

**ORDER SHEET**  
IN THE HIGH COURT OF SINDH, KARACHI

Date	Order with signature of Judge
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Suit No. 1593 of 2012

Nazar Gul Plaintiff

VERSUS

Maymar Housing Service (Pvt.) Ltd.  
& others Defendants

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Suit No. 1934/2014

Maymar Housing Services (Pvt.) Ltd.  
& another Plaintiffs

VERSUS

Nazar Gul Defendant

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Date of hearing: 21.03.2018

M/s. Abid S. Zuberi & Saad Saeed, Advocates for the plaintiff in Suit No.1593/2012 and the defendant in Suit No.1934/2014;

M/s Yawar Faruqui & Irfan Memon, Advocates for the defendants No.1 to 4 in Suit No.1593/2012 and the plaintiffs in Suit No.1934/2014;

Mr. Athar Ali Memon, Advocate for Intervenors in Suit No.1593/2012;

Mr. Muhammad Ashraf Khan Mughal, Advocate for Intervenors in Suit No.1593/2012 and Suit No.1934/2014,;

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**Adnan Iqbal Chaudhry J.-**

1. The 'Suit Plot' i.e. Plot No. 170/A, Block-3, Sir Syed Road, P.E.C.H.S., Karachi, measuring 2000 square yards, is owned by Maymar Housing Service (Pvt.) Ltd. (hereinafter 'Maymar'). Vide a Sale Agreement dated 3.11.2010, Maymar agreed to sell 50% of the Suit Plot to Nazar Gul for a sale consideration of Rs.100,000,000/- (Rupees One Hundred Million only). At the time the Suit Plot was mortgaged by Maymar with a consortium of banks lead by Habib Bank Ltd. [HBL]. Per the Sale Agreement, the amount of Rs.100,000,000/- receivable by Maymar from Nazar Gul was to be used by Maymar for redeeming the mortgage of the Suit Plot, and within 3 months of the Sale Agreement, Maymar was to

convey title of 50% of the Suit Plot to Nazar Gul. To address the delay in the redemption of mortgage of the Suit Plot, Nazar Gul and Maymar entered into an Amending Agreement dated 02.11.2011 to extend the date of performance of the Sale Agreement dated 3.11.2010 to 01.02.2012.

2. By a Partnership Agreement dated 06.11.2010 Maymar and Nazar Gul agreed to construct a public-sale building project on the Suit Plot under the name and style 'Maymar City Tower'; the cost of construction was to be shared equally; the proceeds of bookings/allotments in Maymar City Tower were to be deposited in a joint bank account of Maymar and Nazar Gul and were to be shared between them in a certain proportion; allotment letters and booking receipts to allottees were to be signed jointly by Maymar and Nazar Gul.

3. On 03.12.2010 Maymar delivered possession of the Suit Plot to Nazar Gul in part performance of the Sale Agreement dated 03.11.2010 and the Partnership Agreement dated 06.11.2010, but such possession was delivered subject to the mortgage. Thereafter, negotiations between Maymar and HBL as to the redemption of the Suit Plot broke down and HBL (and two others) filed Suit No.B-36/2012 on 31.05.2012 against Maymar for recovery of finance by sale of mortgaged properties which included the Suit Plot. By order dated 01.06.2012 passed in Suit No.B-36/2012, Maymar was restrained from creating third party rights in the Suit Plot. Such restraining order was also published on 15.10.2012 in the Daily Dawn and the Daily Jang. It appears that prior to the said restraining order, and despite the mortgage of the Suit Plot, Nazar Gul and Maymar acting in partnership, made allotments to third parties of premises in the Suit Plot and shared revenues.

