

**IN THE HIGH COURT OF SINDH AT
KARACHI**

Suit No. 2055 of 2017

Plaintiff : Muhammad Zafar Sheikh,
through Mr. Asim Iqbal,
Advocate.

Defendant No. 1: Muhammad Ali, through Mr.
Karam Chand Kingrani, Advocate

Date of hearing : 24.04.2019

ORDER

YOUSUF ALI SAYEED, J. – The Suit has been filed seeking Specific Performance of a contract encapsulated in a document titled as a “Cancellation-Cum-Supplementary Agreement of Sale” dated 02.06.2005 (the “**Subject Agreement**”), in respect of 1127 square yards out of an overall plot said to measure two acres in Survey No. 134 situated in Deh Khanto, Tappo, Landhi, Taluka & District Malir, now Gadap Town (the “**Suit Property**”).

2. As per the case set up by the Plaintiff, the preceding facts leading up to and culminating in the Subject Agreement are as follows:

- (a) That vide a Lease Agreement dated 24.03.1994, Government of Sindh has been pleased to lease out an area of 4 Acres, N.C No. 89 in Deh Kanto District Malir, to the Defendant No. 1 for a period of 99 years, and such land had then been partitioned into equal plots bearing Survey Nos. 134 and 135.

- (b) That the Defendant No.1 had apparently executed an Irrevocable General Power of Attorney dated 05.08.1998 in favour of one Shaikh Muhammad Arshad in respect of Survey No.134, and in pursuance of the power of delegation contained in Clause 10 thereof the aforementioned Attorney had in turn executed an Irrevocable Sub-Power of Attorney in favour of Babar Mirza Chughtai (i.e. the Defendant No.2), both of the aforementioned instruments having been registered.
- (c) That the Plaintiff had then transacted with the Defendant No.1, through the Defendant No.2, in terms of an Agreement of Sale dated 13.05.2004 for the acquisition of the two acres comprising Survey No. 134 for a total sale consideration of Rs. 27,500,000/- (Rupees Twenty-Seven Million Five Hundred Thousand Only), with it being recorded that a sum of 2,750,000/- had been paid vide Pay Order Numbers 967170 and 967194 dated 07.05.2004 and 11.05.2004 respectively, issued by Muslim Commercial Bank, Frere Road Branch.
- (d) That as per Clause 10 of the aforesaid Agreement, the sale and transfer of Survey No.134 was to be completed within two months from the date thereof, prior to which regularization was to be obtained by the vendor in terms of the Government Land (Cancellation of Allotments, Conversions, Exchanges), Ordinance 2001.
- (e) That as the requisite regularization had not been obtained within the envisaged timeframe, a Supplementary Agreement of Sale dated 31.07.2004 was then entered into for the purpose of extending the time for completion of the transaction up to 30.08.2004.

- (f) That as the condition of regularization still remained unfulfilled beyond the stipulated timeframe, the aforementioned agreements then came to be superseded by the Subject Agreement, in terms of which the earlier transaction stood cancelled and it was agreed that out of the 2 acres comprising Survey No.134, the portion comprising the Suit Property, which was said to be the part thereof adjacent to Plot bearing Survey No.164, would be conveyed/transferred to the Plaintiff for a total sale consideration of Rs.3,201,808/-, it also being reflected in Clauses 2 and 5 that of the sum of 2,750,000/- that had earlier been paid, an amount of Rs.1,149,096/- had been refunded and the remainder of Rs.1,600,904/- was deemed to be and adjusted as part payment towards the Suit Property and the balance consideration payable upon execution and registration of a Conveyance Deed following due regularization and all other requisites for perfection of title.
- (g) That although regularization has apparently since been obtained, the transaction in respect of the Suit Property in terms of the Subject Agreement still remains to be completed, hence the Suit.

