

Order Sheet
IN THE HIGH COURT OF SINDH AT KARACHI
Suit No. 17 of 2021

Date	Order with signature of Judge
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- For orders as to maintainability of the Suit :
- For hearing of CMA No.6832/2021 :
- For hearing of CMA No.7798/2021 :

Mr. Salman Hamid, advocate for the plaintiff.
Mr. Muhammad Nizar Tanoli, advocate for defendant No.1.
Mr. Taimur Ali Mirza, advocate for defendant No.3.

Date of hearing : 20.05.2021.

ORDER

NADEEM AKHTAR, J. – Through the instant Suit for specific performance of contract and permanent injunction, the plaintiff has prayed that defendant No.1 be directed to execute a lease in his favour in respect of the suit property viz. Plot No. B-10, Saima Luxury Homes, Millat Town, near Baghe-Korangi, Karachi, measuring 160 sq. yds., with a house constructed thereon. Consequential relief of injunction has also been sought by the plaintiff against the defendants in relation to the suit property. It is the case of the plaintiff that the parties entered into an agreement for sale dated 30.01.2020 (page 11) whereby defendant No.1 agreed to sell the suit property to him in consideration of Rs.8,500,000.00, out of which a substantial amount of Rs.5,500,000.00 was paid by him to defendant No.1 as advance part payment ; it was agreed that defendant No.1 will be bound to execute the lease in respect of the suit property in his favour latest by 30.01.2021 when the balance sale consideration of Rs.3,000,000.00 will be paid by him to defendant No.1 ; despite his repeated requests and demands, defendant No.1 did not take any step for execution of the lease in his favour, and instead of fulfilling her promise, defendant No.1 threatened him that the matter will be reported by her to police if any such demand is again made by him ; and, thus defendant No.1 failed to perform her agreed part of the contract.

2. Along with the Suit, an injunction application bearing CMA No.98/2021 was filed by the plaintiff on which an ad-interim injunctive order was passed by this Court on 13.01.2021 by ordering that subject to deposit of the balance sale consideration of Rs.3,000,000.00 by the plaintiff with the Nazir of this Court within two weeks, he shall not be dispossessed from the suit property till the next date of hearing. On 07.04.2021, defendant

No.1 filed CMA No.6832/2021 under Section 151 CPC praying that as the plaintiff did not deposit the amount ordered by this Court, the Suit should be dismissed. On the other hand, the plaintiff filed CMA No.7798/2021 under Section 151 CPC on 13.04.2021 praying that he may be allowed to deposit the original documents of his vehicle, described in the said application, in lieu of the amount ordered by this Court as he was unable to arrange or deposit the said amount in cash. Both the above applications came up for orders before this Court on 26.04.2021 when learned counsel for the parties waived notice thereof and sought time for filing counter affidavits thereto. On that date, learned counsel for the plaintiff undertook to satisfy the Court regarding maintainability of this Suit in view of the law laid down by the Hon'ble Supreme Court in Messrs Kuwait National Real Estate Company (Pvt.) Ltd. and others V/S Messrs Educational Excellence Ltd. and another, 2020 SCMR 171, and Hamood Mahmood V/S Shabana Ishaque and others 2017 SCMR 2022.

3. Before advertng to the question of maintainability of the Suit and the respective arguments advanced in relation thereto by learned counsel for the parties, it would be advantageous to briefly discuss the law laid down by the Hon'ble Supreme Court in the above-cited authorities. In Hamood Mahmood (supra), it was held that it is mandatory for the person, whether plaintiff or defendant, who seeks enforcement of an agreement under the Specific Relief Act, 1877, that on the first appearance before the Court or on the date of institution of the Suit, they shall apply to the Court for permission to deposit the balance amount, and any contumacious / omission in this regard would entail in dismissal of the Suit or decretal of the Suit, if it is filed by the other side. In Messrs Kuwait National Real Estate Company (Pvt.) Ltd. (supra), it was held that it is now well-settled that a party seeking specific performance of an agreement to sell is essentially required to deposit the sale consideration in Court ; in fact, by making such deposit the plaintiff demonstrates its capability, readiness and willingness to perform its agreed part of the contract, which is an essential pre-requisite to seek specific performance of a contract ; and, failure of a plaintiff to meet the said essential requirement disentitles him to the relief of specific performance, which undoubtedly is a discretionary relief.

4. It is pertinent to mention here that the entire balance sale consideration of Rs.3,000,000.00 was deposited by the plaintiff on 05.05.2021 with the Nazir of this Court, which fact is substantiated by the Nazir's endorsement to this effect in the court file.

