

Order Sheet
IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 85 of 2020

Date	Order with signature of Judge
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1. FOR HEARING ON CMA No. 643 of 2020
2. FOR HEARING OF CMA No. 644 of 2020
3. FOR HEARING OF CMA No. 2577 of 2020

Mr. Ghulam Rasool Korai, Advocate for the Plaintiff.
Mr. M. Saad Siddiqui, Advocate for Defendant No. 1 a/w
Mr. Zorain Nizamani, Advocate.

Date of Hearing: 01.09.2020

ARSHAD HUSSAIN KHAN, J:- This order will dispose of Application [CMA No. 2577/2020] under Order V11 Rule 11 CPC read with Section 151 CPC, filed by Defendant No.1, seeking rejection of Plaintiff.

2. Present application was filed by Defendant No.1. The Plaintiff upon receiving notice filed counter affidavit denying the allegations levelled in the applications as well as the affidavits in support thereof and sought dismissal of the application. Defendant No.1. did not file any rejoinder to the Plaintiff's counter affidavit.

3. Learned counsel for Defendant No.1 during his arguments has contended that the Plaintiff on 25.04.2006 booked flat No.A-0304 in Defendant's project namely 'LAKHANI PRESIDENCY' located on plot bearing No.42, Deh Okewari, Tappo Drig Road, Karachi. At the time of booking, the Plaintiff paid Rs.500,000/- as token money and the Plaintiff was handed over booking agreement wherein, inter alia, terms and conditions of the monthly instalments were stipulated. However, the Plaintiff refused to sign the said agreement and thereafter, the Plaintiff neither signed the agreement nor paid the installments due towards sale price of the apartment despite various notices and demands. Resultantly, the booking of the Plaintiff was cancelled and the subject apartment was re-allotted to one Mrs. Huma Jafri. Per learned counsel on the demand, the Plaintiff was also offered to collect his token money from the office of Defendant No.1 but he did not turn up and subsequently filed the present suit on 18.01.2020 after delay of

about 14 years. Per learned counsel the suit is not maintainable as there is no agreement in writing between the parties for which the Plaintiff is seeking enforcement. Per learned counsel, even otherwise the present suit is hopelessly time barred as the limitation period, provided under the law for filing a suit of specific performance of contract is three years from the date fixed for performance under the agreement or if no such date is fixed then the date when the Plaintiff noticed refusal of the performance by the Defendant. Per learned counsel, although there is no agreement in existence as the Plaintiff himself refused to sign the booking agreement, yet as per the payment schedule for all the apartments of project annexed with the application form, the Plaintiff had to pay the price i.e., Rs.65,00,000/- for the type of apartment he booked, in installments whereas the project was supposed to be completed in forty (40) months from the date of starting construction. Therefore, limitation for filing the case was initially started after completion of 40 months period and thereafter from the letter dated 09.08.2008, addressed by the Plaintiff to Cantonment Executive Officer, Cantonment Board Faisal, wherein the Plaintiff has categorically mentioned the refusal of Defendant No.1 to execute any agreement. However, the Plaintiff had chosen not to approach the court for seeking specific performance of the so-called contract within the time prescribed under the law and therefore cause of action for filing the case against Defendant No.1 has been vanished. Learned counsel submits that on this count also the suit is barred by time as the limitation provided under Article 28 of the limitation Act 1908 for filing such type of case is one year starting from the date of distress. It is also contended that the Plaintiff despite notices has failed to pay a single instalment towards the sale price of the subject apartment, which reflects malice and malafide on his part that disentitles him for any discretionary relief from this court. It is argued that the suit even otherwise is liable to be dismissed as it is now well settled that a party seeking specific performance of an agreement to sell is essentially required to deposit the sale consideration amount in Court. Failure of a party to meet the said essential requirement also disentitles him to the relief of specific performance whereas the Plaintiff in the present case neither deposited nor shown his willingness and readiness to deposit the balance sale consideration in the court. Learned counsel,

in support of his arguments has relied upon the cases of Mst. MAROOF BEGUM AHMED and another v. IJAZ-UL-HAQ through Attorney and another [PLD 2018 Islamabad 341], Syed MUHAMMAD KHALID v. PROVINCE OF through Secretary Land, Karachi and 2 others [PLD 2009 Karachi 186], Haji ABDUL KARIM and others v. Messrs FLROIDA BUILDERS (PVT.) LIMITED [PLD 2012 SC 247], ABDUL SALAM v. MUHAMMAD SIDDIUE and others [2019 CLC 1623], HAMOOD MEHMOOD v. Mst. SHABANA ISHAQUE and others [2017 SCMR 2022], GHULAM RASOOL through L.Rs. and others v. MUHAMMAD HUSSAIN and others [PLD 2011 SC 119] and ISMAT ASAD v. PAKISTAN OXYGEN LIMITED and another [2010 CLC 1226].

