

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Suit No. 1417 of 2012

DATE: **ORDER WITH SIGNATURE(S) OF JUDGE(S).**

1. For orders as to maintainability of Suit
(vide order dated 08.04.2014)
2. For hearing of CMA No.2422/14
3. For examination of parties / settlement of Issues.

02.04.2019.

Mr. Muhammad Ali Lakhani, Advocate for the Plaintiff.

Mr. Muhammad Vawda, Advocate for the Defendant.

1&2. There is an office note that vide order dated 08.04.2014, maintainability issue of the suit is to be decided. In this regard, the Defendant has also filed a separate application [C.M.A.No.2422 of 2014], which is also listed for hearing today.

In brief, the controversy revolves around recovery of sale price and damages in respect of a plot bearing No.805, measuring 2 Kanals and 10 Marlas, Muaza Sambli, Behra Mall, Daak Khana Angoori, Tehsil Muree, Zila Rawalpindi (the “**Subject Property**”). It appears that parties are entangled in litigation for quite some time and a criminal proceeding was also filed by the present Plaintiff against the Defendant, which was later quashed in C. P. No. D – 4458 of 2012 and maintained up to the Honourable Supreme Court of Pakistan.

Mr. Muhammad Ali Lakhani, Advocate, while representing the Plaintiff has argued that even though, admittedly, a Sale Agreement in respect of the Subject Property was executed in Karachi, but same could not be materialized because Subject Property does not exist and since there

is a confusion about its physical location, therefore, Plaintiff was not interested to complete transaction and demanded the entire payment of Rs.3.8 Million (approx.) back from the Defendant and has filed the present proceeding for damages; therefore, in terms of Section 19 of the C.P.C. suit can be filed on the Original Side in this Court as admittedly the Defendant is resident of Karachi, *secondly*, the Agreement in question dated 03.06.2008 in respect of the Subject Property was executed in Karachi which is Annexure-‘A’ to the plaint. Earlier, the litigation was also filed against the Defendant in Karachi and on the instructions of the Honourable Supreme Court when a joint survey was conducted by the concerned Revenue Authorities at Muree, a confusion arose about physical location of the Subject Property. Learned counsel for the Plaintiff has referred to the order dated 02.05.2014, available at page-7 (of second part of Court file) passed by the Honourable Supreme Court in which specific directions were given to the officials for handing over the possession of Subject Property to the Plaintiff. He then referred and read relevant portion of the Report dated 03.06.2014 of Tehsildar, Muree, which contains following observations_

“Subsequently, in reference to his transfer 912, another transfer No.913 on oral declaration of Khawait No.129, Qitaat # 229, total measuring 60/135386 of 6769-6, area measuring 2 Kanal-10 Marlas was transferred against 10,000/- by Tariq Nazeer Bukhari S/o Syed Nazeer Ahmed Bukhari, house No.42/F-1, Block-6, PECHS. The. & District Karachi (Seller) to Zaiba Kably Wife of Merat Viscardh resident of 45/2, Mohallah Commercial Street Phase-4, D.H.A. Karachi and The and Distt. Karachi, (Purchaser) on 30.08.2008. Photo copy of transfer attached. From perusal of record it is clear that the land in Shamalat Deh Hisis Jadi and the transfer rights therein have been transferred. Thereafter, I asked both the parties about locatioin of land whereupon Tariq Nazeer Bukhari S/o Syed Nazeer Bukhari [Second party] said that for the purposes of possession, I had shown the land to Zaiba Kably from Khasra No.289/1063-3 and this is the same land which was shown to me by Rana Ajmal, the representative of Rana Naeem, at the time when I purchased the

land, I am showing you the same spot. At the spot, there was a wall build with stones. However, the first party [Zaiba Kably] refused to take possession of the said land on the ground that previously, I was shown some other land which is not this land. Copies of transfer and Fard of parties are attached.

At the spot, a sale agreement was shown to me in which the plot was referred to as Plot No.805, however, reference quoted as 805 is transfer number and not plot number which was transferred from Muhammad Zubair S/o Karamdad to Mastajir Khan S/o Sher Dad Khan. 805 is not the plot number. Copy of transfer is attached.

Therefore report is submitted on 3/6/2014 for necessary instruction/order.”

Learned counsel for the Plaintiff has cited the case law reported in P L D 2003 Karachi page-45 [*Haji Riaz Ahmed Mir v. Brig. (Retd.) Ch. Muhammad Sharif*] to supplement his arguments. He concluded his arguments by requesting that the listed application of Defendant be dismissed.

