have heard the learned counsel for the parties, perused the record minutely and have also gone through the relevant law as well as the case law relied upon by the learned counsel for the parties and my findings on the above issues are as follows :-

ISSUE NO. 1 From the perusal of the record, it appears that the stance of the plaintiff case is that he entered into a transaction with defendant No.1 to purchase the suit property, vide an agreement to sell dated 12.05.2003 [Exh.P/2] and total sale consideration was fixed at Rs.40,00,000/- out of which he paid Rs.500,000/- as advance part payment towards sale consideration for which a separate receipt [Exh.P/3] was also issued, and whereas the balance sale consideration was to be paid on or before 13.06.2003 at the time of execution of transfer documents in presence of the concerned officer of DHA, Karachi. However, on 12.06.2003, a date fixed for execution of the documents, defendant No.1, though appeared in DHA office yet he refused to accept the balance payment and to sign the transfer documents. Thereafter, the plaintiff addressed a legal notice dated 14.06.2003 to defendant No.1 whereby he was called upon to fulfill his part of obligation under the agreement dated 12.05.2003 within seven (7) days' time, however, when the plaintiff did not receive any response to the said legal notice he filed the instant case.

Conversely, the plea of defendant No.1 case is that the agreement [Exh.P/2] is a forged and fabricated document as he neither entered into any agreement nor received any payment towards sale consideration from the plaintiff. The stance of defendant No.1 is that one Muhammad Aslam, an estate agent based at Rawalpindi, had promised with him to get the suit property sold at a maximum price of Rs.70,00,000/-, the said estate agent, however, obtained the signatures of defendant No.1 in his office at Rawalpindi on two stamp papers of Rs.50/- each on a printed agreement to sell wherein neither name of the purchaser/vendee, nor witnesses were mentioned. The agreement was a stereotype document having various blank columns, which columns

were subsequently filled illegally and without the consent of defendant No.1 and as such the agreement [Exh.P/2] having no legal sanctity cannot be legally enforceable. As regards the receipt of part payment [Exh.P/3] is concerned, the plea of defendant No.1, is that the same was issued upon receiving payment from the estate agent Muhammad Aslam on the assurance that he will get the suit property sold at the above referred maximum price.

Before going into any further discussion, it would be imperative to discuss the agreement to sell [Exh.P/2] consisting of two pages, which is reproduced as under for the sake of ready reference.

“AGREEMENT TO SALE A PLOT

By this deed of agreement is made on this 12th day of May 2003

Between

Sqn Ldr Ghulam Fareed son of Raja Mansub Dar Khan R/o 207, Street 10, Valley Road Westridge Rawalpindi Holding NIC No. 210-48-147790 Old 37405-7884132-7 New (hereinafter called the ‘VENDOR’) of the One Part.

And

Cmd (R) Muhammad Sharif son of Jalal Din R/o 58/3, LANE # 14, Phase VII, D.H.A. KARACHI Holding NIC No. 514-70-147674 (hereinafter called the ‘VENDEE’) of the other part, (express ‘Vendor’ and the Vendee’ wherever the context so permit shall always mean and include their respective heirs, successors, executors, administrators, legal representatives and or assigns.)

WHEREAS the Vendor above named is seized, possessed of and is otherwise well and sufficiently entitled to all that PLOT OF LAND BEARING NO. 338-A, 38TH STREET, PHASE-VIII, MEASURING 1000 SQ. YARDS OR THEREABOUT SITUATED IN PAKISTAN DEFENCE OFFICERS HOUSING AUTHORITY, KARACHI, hereinafter referred to as the SAID PROPERTY AND WHEREAS the Vendor has agreed to sell and the Vendee has agreed to purchase the said property for a lump sum price of Rs.40,00,000/- (Rupees Forty Lacs only) free from all claims, liens, charges, burdens, disputes, suites, liabilities, encumbrances of whatsoever nature.

