

**IN THE HIGH COURT OF SINDH AT KARACHI
(ORIGINAL SIDE)**

Suit No.1587 of 2013

(Prime Builders v. Pakistan Industrial Development Corporation (Pvt) Ltd & Another)

Plaintiff:	Prime Builders Through Mr. Khawaja Shamsul Islam & Mr. Imtiaz Ali Shah, Advocates
Defendant No.1:	PIDC (Pvt) Ltd Through Mr. Asim Iqbal, Mr. Farmanullah, Ms. Syeda Khizra Fatima Chishti & Syeda Maryam Mastoor, Advocates
Defendant No.2:	Government of Sindh Through Mr. Imran Ahmed Abro, AAG
Date(s) of Hearing:	14-11-2023, 28-11-2023, 8-3-2024 & 10-8-2024
Date of Decision:	15-8-2024

ORDER

1. **Sana Akram Minhas, J:** The instant Suit No.1587/2013 (“**Suit 1587**”) has been instituted by the Plaintiff (“**Plaintiff**”) primarily against the Defendant No.1 (“**PIDC**”) for “*Declaration, Direction, Cancellation, Mandatory & Prohibitory Injunction & Damages*”. This order addresses CMA No.13955/2013, which is an application filed by the Plaintiff under Order 39 rules 1 & 2 read with section 151 of the *Code of Civil Procedure, 1908*, (“**CPC**”). The Plaintiff seeks an injunction to restrain PIDC from selling, dealing with or creating any third party interests in the immovable properties owned by PIDC bearing Plots No.D-6, D-7 & D-8, Bath Island, Karachi (collectively measuring 7250 sq. yards) (“**Suit Plots**”).

Brief Facts

2. The PIDC (a state-owned enterprise controlled by the Government of Pakistan) owns the Suit Plots which it purchased on a 99-year lease from Karachi Municipal Corporation (KMC) in 1959.
3. In 2011, a sale was advertised by PIDC in the newspapers twice: once on 6.3.2011, and again on 12.6.2011. In response to the advertisement of

12.6.2011, the Plaintiff through a letter dated 13.7.2011, submitted bids and offered to purchase the Suit Plots for Rs.330 million. Along with the bid, the Plaintiff enclosed an earnest money pay order of Rs.33 million dated 13.7.2011, constituting 10% of the bid amount.

4. After the Plaintiff issued a reminder letter dated 26.11.2011 to PIDC for issuance of confirmation letter, the PIDC by a letter dated 24.2.2012, invited the Plaintiff to a meeting with the concerned Minister at the latter's office, where the Plaintiff agreed to increase its bid from Rs.330 million to Rs.380 million. This increase was subsequently confirmed by the Plaintiff in a letter dated 2.3.2012.
5. Shortly thereafter, on 13.4.2012, PIDC extended an offer to both the Plaintiff and the Defendant No.2 (viz. Government of Sindh, who had not participated in the bidding process) to purchase the Suit Plots at a reserved price of Rs.450 million with a requirement to finalize the deal within 30 days of the letter's issuance. The Plaintiff accepted this offer and conveyed its agreement to purchase the Suit Plots for Rs.450 million in a letter dated 2.5.2012.
6. Despite the Plaintiff being the highest bidder and agreeing to the increased bid, PIDC, through a letter dated 3.10.2013, conveyed its non-acceptance of the Plaintiff's offer, citing unspecified defects, and returned the Plaintiff's pay order dated 13.7.2011. In response, the Plaintiff resubmitted the pay order to PIDC via a letter dated 11.10.2013, and subsequently instituted the present Suit 1587 on 13.12.2013.
7. An interim restraining order "*as prayed*" was issued by this Court on 16.12.2013, pursuant to the Plaintiff's stay application (CMA No.13955/2013).

Submissions

8. The learned Counsel for the Plaintiff submitted that:
 - a) At PIDC's instance, the Plaintiff agreed to increase the bid twice – from Rs.330 million to Rs.380 million, and subsequently to Rs.450 million. Despite being the highest bidder and agreeing to the increased bid, PIDC's delayed rejection after accepting the Plaintiff's enhanced offer was done in bad faith. PIDC's refusal to finalize the sale, despite the accepted bid, constituted unfair and illegal behaviour. Once the Plaintiff accepted PIDC's latest offer, the transaction was complete, and signing a formal agreement was a mere formality that PIDC could not unilaterally change.

