

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1077 of 2021

Date	Order with signature of Judge
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- For orders as to maintainability of Suit in view of order dt. 29.03.2021 :
- For orders on Nazir's Report dated 29.12.2020 :
- For hearing of CMA No.16443/2019 (U/O XXXIX Rs 1 & 2 CPC) :
- For hearing of CMA No.14253/2020 (U/S 151 CPC) :

Plaintiff : Akhlaq Hashmi, through Mr. Umar Farooq Khan advocate.

Defendants 1-31 : Mst. Bakht Bibi and 30 others, through Mr. Nasrullah Malik advocate.

Defendant No.32: Mukhtiarkar Taluka Memon Goth, District Malir, Karachi, called absent.

Defendant No.33 : Sub-Registrar, Malir Town, Karachi, called absent.

Defendant No.34 : S.H.O., P.S. Memon Goth, Malir, Karachi, called absent.

Date of hearing : 08.04.2021.

ORDER

NADEEM AKHTAR, J. – Through the instant Suit for specific performance of contract and permanent injunction, the plaintiff has prayed that defendants 1 to 31 be directed to perform their agreed part of the contract by transferring the suit property viz. land measuring 4 acres 7 ghuntas, out of Survey No.467, situated at Deh Malh, Tapo Darsano Channo, Taluka Murad Memon, District Malir, Karachi, in his name. Consequential relief of injunction has also been sought by the plaintiff against the said defendants in relation to the suit property. It is the case of the plaintiff that the parties entered into sale agreements dated 03.04.2017, 22.11.2017 and 09.03.2019 whereby the said defendants agreed to sell the suit property to him in consideration of Rs.22,962,500.00, out of which an amount of only Rs.7,000,000.00 was paid by him to them as part payment ; it was agreed that the balance sale consideration of Rs.15,962,500.00 will be paid by the plaintiff to them at the time of transfer of the suit property in his favour within 180 days ; after receiving the above part payment from the plaintiff, the said defendants handed over possession of the suit property to him ; despite the above, the said defendants not only failed to transfer the suit property in his favour, but also tried to take over possession thereof from him ; and, thus the said defendants failed to perform their agreed part of the contract.

2. Vide order dated 29.10.2020, the plaintiff was directed to deposit the balance sale consideration of Rs.15,962,500.00 with the Nazir of this Court within thirty (30) days and the Nazir was directed to invest the said amount in any profit bearing Government scheme. On 23.12.2020, it was pointed out to the Court by learned counsel for the defendants that the plaintiff had not complied with the aforesaid order as the balance sale consideration had not been deposited by him. On that date, a report was called from the Nazir which confirmed that the amount was not deposited by the plaintiff. In view of the above non-compliance of this Court's order by the plaintiff, he was directed vide order dated 22.01.2021 to place on record his bank statement in order to ascertain whether or not the above amount was available in his bank account. Despite the above directions for depositing the balance sale consideration in Court and to place on record his bank statement, the plaintiff failed to comply with the said directions. On 29.03.2021, the following order was passed in the presence of the learned counsel for the parties :

“Learned counsel for the defendants pleads urgency on the ground that plaintiff has still not complied with the order passed on 29.10.2020 whereby he was directed to deposit the balance sale consideration with the Nazir of this Court within thirty (30) days. Urgency granted.

*Learned counsel for the plaintiff concedes that the above order has not been complied with by the plaintiff. He requests for time to seek instructions and also to file an application for extension in the above mentioned time granted by this Court. In view of the above admitted position, prima facie, the Suit is liable to be dismissed in view of the law laid down by the Hon'ble Supreme Court in Hamood Mehmood V/S Mst. Shabana Ishaque and others, **2017 SCMR 2022**. Therefore, I am afraid the request made by learned counsel for the plaintiff cannot be allowed. He is put on notice to satisfy the Court on the next date of hearing as to how this Suit is maintainable and why it should not be dismissed. At his request, adjourned to 08.04.2021 at 11:00 a.m.”*

3. Record shows that an application under Section 148 CPC bearing CMA No.4713/2021 was filed by the plaintiff on 11.03.2021 praying that the time granted to him on 29.10.2020 to deposit the balance sale consideration in Court be extended. It appears that learned counsel for the plaintiff was not aware of this application as he made a request on 29.03.2021 for time to seek instructions and also for filing such application. Be that as it may, the above mentioned orders passed in this Suit from time to time show that despite specific directions by this Court, the plaintiff did not deposit the amount nor did he place on record his bank statement. Moreover, the plaintiff's counsel was specifically directed to satisfy the Court regarding maintainability of the Suit in view of the above-cited authority, and sufficient opportunity was granted to him to prepare himself in order to assist the Court. Instead of addressing the

question of maintainability, he has once again requested that further time be granted to the plaintiff to deposit the balance sale consideration. No explanation whatsoever has been offered by him for not depositing the amount and for not placing on record the plaintiff's bank statement despite specific direction by this Court. It may be noted that it has been vaguely stated by the plaintiff in paragraph 6 of the plaint that he was ready to pay the balance sale consideration to the defendants. However, at the time of institution of the Suit he did not file any application seeking permission of this Court to deposit the balance sale consideration, and even up till now he has not filed any application for this purpose. CMA No.4713/2021 was filed by him on 11.03.2021 i.e. after the direction given to him by this Court vide order dated 29.10.2020 to deposit the amount in Court. The said application cannot be treated as an application seeking permission to deposit the amount in Court as such direction had already been given by this Court on 29.10.2020, and through the said application the plaintiff is merely seeking extension in the time granted by this Court. Even up till now, the plaintiff has not deposited the amount in Court.

4. 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 obligation under the contract, and yet it may not be ready or willing to do so. 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. 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.

5. My above view is fortified by Hamood Mehmood V/S Mst. Shabana Ishaque and others, **2017 SCMR 2022**, wherein it was held by the Hon'ble

Supreme Court 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. As noted above, in the instant Suit the plaintiff not only failed to apply for permission to deposit the balance amount in Court, but also failed to deposit the said amount despite specific direction by this Court. The 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 the Hon'ble Supreme Court was pleased to hold 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. In the above context, 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.

6. 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 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. In the instant case, the conduct of the plaintiff, from the very inception of the Suit, does not reflect that he was/is serious, capable, ready and or willing to perform his agreed part of the contract. He filed this Suit after admittedly paying Rs.7,000,000.00 i.e. only 30% amount of the agreed sale consideration of Rs.22,962,500.00. His conduct and the reluctance on his part to deposit the balance sale consideration despite the Court's order undoubtedly reflects his

deliberate and intentional unwillingness to perform his agreed part of the contract.

7. It was contended on behalf of the plaintiff that the above authorities of the Hon'ble Supreme Court 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 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, but also failed to deposit the amount despite the order of this Court. Thus, the Suit has 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 the order of this Court 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.

8. In view of the above discussion, particularly the law laid down by the Hon'ble Supreme Court in the above-cited authorities, this Suit for specific performance is liable to be dismissed with special compensatory costs to defendants 1 to 31 who have been dragged into this uncalled for litigation by the plaintiff due to which the said defendants were unable to enjoy and exercise their valuable proprietary rights in respect of their own property since last many years.

9. Foregoing are the reasons of the short order announced by me on 08.04.2021 whereby this Suit and listed applications were dismissed with costs of Rs.50,000.00 (Rupees fifty thousand only) to be paid by the plaintiff to defendants 1 to 31 within thirty (30) days. The amount of Rs.7,000,000.00 (Rupees seven million only) received by the said defendants from the plaintiff shall be returned by them to him within thirty (30) days.

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