

HIGH COURT OF SINDH, AT KARACHI

SUIT NO. 86 of 2012

ORDER

Plaintiff : Muhammad Nazim
Through Mr. Abdul Wajid Wyne, Advocate

Defendants : Anwar Hussain Darbari, & another
Through Syed Muhammad Akbar, Advcoate.

CMA No. 2492 OF 2012

DATE OF HEARING: 03.02.2014

NAZAR AKBAR, J. This order will dispose of an application under Order VII Rule 11 CPC wherein the Defendant has prayed for rejection of plaint on the ground that agreement of sale dated 11.11.2011 between the Plaintiff and the Defendant No.1 was illegal improper and no cause of action has accrued to the Plaintiff to file this present suit for specific performance of such contract. The Plaintiff has filed counter affidavit claiming that agreement is binding on the Defendant and as such the suit has been rightly filed for specific performance of the contract.

2. Brief facts stated in the plaint are that the Plaintiff entered into an agreement of sale dated 11.11.2011 with the Defendant No.1 in respect of the property which belong to the son of the Defendant No.1 and not to the Defendant No.1 himself. The Plaintiff averred that total sale consideration was Rs.3,70,00,000/- and at the time of execution of said agreement the Plaintiff handed over five cheques to the Defendant No.1 towards advance / token money. These five cheques included a cheque of Rs.5,00,000/- dated 2.11.2012 and remaining four cheques were all dated 11.11.2011 for the sum of Rs.6,25,000/- each. However, the Defendant No.1 did not encash four cheques and only a cheque of Rs.5,00,000/- was encashed through his account on 14.11.2011. The Defendant No.1 through a legal notice dated 30.12.2011 revoked the sale agreement and informed the Plaintiff that his son has refused to executed power of attorney in favour of Defendant No.1 and the Defendant No.1 is ready to return the amount

which was withdrawn. The Plaintiff in reply to the legal notice admitted that the four cheques were not deposited in the account for encashment and insisted that they are ready to purchase the property and the Defendant No.1 is liable to obtain General Power of Attorney from his son. Therefore, he filed the suit for specific performance of the contract. In the written statement it has categorically been stated by the Defendant No.1 that the Plaintiff was fully aware of the fact that the Defendant No.1 was not owner of the suit property and the owner was not even in Pakistan and the Plaintiff tactic fully got the agreement signed. The agreement was void and therefore, no cause of action has accrued. The Plaintiff despite the knowledge that the Defendant No.1 had no power of attorney or other legal document to enter into agreement to sell the suit property on behalf of the Defendant No.2 insisted and got the agreement executed. In view of these facts, I have first to examine the legality of the agreement for the purpose of forcing its specific performance. In this extent, the relevant clauses of the agreement are reproduced below:-

MR. ANWAR HUSSAIN DARBARI S/O SYED AKBAR HUSSAIN, Muslim, Adult, resident of D-94, Block No.5, F.B. Area, Karachi, holding NIC No.42101-7535898-7, on behalf his real son Mr. Fahad, hereinafter referred to as the Seller/(s) of the One Part;

AND

MR. MUHAMMAD NAZIM S/O. GHULAM QADIR, Muslim, Adult, resident of C-212, Block No.6, F.B. Area, Karachi, holding NIC No.42101-1845800-7, hereinafter referred to as the Purchaser/(s) of the Other Part; *(both expression whenever used shall mean and include their respective heirs, successors, administrators, representatives and assigned.*

WHEREAS the seller/(s) abovenamed has seized, possessed of and otherwise well and sufficiently entitled in respect of property viz; Leasehold Residential Plot of land with Ground Floor only (Single Storeyed) House constructed thereon bearing No.D-94, Block No.5, F.B. Area, Karachi measuring 1326.66 Sq.Yds., hereinafter referred to as the Said Property.

