

IN THE HIGH COURT OF SINDH AT KARACHI

Suit 1114 of 2013 : Zeeshan Pervez
vs. Muhammad Nasir

Suit 1214 of 2013 : Muhammad Nasir
vs. Zeeshan Parvez

For the Plaintiff : Mr. Sajid Latif, Advocate
(Suit 1114 of 2013)

Mr. Mohamed Vawda, Advocate
(Suit 1214 of 2013)

For the Defendant : Mr. Mohamed Vawda, Advocate
(Suit 1114 of 2013)

Mr. Sajid Latif, Advocate
(Suit 1214 of 2013)

Date/s of hearing¹ : 25.08.2020

Date of announcement : 31.08.2020

JUDGMENT

Agha Faisal, J. The crux of this determination is the fate of an Agreement for Sale dated 26.03.2013 (“Agreement”). The plaintiff in Suit 1114 of 2013², being the vendor³ per the Agreement, seeks rescission and cancellation of the said instrument, whereas, the plaintiff in Suit 1214 of 2013⁴, being the vendee⁵, seeks specific performance thereof. In view of the mutual subject matter / parties, the issues were consolidated⁶, hence, the suits shall be determined vide this common judgment.

2. Briefly stated, the parties admittedly executed an agreement for sale in respect of plot of land bearing number 72/III, measuring 550 square yards or thereabouts, 16th Lane Phase VII DHA Karachi, along with bungalow / construction thereon (“Suit Property”). Suit 1114 of 2013 was filed by the Vendor seeking cancellation of the Agreement on the premise that the Vendee was unable to pay the requisite amounts within the stipulated time. Suit 1214 of 2013 was filed, by the Vendee, soon thereafter seeking specific performance of the Agreement and pleading that the Vendor was unlawfully seeking to renege from his binding obligations pursuant thereunder. In this context it is considered appropriate to reproduce the pertinent and pivotal content of the Agreement herein below.

¹ Order XX Rule 1 Code of Civil Procedure 1908.

² Instituted on 04.09.2013.

³ The plaintiff in Suit 1114 of 2013 and the defendant in Suit 1214 of 2013 and for purposes hereof shall be referred to as the “Vendor” herein.

⁴ Instituted on 27.09.2013.

⁵ The plaintiff in Suit 1214 of 2013 and the defendant in Suit 1114 of 2013 and for purposes hereof shall be referred to as the “Vendee” herein.

⁶ Vide order dated 09.10.2014.

"This Agreement to Sell is made at Karachi, this 26 day of March 2013....

1. That the Vendor has received from the Vendee a sum of Rs.2,00,000/- (Rupees Two Lac only) through Cheque No.0041740420 dated 22/03/2013 drawn on Faysal Bank Ltd, Karachi, and now on signing of this Agreement a further sum of Rs.23,85,000/- (Rupees Twenty Three Lac Eighty Five Thousand only) THROUGH No.01700373 Rs.1,900,000/- FBL H.O 0041740422 Rs.485,000/- FBL H.O. both the sums totaling to Rs.25,85,000/- (Rupees Twenty Five Lac Eighty Thousand only) being the advance part-payment towards sale consideration of the said property, receipt of which the Vendor doth hereby fully admit and acknowledge separately.

2. That a further sum of Rs.34,15,000/- (Rupees Thirty Four Lac Fifty Thousand only) shall be paid by the Vendee to the Vendor on or before March 20, 2013 and balance payment of Rs.1,98,50,000/- (Rupees One Crore Ninety Eight Lac Fifty Thousand only) shall be paid by the Vendee to the Vendor at the time of handing over the vacant and peaceful physical possession of the said property and completion of sale formalities including registration of Sale Deed/General Power of Attorney in favour of the Vendee or his nominee(s) on or before 15/08/2013.....

4. That after the payment of Rs.34,15,000/- the Vendor shall be responsible to full pay off the debt/ loan against the said property and obtain the Clearance Certificate / NOC from the Bank concerned."

(Underline added for emphasis.)

