

# HIGH COURT OF SINDH, AT KARACHI

SUIT NO. 981 of 2009

## ORDER

Plaintiff No.1 : Fida Ali Sawani  
Plaintiff No.2 : Rafiq Panjwani  
Plaintiff No.3 : Tufail Sadruddin Suteria  
Through Mr. Abdur Rehman, Advocate.  
Defendant No.1 : Khan Muhammad  
Defendant No.2 : Abdul Rehman  
Defendant No.3 : Mst. Aziza  
Defendant No.4 : Mst. Daulat  
Defendant No.5 : Mst. Salma  
Defendant No.6 : Mst. Zarina  
Through Mr. Abdul Qadir Laghari, Advocate.  
Defendant No.7 : The Province of Sindh,  
Exparte

CMA No. 7668 OF 2011

DATE OF HEARING: 10.03.2014

**NAZAR AKBAR, J.** The Plaintiffs through this suit filed on 10.7.2009 seek enforcement of an agreement of sale dated 30.9.2005 against the Defendants in respect of the property bearing Plot No.GRE 196/A, Britto Road Karachi, admeasuring 628 sq.yds. The Defendants were served on 22.3.2011 and they filed written statement alongwith application under Order VII Rule 11 CPC (CMA No.7668/2011). This order will dispose of application under Order VII Rule 11 CPC. The rejection of plaint has been prayed on the ground of limitation and lack of cause of action to file the present suit and also on the ground that there was an arbitration clause in the agreement of sale that if there arose any dispute between the parties, it shall be resolved through the Shia Ismaili Conciliation and Arbitration Board of Karachi. Since 2011, the Plaintiff has not filed counter affidavit to this application despite notice. However, learned counsel for the Plaintiff has advanced his arguments.

2. The counsel for the Defendants has contended that the agreement to sell sought to be enforced through this suit is incomplete / blank in respect of material terms and conditions. It does not disclose the agreed sale consideration and therefore, this agreement is not enforceable as no consideration is mentioned in this agreement and without lawful consideration and "free consent" of the Defendants even if it is signed this agreement is not a contract in terms of Section 10 of the Contract Act, 1872. The Defendants in their written statement have also averred that no cause of action has accrued to the Defendant to file the present suit. It is contended by the defendants that they had never refused sale and it was the Plaintiff themselves who failed to complete the deal. In para 12 & 13 of the written statement, the Defendants have specifically averred that the Defendants have repeatedly approached the Plaintiff and they never avoided to execute the title documents. The other contention of counsel for the Defendant is that if at all the defendants have raised a dispute and the plaintiffs wanted to enforce an otherwise unlawful contract, then they should have approached the Shia Ismaili Conciliation and Arbitration Board in terms of clause 11 of the agreement.

3. In reply Mr. Abdur Rehman counsel for the Plaintiff has drawn my attention to the letter dated 20.10.2008 sent on behalf of the defendants counsel to the Plaintiff wherein the Defendants have referred to an undated agreement and the sale consideration was claimed @ Rs.67500 per sq.yds which by the time of the said letter and as stated therein was increased to Rs.70,000/- per sq.yds. Mr. Abdur Rehman, advocate for Plaintiffs has also contended that the Defendants in their written statement in reply to para-1 of the Plaint have conceded that the sale consideration was orally agreed at Rs.3,61,10,000/-. i.e at the rate of Rs.57,500/- per sq.yds. He contends that in view of correspondence the limitation did not stop in September 2008. He, however, has not offered any explanation that why the Plaintiffs have not approached the Shia Ismaili Conciliation

and Arbitration Board as agreed by them in clause 11 of the agreement sought to be specifically performed by the Plaintiffs.

4. I have heard both the counsel and have thoroughly examined the record.

5. I have scrutinized the plaint and annexures filed with it to appreciate the question of limitation by referring to the dates mentioned in the pleadings. The basic document is agreement to sell and the Plaintiffs allege it's date of execution as 30.9.2005 and the relevant clauses of the agreement are as follows: -

(1) That the Sellers agree to sell and the Purchasers agree to purchase the property bearing Plot No.196 A, Britto Road, Garden East Karachi, admeasuring 628 square yards together with construction thereon; more particularly described in the Schedule hereto (hereinafter called as the Said Property), for a total consideration of Rs.\_\_\_\_\_ (Rupees\_\_\_\_\_ only). The Purchasers have this \_\_\_\_\_ day of September, 2005 paid Rs.\_\_\_\_\_ (Rupees\_\_\_\_\_ only) as earnest money (the receipt whereof the Sellers hereby acknowledges). The balance of Rs.\_\_\_\_\_ (Rupees\_\_\_\_\_ only) shall be paid by the Purchasers at the time of taking of possession **not later than 2005 on or before that date.**

(4) That the purchasers shall assumes full responsibility for any liability that may arise subsequent to the execution of this Agreement of Sale and after handing over possession of the Property in connection with any construction, reconstruction, of any building or on account of change of land use by the Purchasers.

