

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
SUIT No. 1268 / 2016

DATE	ORDER WITH SIGNATURE OF JUDGE
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Plaintiff: Mansoor Hussain Qureshi Advocate in person.

Defendants: Mrs. Farida Salahuddin & others through Mr. Naeem ur Rehman Advocate.

- 1) For hearing of CMA No. 8515/2016.
- 2) For hearing of CMA No. 12228/2016.
- 3) For hearing of CMA No. 10405/2017.

Date of hearing: 03.04.2018.

Date of order: 03.04.2018.

ORDER

Muhammad Junaid Ghaffar, J. Application listed at serial No. 3 has been filed on behalf of Defendants for rejection of plaint under Order 7 Rule 11 CPC.

Learned Counsel for the Defendants submits that instant Suit has been filed for Specific Performance of an Agreement dated 16.1.2015 which was never signed by Defendant No.1, hence, there is no question of any Specific Performance. He further submits that similarly the receipt at Page 45 is also unsigned and both these facts are admitted in the plaint; therefore, plaint is liable to be rejected. He next submits that some verbal arrangement was entered into and copies of documents of the property were handed over which have now been filed with the plaint whereas, the Plaintiff has not sought Specific Performance of any verbal arrangement and in the meantime, the property has been sold to Defendant No. 3 much prior to the filing of this Suit. In support he has relied upon **1998 CLC 1207 (Abdul Rahim**

V. Karachi Development Authority), PLD 1987 Karachi 676 (Nizar Ali V. Noorabad Cooperative Housing Society Ltd. and others), PLD 1986 Karachi 130 (Muhammad Rashid Bhatti V. KDA and another), 1988 SCMR 824 (Nazeer Ahmed and others V. Ghulam Mehdi and others) and 1984 CLC 3061 (Hakim Bashir Ahmed V. The Government of Sindh and 2 others).

On the other hand, Plaintiff who is a practicing Advocate of this Court has proceeded in person and submits that negotiations were held with Defendant No.1, through Defendant No.2, her attorney and property was also visited, whereafter, substantial amount of Rs. 1,75,70,000/- (Rupees One Crore Seventy Five Lac and Seventy Five Thousand) has been paid in total in cash in two installments and after exchange of draft agreement, the Defendant No.1 backed away and sold the property to someone else. Per learned Counsel the delay was on the part of the Defendant No.1 who could not get the Letter of Administration issued and now this is a matter of evidence; hence, this application is liable to be dismissed.

I have heard both the learned Counsel and perused the record. Insofar as the case of Defendant No. 1 is concerned, it is primarily based on the provisions of Order 7 Rule 11(a) as according to the Defendants the plaint does not disclose a cause of action. The Plaintiff through this Suit has sought Specific Performance of the alleged Agreement dated 16.1.2015 as well as Permanent Injunction and execution of Sale Deed. Admittedly, the Agreement in question as well as the receipts have not been signed and such fact is not in dispute. However, it is not denied that some negotiations were held between the parties and reference in this regard may be made to Para 3 of the supporting affidavit of this application in which reliance on contents of

written statement has been placed, wherein such fact is not denied. It is not the case of the Plaintiff that he is seeking Specific Performance of an Oral Agreement for which there is no bar and it is settled law that Specific Performance can even be sought in respect of an Oral Agreement. However, this case appears to be an exception wherein, the Plaintiff seeks Specific Performance of a written Agreement which is not signed by the seller. In fact the receipts are also unsigned and more surprisingly it is the case of the Plaintiff that a huge amount of Rs. 17.5 million has been paid in cash on two different dates. Again, there could be a case that cash payments were made as at this stage of the proceedings such assertion cannot be discarded out rightly merely on denial by the defendants. Though there are subsequent events after the alleged negotiations and before filing of Suit that the property in question has been sold to someone else and for which there is no application for amendment in the plaint, but nonetheless, again this cannot be a valid ground for rejection of plaint as asserted on behalf of the defendants.

In the case of ***Muhammad Sattar & others v. Tariq Javaid & others*** (**2017 SCMR 98**) a proposition came before a full bench of the Hon'ble Supreme Court that whether any specific performance of an agreement can be sought by a plaintiff (Vendee) who had not signed the agreement himself, and a larger bench of the Hon'ble Supreme Court (comprising of 5 members) has overturned / overruled an earlier decision of a 3 member bench reported as *Mst. Ghulam Hamid v Kh. Abdul Rehman and others* (**2010 SCMR 334**) by holding that a valid contract could be oral or it may be in writing or through any exchange of communication, the acceptance thereof could be express or implied. The Court further held that all valid contracts are not specifically enforceable but

nevertheless may give rise to rights and liabilities, and the breach thereof may entitle the offended party to seek compensation / damages in terms of sections 73 and 74 of the Contract Act, 1872. The Court while dealing with the provision of section 22 of the Specific Relief Act, 1877, has been pleased to observe as follows;

17. A perusal of section 22 of the Specific Relief Act, 1877 as interpreted by this Court in the judgments reproduced hereinabove makes it clear and obvious that the said provision has no bearing on the validity of the contract. It only recognizes the discretion vested with the Court to decline the Specific Performance of an Agreement even in the absence of any impediment, in this behalf, as enumerated in section 21 of the Specific Relief Act, 1877 and in spite of the fact that such Agreement may possess the necessary attributes entitling the Specific Performance of section 12 of the said Act of 1877. It declares that the Specific Performance is essentially an equitable relief which can be declined if it is unjust or inequitable to do so. For determining whether the Relief or Specific Performance is to be granted the circumstances under which the contract is executed and the contract of the parties at that time and thereafter may be taken into account. The illustrated examples pertain to unforeseen circumstances and hardships which may be inflicted upon a party through Specific Performance in contradistinction to the lack of such hardships as a consequence of the failure to specifically perform the contract. The illustrations appended to the provision are not exhaustive but indicate the discretion available with the Court. Such discretion must necessarily be exercised on the basis of sound judicial principles: At the end of the day, the discretion must necessarily be relatable to the circumstances in which agreement came about or to the Specific Performance of the contract and the consequences of grant or refusal of the relief of specific performance. It does not appear possible to invoke section 22 of the Specific Relief Act, 1877 to determine the validity of the agreement.

And finally the Hon'ble Supreme Court has observed as follows;

20. Thus, it appears that the proposition of law that an Agreement to Sell not signed by one of the parties if proved to have been accepted and acted upon would be a valid Agreement to Sell, is a valid contract enforceable in law has in fact been reiterated.

21. In view of the above, it is evident that the proposition that where an Agreement to Sell pertaining to immovable property is not signed by one of the parties thereto, in each and every eventuality, is invalid and not specifically enforceable is fallacious and contrary to the law. The existence and validity of the Agreement and it being specifically enforceable or otherwise would depend upon the proof of its existence, validity and enforceability in accordance with the Qanun-e-Shahadat Order, 1984, the relevant provisions of the Contract Act, 1872, the Specific Relief Act, 1877 and any other law applicable thereto.

In view of hereinabove facts and circumstances of this case, I am of the view that the a plaint cannot be rejected merely on the ground that the agreement is not signed by any one of the parties as there are other mitigating circumstances which may require leading of evidence by the parties to assert their right(s), and therefore, application listed at Serial No.3 bearing CMA No.10405 of 2017 for rejection of the plaint under Order 7 Rule 11 CPC is hereby dismissed.

1&2. Adjourned to a date in office.

J U D G E

ARSHAD/