3. After the exchange of pleadings, the following consolidated issues were framed⁷ for determination:

1. *Whether the plaintiff in Suit No.1214 of 2013 is entitled for specific performance of the agreement relied upon?*
2. *Whether time is essence of the agreement?*
3. *What is the balance amount outstanding out of the total sale consideration?⁸*
4. *What should the decree be?*

4. Mr. Mohamed Vawda, Advocate set forth the case for specific performance and submitted that the Vendee had performed all his obligations within the contractual time; no default or delay was occasioned; the payments to the Vendor are already admitted on the record and the remaining quantum of the sale consideration stands deposited with this Court⁹; and the *bona fides* of the Vendee are borne from the record, in stark contrast to the malfeasance of the Vendee, whose evidence demonstrably contradicts his pleadings.

5. Mr. Sajid Latif, Advocate argued the Vendor's brief for cancellation of the Agreement and interestingly his first argument was that the instrument had already been cancelled by the parties. It was then added that the Vendee was unable to pay the requisite amounts within the specified time, hence, the Agreement must be cancelled / rescinded; the receipts exhibited by the Vendee were denied, however, the amounts stated to have been received therein were admitted; and that no damages may be considered if specific performance is to be allowed. The learned counsel cited authority¹⁰ to demonstrate that if the consideration is not paid within the stipulated time then specific performance ought not to be granted.

⁷ Vide order dated 09.10.2014.

⁸ Substituted vide the Order dated 21.11.2014.

⁹ Order dated 02.09.2014 grants permission for deposit of balance sale consideration and Order dated 09.10.2014 records that the amount had already been deposited.

¹⁰ *Muhammad Umar Gull vs. Nasir Javed* reported as 2016 YLR 1350; *Bank Al Falah Limited vs. Mrs. Shahzadi Zarfashan Sohail* reported as 2016 YLR 2528; *Maj. (R) Muhammad Iqbal Hussain vs. Col. (R) Sadiq Hussain Sheikh & Another* reported as 2017 YLR 2105.

6. This Court has heard the respective arguments, considered the law to which its surveillance was solicited and appraised the evidence on record, in the light of the pleadings, and its findings upon the issues¹¹, in seriatim, are delineated hereafter.

(Whether the plaintiff in Suit 1214 of 2013 is entitled for specific performance of the agreement relied upon?)

7. Since there is no dispute with respect to the exclusive title and possession of the Suit Property, which admittedly vests with the Vendor as of date, and the valid execution of the Agreement is duly admitted, therefore, the question to be addressed is whether the Vendee is entitled to specific performance thereof.

8. The law¹² provides for specific performance of contracts and further contemplates the scenario in which such discretionary¹³ relief may be declined¹⁴. Learned counsel for the Vendor has articulated no cavil the Vendee's right to institute and / or maintain his claim for the specific relief, however, submits that the same may not be granted for the reason firstly that the Agreement has already been cancelled by mutual consent; and contrarily that the instrument must be cancelled since the Vendee has failed to honor two time sensitive payment obligations. In this context it is appropriate to ring fence the scope hereof to evaluation of the grounds invoked.

9. The primary argument is that the Agreement was cancelled, hence, the question of its specific performance does not arise. The record demonstrates that the Vendor had addressed a legal notice¹⁵ to the Vendee dated 02.09.2013, being precisely two days prior to the institution of Suit 1114 of 2013 by the Vendor. The notice stipulates that since a sum of Rs. 3,415,000/- was not paid prior to 20.03.2013 and the balance sale consideration was not paid by 15.08.2018, as required per clause 2 of the Agreement, therefore, the said Agreement is "*hereby*"¹⁶ rescinded.

10. The plaint filed by the Vendor, in Suit 1114 of 2013, on 04.09.2013, two days since the aforementioned legal notice, prays¹⁷ *inter alia* for recession and cancellation of the Agreement on the specified plea that Vendee had not performed his aforementioned contractual payment obligation/s within time.

11. It is imperative to bear in mind at this juncture that the Vendee also filed Suit 1214 of 2013, for specific performance of the Agreement, on 27.09.2013 and was granted interim relief, restraining the Vendor from creating any third party interest in the Suit Property and from parting with possession thereof, on the very date itself. The interim orders continued throughout the tenure of the suits and subsist till date.

¹¹ Order XX Rule 5 Code of Civil Procedure 1908.

¹² Sections 12 & 23 Specific Relief Act 1877.

