

**IN THE HIGH COURT OF SINDH AT
KARACHI**

Suit No. 611 of 2016

Abu Bakar Bin Abdul Qadir and another

Versus

Laeq Ahmed and others

Dates of hearing : **23.01.2017 and 17.04.2017**

Date of Decision : **07.07.2017**

Plaintiffs : **Through Mr. Muhammad Ali Lakhani,
Advocate.**

Defendants : **Through Mr. Safdar Faisal, Advocate.**

Case law cited by the Plaintiffs' counsel.

PLD 2016 Lahore Page-474
(Dr. Hammad Raza Khan Versus Syed Shah Hussain and 2 others).

Case law relied upon by Defendants' counsel.

- 1. 1985 CLC Page-342 [Karachi]**
(*Shajar Ali Hoti Versus Esmail Sobhani*); ***Hoti case.***
- 2. PLD 2013 Lahore Page-716**
(*Gulistan Textile Mills Ltd Versus Askari Bank Ltd and others*);
- 3. 2014 MLD Page-1380 [Sindh]**
(*S. Abdul Mannan Muttaqi Versus Defence House Authority,
through Administrator and 4 others*); ***Muttaqi case.***

Law under discussion: (1). Contract Act, 1872.
(2). Code of Civil Procedure, 1908 (CPC).

ORDER

Muhammad Faisal Kamal Alam, J: CMA No.6546 of 2016

(under Order VII Rule 11 Read with Section 151 of CPC) has been

preferred by learned counsel for Defendants on the grounds that Plaintiffs have concealed the material facts while filing the present proceeding.

1. Mr. Sardar Faisal, learned counsel representing the Defendants has argued that since Plaintiffs have committed breach by not making the agreed payments of Rs.15,00,000/- (Rupees Fifteen Lacs Only) within the stipulated time, that is, before 05.03.2016 and 10.03.2016, therefore, the sale transaction in respect of the property has come to an end. It is further mentioned in the application that a cheque No.00020903 (of 01.03.2016) for Rs.4,00,000/- (Rupees Four Hundred Thousand Only) issued by Plaintiffs to the Defendants towards sale consideration could not be encashed due to stop payment instructions and thus the instrument was 'dishonoured'. As a consequence of the above, it is argued, that Plaintiffs' present suit seeking, *inter alia*, specific performance is liable to be rejected.

2. On the other hand, Mr. Muhammad Ali Lakhani, learned counsel representing the Plaintiffs has controverted the stance of Defendants, primarily on the grounds that Plaintiffs have made the timely payments, but owing to the non-provision of title documents by Defendants, last payment of Rs.4,00,000/- (Rupees Four Hundred Thousand Only) was stopped. In this regard, Plaintiffs' counsel has referred to his earlier legal notice of 07.03.2016, where, demand with regard to above contention has been made. Secondly, it was argued by Plaintiffs' counsel that the Defendants have attempted to create third party interest by entering in the purported sale consideration with some other third party and a public notice appeared in daily 'The News' in its issue of March, 9th 2016. It was strenuously argued that none of the ingredients as mentioned in Order VII Rule 11 of CPC are attracted to the facts of instant suit, as main sale transaction is not in dispute.

3. To fortify his arguments, Plaintiffs' counsel has placed reliance on reported decision of learned Division Bench of Lahore High Court (ibid).

4. Pleadings of both the parties have been taken into account as well as their respective submissions and with their able assistance record has been perused. Both the Plaintiffs and Defendants have filed their synopsis along with case law, already reproduced in the title (supra).

5. The undisputed facts for deciding the present application are that the Defendants agreed to sell their built up property / House No.JM-488, situated in Amil Colony, Jamshed Quarters, Karachi, admeasuring 994 Square Yards (**subject property**) to Plaintiffs for a total sale consideration of Rs.13,50,00,000/- (Rupees Thirteen Crores Fifty Lacs Only). It has also been acknowledged by Defendants (Vendors) that an amount of Rs.11,00,000/- (Rupees Eleven Lacs Only) have been received by them so far, however, since further payment of Rs.4,00,000/- (Rupees Four Hundred Thousand Only) under the above mentioned Cheque was stopped, therefore, the Plaintiffs have committed a breach by not making payment of Rs.1.5 Million within the stipulated time line-10.03.2016.

6. Learned counsel for Defendants (Applicants of CMA No.6546 of 2016) relied upon the above mentioned case law, the gist of which is that when there is not a concluded agreement then there is no cause of action and consequently a Plaint has to be rejected. In a Judgment of **Muttaqi case** (ibid), this Court has rejected the Plaint primarily on the ground that the receipt for earnest money was undated and only signed by one of the Defendants (of that **Muttaqi case**) and other particulars were also lacking, besides the fact that receipt contained the words 'conditional token'; on this factual background, the above decision was handed down in the said **Muttaqi case**. The other factor that weighed with the learned Judge of this

Court was that no sale consideration was settled. In the second reported decision, the principle for rejecting a Plaint has been highlighted and reiterated. The other decision of this Court in **Hoti case** is a Judgment given after a conclusion of trial and not at the preliminary stage for deciding the application of the nature, therefore, the said decision at this stage is not applicable.

7. The object and principle of Order VII Rule 11 of CPC is that a frivolous litigation should be laid to rest at the earliest and bonafide parties should be saved from rigors of a frivolous litigation.

8. The precedents relied upon by the Defendants are distinguishable for the reasons, that firstly and admittedly, subject matter of present transaction in question, that is, the house property is not in dispute; secondly, sale consideration is admitted; thirdly, communication of the offer and acceptance by the parties hereto to each other with regard to the subject matter and the total sale consideration have been acknowledged by both the Plaintiffs and Defendants, which means that all the ingredients of a valid agreement enforceable as a contract exist. Fourthly, the learned counsel for Defendants apparently under some misconception has agitated the fact that the above mentioned cheque of Rs.4,00,000/- (Rupees Hundred Thousand Only) was 'dishonored', which is incorrect. If the relevant document is perused, which is available at Page-65 of the Court file (Annexure P-11), the Plaintiffs have issued a stop payment instruction vide their letter dated 04.03.2016. Stop payment instruction cannot be construed as 'dishonouring of a cheque', as alleged. This is further fortified by a document / Bank Memorandum appended with the Written Statement of Defendants (at Page-103 of the Court file), mentioning the reason for non-payment of the cheque as payment stopped by drawer [at serial No.2 of the said Memorandum], as against 'in sufficient balance' (at serial No.1). In the

latter instance, the said cheque could have been said to be dishonoured. Fifthly, the purported default on the part of Plaintiffs in these circumstances is a triable issue for which evidence is to be led by both Plaintiffs and Defendants, which is only possible when this suit is properly tried (as per law).

9. In view of above discussion, the Defendants have failed to make out a case for grant of their instant application filed under Order VII Rule 11 of CPC, which is hereby dismissed. Restraining order is operating in favour of Plaintiffs since 10.03.2016, therefore, latter (Plaintiffs) are directed to deposit the balance sale consideration of Rs.13,39,00,000/- (Rupees Thirteen Crores Thirty Nine Lacs Only) with the Nazir of this Court within four weeks from the date of this order, which would be without *pre judice* to the pleadings of both the parties. It is further clarified that any observation made herein above is of tentative nature and will not influence the final outcome of this case.

Dated: _____

M.Javaid.P.A.

JUDGE