

IN THE HIGH COURT OF SINDH KARACHI

Suit No. 1518 of 2007
[Ansar Ali v. Altaf Ahmed and others]

Dates of hearing : 09-05-2018 and 14-05-2018.
Date of Decision : 09-08-2018
Plaintiff : Ansar Ali through Mr. Muhammad Ishaq,
Advocate.
Defendant No. 1 : Altaf Ahmed Memon, through
Mr. Shahzad Bashir, Advocate.
Defendant No. 2 : The Sub-Registrar, Malir Town, Karachi,
through Mr. Pervaiz Ahmed Mastoi,
Assistant Advocate General Sindh.

ORDER

ADNAN IQBAL CHAUDHRY J. -

1. The plaintiff is the vendee and the defendant No.1 the vendor of a sale agreement dated 29-08-2007 of which specific performance is sought. The suit property is Plot No.C-29 measuring 117 square yards, Block-A, Kazimabad, Model Colony, Karachi. The sale consideration agreed was Rs.57,00,000/- The date fixed for performance in the sale agreement was 25-10-2007. The suit was filed on 24-11-2007.

2. Per the plaintiff, the defendant No.1 breached clause 9 of the sale agreement when he refused to provide the plaintiff the building completion plan and occupancy certificate of the suit property before the date fixed for performance. On the other hand, it is the case of the defendant No.1 that one of the cheques given by the plaintiff towards the advance payment (Rs.400,000 out of Rs.10,00,000) had been dishonoured; and that in any case the plaintiff did not come forward to pay the balance sale consideration on or before the date fixed for performance; and therefore the sale agreement stood cancelled and the advance payment forfeited.

3. On 17-12-2007, on the plaintiff's application, this court passed an interim order restraining the defendants from creating third party interest in the suit property. By order dated 04-03-2010, the plaintiff was directed to deposit the balance sale consideration in Court while the defendant No.1 was directed to deposit the title documents of the suit property in Court, and in these terms the interim order dated 17-12-2007 was confirmed pending suit. While the defendant No.1 deposited the title documents of the suit property in Court, which, per the plaintiff, still did not include the building completion plan/occupancy certificate, the plaintiff did not deposit the balance sale consideration in Court. By order dated 03-04-2017 it was observed that if the plaintiff had not made the deposit as ordered, then the temporary injunction stood vacated. On 19-04-2017 the Court observed that since the plaintiff had not deposited the balance sale consideration as ordered on 04-03-2010 *"counsel for the Plaintiff is directed to address this court that in view of this situation whether or not this suit is maintainable"*.

4. On 13-12-2017, since the plaintiff's counsel was not present to address the question of maintainability, the suit was dismissed for non-prosecution. On 02-02-2018, the plaintiff's counsel filed an application for the restoration of the suit, along with an application for condoning the delay in filing the restoration application. On 17-04-2018 learned counsel for the defendant No.1 offered that only if the plaintiff's counsel would address the question of maintainability of the suit, he (the defendant No.1's counsel) would concede to the restoration of the suit. Therefore, with the consent of learned counsel, the suit was restored on 14-05-2018 when arguments on the maintainability of the suit were heard and reserved for orders.

5. The question on the maintainability of the suit that was recorded in the order dated 19-04-2017 was essentially that : in a suit for specific performance, where a temporary injunction granted in favour of the buyer/plaintiff is conditioned on the deposit of the balance sale consideration by the plaintiff, whether the suit ceases to

be maintainable if the said deposit is not made by the plaintiff ? Per Mr. Ishaq Ali, learned counsel for the plaintiff, since the deposit was only a condition for the grant of the temporary injunction, while the temporary injunction would vacate on the failure to make the deposit, the suit would still be maintainable as the plaintiff may well be entitled to specific relief on the final adjudication of the suit. In support of such submission, Mr. Ishaq Ali Advocate relied upon the case of *Muhammad Shoaib v. Jamila Khatoon* (2015 YLR 1213).

6. However, while hearing learned counsels on the question above, this Court noticed that under the sale agreement that is subject matter of this suit, the parties had never envisaged specific enforcement thereof. Clause 3 of the sale agreement reads :

“3. THAT both parties further agrees that the time prescribed above for completion of this transaction is essence of this agreement and incase of default on the part of VENDOR performing this agreement; he shall refund the aforesaid advance money and also pay the amount thereof as penalty to the VENDEE within one week from the date/time prescribed therefore in the agreement and in the case of default on the part of the VENDEE; the amount of advance paid by him/her to the VENDOR shall stand forfeited. In these events the agreement shall be cancelled.

