

THE HIGH COURT OF SINDH, KARACHI

Suit No. 905 of 2018

[Aftab Hussain versus Jay Kishan Phulwani]

Plaintiff : Aftab Hussain through Mr. Badrul Alam,
Advocate.

Defendant : Jay Kishan Phulwani through Mr. Ahmed
Ali Ghumro, Advocate.

Date of hearing : 06-08-2019

ORDER

Adnan Iqbal Chaudhry J. - By CMA No. 9740/2018 under Order XXXIX Rules 1 & 2 CPC the Plaintiff prays for a temporary injunction to restrain the Defendant from completing construction on Plot No.F-37, admeasuring 156 sq. yds., P&T Colony, Gizri Road, Clifton, Karachi (hereinafter 'the suit plot'), and from creating third-party interest therein.

By CMA No. 9741/2018 under Order XVIII Rule 18 CPC the Plaintiff prays for an inspection of the suit plot to determine whether the Defendant dispossessed the Plaintiff from the suit plot in violation of the order dated 08-05-2018 and whether the Defendant constructed on the suit plot and created third-party interest therein.

By CMA No. 9742/2018 under Order XXXIX Rule 2(3) CPC the Plaintiff prays for initiating proceedings of contempt against the Defendant for disobeying the order dated 08-05-2018

CMA No. 11568/2018, CMA No. 11569/2018 and CMA No. 11570/2018 were applications by the Plaintiff repeating the prayers made in the first 3 applications and were therefore withdrawn by learned counsel for the Plaintiff. Therefore, CMA No. 11568/2018, CMA No. 11569/2018 and CMA No. 11570/2018 stand dismissed as withdrawn.

2. The facts that are relevant for deciding the above applications are as follows. It is the Plaintiff's case that he had entered into a sale

agreement dated 07-02-2017 with the owner of the suit plot, namely Mateen, whereby the Plaintiff had agreed to construct at his own cost a building comprising of flats on the suit plot, and to deliver the constructed ground and 1st floor to Mateen alongwith a sum of Rs. 4,000,000/-, and in consideration thereof, Mateen agreed to sell the suit plot to the Plaintiff so as to enable the Plaintiff to sell the remaining flats to third parties for the Plaintiff's profit. It is the Plaintiff's case that in order to raise money for constructing the building, he entered into an agreement dated 15-03-2017 (titled '*Flat Booking/Construction Rights Agreement*') with the Defendant who agreed to invest Rs. 9,000,000/- in the project, repayable to him by the Plaintiff in 12 months time in the sum of Rs.19,500,000/- inclusive of profit. Per the Plaintiff, the Defendant released only a sum of Rs. 4,000,000/- as against the agreed investment thereby causing delay in the construction of the building and causing loss to the Plaintiff; that when the Plaintiff had partly constructed the building, the Defendant demanded that the Plaintiff hand over the building project to the Defendant and when the Plaintiff refused, the Defendant tried to dispossess the Plaintiff by force from the suit plot and lodged false FIRs against the Plaintiff; and subsequently this suit was filed *inter alia* for restraining the Defendant from dispossessing the Plaintiff from the suit plot.

3. It is the case of the Defendant that the agreement dated 07-02-2017 relied upon by the Plaintiff purporting to have been made with Mateen (owner of the suit plot) was bogus and forged; that in fact, Mateen had agreed to sell the suit plot to the Defendant pursuant to a sale agreement dated 05-03-2017 where under possession of the suit plot was delivered to the Defendant; that in consideration, the Defendant was to construct flats on the suit plot, deliver 4 flats to Mateen plus a sum of Rs.4,000,000/- while having the right to sell the remaining flats to third-parties for the Defendant's profit. It is the case of the Defendant that under the '*Flat Booking/Construction Rights Agreement*' dated 15-03-2017 it was he who had engaged the

Plaintiff to construct flats on the suit plot and paid Rs.6,359,000/- to the plaintiff towards the cost of construction, but that the Plaintiff stopped construction mid-way in October 2017 and vanished. Per the Defendant, he took physical possession of the suit plot in December 2017 and recommenced construction and also entered into contracts with third-parties for the sale of flats proposed on the suit plot.

