

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

**Suit No. 1106/2018**

Plaintiffs : Mst. Yasmeen Muhammad Shabbir  
& 6 Others through Mr. Rehan  
Kayani, Advocate.

Defendant No.1 : Sikandar Amin, through Mr. Haider  
Imam Rizvi, Advocate.

Defendant No.2 : Abdul Latif & 2 Others, Nemo.

**Suit No. 1527/2018**

Plaintiff : Sikandar Amin, through Mr. Haider  
Imam Rizvi, Advocate.

Defendants 1 to 8 : Mst. Yasmeen Muhammad Shabbir  
& 7 Others through Mr. Rehan  
Kayani, Advocate.

Defendant No.9 : Sub-Registrar, Kamshed Town,  
Karachi, Nemo

Date of Hearing : 23.11.2018

**J U D G M E N T**

**YOUSUF ALI SAYEED, J:-** The captioned Suits relate to a dispute between essentially the same set of parties in respect of Plot No. 8/7, Survey Sheet No.1 35-P/1, Block 3, Darulaman Cooperative Housing Societies Union Limited, Karachi, admeasuring 1500 square yards (the “**Subject Land**”) and the construction of a building being undertaken thereon by the name of D.D. Tower, comprising 16 storeys and consisting of 64 residential flats and 6 commercial shops (the “**Project**”).

2. From a perusal of the respective pleadings, it is apparent that the ownership of the Subject Land can be traced as follows:
- (a) The same was initially acquired for the purpose of the Project by three persons, namely Muhammad Shabbir (“**MS**”), Sikandar Amin (“**SA**”), and one Atif Nazir. Upon acquisition Muhammad Shabbir had a 50% share, whereas that of the other two owners was 25% each.
  - (b) Thereafter, upon disinvestment by Atif Nazir of his 25% share, 15% was acquired by one Abdul Latif whereas the remaining 10% was acquired by MS, with the result that the share of the latter in the Subject Land stood enhanced to 60%.
  - (c) MS then passed away on 18.07.2017, whereupon his 60% interest devolved upon his legal heirs, being his widow, children and father, who are the Plaintiffs Nos.1 to 6 in Suit Number 1106/18.
  - (d) One of the brothers of MS, namely Muhammad Shoaib, is said to have subsequently acquired the 25% share of SA pursuant to a settlement, as documented in terms of the Undertaking of Settlement dated 23.02.2018, for purposes of which a Power of Attorney dated 27.02.2018 was executed by SA in favour of yet another brother of the deceased, namely Muhammad Salman.
  - (e) In exercise of such Power, Muhammad Salman then in turn executed a Sale Deed dated 17.04.2018 in favour of Muhammad Shoaib, who is accordingly the Plaintiff No.7 in Suit Number 1106/18.

3. As such, the seven Plaintiffs in Suit Number 1106/18, collectively espouse a claim to an 85% share in the Subject Land and Project. They allege that whilst SA was initially possessed of a 25% share, he has since executed the aforementioned Undertaking of Settlement and Registered Power of Attorney pursuant to which the Sale Deed dated 17.04.2018 has also since been executed in favour of Muhammad Shoaib, hence SA has no subsisting interest in the Subject Land or the Project. Accordingly, the said parties have brought the Suit seeking a declaration as to their collective ownership, as well as injunctive relief to restrain the Defendant from creating any third-party interest in certain residential units comprising the Project and from interfering with their possession and use of the Subject Land.
  
4. Conversely, Suit Number 1527/18 has been filed by SA against the several persons who are plaintiffs in the earlier suit, whereby he has asserted a claim as to the subsistence of his 25% share in the Subject Land and Project and inter alia sought a declaration that the Undertaking of Settlement dated 23.02.2018 and Registered Power of Attorney dated 27.02.2018 are void ab initio as well as elicited final injunctive relief to permanently restrain the Defendants from enforcing the same or acting thereon and from proceeding further with the Project, including raising any further construction or creating any third party interest in the units forming a part thereof. Somewhat contrarily, it has also been pleaded that the aforementioned Power of Attorney has been revoked on 15.05.2018, and a prayer for declaration has been made in that regard.

