

IN THE HIGH COURT OF SINDH KARACHI

Suit No. 2215 of 2014

[Muhammad Kashif Vohra versus Muhammad Ismail and others]

Plaintiff : Muhammad Kashif Vohra in person.
Defendant 1,3&4 : Muhammad Ismail and others through Mr. Ijaz Ahmed Advocate.
Defendant 2 : Nemo.
Date of hearing : 20-08-2019
Date of decision : 26-11-2019

JUDGMENT

Adnan Iqbal Chaudhry J. - Vide sale agreement dated 25-08-2014 the Defendants 3 and 4 agreed to sell Plot No.84/I and Plot No.84/II to the Plaintiff for a sale consideration of Rs. 140,000,000/-. Under clause-1 of the sale agreement, part of the sale consideration (Rs. 65,000,000/-) was to be paid/adjusted by the Plaintiff by transferring the allotment order of his Plot No.385/II and Plot No.304 to the Defendant No.1 who was the nominee of the Defendants 3 and 4. Under clause-2 of the sale agreement, the remainder/balance of the sale consideration (Rs. 75,000,000/-) of Plot No.84/I and Plot No.84/II was payable by the Plaintiff on registration of the sale deed of the said plots. The sale agreement dated 25-08-2014 was duly performed, i.e. the allotment order of Plot No.385/II and Plot No.304 was transferred by the Plaintiff to the Defendant No.1 in part payment of the sale consideration of Plot No.84/I and Plot No.84/II; the balance sale consideration of Rs. 75,000,000/- was paid by the Plaintiff to the Defendants 3 and 4; and the sale deed of Plot No.84/I and Plot No.84/II was executed by the Defendants 3 and 4 in favor of the Plaintiff.

2. It is the Plaintiff's case that alongside the sale agreement dated 25-08-2014, there was another agreement, which was kept in the safe custody of the Defendant No.2, whereby the Defendant No.1 had agreed that the Plaintiff's Plot No.385/II and Plot No.304 were being transferred to him (Defendant No.1) as security for a period of two months during which time the Plaintiff would pay Rs.65,000,000/- to the Defendant No.1 who would then transfer back Plot No.385/II and Plot No.304 to the Plaintiff. It is for that other agreement, 'Annexure-B' to the plaint, that the Plaintiff has filed this suit for specific performance. That Annexure-B is an un-dated hand-written document on plain paper not executed by any party.

3. By a written statement and counter-affidavit filed in October 2018, the Defendant No.1 denied that the existence of Annexure-B. He stated that the averment of Annexure-B is a story fabricated by the Plaintiff; that such document is not signed by any person; and that as lawful owner of Plot No.385/II and Plot No.304 he had sold/transferred them to a third party. Similar written statements were filed by the Defendants 3 and 4.

4. Alongwith the suit, the Plaintiff had moved CMA No.14720/2014 for restraining the Defendant No.1 from transferring, selling or creating third-party interest in Plot No.385/II and Plot No.304. By an interim order dated 06-11-2014, a temporary injunction was granted as prayed but subject to the deposit of Rs. 65,000,000/- with the Nazir of this Court. However, the Plaintiff did not make that deposit. On 19-11-2014, the Plaintiff's counsel stated before the Court that the Plaintiff intended to make the deposit that very day, but no such deposit was made. Eventually, on 17-02-2015, the Plaintiff's application for temporary injunction (CMA No. 14720/2014) was dismissed for non-compliance. An appeal against such dismissal (HCA No.58/2015) was also dismissed for non-prosecution.

5. On 19-02-2015, the Plaintiff moved a second application for a temporary injunction (CMA No.2418/2015) to restrain the Defendant No.1 from transferring, selling or creating third-party interest in Plot No.385/II and Plot No.304. The Plaintiff submitted that though pay-orders of Rs.65,000,000/- were ready with him on 18-11-2014, he did not deposit the same because the parties had commenced negotiations. Copies of such pay-orders were filed with the second injunction application. However, on 20-02-2017, that second injunction application was dismissed for non-prosecution.

6. On 06-11-2017, the Court raised the following question to the maintainability of the suit:

“Whether non-payment/deposit of the balance sale consideration as ordered on 06-11-2014, warrants dismissal of instant suit?”

On 12-09-2018, while hearing the matter the Court observed as follows:

“During the arguments, the Plaintiff undertakes that he will deposit Rs.6,50,00,000/- (Rupees Six Crores, Fifty Lacs Only) within four weeks from today with the Nazir of this Court. If the above amount is not deposited with the Nazir then the adverse consequence may follow”.

The above observation in the order dated 12-09-2018, insofar as it appeared to give another opportunity to the Plaintiff to deposit the sale consideration, was assailed by the Defendants 1, 3 and 4 in HCA No.338/2018 which was pending at the time this matter was heard. By CMA No.13986/2018, the Plaintiff has too prayed for recalling the order dated 12-09-2018 on the ground that upon verification from the DHA he has come to know that the subject plots (Plot No.385/II and Plot No.304) have been transferred by the Defendant No.1 to a third-party.