NOW THEREFORE THIS AGREEMENT WITNESETH AS UNDER:-

1. That the vendor has this day received from the vendee a sum of Rs.5,00,000/- (Rupees Five Lacs only) in cash/Vide Demand Draft No/Cheque No./Pay Order No. _____ dated _____ draw on _____ being the advance payment towards sale consideration of the said property, receipt of which the vendor doth hereby fully admit and acknowledge separately.
2. That Balance payment of Rs.35,00,000/- (Rupees Thirty Five Lac only) shall be paid by the vendee to the vendor at the time of signing and verification of transfer documents in the presence of concerned officer of Pakistan Defence Officer Housing Authority, Karachi on or before 13 June 2003. And that the purchaser if fails to pay balance amount of consideration within stipulated period then this earnest money/biana will be forfeited.

Thumb impression

Vendor _____ Sd. _____

Vendee _____ Sd. _____

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3. That the vendor shall be liable to pay all dues, debts, claims, taxes, charges, liabilities, burdens, suits, disputes, objections in respect of the said property up to the date of signing of transfer documents in favour of the vendee and from the date onwards the same shall be borne by the Vendee.
4. That the vendor covenants with the vendee that the said property is his separate, exclusive, individual and absolute property and that he has legal rights, full power and lawful authority to transfer/sell the same to the vendee and the said property has not been mortgaged or under lien to any bank or institution.
5. That in case it is found that the title and rights of the vendor were legally defective and there were found any impediments in the transfer in favour of the vendee the vendor hereby undertake and agree to fully secure and indemnify the vendee against all accruing losses, claims demands, dues, litigation, objections, suffered or paid by the vendee owing to any defect relating to the said property.
6. That the vendee shall have the right to get the said property transferred in his own name or in favour of his nominee(s) and the vendor hereby undertake to sign the transfer documents in favour of the vendee or his nominee(s).
7. That the said property has not been mortgaged with any loan giving agency/bank throughout Pakistan and also not under litigation in any court of law.
8. That the vendor hereby allow to vendee to invite objection through publication in the newspaper regarding purchaser of the "Said Property" and the Vendor undertakes to remove such objection (if any) prior to the date of final payment and fully satisfy to the vendee.
9. That the vendor hereby declare that he has not entered into any agreement or negation with any other person(s) regarding sale of the said property.
10. That transfer fee in respect of the said property shall be paid by the vendee alone.

IN WITNESS WHEREOF the parties above named have set and subscribed their respective hands, the day, months and the year first above written.

Thumb

Vendor _____ Sd. _____

Vendee _____ Sd. _____

Cdr (R) Muhammad SHARIF.

Sd.
2. **Maqsood Aslam**
S/o Kh. Muhammad Aslam
R/o H-452 St-16 Chakalala Scheme III
Rwp. NIC. 323-92-544989.

Witness 1. _____
Mohd Aslam S/o Saif Ali
NIC 272-62-408471
Defence Property, Consultant.

[Bold & Italic are hand written]

From the perusal of the agreement [Exh.P/2], it appears that the name of the vendor (defendant No.1), description of property, total sale consideration, receiving of advance part-payment, remaining balance payment and terms of condition of the agreement are typed, whereas, date of execution of the agreement, father's name of vendor, address, CINC number the name of the vendee (plaintiff), his father's name, address and CNIC number, cut of date for the completion of the transaction, and note in para No.2, name of witnesses are hand written. Besides this, the signatures of both the vendor and vendee as well as thumb impression along with signature of the vendor and names of witnesses as well as signature of one witness namely Maqsood Aslam are also appearing.

The defendant No.1 during his examination also produced the agreement dated 12.05.2003 [mark-X], which appears to be a photocopy of Exh.P/2, taken before filling up the name address and NIC Number of the vendee besides name of the witnesses. However, the name, address, NIC Numbers of the vendor (defendant No.1), both old and new, hand written note in para 2, and signature of the vendor along with his thumb impression on both the pages and all the typed material are appearing.