Thus, the parties had categorically agreed, that be that a refusal by the seller, or a default by the buyer, in either case, the sale agreement would stand cancelled, leaving the parties to claim refund, penalty and forfeiture, as the case may be. Consequently, the question of specific enforcement of the sale of the suit property did not arise in the circumstances. In this view of the matter, the question as to the maintainability of the suit was restated vide order dated 09-05-2018 as follows: “if a sale agreement does not envisage specific enforcement thereof, would Section 19 Specific Relief Act, 1877 be attracted ?”

Section 19 Specific Relief Act, 1877 reads:

“Section 19. Power to award compensation in certain cases. Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

Compensation awarded under this section may be assessed in such manner as the Court may direct.

Explanation. The circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section.”

7. Mr. Shahzad Bashir, learned counsel for the defendant No.1 submitted that Section 19 Specific Relief Act, 1877 would only be attracted where the contract has been broken by the defendant, but in this case it was the plaintiff who committed default in paying the agreed amount. Mr. Ishaq Ali, learned counsel for the plaintiff submitted that Section 19 of the Specific Relief Act, 1877 was squarely attracted to the case and even though the plaintiff may not be entitled to specific relief, he would still be entitled to pursue the suit for recovery of the advance payment and for compensation from the defendant No.1 as it is the plaintiff's case that the defendant No.1 had broken the contract by not providing the plaintiff with the building completion plan/ occupancy certificate.

8. In the cases of *Liaquat Ali Khan v. Falak Sher* (PLD 2014 SC 506) and *Adil Tiwana v. Shaukat Ullah Khan Bangash* (2015 SCMR 828), though the suit for specific performance by the buyer/plaintiff was dismissed, he was nonetheless granted a refund of the advance payment made by him.

In the case of *Rashid Naseem v. Amina Fahim* (PLD 2009 Karachi 390), although this was a case where the plaintiff had also prayed for

damages, a learned Division Bench of this Court while observing the bar contained in Section 29 of the Specific Relief Act, 1877, held that under section 19 of the Specific Relief Act, 1877, if the Court decides that specific performance ought not be granted, and that the contract was broken by the defendant, the Court can award compensation if the plaintiff is entitled to it.

In the case of *Athar Jamath Majith v. T. Krishnaswami Naidu* (AIR 1955 Madras 591) it was held that even though the suit for specific performance brought by a Vendee is dismissed, yet the Court may in its discretion order the Vendor to return the amount deposited with him by the Vendee, though the Vendee has not prayed for it.

In the case of *Sm. Shakuntla Devi v. Harish Chandra* (AIR (39) 1952 Allahabad 602) it was held that the words "such suit" occurring in the second para of Section 19 of the Specific Relief Act, 1877 do not confine to a suit under the first para in which compensation for breach has been asked either in addition to or in substitution for such performance. Accordingly, where the Court finds that a contract has been entered into, and there has been a breach of that contract and that it is not possible or desirable to order specific performance of that contract but it is just and proper to award compensation, the Court can make an order allowing compensation to the aggrieved party even without a specific prayer in the plaint.

In the case of *Kashi Parsad v. Baiju Paswan* (AIR 1953 Patna 24) it was held that under the second para of Section 19 of the Specific Relief Act, 1877 the duty of the Court to grant compensation is not dependent upon a specific request being made by the Plaintiff.

In the case of *Province of West Pakistan v. Messrs Mistree Patel & Co.*, (PLD 1969 SC 80) it was held that a forfeiture made under a contractual stipulation would also have to meet the test of Section 74 of the Contract Act, 1872.

9. In the circumstances of the case, though I find that the plaintiff is not entitled to specific enforcement of the sale, the questions whether the plaintiff is entitled to discretion in the refund of the

advance payment made and/or compensation for the alleged breach by the defendant No.1, and alternatively, whether the defendant No.1 is entitled to forfeit the advance payment without proof of actual damage (as required by section 74 of the Contract Act, 1872), are questions that are still open. These questions will have to be decided in this suit pursuant to Section 19 of the Specific Relief Act, 1877 inasmuch as, Section 29 of the Specific Relief Act, 1877 bars the plaintiffs from subsequently suing for compensation for breach of contract if his suit for specific performance is dismissed. Therefore, I hold that though the plaintiff is not entitled to the relief of specific enforcement of the sale of the suit property, the suit survives to the extent discussed above.

JUDGE