

HIGH COURT OF SINDH, AT KARACHI

Civil Suit No.74 of 2007

Plaintiff : Muhammad Saleem through Mr.Arshad Hussain,
advocate

Defendant No.1 : M/s.Premier Agglo Industries (Pvt) Ltd., through
Salman Talibuddin, advocate

Defendant No.2 : M/s. Agglo Stone through Mr.Asim Iqbal, advocate

Date of hearing : 14-03-2013

ORDER

NAZAR AKBAR---J., This order will govern disposal of an application under section 151 C.P.C. (CMA No.1416/2014) filed on 03.02.2014 by one Muhammad Ali, who claims to be son of Muhammad Saleem, the late plaintiff in the suit. The defendant prior to this application in the lifetime of original plaintiff on 18.7.2009 has filed an application under Section 151 CPC (CMA No.6939/2009) for dismissal of instant suit on account of failure of the plaintiff to deposit balance sale consideration amounting to Rs.35,000,000/- in terms of order dated 13.4.2009.

2. The back ground of this case is that the plaintiff filed a suit for Specific Performance of a Contract dated 17.5.2006 in respect of property bearing Industrial Plot Nos. E-1, 2-E, 3, 14-E and 15-E admeasuring 15000 Square Meter, situated in District Lasbella Balochistan. On 13.4.2009, this court after hearing the injunction application was pleased to direct the plaintiff to deposit Rs.35,000,000/- with the Nazir of this court within two months and in the same order allowed the defendant No.2 to be impleaded as defendant since he had purchased the suit property during the pendency of the suit.

3. The plaintiff failed to comply with the order of deposit of balance sale consideration and by order dated 29.3.2010 in the interest of justice another two weeks' time was granted to the plaintiff. On 19.9.2010, the plaintiff to gain further time filed an application (CMA No.4020/2010) with the prayer that instead of deposit of balance sale consideration, he may be allowed to place the original title documents of some other property situated in Nazimabad, as security. Such application reaffirmed that the plaintiff had no funds to acquire the ownership right of the suit property right from the time of entering into the agreement of sale on 17.5.2006 till his death.

4. The legal heirs of the plaintiff till date have not been impleaded as plaintiffs nor any amended title has been filed.

5. On 16.3.2011 only three legal heirs namely Asima Saleem, Asim Saleem and Ali Saleem appeared in persons in court and sought time to engage some other counsel. On 05.11.2013 Mr. Tariq Mehmood, Advocate appeared along with one Muhammad Ali, one of the legal heirs of the plaintiff and sought time to file power. He was informed that the legal heirs of plaintiff are bound to comply with the Court orders of deposit of balance sale consideration and one month time was granted. He never appeared again. On 28.1.2014, this court was informed that Mr. Faisal Kamal, Advocate has filed power on behalf of the legal heirs and again a detailed order was passed to apprise the lawyer that the plaintiff's legal heirs were bound by the order dated 13.4.2009. Instead of complying with the order only one legal heir namely Muhammad Ali filed an application (C.M.A. No.1410/2014) and sought refund of token money advanced by his father, the plaintiff, to the defendant No.1.

6. The learned counsel for the plaintiff in support of his application u/s 151 C.P.C. for refund of token money has advanced only one argument that equity demands that the advance money may be refunded. He relied upon P.L.D. 1969 S.C. 80 and 2010 Y.L.R. 1418. Unfortunately both citations are not relevant in the facts of case narrated above. In P.L.D. 1969 S.C. 80 (*Province of West Pakistan v. Mistri Patel & Co.*) the very suit was filed for the recovery of the earnest money and it was not a suit for Specific Performance of Contract while in the other case law i.e. 2010 Y.L.R. 1418 (*Abdul Wahab v. Shahana Nasim*) out of as many as eight issues, issue No.6 was to the effect that whether the defendant was entitled to forfeit 50% from the earnest money in consonance with the terms of the contract dated 18th May 2005. In the present suit neither the plaintiff has pleaded for refund of earnest money in the plaint nor the issues have been framed regarding the fate of earnest money. The prayer for refund of earnest money is out of the purview of the pleadings and the inherent powers of Courts under Section 151 CPC cannot be stretched to change the complexion of a suit from the suit for Specific Performance of Contract to the suit for simple refund of money and in coming to this conclusion I find support from the judgment of Hon'ble Supreme Court in the case of COLLECTOR OF CENTRAL EXCISE AND SALES TAX VS. PAKISTAN FERTILIZER COMPANY LIMITED (2007 SCMR 351) and the relevant portion of the said judgment is reproduced hereunder:-