3. Of the Applications presently pending determination, two have been filed on behalf of the Plaintiff, being CMA Number 12882/2017 under Order 39, Rules 1 and 2 CPC, seeking that the Defendants be restrained from transferring, alienating or creating any third party interest in the Suit Property or otherwise interfering with the Plaintiffs possession thereof, and CMA Number 12883/2017 under Order 18, Rule 18 CPC seeking an inspection, whereas the third Application, being CMA Number 10807/2018, has been filed by the Defendant No.1 under Order 7 Rule 11 CPC, seeking the rejection of the Plaintiff.

4. Whilst CMA Number 12883/2017 was not pursued, in as much as no submissions were advanced in respect thereof during the course of arguments, whilst pressing CMA Number 12882/2017 it was submitted that the documents filed along with the Plaint as to the transactions that had taken place firstly in respect of Survey No. 134 and then the part thereof comprising the Suit Property reflected that a substantial part of the sale consideration had already been paid and possession of the Suit Property had been handed over to the Plaintiff, which demonstrated the interest and prima facie case that thereby arose in his favour. Attention was specifically invited in this regard to Clauses 5 and 6 of the Subject Agreement as well as a Receipt dated 02.06.2008 and a Possession Letter filed as Annexures P/18 and P/19 to the Plaint. It was submitted that the Suit Property was adjacent to a plot bearing Survey No.164, as was recorded in the very Schedule to the Subject Agreement, and it was submitted that such adjacent plot otherwise belonged to the Plaintiff, hence his interest in acquisition of the Suit Property so as to broaden the available frontage and thus improve the overall dimensions of the land, attention being invited on this note to the site sketch filed as Annexure P/20 to the Plaint.

5. Resisting the claim to injunctive relief and seeking recall of the interim Order made on 20.09.2017 whereby the parties were directed to maintain status quo, learned counsel for the Defendant No.1 submitted that no cause of action had arisen in favour of the Plaintiff and that, even otherwise, the claim was barred by limitation, hence CMA Number 12882/2017 ought to be dismissed. With reference to CMA Number 10807/2018, it was submitted that on the same grounds as well as the aspect of overvaluation the plaint ought to also be rejected. As to the general

application of Order 7, Rule 11, reliance was placed on a judgment of the Honourable Supreme Court in the case reported as Raja Ali Shan v. Messrs Essem Hotel Limited and others 2007 SCMR 741 as well as Single Bench judgments of this Court in the cases reported as Ghous Bux v. Muhammad Suleman and others 2001 MLD 1159, Messrs Mateen Corporation v. Messrs Plasticrafters (Pvt) Ltd PLD 2006 Karach 621, and Muhammad Afzal Pasha and another v. Defence Housing Authority through Managing Director and another 2012 MLD 970.

6. Elaborating on these submissions, it was stated that the Defendant No.1 was neither a signatory to the Subject Agreement in respect of the Suit Property or allied documents executed as an incidence thereof, nor the earlier agreements said to have been executed in relation to Survey No. 134. It was averred that prior to execution of the Subject Agreement, the General Power of Attorney dated 05.08.1998 in favour of Shaikh Muhammad Arshad had been revoked vide a registered Deed of Revocation dated 27.09.2004, hence the Subject Agreement and related documents were devoid of legal effect. It was also contended that, even otherwise, the Suit was barred by limitation as per Article 113 of the Limitation Act, 1908. As to the point of pecuniary jurisdiction, it was submitted that the value of the Suit Property was below the pecuniary threshold and the same had been inflated so as to bring the Suit within the jurisdiction of this Court.

