

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

**Suit No. 1784 of 2010**

Date	Order with signature of Judge
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For hearing of CMA No.8421/2018 (Restoration) :

Mr. Badrul Alam, advocate for the plaintiff.

Ms. Sarwat Jawahir, advocate for the defendants.

Date of hearing : 01.06.2021.

**ORDER**

**NADEEM AKHTAR, J.** – Through this application, the plaintiff has prayed that the order passed on 21.05.2018, whereby this Suit for specific performance was dismissed, be recalled / set aside, and the Suit be restored to its original position. Perusal of the above order shows that the Suit was dismissed on two grounds ; namely, due to the non-compliance of order dated 12.11.2014 by the plaintiff whereby he was directed to deposit the balance sale consideration of Rs.6,500,000.00 in Court within fifteen (15) days ; and also in view of the absence of the plaintiff and his counsel on that date as well as on several previous dates of hearing as the Suit was listed on all the said dates for examination of parties and settlement of issues.

2. It was contended by learned counsel for the plaintiff that the reason of his absence on the relevant date has been sufficiently explained in the affidavit filed by him in support of this application i.e. he was unable to attend this Court from 21.05.2018 to 23.05.2018 due to high fever. He further contended that his absence on the relevant date was not willful or deliberate. Regarding the non-compliance of order dated 12.11.2014, it was contended by him that this Suit was filed by the plaintiff for specific performance of two agreements out of which he has already paid the entire agreed sale consideration in respect of one agreement. According to him, in the above circumstances the order dated 12.11.2014 directing the plaintiff to deposit the balance sale consideration in Court was not justified, and due to this reason the dismissal of the Suit was also not justified. It was also contended by him that as the objections filed by the defendants in response to this application are not supported by their affidavit and they have not filed any counter affidavit, the contents of this application have remained un-rebutted. It was urged by him that in view of the above, the objections filed by the defendants are liable to be rejected and the Suit should be restored. In support of his last submission, he relied upon Messrs Eastern Steel, Karachi V/S National Shipping Corporation, I. I. Chundrigar Road,

**Karachi, PLJ 1984 Karachi 249, Ghulam Nabi V/S Khuda Bux and 2 others, PLJ 1984 Karachi 147, and Abdul Latif V/S Muhammad Yousuf and 2 others, PLD 1996 Karachi 365.**

3. On the other hand, it was contended by learned counsel for the defendants that no plausible explanation has been given on behalf of the plaintiff to justify the absence on the relevant date ; the plaintiff and his counsel were absent not only on the said date, but also on several previous dates of hearing ; the Suit was listed on the relevant date for examination of parties and settlement of issues, therefore, the plaintiff was bound under the law to appear on that date ; and, in view of the absence of the plaintiff and his counsel on the relevant date, the Suit was rightly dismissed. Regarding dismissal of the Suit due to the non-compliance of order dated 12.11.2014 by the plaintiff whereby he was directed to deposit the balance sale consideration of Rs.6,500,000.00 in Court within fifteen (15) days, learned counsel submitted that this Court was fully justified in dismissing the Suit on this ground also in view of the law laid down by the Hon'ble Supreme Court.

4. I have heard learned counsel for the parties at considerable length and have also examined the record of this case as well as the law cited at the bar. The plaintiff had filed this Suit mainly for specific performance of two agreements for sale of two immovable properties, wherein consequential relief of possession, mesne profits and injunction was also sought by him. Record shows that vide order dated 12.11.2014, the plaintiff was specifically directed to deposit the balance sale consideration of Rs.6,500,000.00 in Court within fifteen (15) days, and it was ordered that in case of his failure in doing so within the stipulated period, further time will not be granted to him for this purpose. It was observed in the aforesaid order that as this is a Suit for specific performance, the plaintiff had to show his bonafides in terms of the agreement for sale. It is important to note that the said order dated 12.11.2014 was accepted by the plaintiff as he admittedly never challenged the same in appeal nor did he file any application in this Suit for recalling or reviewing the said order. Resultantly, the said order attained finality long ago i.e. in December 2014, and as such the plaintiff was bound to comply with the same. In view of the above, the argument advanced on behalf of the plaintiff that the said order was not justified and thus the order of dismissal of the Suit due to its non-compliance by the plaintiff is also not justified, being misconceived, is liable to be rejected.