(5) That after execution of these presents, the Purchasers shall through their Lawyer cause to be published in popular newspaper in the form agreed to by the Sellers a Public Notice inviting objections against sale envisaged herein.

(9) That Purchaser shall get the lease of the Plot renewed at their own cost.

(11). That any dispute or difference of opinion with respect to the interpretation to the terms and conditions herein contained shall be resolved through the good offices of His Highness Prince Aga Khan Shia Imami Ismaili Conciliation & Arbitation Board for Karachi / Balochistan and their decision shall be final and binding on the parties to this agreement.

Clause-1 of the agreement is blank not only with respect to the total sale consideration but also even in respect of the earnest money paid and acknowledged. In fact the Plaintiffs have not paid even earnest money at the time of execution of undated sale agreement. However, Plaintiffs have filled the date 30.09.2005. Except date no other blanked is filled. The plaint is silent that how and when the total sale consideration as claimed in the plaint was orally agreed by and between the parties and when and how much earnest / token money with reference to sale consideration was paid, if at all, it was paid. The Plaintiffs have not annexed receipt of payment of any earnest money to the Defendants except annexure K/1 which is a receipt of only Rs.50,000/- paid in January 2009. This receipt is signed by only one of the Defendants, namely Abdur Rehman and no other proof of any other payment towards earnest money has been annexed with the plaint. In clause-1 of the agreement the phrase “not later than 2005 and on or before that date” makes it clear that the agreement was time bound and therefore, the limitation came to an end in 2008. Clause-4 suggest that on the date of signing of sale agreement the Plaintiffs/ purchaser have agreed to take all the responsibility to finalize the deal but purchasers / Plaintiffs have done nothing except causing a public notice published in daily Dawn on 13.10.2005 without or at least before payment of single penny towards earnest money. The date is not mentioned but at least year is definitely mentioned i.e year 2005. Apparently there was time frame till 2005 as given in Clause-1 of the agreement, but correspondence took place between the parties after the expiry of limitation of three years. In view of the above facts the question of limitation has become mixed question of facts and law. Thus it requires evidence, and on the ground of limitation, it is premature to reject the plaint.

6. The second contention of the Defendants is that the Plaintiffs have no cause of action as they have never refused to perform their part of contract. The Plaintiffs in para 13 of plaint averred that the cause of action

accrued in October 2008 and on 6.1.2009 when the Defendant No.2 accepted further payment and followed by legal notice dated 9.4.2009 sent by the Defendants to the Plaintiffs. The perusal of annexures with the plaint shows that Plaintiffs never sent any legal notice in writing to the Defendants nor took any steps pursuant to the agreement to show their own bonafides in getting the property transferred into their name. The Plaintiffs themselves have filed annexure J/4, which is a letter dated 20.10.2008 from the Defendants' side asking the Plaintiff to complete the deal within 15 days' time and the relevant part of the letter dated 20.10.2008 is reproduced below;

That my client has given me clear instruction to suggest you to materialize / finalize the sale consideration within 15 days after receiving this letter or otherwise my clients will be free to enter into new sale agreement with same one else at a better and higher price.

