

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 2625 of 2017

 Date Order with signature of Judge

For hearing of CMA No. 3589 of 2018.

Date of hearing : 17.09.2018.

Mr. Rahman Aziz Malik, advocate for the plaintiff.
 Mr. Muhammad Yaseen Azad, advocate for defendant No. 1.
 Mr. Sharaf Din Mangi, State Counsel.
 Mr. Dhani Bux Lashari, Advocate for S.B.C.A.
 Mr. Aamir Ali, advocate for K.M.C.

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Kausar Sultana Hussain, J: By this order, I intend to dispose of an application under Section 151 C.P.C, being C.M.A. No. 3589 of 2018, filed by the learned counsel for defendant No. 1, alongwith affidavit of defendant No. 1, namely Mehboob Ali, with the prayer to direct the plaintiff to deposit the balance amount as per terms and conditions of the Agreement of Sale dated 11.05.2017, as the defendant No. 1 is ready to execute Sale Deed in favour of the plaintiff subject to deposit of the balance amount, though due to non-payment of balance amount the Agreement of Sale was cancelled and amount paid in advance was forfeited even then the defendant No. 1 is ready to execute the Sale Deed as per terms and conditions of the Agreement to Sell.

2. Notice of this application was issued against the plaintiff, who has submitted his Counter Affidavit to this application of the defendant No. 1.

3. I have heard the learned counsel for the parties at length and have perused the record available before this Court.

4. Mr. Yasin Azad, Advocate for defendant No. 1 contended that the plaintiff may be directed by this Court to deposit the balance amount as terms and conditions of the agreement of sale dated 11.0-5.2017. Per learned counsel for defendant No. 1, the plaintiff has paid advance sale

consideration of Rs. 1,25,00,000/- (One Crore twenty five lacs) out of total sale consideration of Rs. 12,50,00,000/- (one hundred twenty five Million only). He further contended that on 11.09.2017 the plaintiff sent a legal notice to the defendant No.1, which was properly replied by the defendant No.1 on 20.09.2017, wherein the plaintiff was requested to pay the balance amount, which he failed to pay, he was further informed by the defendant No. 1, that in case of delay of payment of balance amount the agreement of sale shall be cancelled and the amount already paid shall be forfeited. The defendant No.1 has stated in his affidavit enclosed with this application that if, inspite of his offer to the plaintiff to deposit balance amount and he will execute sale deed, the plaintiff fails to deposit the balance amount then this Court may grant permission to defendant No.1 to sale the property in question to somebody else. The learned counsel for defendant No. 1 has relied upon the case law reported in 2017 SCMR 2022 (Re-Hamood Mehmood v. Mst. Shabana Ishaque and others). In the said case law the Hon'ble Supreme Court has been pleased to held that :-

“It is mandatory for the person whether plaintiff or defendant who seeks enforcement of the agreement under the Specific Relief Act 1877, that on first appearance before the Court or on the date of institution of the suit, it shall apply to the Court getting permission to deposit the balance amount and any contumacious/omission in this regard would entail in dismissal of the suit or decretal of the suit, if it is filed by the other side.”

5. The plaintiff in his Counter Affidavit to CMA No. 3589 of 2018 stated that after agreement when he approached to defendant No.4 (SBCA) it came in his knowledge that the suit property falls on cut line and its area is reduced by 80-90 Square Yards, therefore the sale price has to be proportionately reduced which was agreed to by the defendant No. 1 initially but later on, he resiled from the same. The plaintiff has denied that the advance amount paid by him to defendant No. 1 in respect of the suit property can be forfeited on any ground whatsoever. Per plaintiff the

defendant No. 4 (SBCA) disclosed to him that the suit property has a 15 feet road cutting as there is a Road Widening Scheme for Britto Road, accordingly the area of the plot i.e. 490 Square Yards will be reduced by 80-90 Square Yards and the plans will not be approved treating the suit property as 490 Square Yards plot, but will be processed treating it a 400 Square Yards plot. The learned counsel for plaintiff has contended that the belated readiness of the defendant No. 1 has no bearing on the suit filed by the plaintiff on the basis of misrepresentation at the time of execution of the suit agreement, wherein the fact of road cutting was intentionally concealed from the plaintiff by the defendant No. 1.

6. While hearing arguments of the parties counsels, this Court observed that the alleged fact of Road Widening Scheme must be confirmed from concerned authority i.e. SBCA (defendant No. 4), accordingly report was called from the defendant No. 4/SBCA. In compliance of direction of this Court Dy. Director SBCA Jamshed Town-1 has submitted compliance report, whereby it was informed by them that :-

“Britto Road is included in the list of roads under Road Widening Scheme, whose existing and proposed width is 50 feet and 80 feet, respectively. As per survey sheet, 15 feet each side of Britto Road falls under the Road Widening Scheme.

Since the said plot is also facing Britto Road, it is affected to the extent of 15 feet on account of Road Widening Scheme. Consequently, no any building work/structure shall be allowed on the affected portion of the plot for the purpose of approval of building plan as the same is an integral part of the road.”