¹³ Section 22 Specific Relief Act 1877.

¹⁴ Sections 21, 24 & 28 Specific Relief Act 1877.

¹⁵ Exhibit 6/9.

¹⁶ As on the date of the notice, being 02.09.2013.

¹⁷ Prayer clause A and B of the Plaint in Suit 1114 of 2013.

It is in this context that the Vendee's categorical denial of any mutually agreed cancellation must be considered.

12. In a complete departure from his pleadings, as particularized supra, the Vendor deposed in his evidence¹⁸ that the Agreement has already been cancelled. This novel plea, completely alien to the pleadings, remained a bare assertion devoid of any corroboration from the record. Vendor's counsel was specifically asked as to whether any positive evidence was adduced to support this claim and the counsel responded in the negative.

13. In such facts and circumstances the Vendor's belated claim that the Agreement was previously cancelled cannot be sustained in view of the contrary pleadings and the evidence on record.

14. This Court will now consider the final argument of the Vendor, being the alleged default in the contractual payment obligation by the Vendee. There are two challenges in so far as the timeline is concerned; firstly that the payment required to be made on 20.03.2013 was not made (in time); and finally that the balance sale consideration was not paid by 15.08.2013.

15. The Vendor's legal notice expressly stipulates that per clause 2 of the agreement a payment was required to be made on 20.03.2013 and the same was not made on or before that time. The plaint filed by the Vendor, in Suit 1114 of 2013, also echoes the same position. However, such an assertion appears absurd since the Agreement itself was executed on 26.03.2013, hence, subsequent in time to a payment ostensibly required to be made post execution thereof.

16. The learned counsel for the Vendee argued that the date was erroneously depicted as 20.03.2013, and the same was supposed to read 20.05.2013. Although the Vendor had pleaded, in the plaint in Suit 1114 of 2013 and in the legal notice referred to supra, that the relevant date was correctly stated to be 20.03.2013, however, during final arguments the Vendor's counsel conceded¹⁹ that the date was in fact an inadvertent misprint, however, it was supposed to be read as 30.03.2013, and not 20.05.2013 as alleged by the Vendee.

Prior to proceeding further it merits to be recorded that the factum of the relevant date being a misprint is an admitted position, therefore, all that remain to be done is to ascertain as whether the evidence supports the alternate date theorized by the Vendor or the Vendee.

17. Per Vendee's counsel it was absurd for an agreement to require a future payment prior in time to its date of execution. It was demonstrated that the amounts in excess of that sought per clause 2 of the agreement were received by the Vendor up until May 2013 without any objection or demur, hence, the belated plea was contradicted *inter alia* by the conduct of the Vendor himself.

The Vendor has specifically pleaded that the date per the Agreement, 20.03.2013, was the correct date and had predicated his

¹⁸ Paragraph 13 of the Affidavit in Evidence – Exhibit 5/1.

¹⁹ The same position was also taken by the Vendor in his Affidavit in Evidence,

claim for rescission of the Agreement thereupon. However, in a complete departure from his pleadings had deposed²⁰ that the said date was 30.03.2013. The subsequent interpretation of the date was also iterated by his counsel during final arguments. No rationale was provided for not mentioning the appropriate date in the legal notice or the plaint that was filed in Suit 1114 of 2013.

18. The Agreement is dated 26.03.2013 and records the payments that have already been made thereunder, until the date of execution, in clause 1 thereof. The Agreement specifically mentions three instruments, particularized therein, and the same is also corroborated by the certification²¹ of Faysal Bank Limited available in evidence. Clause 2 then says that “*That a further sum of shall be paid ... on or before Marach (sic) 20,2013*”. It is prima facie apparent that the amount in contemplation is an amount to be paid post execution of the Agreement.

The evidence denotes that the Vendor accepted 2 payments from the Vendee post execution of the Agreement, vide pay orders dated 11.04.2013²² and 20.05.2013, demonstrably realized per the admission of the Vendor’s counsel and the bank statement²³.

There is nothing on the record to show any attempt by the Vendor to point out to the Vendee that payment/s, purportedly due by 30.03.2013, have not been received in time. On the contrary the Vendor demonstrably and admittedly received and realized the relevant payment²⁴ in the third week of May 2013.