4. On being confronted with the consequences of Suit No.B-36/2012, i.e. the mortgagees' prior claim on the Suit Plot, on 21.11.2012 Nazar Gul filed Suit No.1593/2012 against Maymar and HBL alleging that Maymar and HBL had colluded to redeem the other properties mortgaged by Maymar instead of redeeming the Suit Plot first. The prayers made by Nazar Gul in Suit No.1593/2012 are as follows:

- a. *Declare that the Plaintiff is absolute owner of Plot No. 170-A, admeasuring 2000 square yards, Block No.3, Sir Syed Road, Karachi, pursuant to sale agreement dated 3-11-2010, and is entitled to transfer of the same and in case of failure of the Defendant No.1 to do so, the Learned Nazir of this Hon'ble Court may be directed to transfer and mutate the same in favor of the Plaintiff.*
- b. *Grant a decree for specific performance of the sale agreement dated 03-11-2011 and direct the Defendant No.1 to pay Rs.10,00,00,000 to the Defendant No.5 for Plot No. 170-A, admeasuring 2000 square yards, Block No.3, Sir Syed Road, Karachi and redeem the same.*
- c. *Direct the Defendant No.5 to release the original documents of the suit property and hand over the same to the Plaintiff.*
- d. *Declare that the Defendants No. 1-5 in order to deprive the Plaintiff of his right, title and interest in the suit property have committed fraud against the Plaintiff.*
- e. *Grant a permanent injunction restraining the Defendants No. 1-5 from entering into any transaction in respect of Plot No. 170-A, admeasuring 2000 square yards, situated in PECHS, Block No.3, Sir Syed Road, Karachi, amongst themselves or with any third parties for satisfaction of the amounts due from the Defendants No.1 to the Defendant No.5.*
- f. *Grant a permanent injunction restraining the Defendant No. 1-4 from creating any third party interest in Plot No.170-A, admeasuring 2000 square yards, situated in PECHS, Block No.3, Sir Syed Road, Karachi and further from trying to dispossess the Plaintiff from the plot and/or interfere in the construction activity being carried out thereon by the Plaintiff, or interfere in any manner in his use and enjoyment of the suit property.*
- g. *Grant a mandatory injunction directing the Defendant No.5 to sell/dispose off the other/remaining mortgaged properties of the Defendant No.1, other than Plot No. 170-A, admeasuring 2000 square yards, situated in PECHS, Block No.3, Sir Syed Road, Karachi and settle the outstanding liabilities of the Defendant No.1 and No.2.*
- h. *Any other relief which this Hon'ble Court deems fit and proper under the circumstances of this case.*
- i. *Cost of the proceeding."*

5. It appears that pursuant to the Partnership Agreement dated 6-11-2010 Nazar Gul had commenced construction on the Suit Plot. By an interim order dated 21-11-2012 passed in Suit No.1593/2012 Maymar was restrained from creating third party interest in the Suit Plot, from

interfering in its construction and from dispossessing Nazar Gul from the Suit Plot.

6. Subsequent to the filing of Suit No.1593/2012 by Nazar Gul, Suit No.B-36/2012 by HBL against Maymar was settled and disposed off on 24.12.2013 and the mortgage of the Suit Plot was redeemed by Maymar. Thus, in filing its written statement on 5-3-2014 in Suit No.1593/2012 Maymar categorically stated that it is willing to perform the Sale Agreement dated 3-11-2010 by conveying title of 50% of the Suit Plot to Nazar Gul and to that end Maymar's prayer in its written statement in Suit No.1593/2012 is:

*"It is respectfully prayed that the suit may be decreed in the terms that the plaintiff and the defendant No.1 are the joint owners of the subject property each having 50% share therein in accordance with the Sale Agreement dated 3-11-2010 and the Partnership Agreement dated 6-11-2010."*

7. It appears that before the dispute had arisen between Nazar Gul and Maymar, and prior to the restraining order dated 1-6-2012 passed in Suit No.B-36/2012, and despite the mortgage then existing on the Suit Plot, Maymar and Nazar Gul acting in partnership had made allotments to third parties of premises in the Suit Plot. From the allegations of Maymar it appears that pending the restraint on Maymar in Suit No.1593/2012 and Suit No.B-36/2012, and after the disposal of the latter, Nazar Gul collected from the allottees the installments of the allotments earlier made and also made fresh allotments of premises in the Suit Plot, both to the exclusion of Maymar. Per Maymar, this was done by Nazar Gul in breach of the Partnership Agreement dated 6-11-2010 between them which stipulated that the proceeds of allotments would be deposited in their joint bank account and allotments in the Suit Plot would only be made jointly by Maymar and Nazar Gul. Consequently, on 13-10-2014, Maymar filed Suit No.1934/2014 against Nazar Gul for the following relief:

