

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1487 of 2016

Mrs. Tahira -----Plaintiff.
Versus
Muhammad Abdullah & others-----Defendants.

Dates of hearing: 08.12.2016, 16.12.2016 and 22.12.2016

Plaintiff: Through Mr. Rafiq Ahmed Kalwar, Advocate.

Defendant No.1: Through Mr. Khalid Javed, Advocate.

Defendant No.2: Through Mr. Ejaz Khattak.

CMA No. 9811 of 2016 Under Order 39 Rule 1&2 CPC.

ORDER

Muhammad Junaid Ghaffar, J. This is a Suit for Specific Performance of an Agreement and through listed application, the plaintiff seeks a restraining order against defendants from creating any third party interest in respect of property i.e. Brand New Bungalow (ground plus one) bearing No.147, Commercial Avenue, Phase-VII, measuring 1000 sq. yards or thereabout situated in Pakistan Defence Officers Housing Authority, Karachi, ("Suit Property").

2. Briefly the facts as stated are that the plaintiff entered into an Agreement of Sale dated 20.02.2015 in respect of the Suit Property with defendant No.1 for a total sale consideration of Rs.120,000,000/- out of which Rs.30,500,000/- was paid at the time of signing of the said agreement. It is further stated that according to the plaintiff, the property was under construction,

therefore the time for final payment was agreed upon as six (6) months and before expiry of the deadline of the completion of the transaction, the plaintiff and defendant No.1 mutually agreed to extend time for a further period of five months ending on 20.01.2016, subject to an enhancement of Rs. 5.0 Million in the total sale consideration. Thereafter an Addendum dated 28.08.2015 was executed between the parties, however, in October, 2015, it came to the knowledge of the plaintiff through an Estate Agent that defendant No.1 is marketing suit property and upon such knowledge the plaintiff stopped payment of Rs.5.0 Million paid through cheque at the time of signing of Addendum. It is further stated that thereafter a Legal Notice dated 20.11.2015 was issued by defendant No.1, whereby, the Agreement was cancelled and an offer to return of Rs.18,500,000/- was made to the plaintiff and such Legal Notice was replied, whereas, the defendant No.1 time and again has avoided performance of the Agreement. It is further stated that the defendant No.1 is not in possession of the complete documents to transfer the property in question and is therefore avoiding the request of the plaintiff, hence instant Suit.

3. Learned Counsel for the plaintiff has contended that the property in question at the time of signing of agreement was under construction and a substantial amount of more than 25% was paid by the plaintiff so that the construction could be completed within 6 months and upon fulfillment of the requisite formalities by defendant No.1, the transfer could be affected. Per learned Counsel since the property prices have increased, the defendant No.1 is trying to avoid the performance of the agreement and is marketing the property to sell it to some other buyer. Learned Counsel has

further contended that defendant No.1 is not in possession of “B” Lease and other requisite documents so as to properly transfer and convey the property, and therefore has violated the agreement. Per Learned Counsel since time was not the essence of the Contract and the conditions have not been fulfilled by defendant No.1 for obtaining NOC and other relevant documents, the plaintiff shall not be burdened for deposit of balance sale consideration as there is no breach on the part of the plaintiff. Learned Counsel has read out various clauses of the Agreement including Clause-6 and has submitted that insofar as the plaintiff is concerned no breach has been committed. In support of his contention he has relied upon the cases reported as **PLD 2010 Karachi 295** (*Muhammad Rafique v. Dr. Qadir Ali Khan and another*), **PLD 1973 Supreme Court 39** (*Seth Essabhoy v. Saboor Ahmad*), **PLD 1962 Supreme Court 1** (*Abdul Hamid v. Abbas Bhai-Abdul Hussain Sodawaterwala*), **PLD 1995 Lahore 438** (*Khizar Hayat Khan v. Mussarat Rabbani*), **PLD 2003 Lahore 17** (*Friends Associates (Regd.) through Managing Partner, Lahore and 3 others v. Messrs Binn Bak Industries (Pvt.) Limited through Chief Executive, Faisalabad and 9 others*), **2015 YLR 1213** (*Muhammad Shoaib v. Jamila Khatoon and 4 others*), **PLD 2004 Supreme Court 790** (*Shabbir Ahmed and another v. Zahoor Bibi and others*).