5. It is in this backdrop that CMA No. 8366/18 has been filed by the Plaintiffs under Order 39, Rules 1 and 2, read with Section 94 CPC in Suit Number 1106/18, whereby it has been prayed that the Defendant No.1 (i.e. SA) be restrained inter alia from creating any third-party interest in certain units within the Project, being Apartment Numbers 101 to 104, 202, 401, 402, 404, and 701 (the “**Subject Units**”) or from interfering with their use and enjoyment of the Subject Land.
  
6. On the other hand, the following applications have been advanced by SA in his capacity as the Plaintiff in Suit Number 1527/18:
  - (a) CMA 10767/18, being an application under Order 39, Rules 1 and 2, read with Section 94 CPC, whereby it has been prayed that the persons arrayed as defendants in that suit be restrained from raising any further construction on the Suit Land or creating any third-party interest in the Project, or alternatively from creating any third-party interest in the Subject Units and certain additional residential units as well as a half share in a commercial shop.
  - (b) CMA 10768/18, under Order 39, Rules 1 and 2, read with Section 94 CPC, seeking to restrain the defendants from enforcing, implementing or acting upon the Power of Attorney dated 27.02.2018 and Undertaking of Settlement dated 23.02.2018.

- (c) CMA 12712/18, filed under Order 18, Rule 18 CPC, seeking that an inspection be conducted so as to ascertain the status of the Project and whether any construction had been carried out after the Order of 03.08.2010 made on CMA 10767/18 whereby the parties were directed to maintain status quo.
- (d) CMA 14553/18, being an Application under Order 6, Rule 17 CPC, seeking to amend the plaint so as to assail the Sale Deed dated 17.04.2018 on the ground of non-payment of the total consideration underpinning the settlement, and to incorporate a prayer that the Sale Deed be cancelled.

7. In view of the commonality of parties and subject matter, the aforementioned applications pending across both the suits have been proceeded with simultaneously, and composite arguments were advanced in respect of all five applications, which are accordingly dealt with in terms of this common Order, as follows herein below.

8. Turning firstly to the respective applications for injunctive relief, being CMA Numbers 8366/18 in Suit Number 1106/18 and CMA Numbers 10767/18 and CMA 10768/18 in Suit Number 1527/18, and which may be considered and dealt with simultaneously, it is common ground that the construction had reached an advanced stage by the time that the dispute between the parties came to the point when it was agreed that SA would exit the Project. Prior thereto, SA was apparently entrusted with and undertook the booking of 9 flats, being the Subject Units, whereas the deceased, MS, was responsible for the booking of the remaining flats and shops and to look after the finances/accounts of the Project. As such,

by the time of the demise of MS, SA had received the files of the Subject Units and arranged for the booking thereof in the names of various persons. Whilst the funds to be generated from the booking of the Subject Units was to be utilized towards the construction of the Project, the payment due in respect of such bookings had not materialized, and the genesis of the dispute between the parties appears to gravitate around this aspect.

9. The case advanced by the Plaintiffs in Suit Number 1106/18 in support of their CMA 8366/18 proceeds on the factual plane already noted herein above – that the Defendant, SA, has entered into a settlement with the Plaintiff No.7 for sale of his 25% share in the Subject Land thus disinvesting from the Project, as reflected in the Undertaking of Settlement, and that in furtherance thereof a Registered Power of Attorney dated 27.02.2018 was executed by him in exercise of which the designated attorney (i.e. Mohammad Salman) has executed a Sale Deed dated 17.04.2018 in favour of the Plaintiff No.7, consequently SA no longer has any interest in the Subject Land or the Project and his claim, if any, is limited to the settlement and the consideration payable thereunder, which, per the Plaintiffs consists of a residential unit in the Project bearing Flat number 904, the original file of which has already been handed over to him. As to the Subject Units, it was submitted on behalf of the Plaintiffs were bound by the bookings made by third parties in respect of the Subject Units through SA, and would honour the same in accordance with the applicable terms on which the bookings were made subject to payments being made towards the installments due, failing which the Plaintiffs would exercise their rights as against such third parties in accordance with law.

