

IN THE HIGH COURT OF SINDH KARACHI

Suit No. 1676 of 2016

[Manzoor Ahmed Soomro v. Hameed Ahmed and others]

- Dates of hearing : 09-05-2018 and 15-05-2018.
- Date of Decision : 13-08-2018
- Plaintiff : Manzoor Ahmed Soomro, through M/s Syed Shahid Mushtaq and Amjad Hussain Advocates.
- Defendant No. 1 : Hameed Ahmed through Mukhtiar Ahmed Khoso, Advocate.
- Defendant No. 2 : Arif Latif through Mr. Talat A. Aslam Advocate.
- Defendants 3 & 4 : Mukhtiarkar Shah Faisal Town and Sub-Registrar, Shah Faisal Town, through Mr. Pervaiz Ahmed Mastoi, Assistant Advocate General Sindh a/w Wazir Chand, Mukhtiarkar Shah Faisal Colony.
- Defendant No. 5 : Board of Revenue through Mr. Shabbir Shaikh Advocate.
- Defendant No. 6 : Akhtar Hussain through Mr. Aziz-ur-Rehman Akhund, Advocate.

ORDER

ADNAN IQBAL CHAUDHRY J. -

1. The plaintiff as buyer claims to have a Sale Agreement dated 22-01-2013 with the defendant No.1/seller (Hameed Ahmed) for the sale of the suit property. It is the case of the plaintiff that of the agreed sale consideration of Rs.30,000,000/- (Rupees Thirty Million Only), he has paid Rs.25,500,000/- to the defendant No.1, and that he was delivered possession of the suit property in part performance of said Sale Agreement. However, the plaintiff acknowledges that the defendant No.1 is not the registered owner of the suit property but that the defendant No.1 (Hameed Ahmed) had held the suit property

pursuant to a Sale Agreement dated 07-04-2007 with the defendant No.2 (Arif Latif) who was the registered owner thereof, *albeit* the said Sale Agreement does not discuss/state this fact. Per the plaint, the defendant No.2 (Arif Latif) had executed an undertaking dated 04-02-2013 in favor of the defendant No.1 (Hameed Ahmed) acknowledging the defendant No.1 (Hameed Ahmed) as purchaser of the suit property and entitling him to sell the same; that a dispute arose between the defendants 1 and 2 causing the defendant No.1 (Hameed Ahmed) to file Suit No.400/2013 before this Court against the defendant No.2 (Arif Latif) for specific performance of their Sale Agreement dated 07-04-2007; that when the plaintiff discovered that the defendant No.2 (Arif Latif) was out to sell the suit property to another, the plaintiff confronted the defendant No.1 (Hameed Ahmed), who sent a notice dated 12-07-2016 to the plaintiff cancelling their Sale Agreement dated 22-01-2013; hence this suit for specific performance of the Sale Agreement dated 22-01-2013, for an injunction against the defendants from creating third-party interest in the suit property, and for restraining the defendants from disturbing the plaintiff's possession of the suit property.

2. The defendant No.6 (Akhtar Hussain) was subsequently added to this suit when he too claimed to have entered into a Sale Agreement dated 10-09-2016 with the defendant No.2 (Arif Latif) for purchasing the suit property, and had also filed Suit No.2410/2016 against the defendant No.2 (Arif Latif) for specific performance of their Sale Agreement dated 10-09-2016. Consequently, an amended plaint was filed in this suit on 28-03-2018, wherein the plaintiff has also prayed for a cancellation of the Sale Agreement dated 10-09-2016 between the defendant No.2 (Arif Latif) and the defendant No.6 (Akhtar Hussain).

3. That in the plaint of the Suit No.400/2013, which was for specific performance of the Sale Agreement dated 07-04-2007 between the defendants 1 and 2 (Hameed Ahmed and Arif Latif), the defendant No.1 (Hameed Ahmed) claims that he was in possession of

the suit property in part performance of his sale agreement with the defendant No.2 (Arif Latif); that the defendant No.2 (Arif Latif) had failed to resolve litigation on the suit property and to transfer the same and its original title documents to the defendant No.1 as promised; hence Suit No.400/2013.