- b) Additionally, PIDC's inclusion of the Defendant No.2 as a competitor was malafide, considering that the Defendant No.2 never participated in the bid proceedings and was never a bidder.
 - c) The Plaintiff made no alterations or modifications to its bid, thereby not violating Rule No.31 of the *Public Procurement Rules, 2004 ("PPRA Rules")* established under the *Public Procurement Regulatory Authority Ordinance, 2002*. Regardless, this alleged violation was only brought up by PIDC as an afterthought in its Written Statement.
9. The learned Counsel for PIDC argued that:
- a) The Plaintiff concealed the fact that PIDC returned the Plaintiff's 10% earnest money pay order twice, which the Plaintiff refused to accept both times, indicating that no binding contract or consensus existed between the parties. The Plaintiff approached the Court with unclean hands, presenting a distorted version of the facts to seek specific performance of a purported agreement.
 - b) Inviting bids was in fact an invitation to offer, and unless accepted and confirmed by the competent authority, no enforceable contract came into being nor did it create any right in favour of the highest bidder viz. the Plaintiff.
 - c) PIDC's decision to approach the Defendant No.2 for the disposal of the Suit Plots was a calculated step to secure the best market price. As a state-owned enterprise, PIDC retained the right to accept or reject offers based on commercial considerations to benefit the public exchequer. The disposal of government-owned assets must maximize public benefit, and PIDC was under a statutory obligation to make policy decisions based on these commercial considerations.
 - d) The Plaintiff's bid was non-compliant with PPRA Rules and the belated modification of the bid by the Plaintiff being contrary to Rule No.31 of PPRA Rules, was never approved.

Opinion of the Court

10. Submissions of the respective Counsel have been considered and the record perused along with the case law¹ cited at bar.

¹ Plaintiff's Citations: PLD 1991 SC 14 (*Chairman Regional Transport v. Pakistan Mutual Insurance*); PLD 1991 SC 368 (*Commissioner Income Tax v. Siemen AG*); 2020 SCMR 1957 (*Lahore Development Authority v. Muhammad Tariq Niaz*); 2020 MLD 1849 (*Ahmar Iqbal v. Ministry of Energy*)

11. Before discussing the rival contentions of the parties, the important question that calls for determination in this case is whether there was any concluded contract between the parties binding the PIDC to sell the Suit Plots to the Plaintiff for Rs.450 million.
12. The difference between an offer and an invitation to treat (also called invitation to offer) lies in how they affect contract formation. An offer is a definitive proposal made by one party (the offeror) to another (the offeree). An offer is a clear and unambiguous expression of terms proposed on which the offeror is prepared to be bound. It must be definite, and its acceptance creates a binding contract. On the other hand, an invitation to treat is a preliminary communication indicating that a person is willing to negotiate the terms of a contract but is not yet ready to form a binding contract immediately. Acceptance of an offer forms a contract. Acceptance of an invitation to treat does not form a contract; instead, it is an invitation for others to make offers, which can then be accepted or rejected.
13. Inviting bids is, ordinarily, an invitation to treat. Unless accepted and confirmed by the competent authority, it does not mature into a contract and no enforceable contract comes into being, nor does it create any right in favour of the highest bidder². Similarly, mere bid at an auction, if the bid is subject to confirmation, does not create any contractual right until the bid is confirmed³.
14. In the instant Suit 1587, the advertisement of 12.6.2011 inviting bids for the sale of Suit Plots land is an announcement made by PIDC (i.e. the owner of the Suit Plots) to the public, indicating that it was seeking offers from potential buyers to purchase the Suit Plots. This type of advertisement is usually an invitation to treat rather than a binding offer. It outlines the process by which interested parties can submit their bids and provides relevant details about the land and the bidding procedure.
15. Had things ended here, it would perhaps be straightforward, but it extends beyond this. A subsequent communication of PIDC dated 13.4.2012, offering

Defendant No.1's (PIDC) Citations: 2023 CLC 363 (*Cemtech–Jiangsu JV v. Government of Khyber Pakhtunkhwa*); 2022 CLC 1985 (*Asif Shah v. Mazhar Javed*); 2020 SCMR 2134 (*Muhammad Jawed v. First Women Bank Ltd*); 2020 CLD 254 (*Muhammad Jawed v. First Women Bank Limited*); PLD 2020 Lah 565 (*Bio-Labs v. Province of Punjab*); PLD 2018 Kar 303 (*Sinotec Co. v. Province of Sindh*); PLD 2016 Sindh 207 (*Pakistan Gas Port v. Sui Southern Gas*); 2016 MLD 1287 (*Muhammad Hayat v. Director General*); 2010 CLC 794 (*Nisar v. Muhammad Saeed Safdar*); 2010 SCMR 306 (*Petrosin Corporation v. Oil & Gas Development Company*); 2007 CLD 1336 (*Tariq Mehmood Memon v. Province of Sindh*); 2007 SCMR 1572 (*Noor Muhammad v. Chief Engineer*); 2005 SCMR 263 (*Mumtaz Ahmad Chadhar v. Nasir Ali*); 1975 SCMR 406 (*Abdul Hamid Khan v. Settlement & Rehabilitation Commissioner*); 1974 SCMR 337 (*Parvez Qureshi v. Settlement Commissioner*)