*"i) Declare that the acts and omissions of the Defendant are in breach of the Sale Agreement and the Partnership Agreement signed between the Defendant and the Plaintiff No.1;*

- ii) *Declare that by being unresponsive to the complaints, queries and requests of the Plaintiff No.1, the Defendant acted in illegal, unjust and unfair manner;*
- iii) *Declare that the Defendant has no right to sell units of the Project without signatures of the Plaintiff No.1;*
- iv) *Declare that all transfers, sales and handing over of possession of units of the Project or anywhere on the Property, made in breach of the said agreements between Plaintiff No.1 and the Defendant No.1, are illegal;*
- v) *Direct the Defendant to produce the accounts of overall transactions made pertaining to the Project;*
- vi) *Pass judgment and decree in favor of the Plaintiff No.1 to the tune of its rightful entitlement in accordance with the Sale Agreement and the Partnership Agreement and restore possession of the Plaintiff No.1 in consequence thereof as per its rightful entitlement;*
- vii) *Restrain the Defendant from illegally and maliciously creating any third party interest/s on the Property and the Project including giving possession to the third parties till the pendency of the instant Suit and order the Defendant to hand over possession of the Project to the Plaintiff No.1;*
- viii) *Appoint a Receiver over the Property making him fully authorized to take control of all records and accounts of the Project and to make detailed inventory of the sold units and units which are yet to be sold and to conduct a detailed audit of the accounts of the Project and to compare the results with the deposits made in the Joint Account;*
- ix) *Award liquidated damages to the Plaintiff No.1 to be ascertained in accordance with the report of the learned Receiver;*
- x) *Grant cost of the suit;*
- xi) *Grant any other relief(s) as deemed fit and proper in the circumstances of the case."*

8. In his defense in Suit No.1934/2014 Nazar Gul does not deny that he collected installments of allotments and made fresh allotments on his own to the exclusion of Maymar, but it is his case that in remaining preoccupied with Suit No.B-36/2012, Maymar had practically abandoned the project on the Suit Plot and therefore he (Nazar Gul) was compelled to undertake the project on his own, and thus only he is now entitled to the fruits of his labour.

9. By an interim order dated 13-10-2014 passed in Suit No.1934/2014 the parties were directed to maintain status quo, which order was confirmed on 23-12-2015 with a specific direction to Nazar Gul not to create third party interest in the Suit Plot nor to hand over possession to any third party. The same order was also passed in Suit No.1593/2012.

10. By applications under Order I Rule 10 CPC filed in Suit No.1593/2012 and Suit No.1934/2014, certain Intervenor who claim to have been allotted premises in the Suit Plot pray to be added as defendants to both suits. Mr. Ashraf Khan Mughal and Mr. Athar Ali Memon Advocates for the said Intervenor contended that the Intervenor being allottees of premises in the Suit Plot are entitled to possession thereof. They submitted that due to disputes, first between Maymar and the mortgagees of the Suit Plot (Suit No.B-36/2012), and then between Nazar Gul and Maymar (the subject suits), since possession was being denied/delayed to the Intervenor, they had stopped paying further installments of their respective allotments, but they have all along been ready and willing to do so, and shall do so on receiving possession. Learned counsels for the Intervenor acknowledged that the Intervenor had not initiated independent proceedings against Nazar Gul and/or Maymar for specific performance of their allotments, but they contended that such possession can be ordered to be delivered to the Intervenor in the subject suits and that in fact was the reason for joining these proceedings. Indeed, to that end some of the Intervenor have simultaneously moved CMA No. 6110/2017 in Suit No.1593/2012 seeking orders for possession of premises allotted to them in the Suit Plot.