4. On the other hand, learned Counsel for defendant No.1 has contended that the Agreement in question is an admitted document and has referred to Para-3 and has submitted that the Agreement is in respect of the property, which was complete in all respects. Per Learned Counsel six (6) months period provided in the Agreement expired on 19.08.2015, on which date the plaintiff wrote a Letter to defendant No.1 with a request to further extend

the time and therefore per learned Counsel on 19.08.2015 admittedly the plaintiff failed to make payment of the balance sale consideration. However, at the request of the plaintiff an Addendum Agreement was signed on 28.8.2015 and time for completion of the transaction was agreed upon as 20.01.2016. Learned Counsel has further submitted that at the time of signing of Addendum, the agreed price was increased, and a cheque of Rs.5.0 Million was handed over to defendant No.1, which on deposit was dishonored, compelling the plaintiff to issue Legal Notice dated 20.11.2015 by cancelling the Agreement with an offer to refund /return an amount of Rs. 18,500,000/- out of advance amount of sale consideration as agreed by the parties. Learned Counsel has referred to various documents including "B" Lease dated 08.06.2015 and Letter of MEO dated 08.06.2015 and has contended that the construction work was completed on 14.03.2014, whereafter, aforesaid documents were issued to defendant No.1. He has contended that the plea taken by the plaintiff in the Plaint regarding non-availability of documents and default on the part of defendant No.1 is an afterthought and no such plea was taken in the very first Letter whereby extension was sought in the performance of the Agreement, and therefore, no prima-facie case has been made out nor balance of convenience lies in favour of the plaintiff, whereas, irreparable loss would be caused to defendant No.1 and not to the plaintiff. Per Learned Counsel the Agreement already stands cancelled and therefore, no specific performance can be sought.

5. Learned Counsel for DHA has submitted that in their record the entire papers and documents are in the name of defendant

No.1, whereas, “B” Lease has been issued in respect of Suit Property as stated on behalf of defendant No.1.

6. I have heard all the learned Counsel and perused the record. At the very outset, learned Counsel for the plaintiff was asked by the Court as to whether the plaintiff is still willing to deposit the balance sale consideration to which learned Counsel has candidly replied in negative and has contended that since the default is on the part of defendant No.1, therefore, the plaintiff shall not be burdened with directions to deposit the entire balance sale consideration. Learned Counsel has prayed for disposal of listed application on merits instead. In this matter it is an admitted position that agreement was signed on 20.02.2015 and it would be advantageous to refer certain clauses of the said Agreement so as to decide the controversy in hand.

“WHEREAS the Vendor above named at the time of these present seized possessed of and well and sufficiently entitled to all that **BRAND NEW BUNGALOW** (GROUND PLUS ONE) No.147, COMMERCIAL AVENUE PHASE-VII, MEASURING 1000 SQUARE YARDS OR THEREABOUT SITUATED IN PAKISTAN DEFENCE OFFICERS HOUSING AUTHORITY KARACHI, alongwith electric, gas, water connection and agreed fittings, fixtures such as fans, lights, fancy light and green garden (**complete in all respects**) by virtue of “TRANSFER ORDER” No.DHA/K/A-31397 dated 09-Feb-2013 and FORM “A” SUB-LEASE Registered at No.1842 of Book No.I with the Sub-Registrar-I Clifton Town, Karachi dated 18-04-2013 and M.F. Roll No.6185 of Photo-Registrar, Karachi dated 03.09.2013, hereinafter referred to as the “SAID PROPERTY.”. (Emphasis supplied)

That the remaining and balance payment of Rs.9,00,00,000/- (rupees Nine Crore Only) shall be paid by the Vendee to the Vendor at the time of handing over the physical vacant and peaceful possession of the said property and completion of Sale formalities including registration of Conveyance Deed/Sale Deed in favour of Vendee or his nominee (s) within SIX (6) months from the date of signing of this agreement.

That if the Vendee/purchaser fails to make the balance payment within stipulated period in such even the Vendor shall have right to forfeit the 10% of the total amount i.e. Rs.1,20,00,000/- and remaining advance part-payment will refund to the Vendee and deal will be treated as cancelled, null and void. Similarly if the Vendor fails to complete the sale formality or refuses to transfer/sale the said property to the Vendee or his nominee(s) in such even the Vendor shall be liable to pay the double of 10% of the total amount i.e. ;Rs.1,20,00,000/- (as penalty) with paid 25% advance part-payment.”

7. Perusal of the aforesaid clauses reflect that insofar as the agreement is concerned it is apparently in respect of a Brand New Bungalow along with electric, gas, water connection(s) and agreed

fittings, fixtures such as fans, fancy light etc. complete in all respects. The argument of the learned Counsel for the plaintiff that the agreement in question was in respect of an under construction bungalow does not seem to corroborate with the recital(s) of the Agreement in question. Moreover, initially in Clause-3, it has been provided that the balance sale consideration is to be paid within 6 months from the date of signing of the Agreement and the time for completion of sale formalities including registration of Conveyance Deed, and in case of failure to make the balance payment, the Seller would have the right to forfeit 10% of the total sale consideration i.e. Rs.12 Million. It further appears that the plaintiff through its Letter dated 19.08.2015 approached defendant No.1 seeking extension on the ground of some unavoidable circumstances, and being unable to pay the agreed amount on the due date and requested to allow further time of 5 months for payment of balance sale consideration. It further appears to be an admitted position that pursuant to such request both the parties mutually agreed upon to sign an Addendum to the said Agreement dated 28.08.2015, whereby, the time for completion of sale was extended for a further period of five (5) months i.e. up to 20.01.2016 with an increase of Rs.5.0 Million in the sale price for which a cheque was also issued by the plaintiff for such amount. It further appears that admittedly the said cheque was not en-cashed in favour of defendant No.1 as the same was directed to be stopped by the plaintiff. The plaintiff's case is that after signing of the Addendum, it came to their knowledge that defendant No.1 is marketing the property and therefore, the payment was withheld. Whereas, the defendant's case is that upon dishonoring of the said cheque of Rs.5.0 Million, they issued a Legal Notice, cancelling the