"5. Insofar as the provisions as contained in section 151, C.P.C. are concerned the same could not have been pressed into service for the simple reason that where the jurisdiction of a Court is expressly limited to the decision of particular questions, the decision of other questions must be regarded as impliedly removed from its jurisdiction. The powers as conferred upon a Court under section 151, C.P.C. can only be exercised with respect to procedural matters and the exercise of such inherent powers must not affect the substantive rights of the parties. In this regard we are fortified by the dictum as laid down in case Padam Sen v. State of U.P. AIR 1961 SC 218 wherein it was held that "the inherent powers saved by section 151, of the Code are with respect to the procedure to be followed by the Court in deciding the cause before it. These powers are not powers over the substantive rights which any litigant

possess. Specific powers have to be conferred on the Courts for passing such orders which would affect such rights of a party. Such powers cannot come within the scope of inherent powers of the Court in the matters of procedure, which powers have their source in the Court possessing all the essential powers to regulate its practice and procedure." It may not be out of place to mention here that such inherent powers cannot be used when some other remedy is available and more so, it cannot be exercised as appellate powers. The inherent powers as conferred upon a Court under section 151, C.P.C. applies only to the exercise of jurisdiction where some lis is pending before the Court and does not confer jurisdiction to entertain a matter which was not pending for adjudication. In this regard reference can be made to case Rasab Khan v. Abdul Ghani 1986 CLC 1400; Sajjad Amjad v. Abdul Hameed PLD 1998 Lah. 474; Nazar Muhammad v. Ali Akbar PLD 1989 Kar. 635; Muhammad Ayub Khan v. Riyazul Hasan PLJ 1985 Pesh. 22; Commerce Bank Limited v. Sarfraz Autos PLD 1976 Kar. 973; Muhammad Ashfaq v. Shaukat Ali PLD 1976 Lah. 15; Commerce Bank Limited v. Sarfraz Autos PLD 1976 Kar. 973; Mian Muhammad Ashfaq v. Lt. Col. Shaukat Ali 1975 Law Notes Lah. 725; Ganisons Indus. Ltd. v. Akhlaque Ahmed PLD 1974 Kar. 339; Lal Muhammad v. Niaz Parwara PLD 1971 Pesh. 157; Karamatullah v. Government of West Pakistan PLD 1967 Lah. 171; Bashir Begum v. Abdul Rehman PLD 1963 Lah. 408; Sher Muhammad v. Khuda Bux PLD 1961 Lah. 579; Inayatullah Butt v. Cantonment Board, Rawalpindi PLD 1957 Lah. 583; in re: Subramania Desika AIR 1958 Mad. 284 and Muhammad Usman Khan v. Miraj Din PLD 1978 Lah. 790."

7. This application under Section 151 C.P.C. is also liable to be dismissed for several reasons and some of such reasons are summarized below: -

- i. Till date the legal heirs of the plaintiff have not been impleaded nor there was any application under Order XXII Rule 3 C.P.C. for impleading the legal heirs as party in the instant suit, thus it is not clear that whether the applicant is real son of the deceased or not.
- ii. The plaintiff has been surviving by two wives, five daughters and three sons and none from these legal heirs have

authorized the present applicant to claim/seek refund of earnest money from the defendant through the court.

iii. The earnest money, if at all refundable, it cannot be refunded to the legal heirs unless they are properly impleaded or they produced a proper succession certificate in court to claim the refund as legal heirs of the deceased. Had such application been filed by the plaintiff himself, the thing could have been different.

8. In view of the above facts and reasons discussed, this application (C.M.A. No.1410/2014) is dismissed and application (C.M.A. No.6939/2009) filed by the defendant No.1 for dismissal of suit on account of failure of the plaintiff to prove that he is ready and willing to perform his part of the contract, is allowed. Consequently, the suit is dismissed with no order as to cost.

JUDGE

Karachi
Dated:_____

SM