10. Accordingly, it was submitted by learned counsel appearing on behalf of the Plaintiffs in Suit Number 1106/18 that in this backdrop CMA 8366/18 was to be allowed and SA was liable to be restrained from creating multiple third party interests in the Subject Units or taking any coercive action against the enjoyment and use of the Subject Land.
  
11. The fact that a settlement was entered into consensually has not been denied in as much as the execution of the Undertaking of Settlement dated 23.02.2018 and Registered Power of Attorney dated 27.02.2018 stand admitted, and it has not been suggested that the same was under coercion or duress. Instead, the point in dispute raised by SA turns on the aspect of consideration, and whether the same has been forthcoming in full, as per the given understanding. As is discernible from the pleadings and the arguments advanced, the stance of SA is that his 25% interest amounted to 16 flats and 1.5 shops out of the total of 64 flats and 6 shops comprising the Project, and whilst it was agreed that he would forego 5 flats and a half share of a shop, which is said to have aggregated to Rs.17.975 crores and was to be offset against the cost of construction, it was agreed that the remaining 11 flats and 1 shop were to be given to him as consideration for the settlement. Of these, 7 flats were to be four bedroom units and the remaining 4 were to be 3 bedroom units, each of which was valued at 2.75 crores and Rs.2.2 crores respectively.

12. Advancing this proposition in support of CMA 10767/18, it was contended on behalf of SA that he had executed the Settlement on the basis of such an understanding and in furtherance thereof had subsequently executed the Power of Attorney in good faith, but only the file of a single 3-bedroom flat, being Flat Number 904, was handed over. It is the case of SA that such handover represented only the earnest money towards the settlement, whereas further consideration through handover of further files and payment of certain additional sums remained. The quantum of the claim thus outstanding is computed by him to be Rs.342,752,000/- (Rupees Thirty-Four Crores Twenty-Seven Lacs and Fifty-Two Thousand Only). Additionally, profits in sub-leasing charges are also claimed to be payable.
  
13. Learned counsel appearing on behalf of SA argued that in the absence of specific details in the Undertaking of Settlement as to what exactly constituted the consideration marking the same, consensus ad idem was lacking in the matter, hence the Undertaking dated 23.02.2018 did not constitute a validly concluded contract. Furthermore, it was contended that in the absence of the full consideration, the said Undertaking, as well as the Power of Attorney dated 27.02.2018 and Sale Deed dated 17.04.2018 were even otherwise void ab initio by virtue of Section 25 of the Contract Act, 1872. Hence, it was contended that further construction of the Project was liable to be stopped or, alternatively, a restraint at least be imposed against the creation of third-party interest in the units said to form part of SA's share for purposes of the settlement or that the amounts receivable in respect thereof be deposited with the Nazir.



14. Having considered the pleadings and the arguments advanced, the contention that the Settlement was bereft of consideration does not appear to be borne out in as much as it is not the case of SA that there was no consideration at all underpinning the settlement. Instead, the handover of Flat No. 904 as consideration for the settlement is not disputed, and the argument being advanced is that the same only comprises a small part of the total consideration, the balance of which is said to remain payable. Accordingly, prima facie, the settlement does not appear to be void on this score, the rule being well established that 'consideration only needs to be sufficient not adequate', meaning thereby that the same must be sufficient in terms of having some value capable of expression in economic terms to the promise but need not be adequate as matter of commercial exchange. Thus, whilst a gratuitous promise or 'agreement' is not enforceable as a contract, that does not mean that the Court will investigate the adequacy and see if the parties have got equal value or interfere just because it appears that a person had made a bad bargain.
15. The 3 and 4 bedroom flats in the Project appear to be valued at Rs.2.2 crore and Rs. 2.75 crore respectively, as reflected in the plaint in Suit 1106/18 as well as the computation set out by SA in his Schedule of Claim filed as Annexure "P-19" in Suit 1527/18, wherein a detailed break-up of the amounts said to be due have been set out. Needless to say, if there has been a failure of consideration or part of the consideration for the settlement remains to be paid, a claim may be advanced accordingly, but the argument as to there having been a failure to tender full payment would not of itself suffice for the settlement to be treated as void.

