

IN THE HIGH COURT OF SINDH AT KARACHI**SUIT NO. 1468 / 2008**

Ali Ahmed ----- Plaintiff

Versus

Aisha Warsi & another -----Defendants

For hearing of CMA No. 5056/2013.**Date of hearing: 21.04.2015****Date of order: 06.05.2015****Plaintiff: Through Mr. Malik Altaf Javed Advocate.****Defendant No. 1 Through M/S Abdul Rehman and Kumail Ahmed Shirazi Advocates.****Defendant No. 2 Through Mr. Khalid Mehmood Siddiqui Advocate.****ORDER**

Muhammad Junaid Ghaffar. J: Through listed application (CMA No. 5056 of 2013) the plaintiff has prayed that the defendant No. 2 (Bank) be restrained from handing over the original title documents of the property in question, to defendant No. 1 (Borrower), with further directions that the said documents be deposited with the Nazir of this Court as the plaintiff is willing to make payment of the balance sale consideration in terms of Para 11 of the order dated 10.5.2012 passed by this Court.

2. Briefly stated facts are that instant Suit has been filed by the plaintiff for Specific Performance and Injunction against the defendants; along with the Suit an application bearing CMA No. 10121 of 2008 under Order 39 Rule 1 & 2 CPC was also filed. Such application has been decided by this Court vide order dated 10.5.2012 in favour of the plaintiff, as prayed subject to the plaintiff depositing the balance sale consideration within three months from the date of the order, whereas, if the plaintiff fails to pay the balance sale consideration within the stipulated period, then the interim orders shall automatically stand recalled and vacated. It is an admitted position that the plaintiff has failed to comply with such directions of this Court, whereas, in the meantime the defendant No. 1 has settled the matter with defendant No. 2, before the learned Banking Court No. IV at Karachi, whereby the Decree has been satisfied by defendant No.1 and the documents pertaining to the Suit property have been returned by defendant No. 2 to defendant No. 1.

3. Learned Counsel for the plaintiff has contended that at the time of agreement dated 18.7.2007, the property in question was mortgaged with defendant No. 2 and substantial amount had been paid by the plaintiff to defendant No. 2 in respect of the said property to set-off the loan obtained by defendant No. 1. Per learned Counsel such terms and conditions were part of the agreement dated 18.7.2007 and the Plaintiff was also put in to possession of the Suit property which has not been disputed by the Defendant No.1. Learned Counsel further submitted that since the plaintiff, at the time when the order dated 10.5.2012 was passed, was not in a position to deposit the balance sale consideration, an application was moved on behalf of the plaintiff, whereby the Court

was requested to allow the plaintiff to furnish bank guarantee equivalent to the balance sale consideration, however, such application was not pressed thereafter, and now through listed application it has been prayed that the plaintiff is ready and willing to deposit the balance sale consideration, which may be allowed to be deposited before the Nazir of this Court, as there is likelihood that after obtaining the original title documents from defendant No. 2, the defendant No. 1 may sell the subject property and might create third party interest.

4. Conversely learned Counsel for defendant No. 1, contended that the plaintiff had ample opportunity to deposit the balance sale consideration as interim orders were obtained in the instant matter way back in 2008, whereas the said application was finally decided on 10.5.2012 with a further grace period of three months to deposit the balance sale consideration, which the plaintiff has admittedly failed to do so. Learned Counsel further contended that thereafter the application filed for submission of Bank Guarantee was also not pressed by the plaintiff. Per learned Counsel the plaintiff is in fact reagitating the same issue for the third time before this Court through listed application, which is not permissible, whereas, the plaintiff now intends to deposit the balance sale consideration only for the reason that the prices of the property have escalated. Learned Counsel also submitted that in fact on failure to deposit the balance sale consideration as directed by this Court on 10.5.2012, instant Suit was liable to be dismissed forthwith. Learned Counsel in support of his contention has relied upon the case of ***Syed Muhammad Waqar un Din Vs. Owais Ahmed Idrees (2015 MLD 49)***.

5. Learned Counsel for defendant No. 2 has contended that the defendant No. 2 (Bank) has no relation with the plaintiff, whereas, the amount allegedly deposited by the plaintiff has not been received by the Bank in the account of the plaintiff and has been credited to the account of defendant No. 1, as it is not in the knowledge of Defendant No.2 that any agreement had been entered into, nor the defendant No. 2 was a party to such agreement. Learned Counsel further submitted that the plaintiff had also filed an application under Order 1 Rule 10 CPC and so also under Section 12(2) CPC, before the Banking Court, which have been dismissed, whereas, no further appeals have been preferred against such dismissal. Learned Counsel further submits that after satisfaction of decree, they have already returned the title documents of the property in question to Defendant No.1 as they have no further lien on the said property which stands discharged.

