

ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1214 of 2013

| Date | Order with signature of Judge |
|------|---|
| 1. | For hearing of CMA No.10283/2013 (U/O 39 R 1&2 CPC) |
| 2. | For hearing of CMA No.11059/2013 (U/S 3,6&12 OF <u>CONTEMPT OF COURT</u>). (Notice issued) (It is respectfully pointed out that the matter is already fixed on 7.11.2013 as date by Court) |

07/11/2013:

Mr. Faisal Siddiqui, Advocate for the plaintiff.

None present for the defendant.

NAZAR AKBAR, J: 1. Deferred.

2. Issue fresh notice to the alleged contemnor.

This is a suit for specific performance of contract dated 26.3.2013 between the plaintiff and the defendant. The defendant is said to be residing in the house which is subject matter of the suit. On 27.9.2013 inspection of the premises was ordered with direction to take photographs at the time of inspection and even concerned SSP and SHO were directed to be available at the time of inspection. However, for one or the other reason inspection has not been carried out. Learned counsel for the plaintiff wanted to repeat effort of inspection of the premises with police aid as already ordered on CMA No.10282 of 2013. It is not listed for hearing today, however, the same is taken-up with the consent of plaintiff's counsel.

Today when the Court raised the question of maintainability of an application for inspection of property, Under Order XVIII Rule 18 CPC, mentioned in the agreement of sale with the defendant, the learned counsel argued that once the order has been passed any further orders on the question of maintainability would amount review of order. The learned counsel for plaintiff further

contended that inspection was prayed with police aid only to ensure that the service of summons may be affected on the defendant. It is indeed a matter of great concern that apparently the mode of service of summons provided in Civil Procedure Code has been avoided. There is no room for involving police or any law enforcing agency to ensure the defendant to appear in the civil suit. The remedy is simple that in case of failure to serve the defendant in civil suit, provision of Order V Rule 20 CPC for pasting as substituted mode for service can be invoked. In this case, so far, the Court has not passed any order for substituted service nor the publication has been ordered for service of summons. The interim orders to the effect that the defendant is restrained from creating third party interest and parting with possession of suit property are also in field. Despite interim order and in view of the fact that the course of action available in CPC for service of summons has not been even employed till date, the Plaintiff's request to seek police aid in a suit for specific performance of contract by invoking the provisions of Order XVIII, Rule 18, CPC only to circumvent the procedure of service of summons was unjustified. The anxiety of the plaintiff to ensure that the property should remain intact pending the suit can otherwise be taken care of without violating the fundamental rights of individuals to be dealt with in accordance with law and the inviolability of dignity of man and the privacy of home guaranteed under Articles 4 and 14 of the Constitution of Islamic Republic of Pakistan, 1973.

The other contention of learned counsel that once the order of inspection has been passed on the application on 27.9.2013 by another learned Judge of this Court, the question of maintainability of application under Order XVIII Rule 18 CPC would amount to review is not very convincing either. I have examined the order dated 27.9.2013 passed on the application for inspection of suit premises. On passing an order as a case of first impression, the Court's authority to question maintainability of an application is not ousted. Admittedly, this Court has not examined the application from the point of view of its maintainability on 27.9.2013. Even otherwise, the earlier order has come to an end on

filing of report dated 03.10.2013 by the Nazir, which was taken on record on 10.10.2013 and no fresh order of inspection is in field. Therefore, an order on the said application would not amount to review of earlier order.

In a suit for specific performance of contract, in terms of Section 54 of the Transfer of Property Act, the plaintiff is entitled for the enforcement of contract of sale of immovable property but such contract does not in itself create any right in or charge on such property, therefore, rights of the plaintiff pending his suit for enforcement of execution of sale of immovable property cannot be equated with the rights of the defendant with whom he has entered into an agreement of sale. More-so, merely on the basis of an agreement of sale, if the parties are allowed to use police or law enforcing agencies for its enforcement through civil Court then there is every likelihood that the defendant would be unduly coerced by the plaintiff and in cases in which widows and orphans may be a party on account of genuine and/or fake agreement of sale the precedent of sending police and/or law enforcing agency at the residence of the defendant on the pretext of inspection of the premises under Order XVIII, Rule 18, CPC, pending the suit would be even more dangerous and may result in loss of proprietary rights of such widows, orphans and weak individuals without being properly adjudicated on merits and thereby violate the constitutional rights guaranteed under Article 4 and 14 of the Constitution of Islamic Republic of Pakistan, 1973. Therefore, in suit for specific performance of contract any effort on whatever pretext to involve the police and law enforcing agency should be avoided as it would be in breach of defendant's right to be dealt with in accordance with law. i.e. provision of CPC for service of summons. And more seriously it would be against defendant's dignity as man and his privacy of home, that too, by an individual who has just an agreement of sale with him, which does not confer any right or interest in or charge on such property. In the circumstances, it is ordered that in the first instance while repeating the notice and summons by way of pasting, to be followed by publication if needed the involvement of police be

avoided to keep the privacy of the people intact in line with the constitutional guarantees.

However, as I am not inclined to grant the application for inspection with or without police aid in a suit for specific performance of contract, it was suggested that a sign board of 2' x 2' size may be affixed in front of suit premises but not on the main gate rather on the right or left side of the gate, specifically mentioning that the property is subject matter of the suit pending in this Court and stay is operating. This suggestion has been graciously accepted by the learned counsel for the plaintiff and he says that he would be satisfied as it would serve his purpose. Nazir to affix the aforesaid board at the expenses of plaintiff as soon as possible.

In the above terms the application (CMA No.10282 of 2013) under Order XVIII, Rule 18 CPC is disposed of.

Adjourned to a date in office. Interim order passed earlier to continue till next date of hearing.

JUDGE

S.Akhtar