

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1769 of 2009

Present :

Mr. Justice Nadeem Akhtar

Date of hearing : 10.01.2013.

Mr. Muhammad Shahzad, Advocate for the plaintiff.

Mr. Tufail H. Ebrahim, Advocate for the defendant.

ORDER ON C.M.A. No. 13274 of 2012 :

NADEEM AKHTAR, J.- This application has been filed by the defendant praying that the plaintiff may be restrained from interfering with the defendant's peaceful possession, occupation, enjoyment and/or from creating any objection or hindrance in the sale / transfer of her property ; namely, Plot No.115, 14th Street, Phase VI, Pakistan Defence Officers' Housing Authority, Karachi, measuring 2,000 square yards.

2. Admittedly, the defendant is the sole and absolute owner of the aforementioned property. The brief facts of this case are that the plaintiff and the defendant entered into an Agreement of Sale dated 08.04.2009 (**the agreement**), whereby the defendant agreed to sell her property to the plaintiff and the plaintiff agreed to purchase the same from the defendant. The sale consideration was agreed at Rs.65,000,000.00. A sum of Rs.6,500,000.00, being 10% amount of the agreed sale consideration, was paid by the plaintiff to the defendant as part payment. The balance sale consideration was to be paid by the plaintiff to the defendant as per the terms and conditions of the agreement. Since the plaintiff failed to pay the balance sale consideration to the defendant, the defendant did not complete the sale of her property in favour of the plaintiff. In view of the above, the plaintiff filed Suit No.734 of 2009 before this Court against the defendant for specific performance of the agreement. The Pakistan Defence Officers' Housing Authority, Karachi, was also joined in the said Suit as a proforma defendant..

3. Suit No.734 of 2009 filed by the plaintiff was decreed on 02.09.2009 in the following terms :-

“ i. The plaintiff shall pay to defendant No.1 the balance sale consideration amount within 22 days from today.

ii. *On the date of receipt of the payment, as prescribed above, the defendant shall execute all the requisite transfer documents and convey the Suit property in favour of the plaintiff.*

iii. *In case, the plaintiff fails to make the payment, as prescribed above, she shall loose (!) all his (!) rights and/or claim in respect of the Suit property. The plaintiff may, however, pursue his (!) remedy for refund of the amount that he (!) has already paid to the defendant. ”*

Despite the decree passed by this Court, the plaintiff failed to pay the balance sale consideration to the plaintiff within the time prescribed in the decree. No application for extension of time was filed by the plaintiff, nor did she file an appeal against the decree. As such, the decree attained finality.

4. On 14.12.2009, the plaintiff filed the present Suit against the defendant for damages as well as for recovery of Rs.6,500,000.00 paid by her to the defendant as the part payment. An application bearing CMA No.11264/2009 under Order XXXVIII Rule 5 CPC was also filed by the plaintiff in the present Suit, praying that the defendant be directed to furnish a surety in the sum of Rs.17,500,000.00, or in the alternative, the defendant's property be attached. The said application was dismissed vide short Order announced on 28.03.2012 followed by the reasons thereof dated 03.04.2012.

5. After dismissal of her application for attachment of the defendant's property, the plaintiff applied to the concerned Sub-Registrar for registration of the notice of *Lis Pendens* in respect of the defendant's property under Section 52 of the Transfer of Property Act, 1882. The said notice of *Lis Pendens* was registered with the Sub-Registrar on 09.05.2012, and a copy thereof was sent to the Pakistan Defence Officers' Housing Authority, Karachi, also. It appears that the defendant entered into an agreement for sale of her property with a third party, who got published a public notice in newspapers. In response to the said public notice, the plaintiff addressed a letter dated 15.11.2012 to the counsel of the said third party / vendee, objecting to the sale of the defendant's property by claiming *inter alia* that she had entered into an agreement for sale of the property with the defendant, her Suit (the present Suit) is pending before this Court, and that she has also registered the notice of *Lis Pendens* with the concerned Sub-Registrar.