11. Mr. Abid S. Zuberi, Advocate for Nazar Gul (plaintiff in Suit No.1593/2012 and defendant in Suit No.1934/2014) supported the joinder of the Intervenor and the delivery of possession to them. He submitted that allotments to most of the Intervenor had been made jointly by Nazar Gul and Maymar before these disputes had arisen and the proceeds of such allotments up until sometime in 2012 had also been shared between them as per their agreement. He contended that the relief of specific performance of the Sale Agreement dated 3-11-2010 sought by Nazar Gul in Suit No.1593/2012 also envisages transfer of possession by Maymar to the allottees. In the alternative, he submitted that since the Intervenor

were being adversely affected by Suit No.1593/2012 they were in the very least proper parties thereto, and in support of such submission he relied on the case of *Uzin Export Import Enterprises for Foreign Trade v. Union Bank of Middle East Ltd.* (PLD 1994 SC 95).

12. Mr. Yawar Faruqui and Mr. Irfan Memon, Advocates for Maymar (defendants 1 to 4 in Suit No.1593/2012 and plaintiffs in Suit No.1934/2014) opposed the joinder of the Intervenors in both suits. They submitted that Nazar Gul having yet to be conveyed title to 50% of the Suit Plot by Maymar, had no authority to receive installments from the allottees or to make fresh allotments on his own to the exclusion of Maymar; that the allotment letters and receipts signed by Nazar Gul on his own are fabricated documents and such allottees have been created by Nazar Gul only to frustrate Suit No.1934/2014; that Maymar being the owner of the Suit Plot is entitled to dispute the allottees who claim to have been dealing with Nazar Gul alone; that in any case no possession can be nor should it be given to the allottees in view of the restraining order dated 23-12-2015 that operates in both suits. Mr. Yawar Faruqui further contended that the purpose for which the joinder was being sought i.e. for possession of premises allotted in the Suit Plot, was essentially to seek specific performance of the allotment letters, which relief was beyond the scope of both suits and which relief, for some of the allottees, may well be time-barred by now. Lastly, Mr. Yawar Faruqui argued that the Intervenors who were dealing in a clandestine manner with Nazar Gul alone cannot be said to be necessary parties to a suit for specific performance between Nazar Gul and Maymar (Suit No.1593/2012); and to support such submission he relied on the case of *Vidur Impex and Traders (Pvt.) Ltd. v. Tosh Apartments (Pvt.) Ltd.* a judgment of the Supreme Court of India reported at 2013 SCMR 602.

13. The distinction between a 'proper party' and a 'necessary party' to a suit in terms of Order I Rule 10 CPC, and the prerogative of the Court to add parties to a suit, is settled law, which can be summarized as follows:

- (i) a 'necessary party' is one who ought to have been joined and in whose absence no effective decree can be passed;
- (ii) the non-joinder of a necessary party can be fatal to the suit;

- (iii) a 'proper party' is one whose presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit;
- (iv) a person can be joined as a proper party even though no relief is claimed against him but the primary object of impleading a proper party is to avoid multiplicity of legal proceedings and to determine effectually and finally all questions arising in the proceedings. Such person must, therefore, be a person whose interest is likely to be affected even though no relief is claimed against him;
- (v) persons cannot be added as parties so as to set up a new cause of action which does not concern the original parties;
- (vi) the power of the Court under Order I Rule 10(2) CPC to add parties is generally not a question of initial jurisdiction of the Court but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case;
- (vii) while adding a party, the Court may put the party to terms;
- (viii) if a person does not qualify as a necessary or a proper party, then the Court has no jurisdiction to add him as a party under Order I Rule 10(2) CPC;
- (ix) in exercising power under Order I Rule 10(2) CPC the Court ought to see that it does not load the record with the parties wholly shown to have no interest in the suit, and that the trial of the suit is not embarrassed by the simultaneous investigation of unconnected controversies.

The above principles have been summarized from the cases of *Islamic Republic of Pakistan v. Abdul Wali Khan* (PLD 1975 SC 463); *Pakistan Banking Council v. Ali Mohtararn Naqvi* (1985 SCMR 714); *Uzin Export Import Enterprises for Foreign Trade v. Union Bank of Middle East Ltd.* (PLD 1994 SC 95); *Mst. Rani v. Mst. Razia Sultana* (1994 SCMR 2268); *Ghulam Ahmad Chaudhry v. Akbar Hussain* (PLD 2002 SC 615); and *Muhammad Arif v. District and Sessions Judge, Sialkot* (2011 SCMR 1591).