19. There is yet another payment demonstrated from the evidence in the intervening period, being a payment of Rs. 730,000/-, also duly admitted by the Vendor. Per Vendee’s counsel this payment was made to the bank with which the Suit Property had been mortgaged by the Vendor, at the request of the Vendor. Vendor’s counsel while admitting the payment submitted that it was for some extraneous matter, notwithstanding the letter of Summit Bank Limited²⁵, tendered by the Vendor himself in evidence, showing that the said payment was received in diminution of the Vendor’s outstanding loan, secured by the Suit Property. While there is no evidence of any extraneous nexus between the parties, it is established that even this payment was made on account of the Vendor, by the Vendee, post 30.03.2013.

20. It is *prima facie* apparent that there is no evidence to corroborate the Vendor’s belated stance that the relevant date was required to read 30.03.2013. Such a contention is belied by the Vendor’s pleadings and also his subsequent conduct demonstrated before the Court. Furthermore, the record, coupled with the admitted conduct of the Vendor and the arguments of the Vendor’s counsel, demonstrates no reason as to why the relevant date may not be read as 20.05.2013.

²⁰ Paragraph 3 of the Affidavit in Evidence of the Vendor – Exhibit 5/1.

²¹ Certificate issued by Faysal Bank Limited dated 17.10.2014 - Exhibit 6/35.

²² Made to the order of Summit Bank Limited.

²³ Per the certificate issued by Faysal Bank Limited dated 17.10.2014 - Exhibit 6/35.

²⁴ Per clause 2 of the Agreement.

²⁵ Letter of Summit Bank Limited dated 28.05.2013 – Exhibit 5/2; corroborated by the letter of Summit Bank Limited dated 04.06.2013 – Exhibit 5/3.

21. It falls to the Court to now consider the second challenge in respect of the timeline, being that the balance sale consideration was to be paid before 15.08.2013. Clause 2 of the Agreement contemplates the completion of all the defined conveyance prerequisites by 15.08.2013 and requires the Vendee to pay the balance sale consideration upon the said occurrence. It is imperative to note that the payment of the balance sale consideration is contingent upon completion of the requisites and not otherwise.

22. At the time of execution of the Agreement, the Suit Property was admittedly mortgaged by the Vendor with Summit Bank Limited. The redemption of this mortgage had to be done prior to consummation of the transfer and in such regard clause 4 of the Agreement required that *“after the payment of Rs.34,15,000/- the Vendor shall be responsible to full (sic) pay off the debt/ loan against the said property and obtain the Clearance Certificate / NOC from the Bank concerned”*. It would thus be safe to observe that the conveyance could only take place once the relevant mortgage was redeemed and that obligation rested squarely upon the Vendor.

The evidence has on record an excerpt from the Board of Revenue Deed Management System²⁶ that demonstrates that the mortgage upon the Suit Property remained intact until 09.09.2013. No cavil was advanced by the Vendor / learned counsel to disprove and / or dispel this factum. It would thus appear that on the specified date, being 15.08.2013, the Suit Property remained under mortgage.

23. The Agreement specifies that the balance sale consideration was to be paid *“at the time of handing over the vacant and peaceful physical possession of the said property and completion of sale formalities including registration of Sale Deed”*. The instrument also expresses, per clause 4, that the Vendor shall be required pay his loan and redeem the mortgage upon the Suit Property. It would thus follow that since the mortgage was admittedly not redeemed by the Vendor prior to 15.08.2013, hence, the predefined requisites for the conveyance were never satisfied. It is also noted that even upon the date upon which the legal notice was issued and / or Suit 1114 of 2013 was instituted, by the Vendor, the Suit Property remained under mortgage. Since the requirement of payment of the balance sale consideration was always contingent upon completion of the aforementioned requisites, therefore, there appears to have been no occasion for the Vendee to make payment of the balance sale consideration on the said date.

24. The preponderance of evidence demonstrates that the challenge of the Vendor to the specific performance of the Agreement cannot be sustained and that the Vendor's counsel has been unable to make a case for cancellation thereof. The authority cited by the learned counsel for the Vendor is distinguishable in the facts and circumstances hereof, and even otherwise does not augment his case. Therefore, there appears to be no impediment to the Vendee's entitlement for specific performance of the Agreement,

²⁶ BORDMS Board of Revenue Deed Management System, tendered into evidence on 23.04.2016 and available at pages 183 & 185 of the Evidence file.

