

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO. 828 / 1991

Plaintiffs: Pakistan Post Office Department & another
Through Mr. Choudhry Atif Rafiq Advocate.

**Defendants
No. 1 & 2:** City District Government & another
Through Mr. Qazi Khalid Ali Advocate.

**Defendants
No. 8 to 10:** Anjuman Falah-O-Bahbood and others
Through Mr. S. Masroor Alvi Advocate.

Mr. Salimuddin A. Patoli Assistant Attorney
General.

- 1) For hearing of CMA No. 8293/2009.
- 2) For hearing of CMA No. 3506/1991.
- 3) For examination of parties / settlement of issues.

Date of hearing: 13.04.2018.

Date of order: 13.04.2018.

O R D E R

Muhammad Junaid Ghaffar, J. This is an application (CMA No. 3506/1991) at Serial No.2 pertaining to the year 1991 and for reasons more attributed to the conduct of the plaintiffs, than the office as contended, is pending since then and is being decided through this order with a very heavy heart after almost 27 years.

This is a Suit filed in the year 1991 for Declaration, Injunction and Specific Performance in respect of allotment letter dated 18.04.1952 and it is the case of the Plaintiffs that out of the total amount of Rs. 2,17,800/-, Rs. 1,50,000/- was paid initially and the balance amount of Rs. 67,800/- was paid subsequently. Learned Counsel for the Plaintiff submits that along with this Suit, CMA No. 3506/1991 was filed which was placed before the Court for orders on 06.08.1991 and notice was ordered for 13.08.1991 with further orders of injunction in the meanwhile. He submits that on 24.08.1992 when the matter was fixed before the Court an application under Order 17 Rule 1 CPC was

also fixed and mistakenly the office assigned an identical number i.e. 3506/1991 and such application under Order 17 Rule 1 CPC was dismissed as it had served its purpose, whereas, the injunction application under Order 39 Rule 1 & 2 CPC bearing CMA No. 3506/1991 was never decided finally and when the management of one of the Plaintiffs i.e. Plaintiff No. 2 was privatized and handed over to the present management, and he was engaged as a Counsel, it transpired that the said application has not yet been decided and thereafter, somewhere in 2009 Contempt Application was also filed. He submits that on that very date i.e. 24.08.1992 another application was also fixed before the Court i.e. CMA No. 3712/1991 under Section 151 CPC whereby, the Plaintiffs without prejudice had shown its willingness to deposit the amount of Rs. 67,000/- and such application was also granted. According to the learned Counsel, due to inefficiency on the part of the erstwhile management of Plaintiff No.2, such amount was not deposited and now the Plaintiff seeks permission to deposit the same as Nazir has refused to receive any such amount without further directions. Per learned Counsel interim orders was passed on the very first date and this according to the Plaintiffs still continues; hence, this application be allowed by confirming the injunctive order passed on 06.08.1991, whereas, contempt proceedings be finalized against alleged contemnors.

On the other hand, Mr. Qazi Khalid Ali learned Counsel for Defendants No 1 & 2 has opposed this application and submits that it has already served its purpose, whereas, the matter has been posted for evidence and suddenly the Plaintiffs have come before this Court for decision on this application. He submits that matter be sent for completion of evidence so that the Suit is finally decided.

I have heard both the learned Counsel and perused the record. At the very outset, learned Counsel for the Plaintiff was confronted as to how and why an application pertaining to the year 1991 is being suddenly pressed by the Plaintiffs, as apparently no such efforts were made at least till the year 2008, and it only appears that after taking over of Plaintiff No. 2 by the new management and engagement of a new Counsel, suddenly this application is being pressed, to this learned Counsel could not advance any satisfactory response, except that a mistake was committed by the office, whereas, he is under instructions to press upon such application which was admittedly pending and not yet decided by the Court. Counsel was again confronted and asked not to press such application so belatedly, with caution that if the same is dismissed, heavy cost may be imposed on the Plaintiffs as well as the Counsel, to which again the response was that he has no instructions to withdraw the said application.

Perusal of the record reflects that the case as set up on behalf of the Plaintiffs is that originally the Post & Telegraph Department, Ministry of Communication, Government of Pakistan requested the predecessor of Defendant No.1 for grant of some land in the area in Karachi known as Gizri to accommodate its employees. According to the contents of the plaint as per letter at page 105, (on which no date is available) but in Para 3 it has been stated that the same was issued on 18.04.1952 by the then Municipal Commissioner for allotment of 30 Acres of land near Race Course for construction of residential quarters for the employees of Post and Telegraph Department and as per said letter an amount of Rs. 1,50,000/- was initially paid and subsequently the balance amount of Rs. 67,800/- was to be paid. It is further case of the Plaintiff that possession was

