

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI.
Suit No.411 & 412 of 2016

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

1. For orders on CMA No.12248/2016
2. For orders on CMA No.300/2017
3. For orders on CMA No.3381/2017
4. For orders on CMA No.2618/2016
5. For further orders as no compliance of order dated 07.03.017 has been made.

20.03.2017

Mr. Muhammad Vawda, Advocate for the Plaintiff.
Mr. Neel Keshaw, Advocate for Defendant No.1.
Mr. Abdul Hadi, Advocate for Defendant No.6.
Syed Ehsan Raza, Advocate for Defendant No.7.
Mr. Ejaz Mubark Khattak, Advocate for DHA.

Pursuant to this Court's Order dated 07.03.2017, where Court in clear terms and by sheer indulgence, gave an opportunity to the Plaintiff to honor his commitments and to fulfill the condition precedent to the granting of the status-quo order dated 18.02.2016, where the Plaintiff was called upon to deposit the remaining sale consideration with the Nazir of this Court; one week's additional time was granted by the latest order. However, the Nazir's note depicts that "*no one turned up for compliance within stipulated time. Dated 15.03.2017*". Which fact was also affirmed by the counsel for the Plaintiff that his client did not deposit the balance sale consideration with the Nazir.

The counsel next contended that he has *convinced* his client now to comply with the orders of this Court and during the course of arguments, in the open court waved certain pay orders in the air, allegedly that these (partial amount) pay orders are ready and his client could deposit them right now allowed. However, in the same breath he requested that if further five days' additional time is

granted, his client would be in a position to satisfy this Court's order dated 18.02.2016 by depositing the full balance sale consideration with the Nazir.

Brief facts of the case are that parties entered into the Agreement of Sale of the property in question, which is annexed as P/1 dated 09.12.2015 in Suit No.411/2016 where the total sale consideration of the property in question was Rs.9 Crore 50 Lacs, however, a token payment of Rs.50 Lacs was made to the seller. Having entered into that agreement on 09.12.2015, the instant suit was filed on 16.12.2016, where this Court on the first date of hearing passed a status-quo order and the Plaintiff was ordered to deposit the balance sale consideration with the Nazir. When posed with a question as to why the Plaintiff failed to realize the sale agreement, the counsel submitted that having entered into the agreement, he came to know that Defendant No.7 allegedly claiming to be sister of Defendant No.1 approached the Plaintiff in respect of her share in the property, and since there was a *dispute* as to the ownership, his client preferred to file the instant suit rather than performing the agreement. When posed with another question, when the suit was filed and the Court passed orders that no third party interest be created subject to the depositing the balance sale consideration with the Nazir, why the Plaintiff failed to deposit the balance sale consideration with the Nazir, the counsel drew Court's attention to CMA No.14727/2015, which was filed in another Suit bearing No.61/2015, (where an intervener was trying to become a party), the counsel contended that it is for this reason his client got the knowledge that there are other interveners, he restrained himself from depositing the balance sale consideration with the Nazir.

Admittedly out of total sale consideration of Rs.9,50,00,000/- (Rupees Nine Crores Fifty Lacs only), only payment of Rs.50 Lacs has been paid (5.26%) leaving a large part of the contract as unperformed. The fact that the Plaintiff is attempting to pay the prices of property at this juncture at the rate that he agreed in Dec-2015 is not only devoid of any realistic determination since the property values have increased many folds in the last two years, as well as, it will cause great hardship to the owner, who had been deprived of the true value on account of depreciation of Rupee. The only option available to the Court in all fairness is to have the Plaintiff made a fresh offer of purchasing the property in question at current market value, subject to the Defendants if they are willing to sell it. When counsel for the Defendants were posed as to whether the intention to sell the property still exists, they both denied and stated that their clients are no more interesting in the sale, which rights are protected under Articles 23 & 24 of the Constitution.

To me the controversy at hand is pretty simple leaving no doubt in my mind that the specific performance of the contract was not made by the Plaintiff himself by not only depositing the balance sale consideration, he has also deprived himself of the opportunity made available through the orders dated 18.02.2016 as well as he failed to take benefit by making compliance of this Court's order dated 07.03.2017, where last chance of seven days was given for depositing the balance sale consideration with the Nazir with clear determination that seven days' time was only extended with the sole condition that if the said order was not complied with *suit will be dismissed*.

In support of his contentions notwithstanding while making an admission that Plaintiff continuously failed to deposit the balance sale consideration in all previous opportunities given to it, the learned counsel however, placed reliance on 2011 CLC 1891, 1992 MLD 1699 and 1988 CLC 1175, where it is held that where interim orders have been passed subject to the plaintiff's depositing the balance sale consideration, and if such commitment is not honored, the Court in those circumstances would not be competent to dismiss the suit, however, could only recall the interim orders. It is however worth distinguishing that except in the first case, the dispute before the court in the latter cases was not about specific performance of the contract. In the case of specific performance (2011 CLC 1891) the facts are quite distinguishable. There, the trial court confirmed the injunctive order with the direction to the plaintiff to deposit the balance sale consideration within one month, failing which it was ordered that suit will be dismissed. The plaintiff challenged the said order itself and court held that dismissal is not mandated. In the case at hand, the Plaintiff never challenged any of such orders of this Court passed on 26.02.2016 and 07.03.2017. He rather defied these orders as well as the first order of 18.02.2016. Therefore the dictum laid down in the above referred 2011 case is not attracted.

In the interest of justice and bringing end to frivolous and vicious litigation in the case where only specific performance of the contract is alleged, the Court while looking from the window of Section 15 of the Specific Relief Act, 1877 could always decide as to what extent the part that was to be performed by the Plaintiff has been performed before any further orders or adjudication is to be entertained. Similar question came before the Court in the case of Dr. Hammad Raza Khan vs. Syed Shah Hussain (2016 PLD 474

Lahore) where it was held that *plaintiff must fulfil his obligations first and then ask for compliance of the agreement by the other side and if the plaintiff had failed to perform in full or the part left unperformed or his part was larger than he had performed or wanted to perform then he was not entitled to the decree*. This issue was looked at from a different angle in the case of Wali vs. Manak Ali reported as 1965 PLD 651 SC where the Apex court laid down the golden rule that *a contract must be performed in entirety unless it be incapable of such specific performance*.

In the case at hand, the Plaintiff only performed 5.26% of the contract, which falls short of the anticipated minimum under section 15 of the Specific Relief Act, in terms of which *a party to the contract who has been unable to perform the whole of his part of it, and the part left unperformed by him forms a considerable portion of the whole is not entitled to obtain a decree for specific performance*, thus the plaintiff is not entitled to obtain a decree for the specific performance.

I therefore, do not find any reason deviating from the previous orders of this Court and order not only for the vacation of the stay granted subject to the payment of balance sale consideration with the Nazir, at the same time since no case is made out by the Plaintiff to interfere with the constitutional rights of the Defendants, find myself satisfied to dismiss the suits with directions to the Defendants to deposit 50% of the token money received by them from the Plaintiff with the Nazir of this Court within two weeks for the benefit of the respective Plaintiff.

Judge

Manzoor