

**ORDER SHEET**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
**JUDICIAL DEPARTMENT.**

**R.F.A No. 83/2018**

Sardar Nisar Ahmed

***Versus***

Muhammad Rafique and others.

<b>S. No. of order/ proceedings</b>	<b>Date of order/ Proceedings</b>	<b>Order with signature of Judge and that of parties or counsel where necessary.</b>
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24.08.2020 Sardar Nisar Ahmed, Advocate appellant in person.

**MOHSIN AKHTAR KAYANI J.** Through the instant appeal, the appellant has assailed the judgment and decree dated 04.04.2018, passed by learned Civil Judge, 1<sup>st</sup> Class (East), Islamabad, whereby suit has been partially decreed to the extent of Rs. 29,00,000/- and rest of the claim to the extent of respondents No. 2 & 3 has been dismissed.

2. The laconic facts referred in the instant appeal are that the appellant Sardar Nisar Ahmed has filed a civil suit for recovery of Rs. 29,00,000/- and permanent injunction on the ground that Muhammad Rafique/respondent No.1 defrauded him while receiving Rs. 43,00,000/- and has issued post dated cheques, which upon presentation before the concerned Bank, were dishonoured, resultantly F.I.R No.660/2013, registered under Section 489-F PPC, P.S Industrial Area, Islamabad was registered and Muhammad Rafique/respondent No.1 was taken into custody in the said criminal case, he in connivance

with Mst. Balqees/respondent No.3 approached the appellant for a compromise through his cousin Rashid Mehmood/respondent No.2 and resultantly, compromise deed was executed, whereby the respondent No.2 has admitted the liability and became surety/guarantor on behalf of Muhammad Rafique/respondent No.1. The respondent No.2/Rashid Mehmood paid Rs. 200,000/- out of the total due amount of Rs. 43,00,000/- at the time of compromise and promised to pay the remaining amount of Rs. 41,00,000/-.

3. While entering into compromise, the original sale deed of House 04 Marla, Khewat No. 430, Khatooni No. 629, Khasra No. 319, Mouza Khot Hathial, Tehsil and District, Islamabad was handed over to appellant worth of Rs. 15,00,000/- as a surety till full and final payment. The respondents agreed not to sell the house, unless the payment of the appellant has been cleared. Muhammad Rafique/respondent No.1 after his release on bail from judicial custody, executed another agreement with appellant and also handed over the post dated cheque of Rs. 41,00,000/-, whereby it was settled that an amount of Rs. 18,00,000/- will be paid within 45 days and remaining amount of Rs.23,00,000/- will be paid within three (03) months, in case of failure to pay the same, the respondent No.1/Muhammad Rafique will be bound to pay full

amount i.e. Rs. 41,00,000/- to the appellant. The agreement was placed before the Court of Mr. Muhammad Adnan Jamali, Civil Judge and same was recorded in the order sheet. The respondents have not fulfilled the compromise and the post dated cheque, issued by Muhammad Rafique/respondent No.1 was dishonoured, whereby the appellant filed a suit under Order XXXVII CPC for recovery of Rs. 12,00,000/- against respondent No.1 and during the pendency of the said suit, the appellant has also filed the instant suit. The respondent No.1 has transferred the property, which was given in guarantee/surety, to his wife Mst. Balqees/respondent No.3 through Gift Mutation No. 43421 on 16.01.2018, hence civil suit was filed.

4. The suit has initially been contested by respondent No.1, who has filed his written statement and contends that the agreements dated 09.07.2013, 17.06.2013, 27.06.2013 are void agreements, which are not enforceable by law. Similarly, he denied the receiving of any amount from the appellant, rest of the facts in the plaint were admitted including the issuance of cheques, which were claimed to be of guarantee cheques.

5. The issues were framed on 07.02.2017, which were subsequently amended vide order dated 06.06.2017, whereafter the respondents have been proceeded ex-parte vide order dated 02.04.2018. The

learned Trial Court after recording evidence of the appellant as PW-1 partially decreed the suit to the extent of Rs. 29,00,000/- and rest of the claim to the extent of respondents No. 2 & 3 has been dismissed vide judgment and decree dated 04.04.2018.

6. The appellant in person contends that his evidence was not appreciated in a proper manner, even the admissions available on record in shape of different agreements and statements have not been considered by the learned Trial Court, whereby the liability of the respondents is proved on record.