6. Mr. Tufail H. Ebrahim, the learned counsel for the defendant, submitted that, in view of the decree passed in the plaintiff's Suit No.734 of 2009, the plaintiff lost her claim and all her rights in respect of the defendant's property as she did not pay the balance sale consideration to the

defendant within the time prescribed in the decree. Without prejudice to his above submission, he submitted that by claiming refund of the part payment and damages, the plaintiff herself has relinquished her purported claim and rights in the defendant's property. He further submitted that, in any event, the property is not the subject matter of the present Suit. The learned counsel argued that the defendant has every right to hold and enjoy her property or to sell / transfer the same to any third party, and that the plaintiff has no right at all to interfere in the defendant's peaceful possession, occupation, enjoyment of her property and/or to create any hindrance in the sale / transfer thereof. In the end, it was contended by the learned counsel that the defendant has suffered, and is continuously suffering, financial losses and mental agony because of the illegal acts committed by the plaintiff by registering the notice of *Lis Pendens* and by interfering in the sale of her property.

7. In her counter affidavit, the plaintiff has stated that the listed application is not maintainable as no such prayer has been made by the defendant in her written statement. This objection is misconceived as the impugned actions were taken by the plaintiff in May 2012 and November 2012. Whereas, the defendant filed her written statement on 24.08.2010. A party is entitled to seek his remedy in case, during the pendency of the proceedings, any new development takes place or if he is aggrieved by any action taken by the other party. In such an event, the Court can look into the subsequent events brought to its notice by the party, and the Court may pass appropriate orders as it may deem fit and proper in the facts and circumstances of the case.

8. Mr. Muhammad Shahzad, the learned counsel for the plaintiff, submitted that Section 35(c) of the Specific Relief Act, 1877, provides that, where a decree for specific performance of a contract of sale has been made and the purchaser makes default in payment of the purchase-money or other sums which the Court has ordered him to pay, the seller is bound to sue the purchaser for rescission of the contract and such rescission is to be adjudged by the Court. He submitted that, unless the seller sues the purchaser for rescission of the contract and such rescission is adjudged by the Court, the contract remains alive and the parties thereto will be bound by its terms and conditions. He contended that admittedly the defendant did not sue the plaintiff for rescission of the contract when the plaintiff failed to pay the balance sale consideration in terms of the decree passed in Suit No.734 of 2009, nor the rescission of the contract was adjudged by the Court. The learned counsel argued that, in view of his above submission, the agreement is not only still alive, but is also enforceable, and as such the plaintiff still has

valuable vested rights, interests and claim in the Suit property. In support of his submissions, the learned counsel for the plaintiff cited and relied upon three Single Bench reported cases of Lahore High Court ; namely, (i) Muhammad Riaz Qamar V/S Umar Din and 3 others, **1985 CLC 474**, (ii) Muhammad Ismail V/S Muhammad Akbar Bhatti and 5 others, **PLD 1977 Lahore 177**, and (iii) Nasir Ahmad V/S Muhammad Yousuf, **PLD 1994 Lahore 280**.

9. In the case of *Muhammad Riaz Qamar V/S Umar Din and 3 others* (supra), a consent decree was passed in a Suit for specific performance. Subsequently, an application under Section 12(2) CPC was filed wherein the parties once again entered into a compromise. Thereafter, the original decree was amended without notice to the plaintiff / decree holder. In the amended decree, the plaintiff / decree holder was directed to deposit the balance sale consideration within a specified time, failing which his Suit was considered to have been dismissed automatically. In the original consent decree, there was no such direction for deposit of the sale consideration. A review application was filed by the plaintiff / decree holder, which was dismissed, and the revision filed by him against such dismissal also failed on the ground that the plaintiff / decree holder did not comply with the direction contained in the amended decree. The said order was challenged in the constitutional jurisdiction of the Lahore High Court. The petition was dismissed. The facts of the present case and that of *Muhammad Riaz Qamar* (supra), are distinguishable, and as such the case cited by the learned counsel is not relevant to the present case.