4. Conversely, learned counsel for the Plaintiff while vehemently controverting the contents of the application as well as the arguments advanced by learned counsel for Defendant No.1, submits that the application is frivolous besides being misconceived in nature and as such the same is liable to be dismissed. It is contended that on 24.04.2006 the Plaintiff booked apartment No. A-304 in the subject project of Defendant No.1 and in this regard he made payment of Rs.500,000/-, which has not been disputed by the Defendant, however, immediately after announcement of the project the construction thereof was held up by the government on the issue that the Defendant did not possess the title of the plot where the subject project was announced. Thereafter, the Defendant challenged the said action of government in suit No.1197 of 2006, wherein although the Defendant was allowed to raise construction, however, the same was at the risk and cost of the Defendant. It is also contended that the said suit was disposed of on 16.02.2018. Further contended that the Plaintiff never received any notice regarding cancellation of his apartment in the year 2008 and in this regard notices for cancellation annexed with the written statement are false and fabricated. Moreover, the falsity of cancellation of Plaintiff's allotment can be gauged from the facts that the Defendant after purported cancellation continued to demand installments from the Plaintiff till 2011. In this regard, letter dated 27.11.2011 addressed by the Defendant to the Cantonment Executive Officer was also referred to wherein it was proposed that if the Plaintiff wants to continue the booking he is required to clear all dues up-to-date. It is also contended

that the Defendant had to complete the project within 40 months from the date of construction but till date the construction of the project has not been completed. It is contended that although there is no formal agreement executed between the parties, however, there is nothing in the Contract Act 1872, which prohibits an oral agreement. Further contended that the essentials of valid contract viz. (i) Identity of seller and purchaser, (ii) the amount of sale consideration, (iii) identity and accurate description of the property agreed to be sold, (iv) parties to the agreement to sell an immovable property are very much available and in this regard, he refers to documents annexed with the plaint, which per learned counsel have not been disputed by the Defendant. It is also contended that the suit is within time as limitation for filing a suit for specific performance starts from the date of refusal, which in the present case is 24.12.2019 when the Defendant in reply to Plaintiff's legal notice through its letter informed the Plaintiff about cancellation of his allotment of the subject apartment. Learned counsel in reply to the arguments regarding deposit of balance sale consideration in court in view of the Honourable Supreme Court judgment, has referred to Para 24 of the plaint wherein the Plaintiff has shown his willingness of payment of all dues subject to intimation of firm completion/payment plan and signing of an agreement in accordance with Section 12 (2) of Sindh Building Control Ordinance, 1979. It is also argued that all the correspondences attached with the plaint substantiate the stance of the Plaintiff. Lastly, it is contended that Defendant No.1 has filed the present application just to protract the proceedings to disadvantage the Plaintiff and as such the application is liable to be dismissed with compensatory cost. Learned counsel, in support of his arguments, has relied upon the case of Sheikh AKHTAR AZIZ v. Mst. SHABNAM BEGUM and others [2019 SCMR 524] and MUHAMMAD SATTAR and others v. TARIQ JAVAID and others [2017 SCMR 98]

5. I have heard the arguments of learned counsel for the parties, with their assistance perused the material available on the record and have also gone through the case law cited at the bar.

From the record, it appears that on 23.04.2006 the Plaintiff booked apartment No. A-304 in the project of Defendant No.1 and paid Rs.500,000/- towards booking. Record also reflects that on 15.09.2006

the officials of Board of Revenue visited the site and demolished site office and model apartment constructed by Defendant at the site. The Defendant No.1 challenged the said action of Board of Revenue, Government of Sindh, in Suit No.1197 of 2006 filed before this Court, wherein the Defendant was allowed to raise construction, inter alia, at the risk and cost of the Defendant (Plaintiff in the said suit). The Defendant apprised the situation to the Plaintiff through its letters dated 28.05.2007, 9.10.2007 and 24.12.2007 (Annexures-I, J and K respectively to the plaint). Through its letter 01.01.2008 (Annexure-L,) Defendant No.1 informed the Plaintiff to pay the outstanding dues as per the schedule of payment. In reply to the said letter, the Plaintiff through its letter dated 02.01 2008 (Annexure-M), while referring to his earlier letters informed Defendant No.1 to first resolve the issue of documentation charges and to execute the agreement in accordance with Section 12 (4) of SBCO before to proceed further in the matter. Record further transpires that the Plaintiff also lodged complaint dated 09.08.2008 (Annexure-N) with the Cantonment Executive Officer against Defendant No.1 relevant portion whereof is reproduced as under :

“However Mr. Younus Lakhani Managing Director invited me in his office on 12.01.2008 for a dialogue on my all the contention in which he showed his agreement to decide the matter in principal in return to the patience and cooperation tendered by me with them but refused to execute any agreement as I demanded to him in my letter dated 02.01.2008.