5. It is an admitted position that the order passed by this Court on 12.11.2014 was not complied with by the plaintiff as he did not deposit the balance sale consideration in Court despite specific direction in this behalf. In this context, I may refer to Hamood Mehmood V/S Shabana Ishaque and

others 2017 SCMR 2022, wherein the Hon'ble Supreme Court was pleased to hold 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. The above view is further fortified by a recent pronouncement viz. Messrs Kuwait National Real Estate Company (Pvt.) Ltd. and others V/S Messrs Educational Excellence Ltd. and another, 2020 SCMR 171, wherein it was held by the Hon'ble Supreme Court 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. I may also refer to Allah Ditta V/S Bashir Ahmad, 1997 SCMR 181, and Haji Abdul Hameed Khan V/S Ghulam Rabbani, 2003 SCMR 953, wherein the order of dismissal of the Suit for specific performance passed by the trial Court due to the plaintiff's failure in depositing the balance sale consideration in Court, was upheld the Hon'ble Supreme Court. Thus, in view of the well-settled position as discussed above, the Suit was rightly dismissed vide order dated 21.05.2018 as the plaintiff did not deposit the balance sale consideration in Court despite this Court's order dated 12.11.2014.

6. It was contended on behalf of the plaintiff that the cases of Hamood Mehmood (supra) and Messrs Kuwait National Real Estate Company (Pvt.) Ltd. (supra) cannot be applied in the instant case as this Court, and even this Bench, has granted time in many cases to deposit the balance sale consideration in Court. The above contention is misconceived and misplaced ; firstly, as the plaintiff never sought further time to deposit the amount ; and secondly, as time was granted in the said cases in view of the request made by the plaintiffs therein on the first date of appearance, and there was no default on their part in complying with the direction of this Court to deposit the amount in Court. Whereas, in the instant case, the plaintiff admittedly failed not only in making any such request on the first date of appearance or even subsequently, but also failed to deposit the amount despite the order of this Court. Thus, both the above-cited authorities were fully applicable to the instant case, and accordingly the Suit had to be dismissed because of the plaintiff's failure in

making such request or deposit on the first date of appearance as held by the Hon'ble Supreme Court in Hamood Mehmood (supra), and also in view of his failure to deposit the amount despite this Court's order which is an essential pre-requisite to seek specific performance of a contract as held by the Hon'ble Supreme Court in Messrs Kuwait National Real Estate Company (supra).

7. I shall now discuss the mandatory requirement for a plaintiff to be present on the date when the Suit is listed for examination of parties and settlement of issues, the consequences and implications of his non-appearance on the said date, and the explanation offered in the present Suit by and on behalf of the plaintiff for the absence on the relevant date. In his affidavit filed in support of this application. learned counsel for the plaintiff has stated that he fell sick on 19.05.2018 due to high fever and due to this reason he was unable to attend his cases before this Court from 21.05.2018 to 23.05.2018 ; and, during the said period he had requested another counsel viz. Mr. Muhammad Afsar advocate to attend his cases, including the instant Suit. He has further stated that his cases were attended by the above named counsel during the aforesaid period, however, the said counsel could not appear in the instant case when it was taken up as he was busy in attending his own cases. In view of the above, it is an admitted position, even according to the learned counsel's own statement, that he was aware of the date of hearing and had requested a professional counsel to attend this case on his behalf, and in spite of having the knowledge of the date of hearing of this case, the said counsel preferred to attend his own cases and did not appear in this case although it was called twice on the relevant date. It may be noted that copy of the cause list, or even list of cases of the said counsel fixed on the relevant date, or his affidavit, have not been filed in support of the above contention. It may also be noted that this Suit was not dismissed in the first call and instead it was kept aside in order to give a chance to the plaintiff and his counsel to appear before the Court, and it was dismissed after the second call by observing that the continued absence of representation on behalf of the plaintiff in both the calls had remained unexplained. Surprisingly, there is no explanation whatsoever as to why the above named counsel was absent on both the occasions.

