

ORDER SHEET

**IN THE HIGH COURT OF SINDH AT KARACHI**  
**Suit No.1486 of 2008**

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DATE ORDER WITH SIGNATURE OF JUDGE

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Plaintiff: Y.G. Investment Developers Through  
Mr. Khawaja Shamsul Islam, Advocate.

Defendant No.1: Clifton Estates Cooperative Housing Society,  
Through  
Mr. Mushtaq A. Memon, Advocate.

Defendant No.22: Sajjad Ebrahim Halai in person.

Defendant No.2 to 5, Khalid Abowath & others Through  
7 to 21, 23 to 42 Mr. Sajjad E. Halai, Advocate.  
Except Defendant No.17:

Defendant No.17: Sultan Ali Akber Allana Through  
Mr. Muhammad Vawda, Advocate.

For hearing of CMA No. 10628/2010.  
For hearing of CMA No. 10629/2010.

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Date of hearing / Order: 21.03.2018

**ORDER**

**Muhammad Junaid Ghaffar J.** These two applications have been filed on behalf of the Plaintiff for amendment of the Plaint under Order VI Rule 17 CPC (**CMA No.10628/2010**) and under Order 1 Rule 10 CPC (**CMA No.10629/2010**) for joining the Applicants as Intervenors.

2. Learned Counsel for the Plaintiff has contended that instant Suit was initially filed for Direction, Cancellation and Injection and

a prayer was also sought to the extent of specific performance for an Agreement dated 28.07.2007, which was an outcome of a Memorandum of Understanding dated 10.06.2007, whereby, the Plaintiff had shown interest in purchasing the Defendants' property. Per learned Counsel there were certain conditions attached to the said agreement, whereas, a huge amount of more than Rs.400 Million was paid in advance and so also in respect of expenditures incurred for conversion of the property from residential to commercial and the agreement could not finally materialized. This according to the learned Counsel was on the part of the Defendants/tenants of the Defendants and in the meantime there was a recession in the construction of industry and subsequently on 20.01.2010, a consent order was passed. According to the learned Counsel, the essence of which was that the Plaintiff will not press the relief of specific performance in the subject property, whereas, for the Plaintiff's claim in respect of amount already paid and expenditures incurred. The Plaintiff was permitted to file an amendment application seeking amendment to that extent. Learned Counsel has contended that pursuant to such order this application has been filed, whereas this was done pursuant to a consent order, therefore, there is no justifiable reason to object the Order VI Rule 17 application for amendment. In support he has relied upon **2018 SCMR 82 (Haji Sultan Abdul Majeed (DECD) through Mehboob Sultan and Habib Sultan and others v. Mst. Shamim Akhtar (DECD) through Mah Jabeen and others)**

3. Insofar as, Application under Order 1 Rule 10 CPC is concerned, learned Counsel for Applicant No.1 submits that the Plaintiff was a registered Partnership Firm owned by two partners

namely Mrs. Yasmeen Gul Khanani and Gul Muhammad Khanani, and therefore, alongwith the Partnership Firm, they could be joined as Plaintiffs. He submits that during pendency of these proceedings, the second partner namely Gul Muhammad Khanani has already expired and the Applicant No.1 is in fact now the legal heir of Applicant No.2 alongwith his family. He submits that it is a matter of record that deceased partner had entered into the transactions with the Defendants and in fact money was paid from his personal account, therefore, he is a necessary party to these proceedings.

4. While objecting to the amendment application, learned Counsel for Defendant No.17 has contended that pursuant to Order dated 20.01.2010, the Plaintiff had given up all rights in the property, whereas, it was only a permission to file an amendment application and it must not be granted on the basis of such order. According to the learned Counsel through these applications the amendment is changing the entire complexion of the case, which is impermissible. He submits that insofar as the joining of the Applicant is concerned, once one of them has expired, no claim for compensation or damages remains alive. He has further contended that the Plaintiff ought to have filed a fresh Suit for recovery, whereas, the stances now taken through the amendment is also hit Order 2 Rule 2 CPC as such facts were never alleged in the Plaint. He has further submitted that the amendment is of such a nature that it no longer remains an amendment, but a new Suit.