4. The Plaintiff had first moved CMA No.6677/2018 to restrain the Defendant *inter alia* from occupying the suit plot. That application was disposed of by order dated 08-05-2018 as follows:

“08.05.2018

Mr. Abdul Qayyum Abbasi, advocate for Plaintiff.

Mr. Ahmed Ali Ghumro Advocate files vakalatnama for the Defendant and seeks time to file a reply.

Mr. Qayyum Abbasi Advocate states that he apprehends dispossession and harassment at the hands of the Defendant. Learned counsel for the Defendant states that the Defendant has no such designs. Such statement is treated as an order of the Court and since Mr. Qayyum Abbasi expresses satisfaction on the same, CMA No. 6677/2018 stands disposed off in the same terms.”

5. Thereafter, on 28-06-2018, the Plaintiff moved the above 3 applications allegedly when that the Defendant dispossessed the Plaintiff from the suit plot. Mr. Badar-ul-Alam, learned counsel for the Plaintiff submitted that on 24-06-2018, when the Plaintiff was on Eid Holidays visiting his native town, the Defendant proceeded to take possession of the suit plot. He submitted that such act of the Defendant was in violation of the undertaking given on his behalf as recorded in the order dated 08-05-2018; hence the prayers in the listed applications.

Mr. Ahmed Ali Ghumro, learned counsel for the Defendant submitted that his presence and undertaking recorded in the order dated 08-05-2018 is incorrect as on that date he was before the Circuit Court Hyderabad; that on that day he had instructed his court clerk to file his vakalatnama in this suit and his court clerk had requested some Advocate to do so when the case was called; that the

Court erroneously recorded that the Advocate filing the vakalatnama was Mr. Ghumro; that said Advocate was neither aware of the facts of the case, nor did he have any authority to give any undertaking on behalf of the Defendant. Mr. Ghumro pointed to the order dated 17-07-2018 wherein the aforesaid explanation and submission had been previously recorded. On the merits of the listed applications, he submitted that the Defendant has been in physical possession of the suit plot since December 2017 as the Plaintiff had abandoned the same; that the Defendant had also created third-party interest therein much prior to the order dated 08-05-2018; and that the cheques listed in the alleged agreement dated 07-02-2017 claimed by the Plaintiff to have been paid to Mateen (owner), are all cheques of the Defendant.

6. Heard the learned counsel and perused the record.

Both the Plaintiff and the Defendant claim an interest in the suit plot on the basis of their respective sale agreements with Mateen, the owner of the suit plot. The Defendant alleges that the Plaintiff's agreement is bogus and forged. Though the Plaintiff's agreement in its opening recital is dated 07-02-2017, the date of its execution by Mateen (owner) is mentioned as 07-03-2017; the agreement is not printed on a stamp paper and yet it is attested by an oath commissioner; and the date of the attestation is mentioned as 10-03-2017. On the other hand, the Defendant's agreement is executed by Mateen (owner) on 05-03-2017, prior in time to the Plaintiff's agreement, and it states that Mateen has delivered possession of the suit plot to the Defendant. The cheque numbers of the 7 cheques amounting to Rs. 4,000,000/- listed in the Plaintiff's agreement as having been paid to Mateen, are the same as the ones listed in the Defendant's agreement which the Defendant claims to have paid to Mateen as part consideration of the suit plot. In para-4 of the plaint, the Plaintiff has acknowledged those 7 cheques were not drawn on his bank but were cheques given to the Plaintiff by some other party against some other business transaction. Mateen,

owner of the suit plot, is not a party to the suit, and therefore it has yet to be seen which of the two agreements is owned by Mateen. However, the Plaintiff and the Defendant do not dispute that they had entered into the agreement dated 15-03-2017. From its contents, the agreement dated 15-03-2017 does not appear to be an agreement by the Defendant to lend money to the Plaintiff as asserted by the Plaintiff. Rather, that agreement is titled '*Flat Booking/Construction Rights Agreement*' and it appears to be an agreement whereby the Defendant had engaged the Plaintiff to construct a building on the suit plot and to sell portions therein at an agreed profit for both. In other words, the agreement dated 15-03-2017, the contents of which are undisputed, supports the Defendant's agreement, and on a tentative assessment of the facts it appears that at the time the Plaintiff was in possession of the suit plot, he was there as an agent of the Defendant.