7. In reply, it was pointed out by learned counsel for the Plaintiff that the execution of the Irrevocable General Power of Attorney dated 05.08.1998 in favour of one Shaikh Muhammad Arshad and the Irrevocable Sub-Power of Attorney in favour of the Defendant No.2 was

not a matter in doubt and in fact stood admitted through the stance of the Defendant No.1 as to revocation, and that in the context of such stance it had to be considered that notwithstanding the contention as to incapacity of the Defendant No.2, the Power and Sub-Power were irrevocable, as specifically declared in Clause of 11 of each instrument, and the entire process of regularization of Survey No.134 that had ensued after the purported revocation had been driven by the Defendant No.2 and taken place under his auspices, it being submitted that this was so as the Power and Sub-Power had been coupled with an interest. It was pointed out that the relevant documents in that regard, attention being drawn to Annexures P/28 to P/32 of the Plaint, being copies of the offer of regularization dated 09.04.2011, the Challan of the same date showing payment of the malkano amount, the Letter of Section Officer, Land Utilization Department, dated 09.05.2011 as to verification of such Challan, and the further letters dated 12.05.2011 and 16.05.2011 issued by the Land Utilization Department, Government of Sindh, and the City District Government Karachi respectively, reflecting the regularization, were all addressed/issued or referred to the Defendant No.2 in his capacity as attorney. It was submitted that in the wake of such documents, the contention as to incapacity of the Defendant No.2 was clearly fallacious. Furthermore, it was pointed out that litigation had since ensued between the Defendants Nos.1 and 2 and Shaikh Muhammad Arshad, which had then been withdrawn in view of a settlement of their disputes inter se, hence the plea of revocation was no longer available. On the point of limitation it was submitted with reference to Clauses 5 and 6 of the Subject Agreement as well as a Receipt dated 02.06.2008 and a Possession Letter filed as Annexures P/18 and P/19 to the Plaint that in pursuance of part performance of the transaction the Plaintiff had been put in possession of the Suit

Property, and in terms of the Plaintiff had inter alia sought a declaration as to his right to retain possession as well as permanent injunction to preserve such right, which did not stand extinguished by virtue of limitation. Reliance was placed on a judgment of the Honourable Supreme Court in the case reported as Syed Hakeem Shah (Deceased) through LRs and others v. Muhammad Idrees and others 2017 SCMR 316. Addressing the aspect of valuation, it was denied that the Suit had been wrongly valued. It was contended that the value of the Suit Property was in excess of the pecuniary threshold and it was submitted that, even otherwise, the aspect of valuation was not a ground for rejection of the plaint but, at best, for return thereof for presentation before the competent Court.

8. Having examined the contentions advanced on behalf of the Plaintiff and the Defendant No.1, it appears that a prima facie case as to claim to the Suit Property stands made out by the Plaintiff on the basis of the documents filed along with the Plaintiff and it cannot be said that the plaint does not disclose a cause of action in his favour. As to the plea of revocation of the Power of Attorney, suffice it to say that, as pointed out, the Defendant No.1 has continued to act in relation to the Suit Property for purpose of regularization without any apparent objection, and the effect of such revocation in view of the subsequent conduct of the parties is a triable issue that would fall to be determined at the appropriate stage. The Suit Property being contiguous to the Plaintiff's own land bearing Survey No. 164, and the Plaintiffs ostensible possession being recorded in the Subject Agreement itself as well other documents, the balance of convenience is also in his favour and irreparable loss would ensue if an injunction were denied and the Plaintiff came to be divested therefrom. As to the subject of limitation, whilst it may be well settled that a plaint is to be rejected when any one or

more of the conditions of Order 7 Rule 11 are met, under the given circumstances of the case and the scope of the prayers advanced, it cannot be said that the Suit is barred and the plea of the Defendant No.1 in that regard appears misconceived. The plea of valuation is also not relevant at present, as a mere assertion of overvaluation can scarcely be conclusively relied upon so as to reject or return the plaint.

9. In view of the foregoing, CMA Number 12882/2017 is allowed and the Defendants are restrained from transferring, alienating or creating any third-party interest in the Suit Property or otherwise interfering with the Plaintiffs possession thereof until final determination of the Suit, whereas CMA Numbers 12883/2017 and 10807/2018 are dismissed.

JUDGE

TariqAli/PA