10. In the case of *Muhammad Ismail* (supra), there were only two legal questions before the Court. Firstly, whether a Court which passes the decree in an action for specific performance, retains control over the *lis* and has power to enlarge the time fixed by it for depositing the purchase price under Section 148 or 151 CPC ; and whether a decree, in an action from specific performance, is preliminary in nature. Secondly, if so, whether in the facts and circumstances of the case, the petitioner had made out a case for enlargement of time. It is an admitted position that the decree for specific performance was passed in Suit No.734 of 2009 and not in this Suit, and the plaintiff did not file any application in her aforementioned earlier Suit for extension of time for payment of the balance sale consideration. Therefore, the questions of retaining control over the *lis* and the power to enlarge the time fixed in the decree, do not arise in the present case. This case also has no relevance with the facts and circumstances of the present case. In fact, this case relied upon by the learned counsel for the plaintiff supports the

case of the defendant, as it was held therein that where the Suit for specific performance was decreed subject to condition that the purchase price shall be deposited in Court within a specified time and if the same was not deposited within that time, the Suit shall stand dismissed ; the decree passed by the Court was final and self-operative, and in case of default of payment of the purchase price, the mandate of the Court would tantamount to rescission of contract.

11. Similarly, in the case of *Nasir Ahmad* (supra), the material points before the Court were, whether the Court passing the decree in a Suit for specific performance fixing a time limit for payment of the purchase price, retained the *lis* and could further extend the time for deposit / payment of the purchase price ; and if so, what were the relevant factors for permitting the exercise of jurisdiction by the Court for extending the time further. In view of the discussion in the preceding paragraph, this case is also not relevant in the facts and circumstances of the present case.

12. A careful perusal of Section 52 of the Transfer of Property Act, 1882, **(the Act)** shows that during the pendency of any Suit or proceeding which is not collusive and in which any right to immovable property is in question, directly and specifically, the said property cannot be transferred or otherwise dealt with by any party to the Suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose. The words “any right to immovable property” and “directly and specifically in question”, used in Section 52 of the Act are of great significance. In order to invoke this Section, a party must show that he has some right in the immovable property, such right is directly and specifically in question in the Suit or proceeding, and such Suit or proceeding is pending. In the present case, the Suit in which the plaintiff had claimed right in the immovable property (the defendant’s property) was her previous Suit No.734 of 2009, which was decreed. However, due to the default committed by the plaintiff by not following the direction contained in the decree, she lost her claim and all her rights in the defendant’s property which was the subject matter of her said previous Suit. The defendant’s property is not the subject matter of this Suit, nor has the plaintiff claimed any right therein, either directly or specifically. As such, it cannot be said that the plaintiff has any right in the defendant’s property, or that any such right is in question in this Suit directly and specifically. A bare reading of the plaint is sufficient to show that the plaintiff herself has not claimed any right or interest in the defendant’s property, but has prayed only for the recovery of damages and

the part payment made by her to the defendant. Moreover, CMA No.11264/2009 filed by the plaintiff for attachment of the defendant's property was dismissed in the present Suit. In view of the above discussion, in my humble opinion Section 52 of the Act shall not apply in the present case.

13. I am unable to convince myself to agree with the learned counsel of the plaintiff that, since the defendant did not sue the plaintiff for rescission of the agreement and such rescission has not been adjudged by the Court, the agreement is still enforceable under Section 35(c) of the Specific Relief Act, 1877. The terms of the decree passed in the plaintiff's earlier Suit No.734 of 2009 were very much clear. The said decree specifically provided that in the event of default by the plaintiff in the payment of the balance sale consideration within the period specified in the decree, the plaintiff shall lose her claim and all her rights in respect of the defendant's property. In paragraph 9 of her counter affidavit, the plaintiff has admitted this position. This particular eventuality in the event of default mentioned in the decree, itself was the rescission of the agreement by the Court. As held by the Lahore High Court in the case of *Muhammad Ismail* (supra), such decree was final and self-operative, and in case of default, the mandate of the Court would tantamount to rescission of the contract.

14. I have noticed that the counter affidavit of the plaintiff is absolutely silent about the registration of the notice of *Lis Pendens* by her with the Sub-Registrar, and issuing the letter by her to the counsel for the third party / vendee objecting to the sale of the defendant's property. The plaintiff has failed to justify as to under what right and authority she took the said actions in respect of the defendant's property.

Foregoing are the reasons of the short Order announced by me on 10.01.2013, whereby C.M.A. No. 13274 / 2012 filed by the defendant was allowed as prayed.

J U D G E