From the perusal of the above two documents viz. Exh.P/2 [Mark-X], it manifestly appears that stamp papers (consisting of two pages) of the agreement are one and the same, although the name of the vendee (plaintiff) is not appearing in Mark-X, however, from the perusal of evidence, it appears that initially defendant No.1, being vendor had signed the agreement and put his thumb impression besides to put his written note added in para No.2 of the agreement at Rawalpindi, thereafter the agreement was sent to Karachi for plaintiff's signature who was stationed at Karachi. The defendant No.1 in his pleadings as well as in his evidence has admitted his signature, thumb impressions on both the pages and his written, note added in para-2 of

the agreement however he denied that the agreement was entered into between him and the plaintiff. The precise stance of defendant No.1 is that since the name and signature of the plaintiff being vendee subsequently inserted without his consent, therefore, the agreement is not enforceable being illegal and void.

From the perusal of the original stamp papers on which agreement of sale [Exh.P/2] was typed, it appears that the same were issued from Rawalpindi, where the practice for issuance of stamp paper is that the stamp vendor mentions the name, father's name and address along with NIC number of the purchaser or to whom it was issued, on the back side of the stamp paper. The back side of the stamp papers [Exh.P/2], photo copy whereof is also available along with the plaint, clearly shows that the same were purchased for the agreement of sale (*Iqrarnama bayee*) in the names of both the plaintiff and defendant No.1 whereas the CNIC number of defendant No.1 is also appearing. Besides this, the attesting witnesses namely Khawaja Maqsood Aslam and Muhammad Aslam, whose names are appearing on Exh.P/2, in their respective affidavits on oath (*Bayan-e-Halafi*) Exh. P/4 and Exh. P/5 respectively, have categorically mentioned that the agreement Exh.P/2 has been executed before them by defendant No.1 after receiving the advance part payment of sale consideration on behalf of the plaintiff and putting written note in para 2 of the agreement. The said witnesses were also cross-examined. Relevant portions of the cross-examination of the above said witnesses, for the sake of ready reference, are reproduced as under:

Cross examination of Khawaja Maqsood Aslam [Exh.P/7].

“...Part payment of Rs. Five Lacs in respect of Sale Agreement was made at Rawalpindi. I was informed by PW Muhammad Aslam that other payment apart from above payment were also made but I do not know whether those payments were made. The above said part payment of Rs. 5 lacs was sent in account of Union Bank of PW Muhammad Aslam where I and he went at Rawalpindi and the said amount was collected and then we went to the branch of National Bank at Bank Road Rawalpindi, and the said amount was given to PW Muhammad Aslam to defendant Ghulam Farid. It was PW Muhammad Aslam who had informed that Plaintiff Muhammad Sharif had sent amount of Rs. 5 lacs to him through Union Bank at Rawalpindi. I do not know who had settled the final price of the suit plot. The role of PW Muhammad Aslam was that of main agent. I do not know whether my meeting was arranged at Rawalpindi between plaintiff and defendant Ghulam Farid in connection with that suit deal. At present I cannot identify the signature of defendant Ghulam

Farid. I am shown photo copy of annexure D/1 of the written statement and say that the addition in paragraph (2) thereafter was made by defendant Ghulam Farid. Voluntarily states that "I have made said statement without saying that I identify the writing but because such declaration was made in my presence by defendant Ghulam Farid and he had written it in para (2)."

[Emphasis supplied]

Cross examination of Muhammad Aslam [Exh.P/10]

"..... It is incorrect to say that signature of defendant Ghulam Farid on Ex.P/2 was obtained fraudulently by me and without disclosing him the real facts. Defendant Ghulam Farid was made part payment of Rs. Five lacs in the National Bank, Bank Road, Rawalpindi, where he had signed Ex.P/2 and the Receipt Ex.P/3. I see photo copy of annexure D/2 with the written statement and say that it is copy of Ex.P/3, which I produce as Ex.P/11. For the first time defendant Ghulam Farid declared in D.H.A. Karachi that he would not transfer the suit plot, on perhaps 12th or 13th June 2003. It is incorrect to say that I had told defendant Ghulam Farid that I would get him, Rupees Seventy Lacs as price of suit plot when I got his signature on Ex.P/9 or that the price of Rupees Forty lacs was tentative or that defendant Ghulam Farid raised dispute because on the allegedly told him that he would be given Rupees Forty lacs as the price of suit plot."

