

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Suit No.111 of 2016

DATE

ORDER WITH SIGNATURE OF JUDGE

1. For hearing of CMA No.16620/16 (U/O VII Rule 11 C.P.C)
2. For hearing of CMA No.17504/16 (U/S 151 CPC.)

20.02.2017

Mr. Amir Nawaz, Advocate for Plaintiff.

Mr. Ahmar Jawaid, Advocate for Defendant No1.

1. Through this application, the Defendant No.1 seeks rejection of the Plaint in this matter. Learned Counsel for Defendant No.1 submits that after executing the agreement, the Plaintiff had become dishonest and after filing of this Suit never deposited the balance sale consideration as directed by the Court and kept on seeking extension, whereas, on 13.01.2016, the Plaintiff showed its inability to deposit the balance sale consideration and on such statement the application for interim injunction was dismissed. He submits that nothing is left in this Suit as there remains no cause of action to the Plaintiff as he is not willing to deposit the balance sale consideration.

On the other hand, learned Counsel for Plaintiff submits that though the Plaintiff is not interested in seeking any restraining order and has therefore shown his inability to deposit the balance sale consideration, however, the Plaintiff is willing to proceed with his Suit on its own merits.

I have heard both the learned Counsel and perused the record. It appears that instant Suit has been filed by the Plaintiff seeking the following prayers:-

- a. To declare that the plaintiff has signed an agreement to sale with the defendant No.1 while stipulated period was 75+15 = 90 days in which no violation was committed by the plaintiff.
- b. To restrain the defendant No.1 his agent / servants not to create third party interest regarding the house No.A-1, Block-13, Gulshan-e-Iqbal, Karachi.
- c. To restrain the defendant No.2 & 3 not to consider the registry / mutation of the suit property i.e. House No.A-1, Block-13, Gulshan-e-Iqbal, Karachi.
- d. To pay the compensation to the plaintiff by the defendant No.1 for avoiding the completion of the agreement.
- e. Any other relief which this Hon'ble Court deem fit and proper may be awarded under the circumstances of the case.

Perusal of the aforesaid prayer reflects that this is a Suit apparently for Specific Performance of an agreement (though not worded in this manner), whereas, the other relief(s) which are being sought are to the extent of restraining the defendants from creating any

third party interest and from further restraining the defendants No.2 & 3 not to register or mutate the Suit Property. The plaintiff has not claimed either recovery of any amount, nor any specific damages but only claims compensation in avoiding the completion of the agreement. It is but settled law that in a Suit for Specific Performance, the party coming to the Court shall always be willing to perform his part of the agreement. The person coming to the Court seeking Specific Performance must be willing to deposit the balance sale consideration from day one and only then the Court can consider granting the Specific Performance, which otherwise is a discretionary relief. On perusal of the Plaint it appears that the Plaintiff had shown its intention to deposit the balance sale consideration and had even annexed certain pay orders prepared in favour of defendant as back as of 21.05.2015, however, while arguing the injunction application, the plaintiff showed its inability to deposit the balance sale consideration. Now once the plaintiff is unable to deposit the balance sale consideration, then perhaps there remains no cause of action for the plaintiff to continue with this Suit. If the Court comes to the conclusion that the plaintiff has made out a case for Judgment and Decree then the balance sale consideration is to be paid by the Plaintiff to the Defendant No.1, whereas, to secure the ends of justice, and in the interest of both the parties, the Court invariably (barring certain situations) directs the buyer to deposit the balance sale consideration. This now has become more important due to increasing trend of prices of properties. However, from the conduct, the Plaintiff does not wish to deposit the same, therefore, no useful purpose would be served to proceed further with this Suit insofar as the Plaintiff is concerned, as he is not inclined to deposit the balance sale consideration, and therefore, no Specific Performance can be granted by the Court.

It may be of relevance to observe that relief of Specific performance of an Agreement is discretionary in nature and the Court while granting such relief and or refusing it has to decide the same on the basis of peculiar facts of each case independently. There is no hard and fast rule for adjudication and for exercising such discretionary relief. This appears to be an admitted position that plaintiff has failed to pay the balance sale consideration, and in fact has also not shown willingness to deposit the same even in Court. Upon failure of the plaintiff to pay the balance sale consideration within the extended date of performance of the agreement, the same stands cancelled and terminated insofar as defendant No.1 is concerned. It is also a settled proposition of law that in cases of Specific Performance the Court is not bound to grant such relief merely as it is lawful to do so, and the discretion to be exercised by the Court should always be based upon sound and reasonable analysis of the relevant facts of each case independently. In a Suit for specific performance it is always for the buyer and not the seller to show positive conduct and its willingness to perform and to deposit the balance sale consideration without imposing and or demanding fulfillment of any pre-conditions. Bonafides are only established when willingness is shown without reservations. Even otherwise, such relief being discretionary in nature requires the Courts to maintain a

balance. It is the duty of the Court to see that interests of both the parties are secured and no prejudice is caused to any of them, whereas, it is always the conduct of the parties on the basis of which, specific performance of an agreement is to be granted or refused. The Hon'ble Supreme Court in the case of *Liaqat Ali Khan and others v. Falak Sher and others* (**PLD 2014 SC 506**), has observed that “...*the things as regards powers of the Court in exercising its discretion, become even more clear that there is no two plus two, equal to four formula available with any Court of law for this purpose, which can be applied through cut and paste device to all cases of such nature. Conversely, it will be the peculiar facts and circumstances of each case, particularly, the terms of the agreement between the parties, its language, their subsequent conduct and other surrounding circumstances, which will enable the Court to decide whether the discretion in terms of section 22 (ibid) ought to be exercised.....*”.

Once the Court had directed the appellant to deposit the balance sale consideration on the very first date when interim order was passed, it was obligatory upon the plaintiff to deposit the same within the period specified therein, or in the alternative, within the extended time.

The Hon'ble Supreme Court in the case of *Haji Abdul Hameed Khan vs. Ghulam Rabbani* (**2003 SCMR 953**), has also upheld the order of dismissal of Suit, on failure to deposit the balance sale consideration.

In view of hereinabove facts and circumstances of the case, it appears that there is no cause of action left in this Suit, therefore, the Plaint is hereby rejected under Order VII Rule 11 CPC by allowing this Application.

2. In view of above order, this application has become infructuous and is accordingly disposed of.

J U D G E

Ayaz P.S.