5. Learned Counsel for Defendant No.1 has contended that it is a misconception on the part of the Plaintiff that order dated 20.01.2010 had given absolute permission to seek any amendment of such nature. Per learned Counsel once the relief of specific

performance was given up prayer clauses “I”, “II” & “III” are no more alive, whereas, through the amended plaint entire complexion of the Suit is being changed, which cannot be permitted. According to the learned Counsel, it is settled law that only such amendment is to be allowed, which neither changes the original characteristic of the Plaint nor the relief sought, whereas, pursuant to Order dated 20.01.2010 even the cause of action has gone and it is only a new and fresh Suit, which could be filed in accordance with law. In support he has relied upon **2003 SCMR 542** (*Mst. Noor Khatoon through Legal Heirs and another v. Muhammad Shafi*).

6. While exercising the right of rebuttal, learned Counsel for the Plaintiff has contended that since admittedly various extensions were taken by the Defendants in performing their part of agreement, therefore, once the relief of Specific Performance was given up by consent, as a natural effect, the only claim now remains is what is being asked for through the amended plaint. Learned Counsel has finally submitted that entire contents of the Plaint are to be read and since the agreement in question is admitted, the Plaintiff ought not to have been nonsuited.

7. I have heard all learned Counsel and perused the record. The application under Order VI Rule 17 CPC is an outcome of Order dated 20.01.2010, which reads as under:-

“Counsel for both the parties have agreed as follows:-

“It is jointly stated by the above named parties that the application for interim injunction (CMA No.10282 of 2008) may be disposed of in the following terms:-

A) The Plaintiff does not press the relief of specific performance and/or any right in respect of the subject property being Plot

No.G-7 and 8, measuring 7520 Sq. Yds., situated in Block-8, KDA Scheme No.5, Clifton, Karachi, in the suit which may be proceed for rest of the prayers.

- B) The plaintiff's possession as tenant of Flat No.2 and occupant of Flats No.7 and 17 shall not be disturbed by the defendants No.1 to 42 or any of them except in due process of law.
- C) **The defendants No.2 to 42 shall execute personal bond(s) to the satisfaction of Nazir of this Hon'ble Court binding themselves to meet and satisfy the money decree if any, as may ultimately be passed in the present proceedings and further undertaking to place to record of this Hon'ble Court their current/changed residential addresses until disposal of the suit.**
- D) The plaintiff shall not interfere, in any manner, with the sale, transfer, lease, alienation, etc, of the apartments/flats by the defendants No.1 to 42 or their assignee(s) to any one.

Mr. Kh. Shamsul Islam states that even if the plaintiff fails to establish his case, maximum penalty, that can be imposed upon the plaintiff, would be forfeiture of 10% earnest money. However, in the present case, he states that in addition to 10% that was paid as earnest money, the plaintiff has incurred millions of rupees on commercialization of the property and said amount is liable to be returned to the plaintiff. Mr. Mushtaq A. Memon states that no such claim has been made in the suit. In the circumstances, the plaintiff shall be at liberty to file an application seeking amendments of the plaint to incorporate such claim and thereafter appropriate order shall be passed.

CMA's 988/09, 1028/08 and 109/09 stand disposed of."

(Emphasis supplied)

8. Perusal of the aforesaid order reflects that the injunction on which interim orders were continuing since 2008, was disposed of on the terms that the Plaintiff will not press the relief of specific performance and/or any right in respect of subject property and may proceed for the rest of the prayers. It was further agreed that Plaintiff's possession, in respect of three apartments will not be disturbed by the Defendants, except without due process of law. It was also agreed that Defendants No.2 to 42, who are the residents of the Defendant No.1's Society, shall execute personal bonds to the satisfaction of the Nazir of this Court binding themselves to meet and satisfy the money decree, if any, as may ultimately be

passed in the present proceedings and further undertaking to place on record their current as well as changed residential addresses, if any, until disposal of the Suit and finally the Plaintiff was restrained from interference in any manner with the sale, transfer, lease, alienating etc. of the apartments and flats of Defendants No.1 to 42.

