

HIGH COURT OF SINDH, AT KARACHI

SUIT NO. 1559 of 2009

ORDER

Plaintiff : Khalid Mehmood Yusufi
Through Mr. Muhammad Ilyas Warraich,
Advocate

Defendant : Mst. Kulsum Bai
Through, Syed Mazharul Haq, Advocate

CMA No. 9744 OF 2010

DATE OF HEARING: 12.12.2013

NAZAR AKBAR, J. Through this order I indent to dispose of an application under Order VII Rule 11 CPC (CMA No.9744/2010). The Defendant has taken several pleas for rejection of the plaint including limitation as apparently suit has been filed on 02.11.2009 for specific performance of the agreement dated 13.9.2004. No counter affidavit has been filed by the Plaintiff to this application. The record shows that on the first date of hearing i.e 14.12.2009 the Plaintiff was put on notice by the Court that Plaintiff has to satisfy the Court as to the limitation. The counsel for the Defendant further added that the time was essence of the contract whereby the balance amount of Rs.52,00,000/- was to be paid by the Plaintiff to the Defendant on 18.11.2004, which has not been paid by the Plaintiff till date. The Plaintiff counsel claimed that limitation shall be counted from the date of notice which was sent by the Defendant to the Plaintiff for completing the transaction of sale in terms of the agreement of sale dated 13.9.2004. According to the learned counsel the date of notice is 08.08.2009 and therefore, limitation should start from 08.08.2009. Admittedly this notice is by itself after 05 years of the date of execution of an agreement and there is no other correspondence between the parties, which could be considered as sufficient ground for considering another

date for computing the limitation other than the date of agreement to sell. There is no mention of offer of the Plaintiff and refusal of the Defendant to execute required instrument prior to the notice dated 15.9.2009. Therefore, notice dated 15.8.2009 was by itself after the expiry of limitation period is of no avail for the Plaintiff. The limitation is not supposed to be in the hands of Plaintiff. Once it is expired, the Plaintiff merely by sending a notice cannot revive the right to sue. The Plaintiff has filed agreement as annexure 'C' and admittedly time has been the essence of the contract as it can be appreciated from the following clauses of the agreement

4. The balance sum of Rs.5,200,000.00 (Rupees Five Million Two-hundred thousand only) will be paid by the Purchaser to the Vendor on or before 18th November, 2004, when the Vendor hands over and delivers constructive possession of the Property, as the same is occupied by and in possession of thirteen (13) tenants, by signing letters of attornment, and on as is where is basis and executes Conveyance Deed in favour of the Purchaser, before the concerned Sub-Registrar T Division, Karachi.

5. The time shall be the essence of the Agreement.

The above two clauses of the agreement were neither ever changed / modified nor this is the case of the Plaintiff that time was not essence of the contract. The Plaintiff even on the date of filing of this suit has not offer to deposit amount of Rs.52,00,000/- balance sale consideration in Court. The record of the Court file shows that once the Plaintiff's counsel was directed to satisfy the Court on 14.12.2009, he started avoiding the Court. The Plaintiff's counsel from 14.12.2009 never came forward to satisfy the Court on the question of maintainability of the suit. On 11.12.2013 a comprehensive order was passed thrashing out entire order sheet of last four years to point out the repeated failure of the Plaintiff's counsel to address the Court on the point of maintainability of the suit. It was after the order dated 11.12.2013, that the counsel for the Plaintiff argued the case, though no counter affidavit has been filed. Both the counsel were directed to file copies of case law if they want to rely on

any case law. However, neither of them has placed case law in support of their respective contentions. The counsel for the Plaintiff has not been able to justify filing of the suit for specific performance of the contract after limitation period. The Plaintiff himself has filed publication notice which appeared in daily Jasarat dated 30.10.2005 as annexure 'E'. This notice was issued by and on behalf of the Plaintiff and no objection of whatsoever nature has ever been received in response to the said public notice and therefore, there was no impediment in completing the deal. Even the public notice was subsequent to the crucial date of payment of balance sale consideration as agreed by the Plaintiff.

The crux of the above facts and discussion is that the suit is barred by limitation. It is therefore, dismissed with no orders as to cost.

Karachi:
Dated:14.4.2014

JUDGE

SM