6. I have heard all the learned Counsel and perused the record and case law relied upon by the learned Counsel for defendant No.1. It appears that instant Suit has been filed for Specific Performance of an agreement dated 18.7.2007, purportedly entered into between the plaintiff and the defendant No. 1. Along with the Suit an application bearing CMA No. 10121 of 2008 was also filed and on 27.10.2008, an order was passed by this Court, whereby, it was observed that if the plaintiff is in possession of the Suit property, such possession shall not be disturbed. Thereafter the application for injunction, under Order 39 Rule 1 & 2 CPC, was finally disposed of by this Court vide order dated 10.5.2012, wherein, at Para 10 & 11 the observations / findings are necessary and important for disposal of listed application which reads as under:-

10. Insofar as the banking suit filed by the Bank is concerned, the plaintiff has moved an application under section 12(2) therein. If that application is still pending, then a copy of this order shall be placed before the Banking Court for its consideration while disposing off the same. If the application has since been disposed off, then the party aggrieved by the order is of course at liberty to seek remedy as is available to it in accordance with law. However, it is clarified that if the application is disposed off adversely to the plaintiff; then nothing in this order shall come in the way of the Banking Court taking any steps or further proceedings in the matter before it in accordance with law.

11. In view of the foregoing position, CMA No. 10121/2008 filed by the plaintiff is hereby allowed as prayed, while CMA No. 10600/2009 filed by the Bank is hereby dismissed. However this is subject to the plaintiff depositing with the Nazir of this Court the balance amount due to payable to the Bank within three months from today. By "balance amount" I mean the difference between the sum of Rs. 22,437,095 and the amounts deposited with the Bank on or after 18.7.2007. This shall be without prejudice to the bank making a claim for any other or additional amounts, which shall be payable (if established in accordance with law) by the plaintiff in the same manner and to the same extent as would have been payable by the defendant No. 1 to the Bank pursuant to the finance agreement. The balance amount, if deposited by the plaintiff, shall be paid over to the Bank on an application made in this regard to the Nazir after proper verification and confirmation. If the plaintiff fails to pay the balance amount with the stipulated period, then the interim order shall automatically stand recalled and vacated. CMA No. 287/2009 stands disposed off in the foregoing terms."

7. It has now been informed that the application of the plaintiff filed under section 12(2) CPC before the Banking Court stands dismissed, whereas no further appeal has been preferred on behalf of the plaintiff in this regard. It has also been brought to the notice of this Court that the learned Banking Court vide its order dated 1.4.2015, after having discussed the order of this Court dated 10.5.2012 and subsequent orders, has dismissed an application under section 151 CPC preferred on behalf of the plaintiff, after having failed to convince the learned Banking Court to entertain the applications under Order 1 Rule 10 CPC and section 12(2) CPC. The learned Banking Court had thereafter allowed the redemption of documents of the property in question through the Nazir of the Court as the decree holder (Defendant No.2)

and the judgment debtor (Defendant No.1) had settled the matter outside the Court. Though, thereafter another order has been passed by the Banking Court on 2.4.2015, wherein, an impression has been given that the order dated 1.4.2015, was perhaps passed without having any knowledge about the pendency of instant Suit before this Court, which is not the case as is reflected from perusal of the order dated 1.4.2015. Be that as it may, since the matter has now been settled between the owner of the property and the Bank, therefore, insofar as the present application is concerned, Defendant No.2 has nothing to do with the same, except the purported payments made by the Plaintiff to the Defendant No.2 on behalf of Defendant No.1, for which the Plaintiff has every right to lead evidence, and seek its adjustment from Defendant No.1, if successful in such assertions at the trial of the case.

8. It further reflects from the record and which has not been denied by the learned Counsel for the plaintiff, that after passing of the order dated 10.05.2012, the plaintiff admittedly failed to deposit the balance sale consideration and made an attempt, belatedly to seek orders from this Court for furnishing Bank Guarantee instead of cash payment of the balance sale consideration, however, such application was thereafter withdrawn and now through listed application the same relief has been sought from this Court for deposit of the balance sale consideration. It would not be out of place to observe, that in a Suit for Specific Performance, the party seeking specific performance of an agreement, must come before the Court with a clear intention to perform its part of the agreement, and shall always be available and willing to act further, on the basis of agreement of which the Specific Performance is being sought. In fact, in the case of **Haji Abdul Hameed**