Now when this order is minutely read, it appears that there are two aspects of this order. The one being that the Plaintiff has given up the relief of specific performance in respect of Suit Property; and second, that Defendants No.2 to 42 were required to **execute personal bonds binding themselves to meet and satisfy the money decree, if any.** It is to be appreciated that once the relief of specific performance is given up in a Suit of this nature, the only other relief, which remains is the recovery and return of the money paid, if any, and compensation. Through this amendment application, the Plaintiffs only seek in substance the return and refund of the money in question. The quantum is immaterial for the present purposes. Whereas, it is not in dispute that certain payments were made pursuant to the agreement between the parties and such disclosure is already a matter of record in the plaint and its annexed documents. I had specifically confronted the Counsel for Defendants that what is the effect of Para-C of Order dated 20.01.2010, whereby, they had agreed to bind themselves for execution of a personal bond to satisfy the money decree, if any, and to this there was no satisfactory or responsive answer. It is to be appreciated that this consent order was passed consciously by the Court after considering the claims of both the parties as Defendants were eager to have the injunction application disposed of, so that they can sell their properties and for this reason the Plaintiff abandoned its right of specific performance and as a

corollary, the Defendants were bound to satisfy the money decree, if any. Now, if the contention of the Defendant's Counsel is accepted, opposing the amendment application, this would render the entire suit meaningless as well as infructuous. The only relief now left available to the Plaintiff is to seek refund and compensation and for which the Plaintiff is required to prove the same at the trial and if the application is dismissed it will also frustrate Para-C of the consent order, which cannot be done.

The present application in essence is not of introducing a new plea or a fresh cause of action as contended by all learned Counsel appearing for the defendants, rather, at best it is a case of an alternate plea. And it is needless to observe that the genesis of such an alternate plea can be found in consent order as above. The Honorable Supreme Court in the case of **Nazir Hussain Rizvi v Zahoor Ahmed (PLD 2005 SC 787)**, has laid down certain principles in this context and after relying upon an earlier judgment reported as *Budho v Ghulam Shal (PLD 1963 SC 553)*, wherein, *"it has been held that no two facts can be said to be inconsistent if both could have happened and the test of inconsistency is that a plaintiff which contains both cannot be verified as true but a party can put forward more than one source of his right or defence in which case he is pleading in the alternative"*, it has been pleased to observe, that the *"judicial consensus seems to be that an alternative or inconsistent plea can be raised but contradictory and mutually destructive pleas cannot be taken"*. Recently this judgment has been followed by the Hon'ble Supreme Court in the case of **Haji Sultan (Supra)**, by holding that *"Therefore, we do not consider it at all to be a case of contradictory or mutually destructive pleas, which is being introduced through the proposed amendment. At best, it could be a plea in the alternative that can legitimately be taken in the circumstances of the*

*case. When a plea in the alternative can naturally arise and can co-exist with the main plea, which was not taken in the plaint at the time of filing of the suit then such a plea can be introduced by seeking amendment in the pleadings.”* The facts leading to filing of the present application are fully covered by the observations as above. Accordingly, a case for indulgence is made out for amendment in the plaint, therefore, this application must be allowed.

9. Insofar as the other application under Order 1 Rule 10 CPC is concerned, it is a matter of record that entire negotiations and most of the payments have been made by the deceased Gul Muhammad Khanani and not merely by the Partnership Firm, which is the Plaintiff, therefore, there cannot be any exception in granting the application to the extent of the deceased and since he has expired during pendency of these proceedings, the legal heirs are to be brought on record, which even includes, the Applicant No.1, his wife, who was also the partner of the Firm. It is also a settled law that if a Partnership Firm has two partners and if one expires; it is not that the other partner will not remain liable for the accounts of the Partnership Firm. This is the basic difference between a Limited Company and Partnership Firm, where the partners remain liable personally for the acts of the Firm, therefore, on this score as well the Applicant No.1 will remain a Plaintiff before this Court. Reference in this regard may be made to sections 25, 26 & 27 of the Partnership Act, 1932. Moreover, this application also ought to have been granted in view of the fact that amendment in plaint has been permitted, which also includes compensation and damages.



10. In view of hereinabove facts and circumstances of this case, on 21.03.2018 through a short order, both these applications were allowed and amended plaint available in the file was taken on record and Plaintiff's Counsel was directed to file amended title, whereas, the Defendants were also permitted to file amended written statement, if any, and these are the reasons thereof.

Judge

Ayaz P.S.