In fact it should have been the other way round. The Plaintiff did reply through their counsel on 14.11.2008 (annexure-J/5) but they never come forward to complete the deal nor the Plaintiffs got the lease of the plot renewed at their cost as agreed in clause No.9 of the agreement. It was again the Defendants who sent another notice dated 9.4.2009 to the Plaintiff reminding them that the Defendants have sent notice dated 20.10.2008 to complete the deal but the Plaintiffs have not paid any sale consideration and it was on the persuasion of Aga Khan Regional Conciliation Arbitration Board, that they have agreed to sell their property. To be honest, the Defendants clarified that a nominal sum of Rs.650,000/- were paid to Abdur Rehman when he was sick and hospitalized and he was not in proper sense which they were ready to adjust in sale consideration. However, no sale consideration has been paid, therefore, this agreement stand cancelled. It was after the said legal notice dated 09.4.2009, after its reply on 02.6.2009, the Plaintiffs on 10.07.2009 filed a suit for specific performance without offering to deposit balance sale consideration in Court. Even in their reply dated 2.6.2009 to the last

notice, the Plaintiffs have never offered to complete the deal as they did not give any date and time of execution of documents and payment of sale consideration. In a suit for specific performance, it is the buyer and not the seller who has to show by a positive conduct that he has approached the seller to complete the deal and the buyer was ready and willing to perform his part of the contract and on refusal from the seller, the buyer can file a suit for specific performance. The Plaintiffs, as record shows, after agreement in September 2005 took more than 04 years to pay a sum of Rs.6,50,000/- in the name of earnest money and that too in installments. If it is agreed that the total sale consideration was settled at Rs.3,61,10,000/- on 30.9.2005 but the payment of Rs.6,50,000/- towards earnest money after several years renders the clause No.1 ambiguous wherein parties concluded that:

“The purchasers have this \_\_\_ day of September, 2005 paid Rs.\_\_\_\_\_ (Rupees \_\_\_\_\_) as earnest money”.

And the last installment of Rs.50,000/- out of AN amount of Rs.6,50,000/- was paid in January 2009. The total sum of earnest money till date is not even 2% of the total sale consideration. Despite these facts the Defendant never refused to transfer the property in favour of the Plaintiffs. Even in written statement Defendants reiterated that they have not refused to perform their part of the contract.

In view of the fact that Defendants have not refused to execute document, it cannot be said that cause of action has accrued to the Plaintiffs. The plaint is silent about the date on which Plaintiffs, if at all, offered to tender sale consideration and demanded transfer of suit property. Not only plaint is silent about offer of tender of sale consideration but even in 2011 when the Defendants in the written statement pleaded that they have never refused to execute the required documents, the Plaintiffs have not offered to tender the sale consideration through the Court during the last three years. Therefore, in my humble view the

Plaintiffs failure to offer / tender sale consideration to the Defendant on specific date and time and then demand transfer of suit property, the Plaintiffs cannot assert that the Defendants have refused to perform their part of the contract and a cause of action has accrued to them. There can be no refusal before the offer and there will be no cause of action to sue Defendants to specifically perform their part of the contract which they have not refused. More-so when it is dependent on Plaintiffs to first perform their part of the contract. And the Plaintiffs' / purchasers' far most part of the contract to perform is to pay or tender not only a reasonable earnest money but also offer to tender sale consideration on specified date and time for seeking transfer of his moveable property through a proper instrument. In the case in hand, the plaintiff have not pleaded offer to tender the sale consideration in the plaint, therefore, there was no cause of action. And if any authority is needed on this point one may refer to the case law reported in **PLD 1987 Karachi 132**, MST. KHATOON BEGUM. ...VS.. MST. BARKATUNNISA BEGUM AND 6 OTHERS and the relevant part of the citation is reproduced below.

A suit for specific performance has to conform to the requirements prescribed in Forms 47 & 48 given in Appendix 'A' of the First Schedule of the Civil Procedure Code.

Para.2 of Form 47 requires the Plaintiff to state in the plaint that he applied to the defendant specifically to perform 48 requires the plaintiff to state in the plaint that on such and such date the plaintiff tendered - - - rupees to the defendant and demanded a transfer of the said property by a sufficient instrument. Para. 3 of Form 48 requires the plaintiff to state that on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_, the plaintiff again demanded such transfer (or the defendant refused to transfer the same to the Plaintiff). In a suit for specific performance it is incumbent on the Plaintiff not only to set out agreement on the basis of which he sues in all details, he must go further and plead that he has applied to the defendant specifically to perform the agreement pleaded by him but the defendant

has not done so. He must further plead that he has been and is still ready and willing to specifically perform his part of the agreement. Neither in the plaint nor at any subsequent stage of the suit the plaintiff has taken these pleas.

The Plaintiffs have not pleaded in the plaint that they had offered sale consideration and the Defendants had refused.

In view of the foregoing, the plaint is rejected for want of cause of action.

JUDGE

Karachi:  
Dated:\_\_\_\_\_

SM