Khan vs. Ghulam Rabbani (2003 SCMR 953), the Hon'ble Supreme Court has even upheld the order of dismissal of Suit on failure to deposit the balance sale consideration. The relevant observation of the Hon'ble Supreme Court in that matter reads as under:

“With regard to the deposit of the sale consideration, as affirmed by the High Court, learned Counsel admitted that the amount of sale consideration has not been deposited by the petitioner. Learned Counsel sought shelter behind the interim order passed on the stay application by a Single Judge of this Court, which, in our view, does not have the effect of exonerating the petitioner from the deposit of the sale amount. By the interim order passed on petitioner's C.M, it was not intended to prevent him from performing his part of the contract, which he was seeking to enforce for the last about two decades. In a suit for specific performance, it is always of paramount consideration that the plaintiff, seeking equitable remedy of specific performance must be always willing and ready to perform his part of contract. Conduct of the petitioner unequivocally tends to reflect that he has been protracting the litigation on one or the other ground and has been successful so far on untenable grounds. Since the petitioner did not deposit the sale amount in compliance with the trial Court judgment as well as within the extended period, as permitted by the High Court, we would be legitimately justified in presuming that the petitioner is not serious in the prosecution of his remedy. He appears to be rather unwilling to perform his part of contract. This ground alone, in our view, is sufficient to disentitle him to a decree for specific performance.

Since the petitioner has intentionally and deliberately omitted to perform his part of contract, excepted of him under the law, we are not called upon to dilate upon the hyper technical argument that the learned Civil Judge Second Class was not competent to determine the market price of the suit land prevailing in 1990. Suffice it to say, findings of the two Courts below do not suffer from any legal infirmity or error of jurisdiction. Accordingly, this petition must fail and is hereby dismissed.

9. Similarly, a learned Single Judge of this Court, by respectfully following the ratio of the above judgment, in the case of ***Waqaruddin (Supra)***, has dismissed application of the Plaintiff, whereby, further time was being sought for deposit of balance sale consideration. Whereas, in the instant matter, the Plaintiff was provided ample opportunity by the Court while passing the order dated 10.5.2012, whereby the application filed on behalf of the Plaintiff had been allowed and the Plaintiff was provided a period of three months to deposit the balance sale consideration, however, the plaintiff failed to do so. From

the conduct of the plaintiff it appears that the plaintiff after having obtained a favorable order from this Court initially on 27.10.2008 and finally on 10.5.2012, has failed to show any willingness or desire to act upon his part of the agreement. In fact the plaintiff has failed to show any effort on his part, from day one, to make payment of the balance sale consideration. This is perhaps for the reason that the plaintiff is in possession of the Suit property and on 27.10.2008, when this matter was placed before the Court for the first time, an order was obtained to the extent that possession of the plaintiff shall not be disturbed, whereas, the plaintiff had not shown any willingness to deposit the balance sale consideration. Thereafter, when the Injunction Application was finally decided by this Court on 10.5.2012, the plaintiff was again given a three months grace period to deposit the balance sale consideration, which again the plaintiff failed to deposit. Moreover, the plaintiff also approached the Banking Court to seek restraining orders by filing application under Order 1 Rule 10 CPC and Section 12(2) CPC in respect of the case which had been filed by the defendant No.2 against defendant No.1 and on dismissal of such application(s) no further proceedings were initiated on behalf of the plaintiff. Now when the matter has been finally settled between defendant No.1 and 2, the plaintiff, at this belated stage of the proceedings, has filed listed application through which, once again the same relief is being sought, which this Court had already granted and allowed vide order dated 10.5.2012, of which no compliance was made by the plaintiff, whereas, no plausible reason or justification has been shown on behalf of the plaintiff that as to why the balance sale consideration was not deposited by the plaintiff. From the conduct as discussed herein above, it appears that the plaintiff is acting on its own choice and whims and such

conduct on the part of the plaintiff cannot be appreciated by this Court in case of specific performance of an agreement, wherein, the Court exercises its discretionary powers to get the agreement implemented and enforced. The plaintiff in the instant matter has failed to show any initiative which might have been taken by him in respect of performing his part of the agreement for which instant Suit has been filed.

10. In view of herein above facts and circumstances of the instant case and the case law referred to herein above, I am of the view that instant application does not merit any consideration, whereas, the plaintiff has miserably failed to convince this Court for exercising any discretionary relief in favour of the plaintiff. Accordingly, listed application bearing CMA No. 5056 of 2013 is hereby dismissed with no orders as to cost.

J U D G E

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