² 2007 CLD 1336 (*Tariq Mehmood Memon v. Province of Sindh*); 2010 CLC 794 (*Nisar v. Muhammad Saeed Safdar*)

³ 1974 SCMR 337 (*Parvez Qureshi v. Settlement Commissioner, Multan*)

the sale of the Suit Plots to both the Plaintiff and the Defendant No.2 at a reserved price of Rs.450 million within a specified time-frame of 30 days (which was accepted by the Plaintiff who communicated its acceptance to PIDC vide letter 2.5.2012), significantly alters the situation and the complexion of the case. In view of this letter, at this stage, it cannot be outrightly said or conclusively determined that this letter was merely an invitation to treat. It is a question of fact and requires evidence. There is nothing on record indicating that the Defendant No.2 ever accepted this offer and nor has PIDC at any time claimed that the Defendant No.2 did so.

16. Regarding the case law cited by PIDC's Counsel, these precedents are readily distinguishable and inapplicable to the present case. In none of the referenced cases was a letter subsequently issued by the seller/owner offering the immovable property for purchase at a specified price within a specified time-frame following the initial advertisement as has been done by PIDC in its letter dated 13.4.2012. Moreover, no bidder was twice asked to increase the bid amount by the seller/owner. Additionally, in none of the cited cases did the seller/owner retain a partial payment made by a bidder for over two (2) years (i.e. from 13.7.2011 to 3.10.2013) before belatedly returning it.
17. PIDC, in its letter dated 3.10.2013, alleges that it attempted to return the pay order earlier through a letter dated 29.12.2011 but the same was "*declined*" by the Plaintiff. However, the Plaintiff denies ever receiving this letter, and no courier delivery report is currently available on record. Even if PIDC's allegation is true, it is peculiar that after supposedly returning the pay order on 29.12.2011, PIDC then, by a letter dated 13.4.2012, offers the Suit Plots for purchase to the Plaintiff at a specified price. More oddly, this subsequent letter makes no mention of the earlier letter returning the pay order.
18. Turning now to the next submission of PIDC that as a state-owned enterprise, PIDC had the prerogative to accept or reject offers based on commercial considerations to benefit the public exchequer – since the disposal of government-owned assets needed to maximize public benefit, and PIDC was obligated by law to make policy decisions rooted in these commercial considerations. This reservation of authority (to accept or reject any or all offers without assigning any reason), does not endow the public functionary with a brazen, unchecked and arbitrary power to reject an offer solely because they possess or reserve such authority⁴. Accepting such an argument would effectively grant government-controlled entities the authority to cancel bids at their own will, leading to potential abuses of power. This could allow arbitrary bid rejections without transparency or accountability,

⁴ 2009 CLD 1336 (*Fateh Muhammad Agha v. City District Government*); 2010 CLC 1046 (*Reliance Consultancy v. Federation of Pakistan*)

undermining the principles of fairness and openness essential to a competitive bidding process. If bidders believe their offers can be disregarded on a whim, they may be discouraged from participating, leading to an erosion of trust in the system, making it harder to attract serious and reputable entities/bidders in future transactions. An authority may reserve the right to accept or reject any bid or offer, provided this discretion is exercised with caution, due diligence, and utmost responsibility.