4. Pursuant to order dated 14-10-2013 passed in Suit No.400/2013, the suit property was given under the control of the Nazir of this Court. By order dated 06-03-2018 passed in this suit (Suit No.1676/2016), it was ordered that the Nazir shall retain control over the suit property also for the purposes of this suit.

5. The record shows that on 27-07-2016, CMA No.10873/2016 under Order XXIII Rule 1 CPC was filed in Suit No.400/2013 by the plaintiff of that suit, i.e. the defendant No.1 herein (Hameed Ahmed), and vide order dated 01-08-2016 Suit No.400/2013 was dismissed as withdrawn.

6. In his written statement in this suit (Suit No.1676/2016), the defendant No.2 (Arif Latif) terms the plaintiff and the defendant No.1 (Hameed Ahmed) as land grabbers. The defendant No.2 (Arif Latif) states that he is owner of the suit property; he denies having executed the Sale Agreement dated 07-04-2007 with the defendant No.1 (Hameed Ahmed); he denies to have executed the undertaking dated 04-02-2013 in favour of the defendant No.1 (Hameed Ahmed); he alleges that both the said Sale Agreement and undertaking are forgeries and fabrications; he states that Suit No.400/2013 filed by the defendant No.1 (Hameed Ahmed) against him was withdrawn unconditionally on 01-08-2016; that since the defendant No.1 (Hameed Ahmed) has withdrawn his claim over the suit property, he cannot transfer the same to the plaintiff, and consequently the plaintiff cannot now enforce the Sale Agreement dated 22-01-2013 for the suit property against the defendant No.1 (Hameed Ahmed). The defendant No.2 (Arif Latif) also alleges that the plaintiff and the defendant No.1 (Hameed Ahmed) are in collusion to deprive the

defendant No.2 (Arif Latif) of the suit property; and that Suit No.2410/2016 filed by defendant No.6 (Akhtar Hussain) has been filed at the behest of a *qabza* group of which the plaintiff and the defendant No.1 (Hameed Ahmed) are also members.

7. In his written statement in this suit (Suit No.1676/2016), it is the case of the defendant No.1 (Hameed Ahmed) that he had cancelled his Sale Agreement dated 22-01-2013 with the plaintiff vide legal notice dated 12-06-2016 for the failure of the plaintiff to make the agreed sale consideration.

CMA No.11450/2016 & CMA No.16228/2017 under Order VII Rule 11 CPC:

8. By the above mentioned applications, the defendant No.2 (Arif Latif) and the defendant No.6 (Akhtar Hussain) respectively have prayed for rejection of the plaint. Per the defendants 2 and 6, this suit for the relief of specific performance of the Sale Agreement dated 22-01-2013 cannot be maintained where admittedly the seller (defendant No.1 - Hameed Ahmed) never had title to the suit property, and that once the said seller had withdrawn his Suit No.400/2013 to obtain transfer of title of the suit property to him (under Sale Agreement dated 07-04-2007), there was no clause in the Sale Agreement dated 22-01-2013 that obligated the defendant No.1 (Hameed Ahmed) to seek specific performance of his Sale Agreement dated 07-04-2007 with the defendant No.2 (Arif Latif). However, it is acknowledged by the defendant No.6 that the plaintiff can maintain an action for compensation/damages against the defendant No.1 (Hameed Ahmed). Additionally, the defendant No.6 has taken the objection that the suit is time-barred.

9. Adverting first to the objection that the suit is time-barred, that is urged on the misconception that limitation commenced from the date of the Sale Agreement (22-01-2013) as opposed to the date fixed therein for its performance (06-01-2014). If limitation is computed from the date so fixed, the suit filed on 20-07-2016 is within limitation.

10. As regards the other objection discussed in para 8 above, that objection is essentially that the plaintiff is not entitled to the relief of specific performance. From the vantage point of Order VII Rule 11 CPC, that cannot be a ground for rejecting the plaint. Even if the Court concludes that the plaintiff is not entitled to the relief of specific enforcement of the Sale Agreement dated 22-01-2013, the plaintiff can still fall-back for relief under Section 19 of the Specific Relief Act, 1877 for a refund of the part-payment allegedly made to the defendant No.1 (Hameed Ahmed) and/or for compensation for breach of contract by the defendant No.1 if the plaintiff can prove the same.