7. By order dated 12-10-2018, the Court again observed that the maintainability of the suit would be decided first, and by order dated 25-10-2018 this Court put the Plaintiff on notice also to

address the question whether the suit can survive for compensation in terms of section 19 of the Specific Relief Act, 1877.

8. On being confronted with the unsigned Annexure-B, the Plaintiff submitted that such aspect should be examined after evidence. On being confronted with the numerous opportunities given to him to deposit the sale consideration in Court, the Plaintiff submitted firstly that the order dated 12-09-2018 passed in this suit had been appealed by the Defendants vide HCA No. 338/2018; therefore, till such time the appeal is decided, this Court should refrain from proceeding further with this suit. Secondly, he cited the case of *Bin Bak Industries (Pot.) Ltd. v. Friends Associates* (2003 SCMR 238) to submit that the order requiring the Plaintiff deposit the sale consideration was uncalled for.

9. Mr. Ijaz Ahmed, learned counsel for the Defendants 1, 3 and 4 submitted at the outset that the suit was not maintainable primarily for the reason that the unexecuted Annexure-B relied upon by the Plaintiff could not be a contract to maintain a suit for specific performance. He then submitted that the pendency of HCA No. 338/2018 filed by the Defendants was no impediment to deciding this suit as that HCA had become infructuous when the Plaintiff did not even make deposit within four weeks as required of the order dated 12-09-2018 that was impugned in the appeal. Thirdly, and without prejudice to his first submission, Mr. Ijaz Ahmed submitted that it is by now settled law that on the failure of the plaintiff of a suit for specific performance to deposit the sale consideration in court, the suit is liable to be dismissed.

10. Heard the learned counsel on the question of maintainability of this suit.

As observed above, Annexure-B relied upon by the Plaintiff to be the contract between him and the Defendant No.1 is not signed by any party. It is not a document admitted by the Defendant No.1

or by any other Defendant. It is also not the case of the Plaintiff that there was an oral contract between the said parties in terms of Annexure-B. In these circumstances I do not see how such document can be said to be a contract so as to maintain a suit for its specific performance.

11. But even assuming for the sake of argument that Annexure-B was a contract, the Plaintiff failed to deposit the sale consideration in Court as ordered on 06-11-2014 and then again as observed on 12-09-2018. After going through the cases of *Allah Ditta v. Bashir Ahmed* (1997 SCMR 181); *Abdul Hameed Khan v. Ghulam Rabbani* (2003 SCMR 953); and *Hamood Mehmood v. Shabana Ishaque* (2017 SCMR 2022), I am of the view that a suit for specific performance of contract of immovable property brought by the vendee can be dismissed without going through a trial where the plaintiff, when put on terms to deposit the sale consideration in Court, fails to do so. That has been the consistent approach on the Original side of this Court¹. The wisdom behind that of course is that when called upon by the Court, if the plaintiff/vendee cannot demonstrate that he is ready and willing to make payment to perform his part of the contract, which is the primary test for grant of equitable discretionary relief in a suit for specific performance, then that is sufficient reason for the Court to decline the exercise of discretionary jurisdiction.

12. True, that it is not in every case that the Court may require the plaintiff of a suit for specific performance of contract to deposit the sale consideration in Court, as so held in *Bin Bak Industries (Pvt.) Ltd. v. Friends Associates* (2003 SCMR 238), but then this is not one of those cases. In this case, an order for depositing the sale consideration in Court had been made which order was never challenged by the Plaintiff. The Plaintiff's argument that he had made ready the pay-orders of the sale consideration on 18-11-2014,

¹ See *Sunshine Enterprises (Pvt.) Ltd. v. West Pakistan Bank Terminal (Pvt.) Ltd.* (2002 YLR 3815); *Muhammad Waqaruddin v. Owais Ahmed Idrees* (2015 MLD 49); *Gul Aftab Abro v. Bushra Shakeel* (2017 CLC Note 62); and *Shaikh Muhammad Asghar v. Muhammad Abdullah* (2018 CLC 1409).

is of no help to him when he never deposited those pay-orders in Court. In other words, even if the Plaintiff was 'able' to perform the contract, he was never 'ready' and 'willing' to do so, and therefore he disentitled himself from exercise of discretion in his favor. In such circumstances, and especially when it is not the case of the Plaintiff that a part-payment was made by him under Annexure-B, the question of granting compensation under section 19 of the Specific Relief Act, 1877 too does not arise.

13. Having concluded that there was no contract to begin with so as to maintain a suit for its specific performance, and having seen that even if Annexure-B could be called a contract, the Plaintiff was still not entitled to its specific performance, this suit is not maintainable. In these circumstances, the hands of the Court are not tied to Order VII Rule 11 CPC. It has been elucidated by the Supreme Court of Pakistan in the case of *Haji Abdul Karim v. Florida Builders* (PLD 2012 SC 247), that 'rejection of plaint' and 'dismissal of suit' are distinct concepts with different consequences, and that the Court always retains its inherent power to dismiss a suit.

For the foregoing reasons this suit is dismissed.

JUDGE

Karachi
Dated: 26-11-2019