19. The PIDC's startling and disturbing move to involve the Defendant No.2 (an entity which had not even participated in the bidding process) in pitching the Suit Plots for sale to both the Plaintiff and to the Defendant No.2 (as outlined in letter dated 13.4.2012) coupled with the latter's quick willingness to jump in and help PIDC undercut the Plaintiff's previous bid amount, undermines confidence and casts doubt on the integrity of the PIDC's process for disposing of the Suit Plots. It also reflects poorly on the Defendant No.2's (i.e. Government of Sindh) role as an enthusiastic spoiler, a willing accomplice and an eager participant in wrongdoing and dubious action. The PIDC's flimsy justification for including the Defendant No.2, amongst others, to maximize the price for the Suit Plots (as claimed in paragraph 11 of its Written Statement) is implausible, not credible and hard to swallow. Assuming the alleged pious intent was indeed to achieve the highest possible price, it would be logical to have invited multiple bidders rather than just one. To genuinely achieve this objective, the PIDC would have provided a public and even-handed opportunity for all interested parties to submit their bids openly, rather than only inviting one additional, favoured party (viz. Government of Sindh) in a clandestine manner. Nonetheless, just ends can never justify unjust means, since the fairness of the methods used is just as important as the outcome itself.
20. In Lahore Development Authority v. Muhammad Tariq Niaz⁵, the Supreme Court criticized the public functionary for introducing a third party into the bidding process who had not participated in the auction but offered a higher price. The Court deemed this action unjust, likely to erode public trust and disrupt social order, and emphasized that public officials must act within legal boundaries to ensure societal peace.
21. The Plaintiff and its pleadings will now be considered. The Plaintiff has filed the instant suit portraying it as a suit for declaration of rights and interests related to the Suit Plots. However, upon an examination of the contents of the Plaint and its prayer clauses (in particular prayer clause "a"), it is patent that the essence or core of the suit is for specific performance. The Plaintiff seeks to compel PIDC to fulfil its obligations pursuant to letter dated

⁵ 2020 SCMR 1957 (*Lahore Development Authority v. Muhammad Tariq Niaz*)

13.4.2012 (accepted by the Plaintiff via letter dated 2.5.2012), finalize the sale of the Suit Plots at Rs.450 million, and formally transfer ownership to the Plaintiff. This objective aligns with the legal remedy of specific performance rather than a mere declaratory judgment. Hence, the instant Suit 1587 is a suit for specific performance. In any event, a court, possessing the jurisdiction to adjudicate an application or a case, will look at the substance rather than its form, and consequently the court can still exercise that authority even if an incorrect heading or legal provision is cited⁶.

22. That being so, in a suit for specific performance, a plaintiff must demonstrate both the ability and readiness to fulfil its contractual obligations. While a buyer is not required to deposit the remaining sale consideration when initiating a suit for immovable property, the *Specific Relief Act, 1877* (“**SRA**”) is based on principles of equity, making specific performance a discretionary remedy rather than an automatic entitlement. Therefore, a court has the authority to impose conditions at any stage to verify the buyer's good faith. The notion that the deposit should only be made following a court order is misplaced.
23. A buyer seeking specific performance must show either that he has fulfilled his contractual obligations or has continuously demonstrated readiness and willingness⁷ to do so from the date of the agreement through to the filing of the suit, and beyond if required by the circumstances. The buyer must prove their bona fides and readiness by presenting evidence such as a pay order, cashier's cheque, bank statements, or other relevant material to demonstrate his ability to meet the contract terms. This helps ensure that the suit is not a tactic to disguise default or buy time. Furthermore, the court may direct that the buyer deposits the remaining sale consideration to show both intent and capability, indicating that any failure to complete the contract was not attributable to the buyer⁸. This deposit serves as proof of the buyer's capacity, readiness, and willingness to fulfill his contractual obligations, which is essential for seeking specific performance. It also protects the seller's interests by ensuring fairness and balance between the parties. Failure to meet this requirement of providing deposit may disqualify the buyer from obtaining specific performance, as it is a discretionary remedy

⁶ 1982 SCMR 494 (*Safia Bibi v. Aisha Bibi*); PLD 1993 SC 109 (*Pakistan Fisheries Ltd v. United Bank Ltd*); 1994 SCMR 1555 (*Jane Margrete William v. Abdul Hamid Mian*); 2014 CLD 1548 = 2015 CLC 1734 (*Asif Kudia v. KASB Bank Limited*); 2019 SCMR 2018 (*Al-Khair Gadoon Ltd v. The Appellate Tribunal*)

⁷ Form-47 in Appendix "A" of First Schedule of CPC, 1908 pertains to "Suit for Specific Performance" and delineates the templates and components of pleadings. Its paragraph (3) provides: "*The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice*". See: 2023 SCMR 555 (*DW Pakistan v. Anisa Fazl-i-Mahmood*)

⁸ 2021 SCMR 1270 (*Muhammad Asif Awan v. Dawood Khan*)

that must be applied fairly and reasonably⁹. The courts are not obligated to grant this relief simply because it is legally allowed¹⁰, as outlined in section 22 of SRA.

