

# IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 06 of 2016

**Harish Kumar Vankwani & Others----- Plaintiffs**

**Versus**

**Naheed Kamal Azfar----- Defendant**

**Date of hearing: 18.4.2016**

**Date of Order: 27.05.2016**

**Plaintiffs: Through Mr. Malik Altaf Javed Advocate.**

**Defendant: Through Mr. Jamshed Malik Advocate**

## **ORDER**

For Hearing of CMA No 17 of 2016

1. This is a Suit for specific performance of an agreement dated 04.11.2013 and through listed application the plaintiffs seek orders against defendant for restraining her from creating any third party interest in respect of the Suit property.

2. Briefly the fact as stated are that the plaintiffs entered into a sale agreement with defendant on 04-11-2013 for purchase of property bearing No.F/31, Block-4, KDA Improvement Scheme No.5, Clifton, Karachi, admeasuring 1500 square yards together with construction standing thereon ("**Suit property**") against sale consideration of Rs.435,000,000/- (Rupees Four hundred Thirty Five million only). The plaintiffs paid 10% of the total sale consideration i.e. Rs.43,500,000/- (Rupees Forty Three million and Five hundred thousand only) as earnest money/part payment through nine separate pay orders as detailed in Para (3) of the plaint. It is further stated that balance sale consideration amounting to Rs.391,500,000/- (Rupees Three hundred Ninety One million and Five hundred thousand only) was to be paid on or before 1.3.2014 at the time of taking over peaceful vacant physical possession together with original title and other documents of the Suit property and execution of conveyance deed in favour of the plaintiffs. It

is further stated that before 1-03-2014 the defendant sought some extra time for fulfillment of codal formalities which was allowed by the plaintiffs, but notwithstanding that the plaintiffs repeatedly requested the defendant to receive the balance sale consideration, the same was refused and upon failure of the defendant in performing her part of the sale agreement, instant Suit has been filed for Specific performance of the Agreement in question.

3. Learned Counsel for the plaintiffs has contended that in so far as agreement in question and payment of 10% the earnest money of the agreed price is concerned, the same is admitted and not in dispute. He has further contended that though it has been mentioned in the agreement that time was essence of the agreement, but there is no penalty clause provided, and therefore, this Court while deciding the matter has to see the nature and conduct of the parties. He has further contended that insofar as letter dated 08-03-2014 relied upon by the defendant is concerned, the same was addressed only to one of the plaintiffs/parties to the agreement and not to all, whereas, even otherwise the same was never received by Plaintiff No.1. He has further contended that plaintiffs were, and are, ready to perform their part of the agreement, and the Court may pass orders for deposit of balance sale consideration as the plaintiffs have a prima facie case in their favour, whereas, the balance of convenience also lies in their favour and if injunction is refused, they would suffer irreparable loss.

4. On the other hand learned Counsel for defendant submits that insofar as the agreement in question and payment of earnest money is concerned, the same is also not disputed by the defendant, however, per learned Counsel, in Para 3 of the agreement it was agreed upon that the plaintiffs were bound to pay balance sale consideration on or before 01-03-2014 failing which the agreement was liable to be cancelled as time is of the essence, whereas, the words "*time is of the essence*" is specifically incorporated in the agreement through a hand written note, and therefore it manifestly reflects through express terms that time is essence of the agreement between the parties. He has further contended that there was nothing on the part of the defendant to do or perform, whereas, the defendant never sought any extension of time in performing the agreement, therefore, upon failure of the plaintiff to make payment of the balance sale consideration, the agreement stood cancelled, hence, no specific performance can be sought. He has further

contended that the plaintiffs kept silent for so long and had never shown any intention to make payment of the balance sale consideration from the due date till filing of this Suit and now they have come to the Court after escalation of prices of the property in the city. Insofar as the objection raised by the Counsel for the plaintiffs that they did not received letter dated 08-03-2014, he has contended that in the agreement the plaintiffs never provided any address, but notwithstanding this, the letter was duly sent to the main person who was negotiating the sale of the property on behalf of the other plaintiffs and the address mentioned in the said letter is the address of plaintiff No.1 which fact has not been denied through any Affidavit in Rejoinder. In support of his contention he has relied upon the case of ***Sandoz Limited Vs Federation of Pakistan (1995 SCMR 1431)*** and ***Liaquat Ali Khan Vs Falak Sher (PLD 2014 SC 506)***.