Agreement and offering payment of Rs.18.5 Million after deducting the 10% amount as stated in the Agreement.

8. The entire crux of the Arguments advanced on behalf of the plaintiff is that defendant No.1 was never in position to convey the property in favor of the plaintiff as requisite documents were not ready with defendant No.1 within the stipulated time. However, again such facts are not borne out from the material placed on record. Rather, defendant No.1 has placed on record various documents including "B" Lease dated 08.06.2015, Completion Certificate dated 09.04.2015 and various other documents which apparently contradict the contention raised on behalf of the plaintiff that defendant No.1 was not in possession of these documents before expiry of the stipulated time for transfer of the property in question. Therefore, the contention raised on behalf of the plaintiff at this stage of the proceedings does not seem to be reasonable and plausible so as to exercise any discretionary relief in favour of the plaintiff. Moreover, the learned Counsel for the plaintiff has categorically stated that the plaintiff is not willing to deposit the balance sale consideration, for confirmation of ad-interim order passed in this matter.

9. It may be of relevance to observe that relief of Specific performance of an Agreement is discretionary in nature and the Court while granting such relief and or refusing it has to decide the same on the basis of peculiar facts of each case independently. There is no hard and fast rule for adjudication and for exercising such discretionary relief. This appears to be an admitted position that plaintiff has failed to pay the balance sale consideration, and in fact has also not shown willingness to deposit the same even in Court, whereas, insofar as the contention that defendant No.1 has

defaulted in performing his part of the Agreement, therefore he should not be burdened with deposit of the entire balance sale consideration is concerned, it would suffice to observe that this is a question which can only be adjudicated at the trial stage, and not while deciding the injunction application. Upon failure of the plaintiff to pay the balance sale consideration within the extended date of performance of the agreement, the same stands cancelled and terminated insofar as defendant No.1 is concerned. In my view, if any definite conclusion is drawn, viz a viz the contention of the plaintiff (which even otherwise is not possible at this stage of the proceedings), it would seriously prejudice the case of the parties at the trial. In fact, if the contention of the plaintiff is accepted, at this stage of the proceedings, it would in fact amount to granting the entire relief claimed in the Suit, which cannot be done. It is also a settled proposition of law that in cases of Specific Performance the Court is not bound to grant such relief merely as it is lawful to do so, and the discretion to be exercised by the Court should always be based upon sound and reasonable analysis of the relevant facts of each case independently. In a Suit for specific performance it is always for the buyer and not the seller to show positive conduct and its willingness to perform and to deposit the balance sale consideration without imposing and or demanding fulfillment of any pre-conditions which are to be dealt with at the stage of trial of the case. Bonafides are only established when willingness is shown without reservations. Even otherwise, such relief being discretionary in nature requires the Courts to maintain a balance while deciding an injunction application in such cases. It is the duty of the Court to see that interests of both the parties are secured and no prejudice is caused to any of them. The case law

relied upon by the learned Counsel for plaintiff is not relevant in this matter because of the peculiar facts of this case, whereas, it is always the conduct of the parties on the basis of which, specific performance of an agreement is to be granted or refused. The Hon'ble Supreme Court in the case of ***Liaqat Ali Khan and others v. Falak Sher and others*** (**PLD 2014 SC 506**), has observed that “....***the things as regards powers of the Court in exercising its discretion, become even more clear that there is no two plus two, equal to four formula available with any Court of law for this purpose, which can be applied through cut and paste device to all cases of such nature. Conversely, it will be the peculiar facts and circumstances of each case, particularly, the terms of the agreement between the parties, its language, their subsequent conduct and other surrounding circumstances, which will enable the Court to decide whether the discretion in terms of section 22 (ibid) ought to be exercised.....***”. It is also pertinent to observe that even otherwise this is only the injunction stage and parties are yet to lead evidence, allowing the Court only to make a tentative assessment from the record.

10. In view of hereinabove facts and circumstances of the case, it appears that the plaintiff has failed to make out a prima-facie case nor balance of convenience lies in his favour, whereas, no irreparable loss would be caused to the plaintiff if the injunctive relief is refused, rather, on the other hand, it would cause serious prejudice to defendant No.1. As such, for the aforesaid reasons by means of a short order, I had dismissed the listed application on 22.12.2016.