14. By way of an extension to the above stated principles, I venture to add that while determining under Order I Rule 10(2) CPC whether an intervenor is a necessary party or a proper party, the foremost question before the Court is not how the suit affects the intervenor, but how the



intervenor's absence from the suit will effect its decision - the question how the suit effects the intervenor being a secondary one.

CMA No.6109/2017 & CMA No.2183/2018 in Suit No.1593/2012:

15. A set of seven Intervenors have moved CMA No.6109/2017 and another set of Intervenors have moved CMA No.2183/2018 to be added as defendants to Suit No.1593/2012. Though the latter application lists 19 Intervenors, it is signed only by 12 Intervenors but with supporting affidavits of 16 Intervenors. The case of the Intervenors as discussed in para 10 above is that they being allottees of premises in the Suit Plot, they are entitled to possession thereof, and that it is for such possession that they seek impleadment in Suit No.1593/2012, which according to them, makes them necessary parties to the said suit. Thus admittedly, the Intervenors claim to be necessary parties not because Suit No.1593/2012 cannot be decided in their absence, but for seeking relief which is essentially one for specific performance of their allotment letters, for which relief the Specific Relief Act, 1877 provides them an independent remedy. That much is sufficient to conclude that the joinder applications are misconceived. Nonetheless, even assuming for the sake of argument that the Intervenors are added as defendants to Suit No.1593/2012, given the scope of such suit and the prayer made therein (reproduced in para 4 above), I fail to see how the Intervenors would derive the relief of specific performance of their allotment letters from Suit No.1593/2012. Such relief can only be sought by them by an independent action against Nazar Gul and Maymar by way of a suit for specific performance. Alternatively, they can invoke the alternate dispute resolution mechanism provided to them under clause 21 of their allotment letters, or section 13(3) of the Sindh Building Control Authority Ordinance, 1979 for recovering penalty from the builder for delay in delivery. The questions whether the Intervenors are entitled to specific performance ? whether such relief is within time ? whether allotment letters given to some of the Intervenors only by Nazar Gul (to the exclusion of Maymar), are valid ? whether the completion of the building on the Suit Plot has been approved by the Sindh Building Control Authority under section 7-E of the Sindh Building Control Ordinance, 1979 ? whether an occupancy certificate required by clause 20 of the allotment letters and by section 6(2) of the Sindh Building Control

Ordinance, 1979 as a pre-condition to possession, has been issued/obtained ? - all of which are questions beyond the scope of Suit No.1593/2012.

16. Coming now to the test of Order I Rule 10(2) CPC discussed in paras 13 and 14 above, it is not the case of the Intervenors, nor can it be said that the Intervenors are parties who ought to have been joined in Suit No.1593/2012 inasmuch as, such suit by Nazar Gul is for a right/relief that is independent of the right/relief of the Intervenors. In other words, the right claimed by the Intervenors stems from the title of Maymar to the Suit Plot and the Partnership Agreement dated 6-11-2010 between Maymar and Nazar Gul pursuant to which they were given allotment letters, and not from the Sale Agreement dated 3-11-2010 that is exclusively between Nazar Gul and Maymar under which co-title of the Suit Plot has yet to be conveyed to Nazar Gul. So also, the absence of the Intervenors from Suit No.1593/2012 will in no way impede a decision and an effective decree in the said suit, which decision/decreed cannot in any way adversely affect the separate remedy available to the Intervenors. In view of the foregoing, I hold that the Intervenors are not necessary parties to Suit No.1593/2012.

17. Mr. Abid S. Zuberi, Advocate for Nazar Gul, had contended that the Intervenors were in the very least proper parties to Suit No.1593/2012 - but the question would then be, to what end ? After Maymar has conceded in its written statement to a decree for specific performance of the Sale Agreement dated 3-11-2010 in favor Nazar Gul, the presence of the Intervenors in Suit No.1593/2012 is not at all necessary *"in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit"*. Rather in such circumstances, the joinder applications in Suit No.1593/2012 are pointless and the consent given by Nazar Gul to the joinder of the Intervenors in Suit No.1593/2012 is of no use. In my view the prerogative of the plaintiff (Nazar Gul) to add parties as *dominus litis* is subject to such parties qualifying the test of necessary or proper parties under Order I Rule 10 CPC. The case of *Vidur Impex and Traders (Pvt.) Ltd. v. Tosh Apartments (Pvt.) Ltd.*, the judgment of the Supreme Court of India reported at 2013 SCMR 602 cited by Mr. Yawar

Faruqi, is a case on point. Therefore, I hold that in the circumstances of the case the Intervenors are not even proper parties to Suit No.1593/2012.