[Emphasis supplied]

From the above, it appears that the testimony of witnesses (PWs) remained unshaken and confidence inspiring. Moreover, defendant No.1 in his cross-examination has admitted his signature, thumb impression, written note in para-2 of the agreement [Exh.P/2] as well as receipt of advance part payment under the payment receipt [Exh.P/3]. Relevant portion of his cross-examination for the sake of ready reference is reproduced as under:

"Ex: P/2 bears my signature and thumb impression. Voluntarily states that, "I had put my signature and thumb impression on both pages on 12.5.003 at 12.30 PM of Ex:P/2, and went away, and on return, I was given it's photocopy, the Mark-X, and in that there were no signatures of the vendee and the witnesses, and there was also no stamp and endorsement on back of Ex:P/2. I had handed over my I.D. Card at 06.30 PM on that date, and put my thumb impression and signature on Ex:P/2, after going through it". I had seen Ex:P/2, in the evening at my home and pointed to PW Aslam the agent, that it was not in accordance with standard agreement, on which he told me to correct it in my own hand-writing, and therefore I made such addition in para No:2 of Ex:P/2 in my hand-writing, Where after Aslam said such final draft would be prepared and signed at Karachi. I had made said additions at Pindi at 06.30 PM. The remaining part of Ex:P/2 is in computer print, including sale consideration and advance payment. Ex:P/2 shows my NIC and CNIC Nos: in my hand writing. The receipt Ex:P/3 bears my signature and thumb impression. The sale-consideration and advance payment is in computer print on Ex:P/3. Mark-X and X-1 were given to me before completion of Ex:P/2 and 3 i.e. the signature of vendee and witnesses. Mark X-1 bears my thumb impression and signature. I had myself gone to PW Aslam and asked

him to get the suit property sold. The negotiation for sale of suit property took place between August 2002 to May 2003. My uncle died on 11.5.003 and his burial took place on 12.5.003 at 11.00 AM. I had gone to PW Aslam on 12.5.003 at 12.30 PM, on my return from graveyard. I had received advance payment of rupees five lacs from PW Aslam in National Bank of Pak: of Cantt: branch Rawalpindi, which I deposited in the same branch. The said advance amount is still with me. By the phrase, “blank stamp paper” used in para-4 of my affidavit, I mean that it did not bear signatures of the vendee and the witnesses and the endorsement of stamp-vendor on its back. I protested about it but PW Aslam told me that it was just a formality to show to the purchaser that I was ready to sell, and that the final agreement would be signed at Karachi. I had not protested about it in writing. I have not filed suit for cancellation of said agreement till today. I had come to Karachi on 12.6.2003 for implementation of Mark-X. I had not seen pltf: on 12.6.003 and he had also not given me Demand Draft for remaining amount.”

[Emphasis supplied]

The above cross-examination, besides admission of execution of documents Exh.P/2 and P/3, manifestly appears inconsistent with the stance taken by defendant in paras 4 and 5 of his affidavit-in-evidence, which for the sake of ready reference are reproduced as under:

4. That on 11 May 2003, my uncle died in Central Hospital of Rawalpindi at night and was buried at 1100 hours on 12 May 2003. After his burial, I went to Mr. Aslam and told him that I want to dispose of the suit property. My aim was same that is to purchase two plots in phase II Morgah DHA Islamabad. The price of Morgah plots at that time was increased and varying from Rs.30,00,000/- to Rs.35,00,000/-. He told me that a party from Karachi wants to purchase my plot and draft Agreement is ready and sent to man to nearby Bank who hurriedly drew/encashed Rs.5,00,000/- which were deposited in my account of NBP Rawalpindi Cantt Branch. I was made to sign the Bank Stamp papers and receipt in his office at Rawalpindi. I was tired because of being awoken whole night due to death of my uncle. Thereafter I went straight back home.
5. That in the afternoon (after Asr Prayer), at about 1830 hours I went to Mr. Aslam office and asked him to give me the photocopy of the stamp papers and receipt signed by me. At that time, there was no name or signatures of purchaser or witnesses. There were no stamp Vendors' stamp or signatures either. I handed over photocopy of my computerized I.D. Card No. 73405-7884132-7, as demanded by him. I also told Mr. Aslam that I believe that perhaps the price of the plot is Rs.55,00,000/- to Rs.60,00,000/- or more. He told me that Agreement will be finalized/signed at Karachi at Market rate. If he had told me that only Rs.40,00,000/- will be paid and not prevailing price, then I would have revoked the Blank Agreement then and there.”