7. Report of Dy. Director SBCA Jamshed Town-1, reproduced above supported the version of the plaintiff, regarding Road Widening Scheme. He has enclosed alongwith his report, photocopy of “The Karachi Building & Town Planning Regulations, 2002” wherein at serial No.17 of the Karachi Building & Town Planning Regulations, 2002 Britto Road has been

showing as part of that scheme. The plaintiff through his advocate sent a legal notice to the defendant No.1 on 17.11.2017 after having knowledge through publication about selling the property in question by the defendant No.1 to third party. In that legal notice the plaintiff has specifically contended in para-6 that the plaintiff has been ready and willing to perform his part of contract subject to the condition that since the plot in question due to road cutting in fact is not measuring 490 Square Yards but 85 square yards are less than that the price thereof has to reduce accordingly to the extent of 85 Square Yards, particularly in view of clause-7 of the agreement between the parties.

8. Before discussion further, I would like to bring on record here the said clause-7 of the agreement in question as under :-

“That the Vendee has verified/checked the title documents of the said property from concerned departments. Whereas the Vendor shall keep the Vendee secured, harmless and indemnified against all losses and damages that may be occasioned to the Vendee due to mis-statement/concealment of facts or any claim/objection or demand is made or preferred by any one in respect of the said property or any part thereof.”

9. Section 14 of the Specific Relief Act, 1877 is very much relevant in the circumstances of the present case. I would like to reproduce here section 14 of the said law as under:-

14. Specific performance of part of contract where part unperformed is small. *Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency”*

10. The learned counsel for the plaintiff has relied upon the following case laws:-

- a. PLD 1972 SC 39.
- b. PLD 2010 Karachi 295.
- c. 2012 SCMR 900.
- d. 1999 CLJ, P.7.
- e. 2011 CLC 1891 (Lahore).
- f. 2013 CLC 316 (Karachi).
- g. 2007 MD 116 (Lahore)
- h. PLJ 2006 Lahore 219 (iii).
- i. A.I.R 1948 Cal 147.
- j. 2000 MLD 1875 Karachi.
- k. 2002 LR 3168 (OB) Lahore.
- l. 2009 YLR 1672.
- m. PLD 2003 S.C. 430 (d) and (g).
- n. PLD 2010 S.C. 952.
- o. 2010 SCMR 286.
- p. PLD 2011 S.C. 323.
- q. A.I.R. (29) Sindh 81.
- r. A.I.R. 1914 Calcutta 661.
- s. PLD 1965 (W.P), Karachi 274.
- t. PLD 2003 Karachi 45 and
- u. 1992 CLC 1678.

11. Upshot of above discussion is that the plaintiff and defendant in fact are willing to perform their respective parts of the agreement in question, but the root cause of the dispute is that the plaintiff, due to Road Widening Scheme, entailing the area of suit property being reduced up to 80-90 Square Yards, wants to proportionately reduce sale consideration to that extent only. Report submitted by the Deputy Director SBCA Jamshad Town-1, shows that the Karachi Building and Town Planning Regulations were notified in the year of 2002, while sale agreement of property in question was executed between the parties in the year 2017, therefore, it is expected that the Road Widening Scheme was in knowledge of the defendant No. 1 but, he neither disclosed it before the plaintiff nor it was mentioned in the sale agreement. The Clause-7 of the sale agreement shows that at the time of execution of sale agreement the defendant No. 1 indemnified against all losses and damages, if occasioned to the vendee due to mis-statement/concealment of facts or any claim/objection or demand is made or preferred by any one in respect of the said property or any part thereof. In the light of the Clause-7 of the agreement discussed above, admittedly there is road widening Scheme and it is also un-denied fact that it was not disclosed by the defendant No.1 to the plaintiff at that

time, hence per indemnity of defendant No.1 he has to bear loss of reduced sale consideration to the extent of area reduced due to Road Widening. Besides this, the law provides in Section 14 of the Specific Relief Act, the specific performance of part of contract, where part unperformed is small, the Court may, at the suit of either party direct the party to perform his part of contract to such extent he is able to perform and the part which is left unperformed consists of only a small proportion to the whole in value and admits of compensation in money the Court may award compensation in money for the deficiency. It has been held in PLD 1965 S.C. 37, by the Hon'ble Supreme Court that :-

“The rule enunciated in section 14 hold goods even where the deficiency in area is discovered after the execution of the conveyance and the vendee is entitled for the compensation. Further it is not necessary that the inability may be due to a legal defect in the ownership. It may be due to other facts as acquisition of land by the Government.”

12. Keeping in view the legal and factual position of the case, the application of defendant No.1 bearing CMA No.3589/2018 is hereby allowed. The plaintiff is directed to deposit proportionate balance sale consideration of 400 square yards or thereabout plot subject to actual measurement to be carried out by the SBCA of land bearing No.394-A, situated at Britto Road Garden East Quarters, Karachi (suit property) within 30 days time from this order, in the office of Nazir of this Court. After depositing proportionate balance amount, the defendant No.1 is directed to execute Sale Deed in favour of the plaintiff. However the defendant No.1 will handover the constructive possession of the area of performed part of agreement only leaving rest of the area clear/open for future road widening, consequently, sale deed shall also be executed to the extent of performed part. In case of failure of the plaintiff to make compliance of the order of this Court within stipulated time, the defendant No.1 would be at liberty to sale the plot in question to any third party

without further notice to the plaintiff. Since there is no clause in sale agreement regarding forfeiture of advance money in case of failure of the vendee to pay whole money within agreed time, therefore in case of failure of the plaintiff to pay balance amount within one month from this order, the advance amount paid by the plaintiff shall not be forfeited by the defendant No.1. Order passed accordingly. Matter adjourned for submission of compliance report of order of this Court.

Faheem/PA

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