

ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI  
Suit No.588 of 2014

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DATE	ORDER WITH SIGNATURE OF JUDGE
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For hearing of CMA Nos.:-

1. 5451/2014
2. 4775/14
3. 5053/14
4. For hearing of Commissioner's Report dated 12.05.2016
5. For orders on Nazir Report dated 12.05.2014
6. For Exparte order against defendant No.3 served with summons marked as Flag-A

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11.11.2016.

Mr. Malik Altaf Javed, Advocate for Plaintiff  
Mr. Slaman Hamid Advocate for Defendant No.1  
Ms. Lubna Ejaz Advocate for Defendant No.6  
Ms. Nighar Afaq, State Counsel

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1 to 5. The applications and reports of Commissioner and Nazir as mentioned at Serial No.1 to 5 are being disposed of through this common order. Application listed at Serial No.2 has been filed by the Plaintiff under Order 39 Rule 1 & 2 CPC, whereby, it has been prayed to restrain the Defendants from creating any third party interest in the Suit property as well as from dispossessing the Plaintiff and or his tenant. On 11.11.2014 an order was passed by this Court on this application, whereby, parties were directed to maintain status quo. Thereafter, application listed at Serial No.3 has been filed for initiation of contempt proceedings against the Defendants for having violated the order dated 11.04.2014. Whereas application listed at Serial No.1 has been filed Under Order 39 Rule (7) read with Section 94 and 151 CPC for a second inspection of the property, and for removal of the material from Suit property through Nazir of this Court. At No.4 and 5 are the reports of Commissioner and Nazir appointed by this Court for inspection of the Suit property.

Learned Counsel for the Plaintiff submits that Plaintiff entered into an agreement of sale on 08.05.2003 with Defendant No.1 and 2 for purchase of 01.06 Acres of land out of 2.56 Acres having Plot No.B-41, Site Survey Sheet No.27, Survey Sheet No.35/L/13, admeasuring 2.56 Acres, Industrial trading Estates Ltd, Trasnlyari Quarters, Karachi within the territorial Limits of Site Police Station, Karachi. He submits

that upon execution of this agreement and payment of the entire amount of Rs.20 Million (apparently inadvertently mentioned as Rs: 20 Billion in the agreement) in cash, the Plaintiff was put into possession, whereas, the Sale Deed was to be executed after release of documents lying with the Bank. He further submits that thereafter, Defendant No.2 had executed a registered Power of Attorney dated 16.05.2013 in respect of his share of the property in question, whereas, Defendant No.1 has failed to perform his part of the agreement, hence, instant Suit. He further submits that on or around 08.04.2013 Defendant No.4 came at the Suit property and demanded its vacation within two days and plaintiff tried to persuade him that he is holding possession lawfully in performance of the Sale Agreement in question. However, he was taken to the Police Station and was detained; and thereafter was let off only on the condition that he would hand over peaceful possession within two days. He submits that when this Suit was filed, on 11.04.2014 parties were directed to maintain status quo and an inspection was also carried out on the very same day, and as per report of the learned Commissioner dated 17.04.2014, Plaintiff was in possession. Per learned Counsel once again an attempt was made by Defendant No.1 to dispossess him and on 17.04.2014 a contempt application was moved, which is listed at Serial No.3. He submits that thereafter, second inspection was carried out through Nazir of this Court vide order dated 25.04.2014 and per Learned Counsel the said report is also in favour of the Plaintiff and shows him in possession of the property through his tenants. He submits that Defendant No.1 in defiance of the order of this Court dated 11.04.2014 has dispossessed the Plaintiff, therefore, the Plaintiff should be put back into possession as he is owner of the property in question. In support of his arguments, he has relied upon the case laws reported in **1998 C L C 1872 (Saifur Rehman Vs. Muhammad Ayub and 2 others)**, **1994 C L C 1601 (Mrs. Shazadi baber vs. Hina Housing Project (Pvt.) Ltd and others)**, **1985 C L C 457 (Ghulam Muhammad vs. Ch. Khushi Muhammad and another)**, **2002 C L D 77 (Concentrate Manufacturing Company of Ireland and 3 others)**, **1993 C L C 714 (M/s. Merkuria Sucden vs. Rice Export Corporation of Pakistan Ltd. and others)**, **2006 Y L R 3117 (Riaz begum vs. Province of Punjab through Collector Distrcit, Khushab and others)**, **1995 C L C 2020 (Mst. Hamida Akhtar vs. Nazir Muhammad and 2 others)**, **2010 M L D 1180 (Mst. Aqeela Hai and**

***others vs. Province of Sindh through the Secretary Land Utilization Department and others) and 1989 M L D 2034 (Lahore) (Muhammad Rashid vs. Administrator Evacuee Property and others)***

On the other hand, learned Counsel for Defendant No.1 submits that instant Suit is a collusive Suit in between Plaintiff and Defendant No.2. He submits that the Suit property in question was jointly owned by Defendant No.1 and Defendant No.2 pursuant to an Assignment Deed dated 24.05.2002, whereas, Defendant No.2 has sold out his portion of the property to the Plaintiff and upon refusal of Defendant No.1 to sell his share of the property, instant Suit has been filed. Learned Counsel submits that insofar as Defendant No.1 is concerned, he has not entered into any agreement, which is a forged and fabricated agreement and has been prepared by the Plaintiff in collusion with Defendant No.2. Learned Counsel has referred to the Power of Attorney issued by the Defendant No.2 in favour of the Plaintiff and submits that it is only in respect of 0.53 Acres which is 50% undivided share of the Defendant No.2, whereas, Defendant No.1 is still owner of his share of the property and is also in possession. Learned Counsel submits that first inspection was carried out in absence of Defendant No.1 and Plaintiff in collusion with the Defendant No.2, has misled the learned Commissioner by showing their tenants on the Suit property as having possession and the portion owned by the Defendant No.1 was not brought to the notice of the learned Commissioner. He further submits that the agreement in question shows that the entire sale consideration was paid in cash, whereas, there are two owners of the property admittedly, and it has not been stated that who has been paid how much amount, whereas, the agreement also does not provide the date of its performance, therefore, no specific performance of such an agreement can be sought. He has also referred to a letter dated 20.05.2014 issued by the Bank Al-Habib Limited which states that documents of the property in question were released to Defendant No.2 on 29.11.2004. Learned Counsel further submits that insofar as the order passed on 11.04.2014 is concerned, the same may be confirmed to the extent of Defendant No.2's share in the property who is not appearing in this matter, whereas, it may be dismissed / discharged as against defendant No.1.