Record also transpires that the stance taken by defendant No.1 in his pleadings, affidavit-in-evidence and the cross examination are not

only inconsistent but it also contradicts the stance taken by him in his reply of legal notice 25.06.2003 [Exh.D/3] which for the sake of ready reference is reproduced as under:

“Subject: REPLY TO LEGAL NOTICE DATED 14.06.2003

Under the instructions from my client, Col (R) Ghulam Farid son of Raja Mansab Dad Khan, resident of House No. 207, Street No. 10 Valley Road Westridge Rawalpindi Cantt: I hereby reply your legal notice dated 14.6.2003, as under:-

1). That the legal notice dated 14.6.2003 is misconceived, based on malafide intention and ulterior motives. Your client has not only concealed the relevant facts but is guilty of misrepresentation. The fact of the matter is that your client persuaded my above said client to sign the draft of so called agreement on the assurance that as soon as a reasonable purchaser desires to purchase the plot, my client will be properly informed to settle the price. My client trusted your client being ex-member of the Armed Forces and signed the incomplete draft of agreement. Copy of so-called agreement is annexed with the written reply.

2). That my client has never executed a concluded agreement with Muhammad Ishaq Subhani s/o Abdul Rehman Subhani. My above said client had never met till today with Muhammad Ishaq Subhani. No terms were ever settled between my client and your client. The draft agreement which was handed over to my client was neither signed by Muhammad Ishaq Subhani nor by the witnesses. The so-called agreement to sell is a forged and fabricated document, result of fraud, concealment of relevant facts and misrepresentation, hence no agreement exists between the parties.

3). That the prevailing rate of plot is Rs.70,00,000/- (Seventy lacs) but your client is pressurizing my client to sell out the plot only for Rs. 40,00,000/- (forty lacs) and thus wants to misappropriate Rs. 30,00,000/- (Thirty lacs). So, it is requested to kindly ask your client to withdraw the legal notice dated 14.6.2003, otherwise my client reserves his right to initiate civil as well as criminal proceedings against your client at his risk and cost.”

[Emphasis supplied]

Conversely, the stance of the plaintiff appears to have been consistent with his affidavit in evidence [Exh.P/1], legal notice dated 14.06.2003 [Mark as X-4] and his testimony during cross-examination has remained unshaken. For the sake of ready reference relevant portion of the legal notice dated 14.06.2003 and cross-examination of the plaintiff are reproduced as under:

Legal Notice date 14.06.2003

“Under the instructions of my client, Cdr. (R) Muhammad Sharif s/o Jalal Din R/O 58/3, lane No. 14, Ph 7 DHA, Karachi I have to address you as under:-

1. That at Karachi on 12-05-2003 you agreed to sell and transfer your plot bearing No. 338-A, 48 street, Phase 8, measuring 1000 Sq. Yds. DHA Karachi, to my client or his nominee at the agreed price of Rs. 40,00,000/= (forty lac), free from all dues, claims, liens, charges, burdens, disputes, suites, liabilities and encumbrance of whatsoever nature. You received a sum of Rs.5,00,000 (five lac) by way of advance payment towards sale consideration of the aforesaid plot for which you signed on an agreement to sell dated 12-05-2003 and also issued payment receipt to my client separately.

