

IN THE HIGH COURT OF SINDH AT KARACHI

Civil Suit No.1689 of 2008

[Mst. Saira Khatoon Vs. Syed Muhammad Ashraf and another]

Date of hearing : 27.02.2018

Date of Decision : 27.02.2018

Plaintiff : Mst. Saira Khatoon, through Mr. Adnan Ahmed, Advocate.

Defendants : Syed Muhammad Ashraf and Syed Asif Ali.
(*Nemo for both the Defendants*).

JUDGMENT

Muhammad Faisal Kamal Alam, J: The present case has been filed by Plaintiff for Recovery of Earnest Money and Damages, with the following prayer clause_

“It is prayed that this Hon’ble Court may be pleased to pass Judgment and Decree in favour of the Plaintiff and against the Defendants as under: -

- a. Awarding sum of Rs.1 Crore to Plaintiff payable by the Defendants as compensation/damages.*
- b. Allowing markup of the aforesaid amount @ 14% per annum from the date of institution of suit till realization.*
- c. To direct the Defendant No.1 to pay Rs.50,000/- which was received by him from the Plaintiff in lieu of sale transaction of property Flat No.509, Block-2, 5th Floor situated at in the project known as Bait-ul-Hina Apartment, Block-18, Gulistan-e-Johar, Karachi with markup of Rs.14%.*

d. Granting any better relief(s) which is deemed fit and proper in the circumstances of the case.”

e. Awarding cost of the suit.”

2. On issuance of summons, the Defendants did not contest the claim of Plaintiff and eventually on 18.08.2009, the learned Assistant Registrar after examining the record in which service was held good on the Defendants, debarred the Defendant No.1 from filing his Written Statement. The present Plaintiff did not press her claim against the Defendant No.2 and vide order dated 27.11.2012, the present Suit against the Defendant No.2 was dismissed as withdrawn with further directions that his name be struck off through red Ink, which was done accordingly.

3. It is necessary to give a brief background controversy involved in the present matter that earlier Suit No.1066 of 2008 was filed by the present Plaintiff against Mst. Tanveer Jehan and Syed Asif Ali (*the present Defendant No.2, who now stands deleted*) for, *inter alia*, Specific Performance of the Contract in respect of an Apartment bearing No.509, Type-A-1, Block-2, 5th Floor in the multi-storey project known as “*Bait-ul-Hina*”. It is a consistent claim of present Plaintiff that she through her husband-Aftab Alam, paid Rs.50,000/- (*Rupees Fifty Thousand Only*) to the attorney of said Syed Muhammad Ashraf, the present Defendant No.1, who was admittedly brother-in-law of the above named Mst. Tanveer Jehan. However, the above earlier suit (*Suit No.1066 of 2008*) was contested by Mst. Tanveer Jehan and besides filing her Counter-Affidavit to the injunction application of present Plaintiff, she also moved an application for rejection of plaint under Order VII, Rule 11 of CPC. After hearing the parties, the learned Judge on 15.10.2008 rejected the plaint of the above Suit No.1066 of 2008 by holding that no claim against Mst. Tanveer Jehan was made out, but further observed that the claim of present Plaintiff will

continue against the present Defendant No.2. In this order, there was also an observation that payment was received (*purportedly*) by Syed Muhammad Ashraf, who is claiming to be the attorney of Mst. Tanveer Jehan. The above order about rejection of plaint attained finality; subsequently, present Plaintiff, inter alia, invoking Order VII Rule 13 of CPC, filed the present *lis*.

4. Mr. Adnan Ahmed, the learned counsel representing the Plaintiff on a query has referred to the order dated 27.11.2012 passed in the present *lis* to show that since Plaintiff against the present Defendant No.2 has withdrawn its claim, therefore, for all practical purposes, the earlier Suit No.1066 of 2008 become infructuous. He further submits that the present *lis* is on a distinct cause of action. Learned counsel for Plaintiff has further referred to the order dated 09.11.2017, on which date, the husband of Plaintiff-Aftab Alam, who is also attorney of Plaintiff and one other witness, namely, Syed Mukhtar Saidain were examined. Since the Defendant No.1 is not contesting the matter, therefore, the said witnesses were not cross-examined and side of Plaintiff stood closed and it was ordered that this matter should be listed for final arguments.