I have heard both the learned Counsel and perused the record. Insofar as, specific performance of the agreement in question is concerned, it appears that it is case of the Plaintiff that the entire amount in respect of the Suit property purportedly sold by Defendant Nos.1 & 2 has been paid in cash to both the Defendants. It is further case of the Plaintiff that pursuant to such agreement Defendant No.2 has executed a registered Power of Attorney in favour of the Plaintiff for his 50% share i.e. 0.53 Acres out of 1.06 Acres which is the total area of the plot in question. Admittedly, Defendant No.2 has chosen not to contest this Suit despite being served. The crux of the argument of the learned Counsel for the Plaintiff is that after passing of order dated 11.04.2014, the Plaintiff has been dispossessed and pursuant to two inspection reports of the learned Commissioners, it has come on record that at the relevant time when first inspection was carried out, plaintiff was in possession. However, when the second inspection was carried out, the Plaintiff was dispossessed from the portion of the plot and, therefore, on the basis of these reports application at Serial No.1 be allowed and by exercising powers Under Section 94 CPC the Plaintiff should be put back in possession of the said piece of land.

On perusal of the plaint and the agreement in question, it appears that now it is only to the extent of execution of the sale deed, of which the specific performance is to be sought by the plaintiff as in terms of the plaint at the time of filing of instant Suit, he was in possession and was subsequently dispossessed. According to the Plaintiff the entire sale consideration has been paid and therefore, insofar as the specific performance of the agreement in totality is concerned, evidence is to be led by the parties so as to ascertain, as to whether any such agreement was executed by Defendant No.1 or not. The case of the plaintiff now rests on its application at Serial No.1 and the report of inspections for passing of a Status-Quo ante order. Insofar as, reliance on the two reports of the learned Commissioner(s) is concerned, it appears that when first inspection was carried out it was without any assistance from Defendant No.1, and on perusal of the same it reflects that various tenants were performing their jobs and carrying on business including dealing in scrap material and machinery. However, it does not specifically details out the entire area of the plot in possession of the Plaintiff at the relevant time, nor there appears to be any categorization or area marking as well as numbering of the respective areas,

purportedly in possession of the Plaintiff's tenants. It further appears that though Plaintiff claims that the Suit property is in his possession mostly through his tenants and part through him, but neither in the plaint nor thereafter, any tenancy agreement and or details of the tenants have been placed on record. It is only the Commissioner's Inspection reports through which the possession is being tried to be proved through tenants. Whereas, on the other hand, when the second inspection of the Suit property was carried out by the Nazir, it reflects that certain portion of plot i.e. almost 2,500 square yards, (approximately equal to 0.53 Acres) appears to be in possession of Defendant No.1 through his attorney and along with this report, Nazir has also placed on record tenancy agreements dated 7.1.2014 which is prior to the passing of order i.e. 11.04.2014. Therefore, at this stage of the proceedings, the assertion of the Plaintiff that entire Suit property in question was in his possession prior to filing of this Suit does not seem to be convincing, and requires the parties to lead evidence in support of their respective claims. Moreover, the report of Commissioners are for the purpose of assistance to the Court in finally deciding the issue, and are never binding ipso facto. The Court is otherwise required to examine and see that what assistance can be taken from such reports while deciding any contested issue, whereas, inspection reports cannot be a substitute of evidence and can only be used in aid of evidence.

It may also be observed that the agreement in question has been specifically denied by Defendant No.1, whereas, Plaintiff claims to have paid the entire sale consideration in cash and admittedly is not in possession of any receipt to that effect on the basis of which the Plaintiff's claims can be justified, at least at this stage of the proceedings without leading any evidence. Insofar as the claim to the extent that Plaintiff is in possession of registered title documents of the property in question is concerned, perusal of letter of Bank Al-Habib Limited dated 20.05.2014 reflects that the same were handed over to Defendant No.2, and therefore the possibility cannot be ruled out that while executing Power of Attorney in respect of his share of the property, and after receiving sale consideration to that extent, he may have handed over the same to the Plaintiff. Therefore, having possession of the original title documents does not absolutely establish the execution of the agreement in question, at least by defendant No.1 and it is to be proved at the trial of the case.

In view of hereinabove facts and circumstances application listed at Serial No.1 is dismissed. In so far as, the application listed at Serial No.2 is concerned, the same is disposed of by directing the Defendant No.2 to maintain status quo in respect of his share of the property in question i.e. 0.53 Acres, however, this shall not be applicable to the portion of the property owned by Defendant No.1. The application listed at Serial No.3 can only be disposed of after evidence is recorded and therefore shall be taken up alongwith final arguments in this case. The Commissioners Reports at Serial No.4 and 5 are taken on record.

6. The matter is adjourned to a date to be fixed by the office. As a last and final chance Defendant No.3 is granted four weeks' time to file written statement.

J U D G E

Rafiq/P.A.