2. That the transaction was to be completed at Karachi on or before 13 June 2003. Accordingly a set of documents for transfer of above said plot was submitted in DHA in favour of my client's nominee, Mr. Muhammad Ishaq Subhani S/o Abdul Rehman Subhani, which was given Sr. No. 52 for signing before the DHA Designated Officer on 12-06-2003, because it was agreed that you would reach Karachi before the due date to complete all the formalities for the transfer of the said plot in DHA office.

3. That you reached Karachi on 11-06-2003 at night and came in DHA office on 12-06-2003. You were presented balance sale consideration in shape of demand drafts No 'DD0001505' dated 07-06-2003, No 'DD0006775' dated 07-06-2003 drawn on MCB Karachi Saira Centre Branch and MCB Karachi Defence Housing Society Branches respectively and demand draft No 'DD158748' dated 7-June drawn on ABN AMRO Bank main branch, Karachi, by my client but you refused to accept the balance sale consideration and also refused to sign on transfer papers before DHA designated officer.

4. That you have committed breach of the contract. But inspite of that my client is willing to perform his part of the contract and is willing to pay the balance amount of the sale consideration to you."

Relevant portion of cross-examination of plaintiff

"...I am the purchaser of suit plot. I had dealt with def. No.1 for purchase of suit plot through P.W. Mohd. Aslam. The price of suit plot was negotiated and agreed with def. No.1 by P.W. Mohd. Aslam, who had informed me that the suit plot was available for sale. The agreement of sale of suit plot was got prepared by P.W Mohd. Aslam at Rawalpindi, but I was not present there at that time. I had received the agreement of sale at Karachi, sent from Rawalpindi by P.W. Mohd. Aslam through TCS, perhaps on 13 or 14 May 2003. The agreement of sale also bears my signature, put by me at Karachi on the day of its receipt through TCS. I had not seen def. No.1 till signing of the said agreement by me. The agreement of sale received by me at Karachi, was not in the shape of Ex.P/9. I see Ex.P/2, and say that the blanks in it are filled in hand-writing which are not in my hand-writing, and those were also not written in my presence. It is incorrect to say that Ex.P/2 was got signed from def. No. 1 when its blanks were not filled in. I have not agreed to sell suit plot to Mohd. Ishaq Subhani. Voluntrarilly states that "Suit plot was purchased for Mohd. Ishq Subhani, by me for that reason the transfer documents were filed in his name." It is not mentioned in Ex.P/2, that the suit plot was purchased for Mohd. Ishaq Subhani. Voluntarily states that "In Ex.P/2, it is written that I can get the suit plot transferred in my name or in name of my nominee."

"... It is incorrect to say that Ex.P/2 was got executed from Def. No.1 by P.Ws Kh. Maqsood Aslam, Mohd. Aslam and myself in collusion

with each other by giving him false promise. The payment mentioned above of Rs. Five Lacs, were sent from Karachi from my account, as advance to P.W. Mohd. Aslam as per instructions for onward payment to the owner of suit plot.”

From the reply of legal notice [Exh.D/3], it transpires that defendant No.1 was not only acquainted with the plaintiff but had discussion with him in respect of the suit property prior to entering into the contract. Furthermore, a perusal of agreement [Exh.P/2], in view of defendant No.1's admission with regard to his signature, thumb impressions on both the pages and his written note added in para No.2 on the agreement and acceptance of advance part payment, clearly reflects that defendant No.1, at the time of execution of agreement [Exh.P/2], was very much aware of fact that the agreement of sale [Exh.P/2] was being executed between him and the plaintiff. Not only this, defendant No.1's putting note in his own hand-writing on the agreement, clearly reflects that before putting his signature and thumb impression on pages of the agreement [Exh.P/2], he had gone through the contents of the agreement [Exh.P/2] and while agreeing with the total sale consideration fixed for the suit property, accepted the advance part-payment of sale consideration. The advance sale consideration was not only admitted by defendant No.1 in the agreement but he also issued a separate receipt [Exh.P/3] in respect thereof. Besides, the presence of defendant No.1 at Karachi on 12.06.2003 before the cut-off date, i.e. 13.06.2003 for completion of agreement [Exh.P/2], clearly indicates that agreement was final in every respect. Moreover, there is nothing available on the record, which could show that defendant No.1, from the episode at DHA, Karachi on 12.06.2003, after coming to know the fact that the plaintiff is seeking transfer of the suit property under the agreement [Exh.P/2], at no point in time either had sent any notice or letter for cancellation of agreement [Exh.P/2] either to the plaintiff or to his estate agent Muhammad Aslam and or rescinded the agreement [Exh.P/2] by claiming it as draft agreement or otherwise, besides to return the advance part-payment, which he had taken at the time of execution of agreement [Exh.P/2]. Such facts clearly demonstrates that the agreement [Exh.P/2] is a concluded agreement and cannot be termed as draft agreement and its terms are binding upon the parties. The claim of defendant No.1 in respect of market value of the property at the relevant time was of Rs.60 to Rs.70 lacs, and further