Section 19 Specific Relief Act, 1877 reads:

“Section 19. Power to award compensation in certain cases. Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

Compensation awarded under this section may be assessed in such manner as the Court may direct.

Explanation. The circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section.”

In the cases of *Liaquat Ali Khan v. Falak Sher* (PLD 2014 SC 506) and *Adil Tiwana v. Shaukat Ullah Khan Bangash* (2015 SCMR 828), though the suit for specific performance by the buyer/plaintiff was dismissed, he was nonetheless granted a refund of the advance payment made by him.

In the case of *Rashid Naseem v. Amina Fahim* (PLD 2009 Karachi 390), although this was a case where the plaintiff had also prayed for damages, a learned Division Bench of this Court while observing the bar contained in Section 29 of the Specific Relief Act, 1877, held that under section 19 of the Specific Relief Act, 1877, if the Court decides that specific performance ought not be granted, and that the contract was broken by the defendant, the Court can award compensation if the plaintiff is entitled to it.

In the case of *Athar Jamath Majith v. T. Krishnaswami Naidu* (AIR 1955 Madras 591) it was held that even though the suit for specific performance brought by a Vendee is dismissed, yet the Court may in its discretion order the Vendor to return the amount deposited with him by the Vendee, though the Vendee has not prayed for it.

In the case of *Sm. Shakuntla Devi v. Harish Chandra* (AIR (39) 1952 Allahabad 602) it was held that the words "such suit" occurring in the second para of Section 19 of the Specific Relief Act, 1877 do not confine to a suit under the first para in which compensation for breach has been asked either in addition to or in substitution for such performance. Accordingly, where the Court finds that a contract has been entered into, and there has been a breach of that contract and that it is not possible or desirable to order specific performance of that contract but it is just and proper to award compensation, the Court can make an order allowing compensation to the aggrieved party even without a specific prayer in the plaint.

In the case of *Kashi Parsad v. Baiju Paswan* (AIR 1953 Patna 24) it was held that under the second para of Section 19 of the Specific Relief Act, 1877 the duty of the Court to grant compensation is not dependent upon a specific request being made by the Plaintiff.

11. In the circumstances of the case, even if it is assumed that the plaintiff is not entitled to specific enforcement of the sale, the question whether the plaintiff ought to be refunded the alleged part-payment made and/or compensation for the alleged breach by the defendant No.1, is a question that is still open. That question will have to be

decided in this suit pursuant to Section 19 of the Specific Relief Act, 1877 inasmuch as, Section 29 of the Specific Relief Act, 1877 bars the plaintiff from subsequently suing for compensation for breach of contract if his suit for specific performance is dismissed. Therefore, the prayer for rejection of the plaint is misconceived. **Accordingly, CMA No.11450/2016 and CMA No.16228/2017 are dismissed.**

CMA No.4330/2018 under Order VII Rule 11 CPC:

12. As regards the application of the defendant No.1 (Hameed Ahmed) for rejection of the plaint, that does not take any of the grounds enumerated in Order VII Rule 11. Rather it seeks rejection of the plaint by raising disputed questions of fact, one of them being that the defendant No.1 (Hameed Ahmed) had never executed the Sale Agreement dated 22-01-2013 which is completely contrary to his written statement. **For the reason that the grounds taken in this application do not fall under Order VII Rule 11 CPC, CMA No.4330/2018 is also dismissed.**

CMA No.6550/2018:

13. By this application the defendant No.1 (Hameed Ahmed) has prayed that the possession of the suit property be delivered to him by modifying the order dated 06-03-2018 passed in this suit inasmuch as, by order dated 29-08-2017 passed in Suit No.400/2013, it was ordered that since the said suit had been withdrawn, the security guards deployed by the Nazir at the suit property should be removed and possession of the same should be delivered to the plaintiff of that suit, i.e. the defendant No.1 herein. But the said order dated 29-08-2017 passed in Suit No.400/2013 was subsequently recalled by order dated 10-05-2018 when it was brought to the notice of the Court that by an order dated 06-03-2018 passed in this suit (Suit No.1676/2016), the Nazir had been ordered to retain control over the suit property for the purposes of this suit as well. **Therefore, CMA No.6550/2018 is misconceived and is dismissed.**

JUDGE