7. This brings us to the order dated 08-05-2018 (see para 4 above) and to Mr. Ghumro's explanation that had also been previously recorded in the order dated 17-07-2018. To support his submission that the undertaking recorded in the order dated 08-05-2010 had never been given by him, Mr. Ghumro, learned counsel for the Defendant has filed a copy of an order dated 08-05-2018 passed in Criminal Revision Application No. S-80/2017 fixed before the Circuit Court at Hyderabad, which shows that on 08-05-2018 Mr. Ghumro was in fact at Hyderabad and therefore, the mention of his name in the order dated 08-05-2018 recorded in this suit was incorrect. It is apparent to me that the Court mistook the Advocate filing Mr. Ghumro's vakalatnama in this suit as Mr. Ghumro. Since the order dated 08-05-2018 was passed by this Bench, therefore, in exercise of powers under section 153 CPC and on the principle of *actus curiae neminem gravabit* (act of court shall prejudice no man), I hereby correct that error. Consequently, there is no contempt of court.

8. That leaves us with the matter of the undertaking recorded in the order dated 08-05-2018. While it is not clear under what circumstances that other Advocate had given the undertaking on behalf of the Defendant, the fact of the matter remains that he had no authority to do so, in that he was neither the Defendant's Advocate nor is there anything to show that he had been instructed by the Defendant's Advocate to give such undertaking. In other words, in the given circumstances, the undertaking of that other Advocate cannot be used by the Plaintiff to attribute to the Defendant an acknowledgment of the Plaintiff's physical possession of the suit plot as on 08-05-2018. For that the Plaintiff would have to stand on his own legs.

9. Excepting the order dated 08-05-2018, Mr. Badar-ul-Islam, learned counsel for the Plaintiff could not point to any material that demonstrated the Plaintiff's physical possession of the suit plot as on 08-05-2018. The photographs filed by the Plaintiff with his inspection application are of no help as these were filed later on 28-06-2018 and are photographs only of the structure on the suit plot from the outside. On the other hand, the Defendant relies on copies of sale agreements with third-parties executed in January, February and March, 2018, i.e., prior to the order dated 08-05-2018, to contend that he was in physical possession of the suit plot since December 2017; that he was the one who completed construction thereon and contracted to sell flats thereat to third-parties. But having said that, the Plaintiff has not moved any application for restoration of possession of the suit plot. Rather, by CMA No.9740/2018 he seeks to restrain the Defendant from completing construction on the suit plot and from creating third-party interest therein. Admittedly, the interest that the Plaintiff claims in the suit plot emanates from his sale agreement with Mateen (the owner). But the Plaintiff never sued Mateen for specific performance of that sale agreement despite having knowledge that the Defendant too relies on a sale agreement with Mateen which is adverse to the Plaintiff, thus leading to the

inference that the Plaintiff was not ready, willing and able to construct the building on the suit plot as said to have been agreed with Mateen.

10. In the circumstances, when the Plaintiff has not sued for specific performance of his sale agreement with the owner of the suit plot or for possession of the suit plot, and where this suit by the Plaintiff is also not for the specific performance of his agreement dated 15-03-2017 with the Defendant, which the Plaintiff claims to have terminated, I do not see the cause for restraining the Defendant from performing his sale agreement with the owner of the suit plot. Therefore, the Plaintiff has failed to make out a *prima facie* case or a case of irreparable harm to restrain the Defendant. The balance of convenience is also not in his favour and there is no purpose to the inspection application. Resultantly, CMA No.9740/2018, CMA No.9741/2018 and CMA No.9742/2018 are dismissed. Nothing herein shall be construed as preventing the Sindh Building Control Authority from taking any action under the law if the construction raised on the suit plot is without an approved building plan or contrary to an approved building plan.

JUDGE

Karachi
Dated: ____-11-2019