his estate agent namely Muhammad Aslam told him that the agreement [Exh.P/2] is a draft agreement whereas actual agreement will be finalized at the market value are all verbal assertions of defendant No.1 for which no evidence has been produced by the defendant No.1. Conversely, said Muhammad Aslam in his cross-examination has categorically denied the said fact. It is settled position of law that oral statement/evidence cannot exclude the documentary evidence. Reliance in this regard can be placed on the case of *Elahi Bakhsh through Legal Heirs and others v. Muhammad Iqbal and another* [2014 SCMR 1217].

The learned Divisional Bench of this court in the case of *Reza Iqbal v. Royal Group through Attorney* [PLD 2011 Karachi 524], while dealing with somewhat of similar issue as that of present case, inter alia, has held as under:

“Once sale consideration was fixed between parties by way of offer and acceptance and defendant received biyana, then he was duty bound to perform his part of promise. Had there been no intention of defendant to sell property, he would have neither accepted cheque nor encashed same.”

Although defendant No.1 has also attempted to show by examining the stamp vendor namely Hafiz Azmat Hussain [Exh.D/5] that the stamp papers on which agreement Exh.P/2 was typed was not issued by him as he had left the business of stamp vending in the year 2000 much prior to the dates of issuance of stamp papers allegedly issued by him, however, in view of defendant No.1's admission with regard to his signatures and thumb impressions on both the pages of the stamp paper on which agreement [Exh.P/2] was typed, the evidence of the stamp vendor that he has not issued the said stamp papers is of no consequence and help to the defendant.

According to Section 10 of the Contract Act, 1872, "All agreements are contracts, if they are made by free consent of the parties, competent to contract, for a lawful consideration with a lawful object, and not hereby expressly to be void." The essential elements of a valid and binding Contract are (i) Proper offer and proper acceptance, (ii) Lawful consideration and (iii) Competent to contract or capacity.

The agreement of sale [Exh.P/2] when seen on the 'touchstone' of the definition of an agreement/contract, it provides that all material

terms, which are prerequisite or essential in formulating a valid contract are available.

I have evaluated the evidence and scrutinized each and every aspect of the documents produced by the parties. The preponderance of evidence leads me to reach a conclusion that the subject contract is a valid, conclusive and binding contract in terms of Section 10 of the Contract Act, 1872, and had been executed between the plaintiff and defendant No.1. Accordingly, this issue is answered in affirmative.