Arguments are obviously controverted by Mr. Muhammad Vawda, Advocate, appearing for the Defendant. He has argued that there was no confusion about the physical location of the Subject Property and the Defendant was ever ready and willing to hand over the possession of the same but Plaintiff was reluctant to complete the transaction. Learned counsel further submitted by referring paragraph-8 of the plaint as well as the cause of action, that the entire exercise with regard to the Subject Property was taken at Islamabad and Rawalpindi and since the Subject Property, admittedly, situated in Tehsil Muree, therefore, this Court lacks jurisdiction. He has referred to the portion of the order passed in above constitutional petition by the learned Division Bench of this Court, in which the proceedings were quashed against the Defendant and it was held that the case of cheating and dishonest intention is not made out, which order

was maintained up to the Honourable Supreme Court as mentioned in the preceding paragraphs. Learned counsel has further relied upon Section 16 of the C.P.C. to emphasize that the proceeding of the nature should have been filed before the competent Court and not this Court. He placed his reliance on the following case law_

- i. P L D 2008 Karachi page-536,
[*Ghulam Fareed v. Shahid-ud-Din Tughalaq*]
- ii. 2011 C L C page-1176
[*Muhammad Naved Islam and 3 others v. Mst. Aisha Siddiqui and 14 others*]
- iii. 2011 C L C page-1450
[*Muhammad Bachal v. Province of Sindh through Home Secretary and 12 others*]

Arguments heard, record perused.

The crux of the case law cited by the Defendant's learned counsel is that even if the damages are sought for the wrong done to a party in respect of the transaction of immovable property then the proper forum to decide the dispute is where the property in dispute situate. *Secondly*, Section 120 of C.P.C. excluding the applicability of Sections 16, 17 and 20 of C.P.C. *vis-à-vis* Original Jurisdiction of this Court, shall not apply where the property in dispute is situated outside Karachi. *Thirdly*, provisions of Order VII, Rule 10 of C.P.C. are mandatory in nature and the Court should decide firstly about its jurisdiction. The exhaustive decision of learned Division Bench, handed down in the case of *Naved Aslam (Supra)*, in which, the order of learned Single Bench to return the plaint, was maintained, is based on the facts, that the appellant (of the reported case) filed a suit seeking declaration in respect of an immovable property situated at Jamshoro, together with a relief of mandatory injunction, cancellation and damages; hence, the claim of damages was directly linked and forms an integral part of other reliefs pertaining to an immovable property; *whereas*, in the reported decision relied upon by the Plaintiff's side, it is held, that this

Court has jurisdiction when party is claiming merely recovery of his amount paid towards a sale transaction of immovable property, which does not materialized and consequently, the objection to the jurisdiction was repelled, although the property (of the reported case) was situated in Gujranwala.

Ex facie, undisputed factual aspect at present is that the Assistant Commissioner, Muree, has submitted a Report dated **30.06.2014** before the Honourable Supreme Court, in which it is mentioned that the Plaintiff does not have any possession at site; *secondly*, conclusion of the Report is, that at site dispute arose between present Plaintiff and Defendant with regard to the physical location of the Subject Property.

Through the present *lis* the Plaintiff is seeking return / recovery of entire sale price which admittedly was paid to the Defendant as is also observed in the decision of learned Division Bench of this Court in the above constitutional petition and *additionally* the amount towards damages. Prayer clause of the plaint makes things clear that the present suit is not in respect of the subject property, but only for return of the amount of sale price and damages; which means that the sale transaction between the parties had ended long time back. The decisions cited by the learned counsel for the Defendant are thus distinguishable on the ground, *inter alia*, that in all those cases the damages and compensation for wrong done to the property has / had a direct nexus, rather integrated with the entitlement sought about the property(ies) (involved in those cases); in other words, the parties claiming such relief were also claiming their rights and interest in the property, but in the present case, the wrongful acts allegedly committed by the Defendant are separable from the immovable property itself. Hence, the claim of Plaintiff in the present *lis* is severable from the subject property and *admittedly* the present Plaintiff is not

claiming any right or interest in the subject property, rather demanding her money / sale price back together with damages, if at all she is able to prove the same. In fact the Defendant admittedly is a resident of Karachi, Sale Agreement, which though no longer enforceable, was also executed at Karachi and the payments were also made at Karachi, thus, the jurisdiction of this Court is not ousted, in these circumstances. Hence, this Court has jurisdiction to entertain the present suit and accordingly application [C.M.A. No.2422 of 2014] is dismissed.

It is clarified that observation made hereinabove are only tentative in nature and will not influence the final outcome of this case.

3. Deferred.

Adjourned to a date in office.

Riaz/P.S.

Judge