(Whether time is essence of the agreement?)

25. It is trite law²⁷ that in contracts related to immovable property the time mentioned therein could not be construed as the absolute essence thereof and due consideration had to be given to the appurtenant context and conduct. In the present case the issue of the relevant dates / time has been discussed supra, repetition whereof is eschewed herein, and it is borne from the evidence that the specified dates / time were not the essence of the Agreement as the initial date, being 20.03.2013, was admittedly an inadvertent misprint and the second date, being 15.08.2013, was demonstrably contingent upon the discharge of the Vendor's obligation per clause 4 of the Agreement.

(What is the balance amount outstanding out of the total sale consideration?²⁸)

26. The Agreement denotes that the total sale consideration amounted to Rs. 25,850,000/-. The Vendee pleaded having made five distinct payments to the Vendor and upon being confronted in respect thereof during his cross examination, Exhibit 5, the Vendor admitted receipt thereof unequivocally. The Vendee has adduced a statement²⁹ issued by Faysal Bank Limited wherein it has been certified that five payments were made by the Vendee to the benefit of the Vendor, vide five distinct and identified instruments³⁰, and the total quantum thereof amounts to Rs. 6,815,000/-. It may be pertinent to mention that during the course of the final arguments the learned counsel for the Vendor confirmed that the Vendee had in fact received the aforementioned sums vide the particularized instruments. The balance sale consideration amounted to Rs. 19,035,000/-, however, the amount deposited by the Vendee in Court is in excess thereof, being 19,800,000/-. It would thus follow that the Vendee has deposited an excess amount equaling Rs. 765,000/-. It is also poignant to note that the Vendor's counsel did not controvert the aforementioned factum during final arguments.

27. In the interests of clarity it is considered expedient to encapsulate the discussion supra in a tabular form:

Sale Consideration		Rs. 25,850,000/-
Amounts admittedly paid	Rs. 200,000/-	
	Rs. 1,900,000/-	
	Rs. 485,000/-	
	Rs. 730,000/-	
	Rs. 3,500,000/-	Rs. 6,815,000/-
Balance sale consideration due		Rs. 19,035,000/-
Amount deposited in Court		Rs. 19,800,000/-
Excess amount deposited		Rs. 765,000/-

28. It is apparent from the record that an amount of Rs. 765,000/- has been deposited in excess of the sale consideration, hence, the Vendee is entitled to the return thereof in addition to profit³¹ accrued thereon.

²⁷ Section 55 of the Contract Act 1972; 2020 YLR 607; PLD 2017 Sindh 88.

²⁸ Substituted vide the Order dated 21.11.2014.

²⁹ Certificate issued by Faysal Bank Limited dated 17.10.2014 - Exhibit 6/35.

³⁰ The pay order / cheque number, issuer (being the Vendee), beneficiary (Vendee), account drawn upon, amount and date is certified by Faysal Bank Limited in the statement adduced as Exhibit 6/35, veracity whereof was admitted by Vendor's counsel.

³¹ Vide Order dated 02.09.2014 permission for deposit was granted by the Court and it was specified that the amount was to be invested by the Nazir in a profitable Government scheme.

(What should the decree be?)

29. The Vendee has made out a fit case for grant of specific performance of the Agreement, whereas, the Vendor has been unable to demonstrate and / or prove any grounds to merit cancellation thereof. Therefore, Suit 1214 of 2013 is decreed, with costs, in favor of the plaintiff with directions to the defendant to forthwith execute a conveyance deed in favour of the plaintiff with respect to the Suit Property and deliver peaceful vacant possession thereof. The balance sale consideration, being Rs. 19,035,000, and profit accrued thereon, may be paid by the Nazir to the defendant upon execution of conveyance deed and delivery of the Suit Property to the plaintiff. The excess amount deposited with the Nazir, being Rs. 765,000/-, and profit accrued thereon, shall be returned to the plaintiff. Suit 1114 of 2013 is hereby dismissed with costs.

JUDGE