18. **Therefore, for reasons discussed in paras 15 to 17 above, CMA No.6109/2017 and CMA No.2183/2018 in Suit No.1593/2012 are dismissed. The office is directed to list Suit No.1593/2012 for examination of parties / settlement of issues within 2 weeks so as to determine whether the parties thereto remain at issue or not, and whether a decree can be passed therein.**

CMA No.17175/2014 in Suit No.1934/2014.

19. A set of seven Intervenors have moved CMA No.17175/2014 to be added as defendants to Suit No.1934/2014. These are the same Intervenors who have moved CMA No.6109/2017 in Suit No.1593/2012. The first ground urged by them for qualifying as necessary parties to Suit No.1934/2014 is the same as the one urged in their joinder applications in Suit No.1593/2012 i.e. that being allottees of premises in the Suit Plot, they are entitled to possession thereof and that it is for such possession that they seek impleadment in Suit No.1934/2014. The misconception in such submission in light of the independent remedies available to the Intervenors has already been discussed in paras 15 and 16 above, and the same reasons are reiterated for holding that here too the Intervenors are not necessary parties to Suit No.1934/2014 and their joinder cannot be to enlarge the scope of such suit.

20. The other ground urged by the Intervenors of CMA No.17175/2014 to contend that they are necessary parties to Suit No.1934/2014 is that the interim order of status quo dated 13-10-2014 passed in the said suit deprives them of the right to seek possession of their premises in the Suit Plot. It be recalled that the said status quo order was subsequently confirmed on 23-12-2015 while specifically restraining Nazar Gul from creating third party interest in the Suit Plot and from delivering possession to third parties. While such contention of the Intervenors appeared at first to have force, it fails on analysis. The order dated 23-12-2015 only restrains Nazar Gul from dealing with third parties on his own to the exclusion of Maymar, because that is how Nazar Gul is bound by

his Partnership Agreement dated 6-11-2010 with Maymar, under which agreement third party rights in the Suit Plot can only be created by them jointly. The order dated 23-12-2015 does not in any way restrict an action for specific performance if brought by the Intervenors for their allotment letters, for if such an action deserves, it will be the Court that will compel Nazar Gul and Maymar to specifically perform their agreement with the Intervenors.

21. This brings us to the question whether the Intervenors of CMA No.17175/2014 qualify as proper parties to Suit No.1934/2014 if not necessary parties. Here I find that they do. Prayer clauses (v) and (viii) of the plaint in Suit No.1934/2014 (reproduced in para 7 above) essentially seeking a rendition of account from Nazar Gul for monies received by him from the allottees of premises in the Suit Plot. The Intervenors of CMA No.17175/2014 claim to be such allottees. From the documents filed with CMA No.17175/2014 it appears that uptill 2012 receipts were issued to the Intervenors 1 to 4 jointly by Maymar and Nazar Gul, but in the first quarter of 2014 it was Nazar Gul alone who issued receipts to the Intervenors 1 to 4. The others, i.e. Intervenors No.5 to 7 (of CMA No.17175/2014) claim to have been allotted premises in the Suit Plot on 22-2-2014 and their allotment letters and receipts are signed only by Nazar Gul. Thus to effectually and completely adjudicate what money was received by Nazar Gul and from which allottee, which is the central question in Suit No.1934/2014, I find that the presence of the said Intervenors before the Court would be necessary. **Therefore, CMA No.17175/2014 in Suit No.1934/2014 is allowed and such Intervenors are added as defendants 2 to 8, however on the terms that such Intervenors shall not be entitled to agitate specific performance of their allotment letters in Suit No.1934/2014. The plaintiff is directed to file an amended title to the said suit arraying the newly added defendants.**

JUDGE

Dated: 17-05-2018