9. ISSUE NO. 2: From the perusal of the terms and conditions of agreement of sale [Exh.P/2], it appears that the total sale consideration for suit property was fixed at Rs.40,00,000/- out of which vendor (defendant No.1) received 5,00,000/- as advance part payment from the vendee (Plaintiff) on 12.05.2003. The said advance part-payment was not only admitted in the agreement [Exh.P/2] but a separate payment receipt in respect thereof was also executed by defendant No.1 as Exh.P/3. Whereas balance sale consideration of Rs.35,00,000/- was to be paid by the vendee to the vendor at the time of execution of transfer documents before the concerned officer of Pakistan Defence Officers Housing Authority, Karachi, on or before 13.06.2003. Record also reflects that the plaintiff in his evidence has produced photocopy of the demand drafts of balance sale consideration as [Mark-X/1, X/2 and X/3], which were prepared in the name of defendant No.1 on 07.06.2003 before the cutoff date. However, when defendant No.1 despite being at Karachi on a date fixed and taken by the plaintiff from the DHA for execution of transfer, did not execute the transfer documents in the name of his nominee, the plaintiff sent a legal notice date 14.06.2003 [Mark-X/4] wherein while asking defendant No.1 to execute requisite transfer documents in favour of his nominee as per the terms of agreement he had shown his willingness and readiness to perform his part of obligation under the agreement [Exh.P/2]. Thereafter, the plaintiff filed the present suit and sought specific performance of the contract. In absence of any documentary proof that agreement [Exh.P/2] was cancelled and or withdrawn for any reason by defendant No.1 prior to filing of this case, it clearly establishes that agreement Exh.P/2 is in existence. Although defendant

No.1 has attempted to show that since the agreement was not final and concluded one being a draft agreement, therefore, he was not obliged to fulfill his part of obligation under the agreement, however, in view of the findings of issue No.1, it has been held that the agreement of sale [Exh.P/2] is final and concluded agreement and as such the parties are bound to fulfill their respective part of obligation under the agreement.

It is now well settled that a party seeking specific performance of an agreement to sell is essentially required to deposit the balance sale consideration amount in Court. In fact, by making such deposit the plaintiff demonstrates its capability, readiness and willingness to perform its part of the contract, which is an essential pre-requisite to seek specific performance of a contract. Failure of a party to meet the said essential requirement disentitles him to the relief of specific performance, which undoubtedly is a discretionary relief. Reliance in this regard can be placed in the case of Messrs Kuwait National Real Estate Company (Pvt.) Ltd. and others v. Messrs Educational Excellence Ltd. and another [2020 SCMR 171].

In the present case, the plaintiff has already paid the advance part-payment of sale consideration to the defendant and for the balance sale consideration in order to demonstrate his readiness and willingness to perform his part of the contract, which is an essential pre-requisite to seek specific performance of a contract, he had deposited the entire balance sale consideration with the Nazir of this Court. Whereas from the evidence, it has been established that the defendant despite having received the advance part sale consideration has failed to fulfill his part of obligation under the agreement [Exh.P/2], that is, to execute transfer documents of the suit property in favour of the plaintiff and or his nominee and as such breach on the part of defendant No.1 is apparent in the matter. Accordingly, this issue is answered in affirmative.

10. ISSUE NO.3 In view of the findings on issue No.1, this issue has become redundant and as such no finding is required to be made on the same.

11. ISSUES 4 & 5: In view of the foregoing discussion and in terms of the findings on Issues No. 1 and 2, I have come to the

conclusion that the plaintiff has established his claim through evidence and as such he is entitled for discretionary relief for enforcement of the agreement of sale [Exh.P-2]. Accordingly, the suit of the plaintiff is decreed in the following terms:

- a. The defendant is directed to perform his part of obligation in terms of the agreement of sale dated 12.05.2003 and execute requisite transfer documents in favour of the plaintiff and or his nominee and also handover the suit property (plot of land bearing No.338-A, 38 Street, Phase-8, measuring 1000 Sq. Yds., DHA, Karachi,) along with all its original title and relevant documents to the plaintiff under the supervision of the Nazir of this Court within a period of thirty (30) days.
- b. However, in the event the defendant fails to comply with the above order, then the Nazir of this Court, on behalf of the defendant, shall execute requisite documents in favour of the plaintiff or his nominee within the next 30 days.
- c. In compliance of either of the above terms, the expenses for execution of transfer documents at DHA i.e. Nazir's fee and other charges etc. shall be borne by the plaintiff. And after completion of subject sale transaction the amount of balance sale consideration, lying with the Nazir of this Court, along with profits accrued thereon shall be given to defendant No.1 upon proper verification and identification.

JUDGE

Karachi;

Dated: **29.05.2020.**

*Jamil****