16. Under such circumstance and in the face of admitted documents in the shape of the Undertaking dated 23.02.2018 and Power of Attorney dated 27.02.2018, as well as the factum of execution of the Sale Deed dated 17.04.2018, it is apparent that the more direct claim of SA would be for enforcement of the settlement in accordance with the terms alleged by him to form the true understanding underpinning the settlement, the scope and parameters of which are the very point in dispute, and which would only properly be determined after evidence is led in that regard. However, at the moment, prima facie, SA ostensibly no longer has a subsisting right of ownership or proprietary interest in the Subject Land, and whilst the contention that the contract resulting in such a state of affairs is void for absence or lack of consideration may remain a matter that SA advances for determination, the same does not provide the bedrock of a prima facie case in favour of SA warranting either the grant of injunctive relief to restrain further construction or the creation of third party interest so as to preclude the booking of flats and shops within the Project. However, in view of the apparent settlement, a prima facie case is conversely made out for restraining SA from acting so as to create any third-party interest in the Subject Units, in respect of which bookings are already said to have been made in favour of third parties and which would, as previously stated, continue to be acted upon in accordance with the applicable terms subject to payments being made towards the installments due in that regard.

17. As for CMA 01768/18, it is apparent that in pursuance of the Undertaking of Settlement dated 23.02.2018 and in exercise of the Power of Attorney dated 27.02.2018 executed by SA in furtherance thereof, the Sale Deed dated 17.04.2018 has since been executed and registered, hence, on the face of it, this application has become infructuous.
  
18. In terms of CMA 12712/18 it has been sought that an inspection be conducted so as to ascertain the status of the Project. The only argument essentially advanced in support thereof was that no prejudice or harm would be caused if an inspection were carried out. Be that as it may, in view of the discussion on the scope and nature of the dispute whilst addressing the subject of CMA Numbers 8366/18, 10767/18 and 10768/18, it appears that no constructive purpose would be served through such an exercise.
  
19. Turning now to CMA 14553/18, being an Application filed by SA under Order 6, Rule 17 CPC, seeking to amend the plaint in Suit Number 1527/18 so as to assail the Sale Deed dated 17.04.2018 on the ground of non-payment of the total consideration underpinning the settlement and incorporate a prayer that the Sale Deed be cancelled, the contention of SA is that the Sale Deed dated 17.04.2018 was not placed on record in Suit No.1106 of 2018 and only subsequently came to the fore during the course of Suit Number 1527/18, hence the application for amendment. In this regard, it merits consideration that whilst there is a marked difference between an instance of fraud in the execution of a contract and a failure of

consideration, and the Court may generally be reluctant in granting restitution to a grantor by means of cancellation on account of a failure of consideration in the absence of fraud marking the execution of the underlying deed, be that as it may, albeit that a claim premised on such an argument may not disclose a prima facie case for grant of injunctive relief, as discussed herein above, that is not to say that a party should be denied the chance of making out a case in that regard at the final stage should he be so inclined as to advance the same along those lines.

20. In the light of what has been discussed hereinabove, CMA No. 8366/18 in Suit Number 1106 of 2018 is allowed, and the Defendant No.1 therein is restrained from creating any third-party interest in the Subject Units or from interfering with the use and enjoyment of the Subject Land. Conversely, as to the Applications in Suit Number 1527 of 2018, CMA Numbers 10767/18, 10768/18 and 12712/18 are dismissed, whilst CMA 14553/18 is allowed. Let the amended title be filed accordingly within 7 days. Office is directed to place a copy of this Order in the connected Suit.

Karachi.  
Dated \_\_\_\_\_

JUDGE