24. In this instance, the Plaintiff accepted PIDC's offer dated 13.4.2012, on 2.5.2012, and initiated the lawsuit on 13.12.2013. Considering that the Plaintiff did not take any initiative to deposit the accepted sale price in Court, and now, nearly eleven (11) years later, in 2024, it would be grossly inequitable and profoundly unjust to allow the Plaintiff (Buyer) to deposit the same sum in Court – especially when the Plaintiff has only issued a pay order for Rs.33 million while retaining the use of balance Rs.417 million (out of the total Rs.450 million). The value of land in Pakistan has surged significantly over time, and the rupee has continuously depreciated. Even this pay order dated 13.7.2011 of Rs.33 million has not been presented for encashment by PIDC to-date (which pay order was returned by PIDC on 3.10.2013 but resubmitted by the Plaintiff on 11.10.2013). Since then, although the pay order has been physically with PIDC (drawee/beneficiary) but with the funds likely still held by the issuing bank even though the pay order has well passed its six-month validity period and has become stale (since the issuing bank would have set aside this amount in its own accounts, effectively earmarking the funds for the pay order and the unclaimed amount [which has not been released to the drawee/beneficiary i.e. PIDC] does not automatically revert to the customer i.e. Plaintiff).
25. Therefore, the Plaintiff is directed to deposit the entire sum of Rs.450 million in cash with the learned Nazir of this Court. Additionally, the Plaintiff must deposit the accrued mark-up at the tentative rate of 18% per annum on the sum of Rs.417 million from the date of the Suit to the present date, within twenty-one (21) days from the date of this order. This does not apply to the entire Rs.450 million, for the reason that the Plaintiff has already issued a pay order for Rs.33 million dated 13.7.2011 and has been out of pocket for this amount since then. On receipt of the funds, the Nazir shall invest the amount in a profit-yielding government scheme. Failing to direct the deposit of the accrued mark-up could lead to a miscarriage of justice and unfairly benefit the Plaintiff, who, with only a minimal payment (of an un-encashed pay order of Rs.33 million) which constitutes a meagre 7.33% of the enhanced sale price accepted by it (of Rs.450 million), has effectively tied up the Suit Plots for over a decade.
26. The Plaintiff also claims damages. Section 19 of SRA permits a person seeking specific performance of a contract to also pursue compensation for

⁹ 2020 SCMR 171 (*Kuwait National Real Estate v. Educational Excellence Ltd*)

¹⁰ 2017 SCMR 1696 (*Muhammad Abdur Rehman Qureshi v. Sagheer Ahmad*)

its breach. This compensation can be sought either in addition to or as a substitute for the specific performance. This provision is significant given the restriction in section 29 of SRA, which states that the dismissal of a suit for specific performance, or any part of it, precludes a plaintiff from subsequently suing for compensation for the breach of that contract or its part.

27. Given the above, the Plaintiff has made out prima facie, arguable case. The balance of convenience also lies in the Plaintiff's favour and it would suffer irreparable loss in case the corpus of the lis (an immovable property) is not preserved. The present application is, therefore, allowed, subject to the condition outlined in paragraph 25 above. Should the Plaintiff fail to deposit the specified amount with the Nazir within the allotted time, this interlocutory application (CMA No.13955/2013) shall stand dismissed.
28. It is clarified that any deposit to be made by the Plaintiff in compliance with this order does not in any way imply that the Plaintiff is entitled to specific performance of the instant Suit 1587 or that the resolution or final determination of this Suit will be concluded at the same rate. Questions whether the Plaintiff had sufficient funds available during the relevant period to make the balance payment, the consequences of late deposit or non-deposit in Court by the Plaintiff (depending on the course of action chosen), its failure to file an application seeking permission from this Court to deposit the balance sale price to date, the increase in real estate prices in the intervening period, the overall competence and merits of the instant Suit, amongst other factors, will all be evaluated when finally deciding this Suit based on the evidence presented by the parties.
29. Regarding the expired pay order, PIDC shall hand it over to the Nazir within ten (10) days from the date of this order. The Nazir shall then return it to the Plaintiff, should it wish to reclaim the relevant amount from the issuing bank, subject to the bank's policy and procedure.
30. CMA No.13954/2013 (being an application under Order 39 rules 1 & 2 read with section 151 CPC): Through this interlocutory application, the Plaintiff requests a mandatory injunction directing PIDC to execute a sale deed in favour of the Plaintiff for the Suit Plots. The application is premature at this stage and is deferred. It will be heard and decided alongside the main case at the time of arguments after the evidence has been recorded.

JUDGE

Karachi
Dated: 15th August, 2024