5. The Plaintiff's main witness, namely, Aftab Alam has produced his General Power of Attorney as Exhibit-P/1. He has also produced in his evidence, the Receipt dated 28.06.2008 as Exhibit-P/2, which forms the basis of present proceeding / claim of Plaintiff. It is mentioned in this receipt that Defendant No.1 has received a sum of Rs.50,000/- (*Rupees Fifty Thousand Only*) as part payment towards the aforesaid Apartment. The other document bears a heading of 'Confirm Receipt'-exhibit P/3, reiterating the fact of receiving above amount by Defendant No.1 from the said attorney of Plaintiff. It has been clarified by the learned counsel that the first receipt also contains a guarantee on behalf of Syed Asif Ali against

whom, the present suit was not pressed and bears the signature of Syed Mukhtar Saidain as one of the witnesses, who has been examined in the present proceeding. A Photocopy of the Sub-Lease in respect of the aforesaid Apartment is also produced by learned counsel for Plaintiff in the evidence, but since it is not relevant to the dispute in question, therefore, it was marked as Annexure "A". Per learned counsel, this document was handed over by Defendant No.1 to Plaintiff's attorney, when the latter paid the above earnest money, merely to demonstrate that Defendant No.1 is in fact authorized to sell out the aforesaid Apartment to Plaintiff.

6. Besides the above, the Plaintiff is also claiming damages of *rupees ten million* towards mental agony, defamation and financial losses caused to the Plaintiff on account of the wrongful acts of Defendant No.1.

7. Even though, the proceeding has remained ex-parte and the evidence of Plaintiff has gone unchallenged / unrebutted, but still the settled judicial principle requires that the Court should apply its mind while granting such type of relief, particularly that of damages.

8. The Points for consideration in this matter are as under:

- (i) Is Receipt of Rs.50,000/- (*Rupees Fifty Thousand Only*) was paid as an earnest money to Defendant No.1, which he is liable to return?;
- (ii) Has the Plaintiff suffered any damages on account of the entire transaction, acts and deeds of Defendant No.1?

POINT NO.1.

9. The record of the two cases is examined; present one and the earlier Suit No. 1066 of 2008. The argument of Plaintiff's counsel has substance that cause of action as well as the prayer clauses (relief claimed) in both

suits are different and distinct from each other. Thus, the present proceeding is not barred. With regard to the First Point, that is, receipt of the earnest money of Rs.50,000/-, in view of the above discussion, unrebutted evidence and material that has come on record, it is not difficult to hold that Defendant No.1 in fact had received a sum of Rs.50,000/- (*Rupees Fifty Thousand Only*) from the Plaintiff for the sale of the afore referred Apartment. Since, it is now a proven fact that the said Defendant No.1 did not have any valid authority from the above named owner of the Apartment for its sale, hence, the Defendant No.1 through mis-representation and fraud, induced the Plaintiff in paying the above amount of rupees fifty thousand towards part payment/earnest money for sale of the afore mentioned Apartment, which he (the said Defendant No.1) is liable to return/pay back the same to Plaintiff.

POINT NO.2.

10. Adverting to the Point No.2; in my considered view, the Plaintiff's side has not led convincing and specific evidence about the claim of Rupees Ten Million towards damages, particularly relating to defamation and loss of reputation. It is a settled rule that for awarding such type of damages, the evidence led by a Plaintiff is to be minutely examined that whether he has discharged his onus to proof about the claim of special damages. In this proceeding this important factor is absent in the case of present Plaintiff. But, at the same time, general damages can be granted by invoking the well-established rule of thumb. Undisputedly, Plaintiff in the present case has suffered because of the wrongful acts and conduct of adversary / Defendant No.1. For the past almost 10 years, the earnest money of Rs.50,000/- (*Rupees Fifty Thousand Only*) is lying with the Defendant No.1, who is enjoying the same with impunity. The said Defendant No.1 never bothered to contest any claim, on the one hand and on the other hand

the Plaintiff throughout these years is pursuing her claim and remedy diligently. This period of almost a decade has caused the Plaintiff mental agony and obviously financial losses, because litigation comes with a cost.

11. In these circumstances, an amount of Rs.5,00,000/- (*rupees five hundred thousand*), in my considered view, would be adequate damages for the Plaintiff, which the Defendant No.1 is liable to pay. For reaching this conclusion I am guided by a reported decision of Hon'ble Apex Court reported in **2012 CLD page-6** (*Abdul Majeed Khan Vs. Touseen Abdul Haleem*).

12. The upshot of the above is that the present suit is decreed to the extent that the Defendant No.1 is liable to pay an amount of Rs.50,000/- (*Rupees Fifty Thousand Only*) to Plaintiff with 10% markup from the date of the institution of present suit till realization of the amount. In addition to the above, the Defendant No.1 is also liable to pay Rs.5,00,000/- (*Rupees Five Hundred Thousand Only*) to the Plaintiff towards damages. Plaintiff, in these circumstances, is also entitled for the costs of the proceeding.

13. The suit is decreed in the above terms.

Dated: 27.02.2018

JUDGE

M.Javid.P.A.