5. I have heard both the learned Counsel and perused the record. Insofar as the Agreement dated 04.11.2013 entered into between the plaintiffs and defendant as well as payment of 10% advance amount of Rs.43,500,000/- (Forty Three Million and Five Hundred Thousand) is concerned the same is not in dispute. As per Agreement between the parties, the last date for payment of balance sale consideration of Rs.391,500,000/- (Three Hundred and Ninety One Million and Five Hundred Thousand) was agreed upon as 01.03.2014. It is also not in dispute that by such date, the plaintiff had failed to make payment of the balance sale consideration. To have a better understanding of the controversy between the parties, it would be advantageous to refer the relevant portion of the Agreement regarding payment of balance sale consideration and its last date, which reads as under:-

(3) That the balance amount in full and final settlement amounting to Rs.391,500,000/- (Rupees Three Hundred Ninety One Million Five Hundred Thousand only) shall be made by the Vendees to the Vendor ON OR BEFORE 1st MARCH, 2014 at the time of taking over peaceful, vacant and physical possession together with all Original Title and other documents and of the Said Property & upto date paid Challans/Bills of the Said Property and execution/registration of conveyance deed in favour of the Vendees and/or their Nominee(s) and after clearance of objection(s) if any by the Vendor at Vendor's Cost and Expenses failing which this Agreement may be liable to be cancelled as time is of the essence. (Paid by Vendees) AND in case of delay in completing any of the above Said Formalities and handing over peaceful, vacant and physical possession and providing clean/marketable title the payment shall also be simultaneously delayed."

6. Perusal of the above said clause reflects that the balance amount was to be paid as full and final settlement by the Vendee (Plaintiffs) to the Vendor (Defendant) on or before 01.03.2014 at the time of taking over peaceful, vacant and physical possession together with all original title and other documents of the property in question. It is further provided that the Conveyance Deed would also be executed/registered in favour of Vendee and/or their Nominee(s). Whereas, in case of failure, the Agreement in question may be liable to be cancelled as time is of the essence. It is further provided that in case of delay in completing any of the aforesaid formalities and handing over of the peaceful, vacant and physical possession and so also providing clean/marketable title, the payment shall also be simultaneously delayed. It further appears that upon failure of the plaintiffs to make payment of balance sale consideration, a Letter dated 08.03.2014 was issued to plaintiff No.1 by referring to the Agreement in question and stating that the defendant is ready and willing to convey the title and possession of the property, whereas, the defendant has also purchased another property bearing House No.28/1, Khayaban-e-Shamsher, Phase-V, D.H.A., Karachi. The defendant had further informed the plaintiff No.1 that time is the essence of the agreement and failing which, the same would stand cancelled on 10.03.2014, if payment is not made by that date. It further reflects from perusal of this letter, that as per mutual agreement, the date for payment of balance sale consideration was extended from 01.03.2014 to 10.03.2014. Though the Counsel for the plaintiff has denied that any such letter was ever received by the plaintiffs as it was only addressed to plaintiff No.1, however, the learned Counsel was specifically asked as to when did the plaintiffs approached the defendant for making payment of balance sale consideration and from where the plaintiff came to know that the defendant had requested for some extra time regarding fulfillment of codal formalities for transfer of the Suit Property, the learned Counsel could not give any satisfactory response. Though in Para-4 of the plaint it has been stated on behalf of the plaintiffs that they repeatedly requested the defendant to receive the balance sale consideration, however, neither any specific date is mentioned in the plaint nor any document of whatsoever nature has been annexed with the plaint so as to establish prima-facie that the plaintiffs were willing to pay the balance sale consideration. Further, nothing has been stated nor any documentary support has been annexed with the plaint so as to establish that at the relevant time the

plaintiffs had sufficient funds to pay the balance sale consideration. It is further noted that the date for payment of sale consideration was 01.03.2014, whereas, instant Suit for specific performance of the agreement has been filed on 01.01.2016, and nothing has been stated in the plaint as to what transpired in between this period and as to what efforts were made by the plaintiffs to persuade the defendant to accept the balance sale consideration and transfer the Suit Property.