8. On my query, it was candidly conceded by learned counsel for the plaintiff that despite his indisposition he did not apply to the Hon'ble Chief Justice of this Court for general adjournment during the above mentioned period. It may be observed that the facility of seeking general adjournment has been made specially and easily available for practicing advocates of

this Court so that they may seek exemption from appearing in their cases before the Court during a specified period when they are unable to do so for any genuine and valid reason ; this is necessary and important so that adverse orders are not passed in their cases in their absence ; and, adverse orders are generally not passed when a counsel has been granted general adjournment, except in extraordinary circumstances. In the present case, it is an admitted position that learned counsel for the plaintiff chose not to avail the above facility despite his indisposition, and the counsel instructed by him to attend this case, in spite of having knowledge of the date of hearing, remained absent in both the calls on the relevant date. In the above circumstances, the explanation offered by learned counsel for the plaintiff cannot be accepted.

9. In addition to the affidavit of his counsel, the plaintiff has also filed his own affidavit in support of this application, wherein he has stated that he was unable to attend this case on the relevant date as he went to Hyderabad on 20.05.2018 to visit his ailing sister whose condition was serious, and he returned to Karachi on 23.05.2018. As he has claimed to have gone to Hyderabad, it can be assumed that he may have travelled by car, therefore, he was not expected to file copies of his tickets of such travel that may have been necessary in case of a long-distance journey by airplane or train. However, he ought to have filed at least copies of the medical certificate, medical prescriptions and reports, and proof of hospitalization, if any, of his sister who's condition, according to his own statement, was serious. None of the above has been filed by the plaintiff. Moreover, he has also not claimed that he had informed his counsel in advance that he will not be able to attend this Suit on the relevant date. The above aspect is important and relevant as it is not the case of the plaintiff that he and/or his counsel were not aware of the date of hearing of this Suit. Therefore, it was his duty to ensure his presence in this Suit before this Court on the relevant date because it was listed for examination of parties and settlement of issues, or to inform his counsel in advance about his inability to appear. By not doing either of the above, the plaintiff cannot claim that he was vigilant in pursuing this Suit or he has sufficiently explained his absence on the relevant date.

10. Record shows that the Suit came up before this Court on 16.11.2015, 15.01.2018, 06.04.2018 and finally on 21.05.2018 for examination of parties and settlement of issues, but on all the above mentioned dates the plaintiff and his counsel were absent without any intimation. The above conduct of the plaintiff and his counsel was noted by this Court in the order passed on 21.05.2018 when the Suit was dismissed. As noted above, indulgence was shown by this Court even on that date as instead of

dismissing the Suit in the first call when the plaintiff and his counsel were absent, the matter was kept aside and was eventually dismissed after the second call when again no one was present on behalf of the plaintiff. It is an admitted position that there was nothing on record before this Court on the relevant date to show that the Court was informed about the reason of the absence of the plaintiff and his counsel. It is well-settled that when a Suit is fixed for examination of parties and settlement of issues, a plaintiff is required to be present along with his evidence and witnesses ; and, in case of his failure, the Suit is liable to be dismissed. Therefore, no exception can be taken to the dismissal of the present Suit due to the continuous and unexplained absence of the plaintiff and his counsel on the above mentioned four dates, particularly the relevant date, when the Suit was fixed especially for examination of parties and settlement of issues.

11. Regarding the contention of learned counsel for the plaintiff that the objections filed by the defendants are not supported by their affidavit and they have not filed any counter affidavit, it may be noted that the counter affidavit of the defendants would have been relevant if any factual controversy had been raised in this application by the plaintiff which would have required specific denial by the defendants. The non-deposit of the balance sale consideration by the plaintiff despite this Court's order and the continuous and unexplained absence on his behalf on the above mentioned dates, particularly the relevant date, is a matter of record. Therefore, filing of counter affidavit by the defendants was immaterial.

12. I have already rejected the explanation offered by and on behalf of the plaintiff for the absence on the relevant date. However, it is necessary to observe that had the said explanation been accepted for the sake of argument and had the Suit been restored, even then no useful purpose would have been achieved and such exercise would have been completely futile as the dismissal of the Suit was inevitable. The Suit was liable to be dismissed in any event in view of the above-cited law laid down by the Hon'ble Supreme Court due to the plaintiff's admitted failure in depositing the balance sale consideration in Court despite this Court's order. Thus, the order dated 21.05.2018 of the dismissal of the Suit on both the grounds was fully justified, and the same is not liable to be recalled.

13. Foregoing are the reasons of the short order announced by me on 01.06.2021 whereby the listed application was dismissed with no order as to costs.

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