3. That at the time of execution of Sale Deed / General Power of Attorney. Mr. Anwar Hussain Darbari, obtains General Power of Attorney from

Present Owner of the Said property / present Mr. Fahad (i.e Present Owner).

3. It is admitted position that the plaintiff was fully aware of the fact that the Defendant No.1 was not and is not an absolute owner nor he was otherwise entitled to lease hold rights in respect of the property bearing Plot No.D-94 Block-5 F.B Area, Karachi to sell it to the Plaintiff. And yet he was so declared in the recital of agreement. This was negation of the description of party of the ONE Part. On the face of it this agreement between Plaintiff and Defendant No.1 was without permission and authority from the original owner i.e the Defendant No.2 and that is why it has been specifically mentioned in clause-3 that the Defendant No.1 to obtain power of attorney from the owner of the said property, namely, Mr. Fahad, the Defendant No.2. The Defendant No.2 has never consented to this agreement and he has flatly refused to executed power of attorney in favour of Defendant No.1 as is evident from the legal notice dated 30.12.2011 sent by the Defendant No.1 to the Plaintiff and filed with the plaint. There is no previty of contract between the Plaintiff and the Defendant No.2, the real owner of the property. The Plaintiff cannot seek specific performance of contract of sale of immoveable property of defendant No.2 without showing sale agreement with him. Learned counsel for the Plaintiff had no answer to the question that since the Defendant No.2 has not executed the sale agreement of his property then how, merely because the Plaintiff has entered into an agreement of sale of his property with the Defendant No.1, the Plaintiff can enforce the same against the Defendant No.2.

4. There is yet another angle to be noticed in the present suit, the Defendant No.2, who is admittedly owner of the suit property was not in Pakistan on the date when the plaintiff and Defendant No.1 entered into an agreement and in the memo of plaint the Plaintiff has mentioned suit property as address for service on the defendant No.2. Plaintiff first entered into an agreement to sale of the property of the defendant No.2 at

his back with a stranger to the property and then he has knowingly given wrong address for service may be with intention to get an ex-parte decree. In the absence of an agreement between the Plaintiff and the Defendant No.2, the Plaintiff has no cause of action against the Defendant No.2. Therefore, on this score alone the suit is dismissed against the Defendant No.2.

5. As regard the agreement having been signed by the Defendant No.1, suffice is to say that this agreement is void for several reasons; (i) It was within the knowledge of the Plaintiff that the agreement shall be dependent on execution of General Power of Attorney by the Defendant No.2 in favour of the Defendant No.1. The Defendant No.2 was not under any obligation to execute such General Power of Attorney and as such the agreement of sale was not a concluded agreement; (ii) the Defendant No.1 never had the authority to enter into an agreement of sale in respect of the property which did not belong to him and therefore, it cannot be considered that the agreement entered into by Defendant No.1 was for a lawful object as he had no legal authority to sell the property of a third person. This was a void agreement in terms of Section 23 of the Contract Act, 1872. Section 23 of the Contract Act, 1872 reads as under:-

23. What considerations and objects are lawful and what not. The consideration or object of an agreement is lawful, unless:--- it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law: or

is fraudulent; or involves or implies injury to the person or property of another, or

the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

The nature of this agreement of sale was that it involved injury to the property of another person namely the Defendant No.2 and therefore, the consideration and / or objects of the agreement were unlawful. Not only

that even the offer of sale by the Defendant No.1 was revoked in writing by the Defendant No.1 in unambiguous terms through the legal notice dated 30.12.2011 and admittedly he has not encashed four cheques worth Rs.25,00,000/- towards token / advance sale consideration.

6. In view of the above legal and factual position the Plaintiff has no cause of action even against the Defendant No.1. The jurisdiction to decree specific performance of contract is even otherwise discretionary and in the given facts of the case discretion cannot be exercised in favor of the Plaintiff even at any later stage of proceeding. The plaint is, therefore, rejected, for want of cause of action against the Defendants.

JUDGE

Karachi:
Dated:28.4.2014

SM