7. The Counsel for the plaintiff has made an attempt to argue that notwithstanding the date for making payment of balance sale consideration, as well as endorsement to the effect that time is essence of the agreement, in cases of immovable properties, time is not always essence of the agreement and the Court has to decide the matter by examining the conduct of the parties. Though there is no cavil to this proposition that normally in cases of immovable property, time is not always the essence of the agreement, however, there are exceptions to such settled proposition. In this matter, it has been specifically agreed by the parties that time is essence of the agreement. In fact the endorsement to this effect has been consciously made through a handwritten note which was not originally available in the agreement; therefore, it very clearly shows the express intention of the parties that time is essence of the agreement. Even if such aspect of the matter is ignored, the relief of specific performance is always discretionary in nature as provided in Section 22 of the Specific Relief Act. The conduct of the plaintiffs in this matter does not appear to be such that at-least at this stage of the proceedings, injunction could be granted to them. As stated hereinabove, the time for payment of balance sale consideration expired on 01.03.2014, whereas, the plaintiffs have come to this Court on 01.01.2016. The Counsel for the plaintiffs was repeatedly asked to as what is the justification with the plaintiffs to file instant Suit for specific performance after lapse of more than one and half year, however, the Counsel could not satisfactorily respond, whereas, even otherwise nothing has been stated in this regard in the plaint. Such conduct of the plaintiffs does not entitle them to the grant of any injunctive relief at this stage of the proceedings.

8. The Honourable Supreme Court in the case of ***Liaquat Ali Khan (Supra)*** while dealing with such aspect of the matter as to the discretion of the Court in cases of specific performance, as well as whether or not

time is the essence of such agreement, has been pleased to observe as follows:-

“In this background, when we examine the oral as well as documentary evidence produced by the parties in the Suit, we find that soon after the expiry of timeframe under the agreement for payment of balance sale consideration amount, which admittedly respondents Nos. 1 to 4 failed to honour, the appellants had issued the notices dated 13.5.1979 to them. The receipt of these notices is not denied by at least three respondents from respondents Nos. 1 to 4, but still none of them bothered to give its reply. Thus, this document is very material to show conduct of both the parties after the execution of agreement dated 2.4.1979, till the institution of the Suit for specific performance before the civil Court on 7.10.1980. It is quite surprising that although the agreement dated 2.4.1979 contained a very clear and unambiguous term for payment of balance sale consideration amount to the appellants by 10.5.1979 and also entitled them for forfeiture of earnest money in case respondents Nos.1 to 4 in making compliance of this condition, still, respondents Nos. 1 to 4 did not bother to make any correspondence with the appellants showing their intention to keep the agreement alive for specific performance or to offer any explanation for nonpayment of balance sale consideration within the agreed time.....”

20. Another important aspect of the case is that the conduct of both the parties to the agreement, subsequent to its execution as mere willingness of a party to seek specific performance of the agreement at one particular time after lapse of more than one year and six months to the execution of such agreement and more than one year and three months from the date of expiry of the stipulated time agreed for remaining payment under the agreement will not entitle him for the relief of specific performance, for the lone reason that Suit so instituted was within the period of limitation.....”

25. Keeping in view the facts and circumstances of the present case, as discussed above, we have also carefully gone through the judgments cited by both the learned Advocates Supreme Court in support of their respective contentions, particularly, as regards the question as to whether in a Suit for specific performance of contract in respect of some immovable property time is not the essence of the contract and what are the fundamental principles regulating the exercise of discretion by the Court in granting the requisite relief within the legal frame of section 22 read with sections 23 and 24 of the Specific Relief Act. The pith and substance of the cases cited above is that primarily it would entirely depend upon the specific terms / language of the agreement and the relevant facts and circumstances, of each case at the time of entering into the agreement and thereafter, which will enable the Court to decide whether the stipulation of specific time for specific performance of an agreement was not the essence of the contract or the Court while exercising its discretion in this regard could brush aside such agreed stipulation of timeframe merely for the reason that the agreement relates to a transaction involving sale of the immovable property.....”

In our opinion, in such circumstances when there was clear stipulation of the type incorporated by the parties in the agreement having regards to it, while exercising discretion such agreed terms cannot be disregarded by the Court.” (Emphasis supplied)

9. In view of hereinabove facts and circumstances of the case, I am of the view, that neither any prima-facie case has been made out, nor balance of convenience lies in favour of the plaintiffs, whereas, if any injunction is granted, the defendant would suffer irreparable loss. Accordingly, the listed application is dismissed. It is needless to state that observations made hereinabove are tentative in nature and shall not prejudice the case of any of the parties at the trial of the Suit.

10. Listed application stands dismissed.

Dated: 27.05.2016

Judge