

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1063 of 2016

[**Abdul Rauf and others** *versus* **Muhammad Amin Lakhani and others**]

Date of hearing : 06.09.2023

Plaintiffs : Abdul Rauf and 3 others, through Ahmed Masood, Advocate.

Defendants No.1 to 4 : Muhammad Amin Lakhani and 3 others through Ms. Sadia Sumera, Advocate.

Defendants No.6 to 8 : Mehmood Jabbar Lakhani and 2 others, through Mr. Rajindar Kumar, Advocate.

Defendants No.12 to 15 : Saadia Lakhany and 3 others, through Mr. Mujtaba Sohail Raja, Advocate.

ORDER

Muhammad Faisal Kamal Alam, J: This Order is passed on the basis of observation and Issue framed in the Order dated 06.04.2022.

2. Relevant facts for deciding CMA No.1052 of 2021, are that an Agreement to Sell dated 07.08.2015 was entered into between Plaintiffs and Defendants No.1 to 9 [however, Defendants No.5 and 9, who are Mother and Son, in their Written Statement have averred that signatures were obtained on the Sale Agreement by not disclosing correct facts); total sale price was/is Rs.96,000,000/- (Rupees Ninety Six Million only) and Rs.19,000,000/- (Rupees Nineteen Million only) was paid towards part payment, which is around 20% of the entire sale price. The sale transaction could not be concluded, leading to filing of the present *Lis*. Vide Order dated 23.12.2019, injunction was granted subject to depositing of the balance sale consideration, but it was not deposited. Subsequently, by the Order dated 17.04.2018, Defendants No.12 to 15, were impleaded. The **Suit**

Property is a double storey House, on Plot SurveyNo.538, Sheet No.GE, measuring 1300 Square Yards, Deep Chand Ojha Road [now known as Qazi Nazrul Islam Road / Business Recorder Road), Garden East Quarters, Karachi. Possession of the Suit Property is still with Defendants, in particular, Defendant No.11.

3. Mr. Rajinder Kumar, Advocate for Defendants No. 6 to 8, on a specific query states that they have no objection if the subject Contract is revoked and the earnest money / part payment as mentioned hereinabove is returned to the Plaintiffs.

4. Mr. Mujtaba Sohail Raja, Advocate, representing Defendants No.12 to 15, has stated that Plaintiffs willfully defaulted in not depositing the balance sale price and violated the above injunction granting Order, hence, this Suit merits dismissal and consequently, the above amount is liable to be forfeited; contended that Plaintiffs with *mala fide* reasons have prolonged the sale transaction in order to get an undue advantage and they are not entitled for refund of the part payment. Argued that in this kind of proceeding, Plaintiff / Purchaser has to show his willingness to perform the contract along with his financial capacity; since Plaintiffs have defaulted in making balance sale price, hence, their willingness to perform the present Sale Agreement is lacking so is financial capacity, resulting in dismissal of this *Lis*. He has cited the following case law in support of his arguments_

- i. **P L D 1961 (W.P.) Karachi 623**
[*The Trustees of the Port of Karachi versus Ghulamali Habib Rawjee*]; and
- ii. **2021 S C M R 1108**
[*Muhammad Jamil and others versus Muhammad Arif*].

5. On the other hand, the stance of Mr. Ahmed Masood, Advocate, representing the Plaintiffs, is that the above case law is distinguishable, because it is the Defendants, who are enjoying the part payments for the

past many years coupled with the fact that the possession of the Suit Property is also with them; thus, Plaintiffs are deprived of their hard earned money so also the Suit Property they wanted to purchase. Contended that the criteria laid down for forfeiture of amount is that it should not bring a windfall profit for a seller or a party claiming to forfeit the amount. Relied upon the following case law_

2020 C L C 300

[*Shahzad Nabi versus Naseer Turabi and 9 others*].

6. Arguments heard and record perused.

7. For the past eight years [from the date of the Agreement], majority of Defendants are enjoying the funds paid by the Plaintiffs towards sale consideration so also possession of the Suit Property. During hearing, a specific question was asked from the Plaintiffs' counsel, that whether Plaintiffs are still ready and willing to conclude the transaction and the answer was in affirmative. Conversely, Mr. Mujtaba Sohail Raja, Advocate, has stated that since prices of properties have grossly increased, the Suit Property cannot be sold to the Plaintiffs on the actual agreed price.

8. Present *Lis* has peculiar facts because of number of Legal Heirs – Co-owners; even those Defendants (*ibid*), who have not disputed the signing of Sale Agreement, have stated that it was/is a contingent Contract; have stated in the pleadings that they persuaded Defendant No.11 to hand over the possession, but are unsuccessful; thus, in these circumstances, Plaintiffs are not defaulters if the conditional injunction order was not complied with, as already they have paid a substantial amount to the Defendants [*ibid*]. **Secondly**, Defendants have not suffered any losses, as both the above part payment and the Subject Property are with them since beginning. Conscious of this fact that property prices have increased enormously, if this transaction is ended, then Defendants can again dispose

of the Suit Property at a much higher price than the present one [according to their own stance, as above]; *whereas*, the Plaintiffs are only claiming back the actual amount paid by them to the Defendants without any accruals thereon. Conversely, in the present case, the non-refund of the part payment would be a wind fall profit for the Defendants and not Plaintiffs.

9. In view of the above, the case law cited by the Defendants' counsel is distinguishable. Stance of the Defendants No.12 to 15, is unreasonable and untenable, which is not even supported by the other co-owners/Defendants, as stated herein above. Consequently, the issues answered in the terms that, the present Suit cannot be dismissed and the Defendants who have received the above **amount/Part Payment** are liable to return the same to the Plaintiffs, which should be deposited with learned Nazir of this Court within two weeks from today, thereafter, the same shall be released to the Plaintiffs, as per the Rules.

10. Application is disposed of in the above terms.

Judge

Karachi.

Dated: .09.2023.

Riaz / P.S.