7. The notices were issued to the respondents, which have been served upon respondents No. 1 to 3, who despite the service did not put their appearance before this Court, even this Court has also adopted the substituted mode of service through publication in Daily Pakistan dated 11.06.2019, resultantly they have been proceeded against ex-parte vide order dated 25.11.2019.

8. Arguments heard and record perused.

9. Perusal of record reveals that the appellant appeared as PW-1 in his own support to prove his case, whereby he has recorded his statement in line with the facts narrated in the plaint and has produced the certified copy of the application of compromise in a criminal case as Exh.P1, copy of sale deed of House 04 Marla, Khewat No. 430, Khatooni No. 629, Khasra No. 319, Mouza Khot Hathial, Tehsil and District,

Islamabad as Exh.P3 as well as copy of the post-arrest bail application, agreement dated 10.02.2015 as Exh.P2.

10. While considering the claim of the appellant, it appears that appellant has improved the case beyond his pleadings, whereby his original case in the plaint was of recovery of payment against Muhammad Rafique/respondent No.1, who has allegedly received Rs. 43,00,000/- from the appellant, however, the reasons for the said payment have not been brought on record by the appellant through plaint, but on the other hand while appearing as PW-1, the appellant has asserted that respondent No.1 has received the payment on the pretext of sale of plots of the CDA and when he failed to transfer the plot, post dated cheques were issued by the respondents, which were dishonoured on its presentation and in this regard F.I.R

No. 660/2013, under Section 489-F PPC, P.S Industrial Area, Islamabad was lodged, whereafter compromise was executed between the parties.

11. While considering the case in hand, the claim of the appellant is based upon the negotiable instruments i.e. cheques, whereas the appellant has produced Exh.P1, which is the attested copy of the application for post arrest bail of Muhammad Rafique/respondent No.1, in which he has referred his agreement of compromise as Exh.P2 through Rashid

Mehmood/Respondent No.2, therefore, the compromise executed between respondent No.2 and appellant clearly spells out the amount of Rs. 23,00,000/- was to be paid to the appellant, though the same was not paid as per agreed terms and conditions. Similarly, clause-II of the agreement also reflects that a sale deed of House 04 Marla, Khewat No. 430, Khatooni No. 629, Khasra No. 319, Mouza Khot Hathial, Tehsil and District, Islamabad amounting to Rs.15,00,000/- was also handed over to the appellant as guarantee, this factum clarifies that Rashid Mehmood/respondent No.2 on behalf of Muhammad Rafique/respondent No.1 agreed to discharge the liability.

12. Besides the above referred position, it has been observed from the written statement of the respondent that, he has not denied the execution of compromise agreement Exh.P2 as well as other documents, rather taken the plea that all agreements referred by the appellant are void, such plea has neither been substantiated on record.

13. In terms of Article 117 of the Qanun-e-Shahadat Order, 1984 the initial onus to prove the case is upon the appellant/plaintiff, whereas it is the obligation of the plaintiff to prove the due execution of documents, however in this case when the respondents have not denied the execution, there is no further need to prove the agreements executed

between the parties, which are deemed to be admitted by respondents in the written statement, hence the provisions of Articles 32, 33 and 34 of the Qanun-e-Shahadat Order, 1984 support the case of appellant.

14. While considering the above background, we have gone through the ex-parte judgment and decree dated 04.04.2018, passed by learned Civil Judge, 1st Class (East), Islamabad, whereby learned Trial Court has appreciated the agreement Exh.P1 and has also considered the original sale deed Exh.P2 in a proper manner, however, the learned Trial Court in Para-10 of the impugned judgment has agreed with the version of appellant, which remained unchallenged. This entire background confirms that Trial Court has considered each and every aspect including the principal claim of the appellant and partially decreed the suit to the extent of Rs.29,00,000/- through a well reasoned judgment, therefore any additional claim for transfer of the property referred in Exh.P2 is not justiciable. It is trite law that two conflicting prayers could not be decreed, especially when the principal claim is to the extent of recovery of amount of Rs. 29,00,000/- only, as such we are of the considered view that the second prayer has rightly been dismissed as the property referred in Exh.P2 is for security purpose only, which could only be claimed or given/transferred in the name of appellant, if the principal claim of Rs. 29,00,000/- was not satisfied.

15. For what has been discussed above, instant regular first appeal is **DISMISSED.**

(FIAZ AHMAD ANJUM JANDRAN)  
JUDGE

(MOHSIN AKHTAR KAYANI)  
JUDGE

Announced in open Court on 14th Sept 2020.

JUDGE

JUDGE

RAMZAN