handed over, and until 14.10.1990 no demand was ever raised by the Defendants, nor the possession of the Plaintiff, was ever questioned, when suddenly upon purported failure of payment of the balance amount, a show cause notice was issued for vacating the premises in question. The said notice was challenged and impugned through this Suit and according to the copy of order placed on record, on 06.08.1991 the Court had observed injunction in the meanwhile. Unfortunately, no original order of such date is available in the Court file. Nonetheless, it further appears that thereafter, the Plaintiffs filed another application bearing CMA No.3712/1991 seeking permission of the Court to deposit the amount of Rs. 67,000/- with the Nazir of this Court. It is to be noted that this was an action initiated by the Plaintiff itself, notwithstanding its own case, that an injunction in the meanwhile had already been granted. Be that as it may, the application was allowed through order dated 24.08.1992 for depositing the balance amount with the Nazir and to be further invested in Defence Saving Certificates; but admittedly the amount was never deposited. In fact the Plaintiffs now seek permission to deposit the balance amount. It further appears that while confronted the learned Counsel for the Plaintiff conceded that though according to the Plaintiffs assertion in the plaint the balance amount had already been paid to the Defendant even before filing of Suit and issuance of show cause as above, but they do not have any record to substantiate such claim. Record further reflects that since 1992 the Plaintiff admittedly never came before the Court to deposit the balance sale consideration, whereas, in the year 2005 by consent the issues were settled and matter was posted for evidence. On 08.09.2009 suddenly, when a new Counsel was engaged, a contempt application was filed and from nowhere office was

approached and CMA No. 3506/1991 was fixed for hearing. The idea behind this was to pursue the freshly filed contempt application. It further appears that somewhere in 2007 affidavit in evidence was already filed on behalf of the Plaintiffs and matter was being continuously posted for cross examination on the basis of the affidavit in evidence. This conduct throughout reflects that plaintiffs were never interested in proceeding with this application till 2009.

Nonetheless, as to the present application, at the very outset it may be observed that in a Suit for Specific Performance, the party seeking such specific performance is supposed to show its willingness to perform its part of the agreement, at all times. This is now a settled and basic principal. And the best mode to satisfy as to its willingness in a Suit by a buyer seeking specific performance is a request to deposit the balance sale consideration. Though initially no such application was made before the Court for making deposit, but perhaps subsequently, it was realized that for seeking relief of specific performance, the willingness must be shown, CMA bearing No.3712/1991 was filed and was accordingly granted without prejudice through order dated 24.08.1992. However, the said order was never complied with and no deposit of balance sale consideration as directed was made. In all fairness upon such failure, even the entire Suit could or ought to have been dismissed by the Court, as by now it is also settled law that in cases of specific performance, which otherwise is a discretionary relief, if a party fails to deposit the balance sale consideration upon directions, the Suit can even be dismissed. Reliance in this regard may be placed on the case reported as 1997 SCMR 181 (*Allah Ditta v. Bashir Ahmad*), *Haji Abdul Hameed Khan vs.*

Ghulam Rabbani (2003 SCMR 953), and Syed Muhammad Waqar ud Din v Owais Ahmed Idrees (2015 MLD 49).

This being so, now the Plaintiffs, after change of management, have, with courage, audacity and intrepidity come before this Court showing exigency and have pressed upon the earlier application, which in fact had become infructuous by their own conduct as even after grant of some injunction as contended, they themselves filed a subsequent application for making deposit of the balance sale consideration. In my view once a subsequent application was filed, the preset application became meaningless and redundant, and because of the Plaintiffs own conduct, this application could not have been pressed upon any further, until such time the balance sale consideration was deposited. Admittedly, this was not done and therefore, there remains no reason to press this application anymore and for this reason the learned Counsel at the very outset was cautioned not to press this application as it had become infructuous. However, the learned Counsel insisted on a decision on merits but regretfully I may observe that nowadays as and when a new Counsel is engaged or for that matter the management is changed, the entire stance of the erstwhile Plaintiff, as well as the Counsel, is altered or an attempt is made to modify and take a U-turn. This cannot be appreciated by the Court. Moreover, the Counsel owes a duty as an Officer of the Court to properly assist for timely dispensation of justice, and this is an onerous duty, but, merely for the reason that a Counsel has been engaged subsequently in an ongoing matter, neither the pleadings nor the stance already taken can be changed. Once a plaint has been filed and the matter has been proceeded with, the party or for that matter a subsequent Counsel, is precluded from retracting or

resiling from such stance. The Courts are not to be burdened with new pleas every now and then without any justifiable cause. The conduct of the Plaintiffs is evident from the above discussion that they never chose or came before the Court to deposit the balance sale consideration, and upon failure, the Suit ought to have been dismissed; but for one reason or the other be, it on the part of the office or the Plaintiff or its Counsel, the matter could not proceed further, and now belatedly for no reason, the injunction application has been pressed. Once the matter is posted for evidence proprietary demands that no further application are to be entertained, except in peculiar facts and circumstances warranting such applications, which in the present are completely lacking. All ingredients for grant of an injunctive order are completely missing in this case insofar as plaintiffs are concerned. In fact a situation has arisen for dismissal of the entire Suit as stated hereinabove, what to talk of an injunctive order anymore. This aforesaid conduct of the plaintiff has unnecessarily burdened the Court and has consumed the precious time in deciding the listed application which already stands infructuous as discussed hereinabove. And more so which was factually abandoned by the plaintiff's itself long ago. And finally despite being cautioned, application has been pressed, therefore, in view of such position this application is dismissed by imposing cost of Rs.20,000/- upon the plaintiffs which shall be deposited in the account of Sindh High Court Clinic.

1. Since CMA 3506/1991 was never pursued after 1992, whereas, it practically became infructuous immediately after the plaintiff failed to deposit the balance sale consideration; hence no case for contempt is otherwise made out. Accordingly this application is also dismissed.

3. Office is directed to list this after four weeks for Evidence according to roster.

J U D G E