5. It was contended by learned counsel for the plaintiff that this Suit is not hit by any of the above authorities and as such is fully competent and maintainable. In support of his above contention, he submitted that the contumacious / omission referred to in Hamood Mehmood (supra) cannot be attributed to the plaintiff as he has already deposited the amount in Court, and as such this authority is not applicable to the instant case. It was further submitted by him that in Messrs Kuwait National Real Estate Company (Pvt.) Ltd. (supra), the deposit of the sale consideration in Court was held to be an essential pre-requisite to seek specific performance of a contract, however, no timeframe for such deposit was prescribed therein nor was it held therein that the deposit is mandatory at the time of institution of the Suit or on the first appearance before the Court ; and, it was further held in the said case that a plaintiff is disentitled to the relief of specific performance only if he does not deposit the amount. It was urged by him that since the plaintiff has now deposited the amount in Court, both the above authorities are clearly distinguishable and the plaintiff cannot be non-suited in view thereof. Without prejudice to his above submissions, it was argued by him that both the above mentioned pronouncements were made by an equal number of Hon'ble judges, however, Messrs Kuwait National Real Estate Company (Pvt.) Ltd. (supra), wherein no timeframe was prescribed for depositing the amount in Court, being later in time, shall prevail.

6. On the other hand, by strongly relying upon the above authorities it was emphatically argued by learned counsel for defendant No.1 that the said authorities are fully applicable to the facts and circumstances of this case, and the interpretation thereof by learned counsel for the plaintiff is misconceived. He submitted that the plaintiff was required to deposit the amount within the time allowed by this Court and by not doing so, he has disentitled himself from seeking the relief of specific performance. He also submitted that this Court, and even this Bench, has dismissed many Suits for specific performance at the initial stage as the plaintiffs therein had failed to deposit the balance sale consideration in Court. It was urged by him that the same treatment should be given to this Suit as well.

7. I have heard learned counsel for the parties at considerable length and have also examined the material available on record as well as the law cited at the bar. It is a matter of record that the plaintiff has deposited the entire balance sale consideration in Court on 05.05.2021. Therefore, it is not the case, nor has it been alleged or argued on behalf of defendant No.1, that the plaintiff has completely failed to deposit the amount in Court.

According to defendant No.1, the plaintiff has disintitiled himself from seeking the relief of specific performance and as such the Suit is liable to be dismissed only due to the reason that the amount was not deposited by him within the time ordered by this Court. This position makes the instant case distinguishable from Hamood Mehmood (supra) and Messrs Kuwait National Real Estate Company (Pvt.) Ltd. (supra) as in both the said authorities the plaintiffs, who had filed the Suits for specific performance, had failed to deposit the amount in Court despite the orders passed by the Court in this behalf. It may be observed that same was the position in the Suits for specific performance dismissed by this Court, and by this Bench also, which have been relied upon by learned counsel for defendant No.1. In all the said Suits, the plaintiff had either not volunteered or applied to deposit the amount in Court or had failed to deposit the amount in spite of the Court's order.

8. It is important to note that the readiness and willingness by a party to a contract to perform its agreed part of the contract is a condition precedent for that party for instituting a Suit for specific performance of such contract under the Specific Relief Act, 1877, against the party committing breach of the contract. Such readiness and willingness must be genuine, real and meaningful, and not merely a statement without any meaning and intention as there is a vast difference between the capability or ability to perform the agreed part of the contract and the readiness and willingness to do so. A party may be fully capable and able to fulfill its obligations under the contract, and yet it may not be serious, ready or willing to do so. In a Suit for specific performance, it is obligatory upon the plaintiff to demonstrate in unequivocal terms in his pleadings, as well as by his conduct throughout the proceedings, that he has always been and is still serious, capable, ready and willing to perform his agreed part of the contract. Such seriousness, readiness and willingness of the plaintiff is the essence of and a condition precedent for seeking specific performance of contract, and in the absence thereof, the equitable and discretionary relief of specific performance cannot be granted. The seriousness, capability, readiness and willingness to perform its agreed part of the contract, being the condition precedent for seeking specific performance, can be judged from the conduct of the party seeking such relief. The main object and essence of this condition precedent in a Suit for specific performance, as I understand, is to ensure that specific performance is sought only by such party to the contract who is serious, capable, ready and willing to perform its agreed or remaining, as the case may be, part of the contract despite the fact that the other party has committed breach thereof ; and, to discourage such

persons who are not serious, capable, ready and or willing to perform their agreed / remaining part of the contract and who are interested only in dragging the other party in unnecessary litigation in order to pressurize them.

9. In the case at hand, by depositing the amount in Court the plaintiff has *prima facie* shown his readiness, willingness, seriousness and capability to perform his agreed part of the contract. It must always be kept in mind that specific performance cannot be claimed as a matter of right, and the grant of such relief is purely discretionary which depends upon the facts and circumstances of each case. The question whether or not the plaintiff is entitled to specific performance will be decided by this Court at the appropriate stage in accordance with law after evaluating the evidence produced by the parties in support of their respective contentions.

10. In view of the above discussion, it is hereby held that the instant Suit is maintainable and the same should be decided on merits. Resultantly, CMA No.6832/2021, filed by defendant No.1 for dismissal of the Suit, is dismissed with no order as to costs ; and, CMA No.7798/2021, filed by the plaintiff seeking permission to deposit the original documents of his vehicle in lieu of the amount ordered by this Court, having become infructuous in view of the deposit already made by him, is dismissed as such.

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