I myself obtained from builders a photo copy of High court of Sindh order dated 30-11-2007(copies enclosed) and after reading the detail of above said court order I wrote a letter dated 28-01-2008(copy enclosed) in which I requested to them please immediately and preferably in writing provide me optimum assurance on all the queries asked by me in my all the adverted letters as also advised by the Honorable Court in their Order dated 30-11-2007 that "allottee who have invested in the project may be duly informed about the litigation and this order" before to proceed further in the matter in return of my patience and cooperation with you for the last more than two years and honor your all the verdicts, as I have already extended full cooperation with you during entire court proceedings period and put following two options(I intend to adopt in future) in the circumstances.

1- To ask you to refund my deposited amount with up-to-date profit thereon at the prevailing rate of interest as per their calculation charged by the Bank/HBFC on House Financing.

OR

2- To continue on following Terms & Conditions:-

- a) Company (M/s Lakhani Builders) will pay me the interest at the prevailing rate of interest as at S.No.1 above on my investment from the date of booking of captioned Flat i.e. 23-04-2006 onward.
- b) Documentation charges will be payable by me at the rate of 8 % on total cash Cost (excluding the Cash discount of Rs.100, 000/-) of my booked Unit/Flat at the time of Sub Lease of said Unit.
- c) Company will provide me a guarantee for obtaining a sum of Rs. 36,000,000/- as loan from HBFC or any other agency on my booked Flat in your project otherwise arrange for me the company loan from their resources on the same Terms & conditions applied by the HBFC / Bank.
- d) Amount of interest on my investment as per clause (a) above will be added towards price/cost of my booked Unit.
- e) Terms & conditions as earlier demanded by me should be revised as you already showed your consent to revise the same accordingly in my recent meeting with you.
- f) Further payment will be made / payable by me after final decision by the honorable High court.
- g) I will only be responsible to pay you the agreed cash cost of my booked flat (as per clause (f) above) and it will be paid according to construction schedule prescribed by the KBCA.

If the above all the Terms & pre conditions are acceptable for you than please send your written consent immediately otherwise please refund my initial payment of Rs.500,000/= along with up-to-date profit there on at the prevailing investment rate of profit on investment applied by the Bank / HBFC on their investment on property from the date of payment i.e. 23-04-2006 at the earliest but not beyond 30 days from the date of receipt of this letter.

In reply to my above said letter dated 28-01-2008 the builders after passing of more than three months sent me an undated letter received to me on 19-05-2008(copy enclosed) in which builder informed me that since I avoiding the payment of dues against the booked Flat one pretext or the other. Hence, they accepted my first option to refund the deposit of Rs. 500,000/-. The demand of interest as per my choice is illegal hence the same cannot be acceded,

[emphasis supplied]

6. Record also reflects that the Plaintiff also lodged complaint against Defendant No.1 with Association of Builders and Developers of Pakistan (ABAD). The Defendant in the reply to ABAD's letter, had informed the ABAD through its letter (Annexure –P) relevant portion whereof as under:

“ It is hereby state that Mr. Tauqeer Ahmed booked a flat bearing No. A-304 in our project named “Lakhani Presidency” on 23.04.06 and paid only Booking amount of Rs.500,000/- (Five hundred Thousand only). After that he is defaulter of outstanding dues of allocation & confirmation.

Construction work was stopped in September 2006, and again started in December 2007. Even after start of work again, he paid nothing and claimed for refund of Booking Amount with interest. Company is ready to refund after deduction of services charges according to rules & regulation.”

The said stance of Defendant No.1 was subsequently communicated to the Plaintiff by ABAD through its letter dated 24.12.2008 (Annexure-O).

7. Record also reveals that the Plaintiff on 01.12.2016 sent legal notice (Annexure-U) to Defendant No.1 and when did not receive any reply he sent another notice 09.12.2019 (Annexure-V) which was replied by Defendant No.1 through its letter (Annexure-W), where after the present suit was filed.

8. According to Section 10 of the Contract Act, 1872, "All agreements are contracts, if they are made by free consent of the parties, competent to contract, for a lawful consideration with a lawful object, and not hereby expressly to be void." The essential elements of a valid and binding Contract are (i) Proper offer and proper acceptance, (ii) Lawful consideration and (iii) Competent to contract or capacity.

From the above, it clearly transpires that although there is no formal agreement in writing, yet there was a valid contract between the Plaintiff and Defendant No.1 and merely on the ground that there is no formal agreement entered into between the parties this suit cannot be dismissed. Reliance in this regard is placed on the case of *Muhammad Sattar and others v. Tariq Javed and others* [2017 SCMR 98], wherein the Honourable Supreme Court of Pakistan, inter alia, has held that a valid contract could be oral or it may be through exchange of communication between the parties. Once an offer was communicated, the acceptance thereof could be expressed or implied. Such acceptance of the offer or acting upon the said bargain, formal signatures of both or either of the parties were not a necessary requirement. All that was required was an offer and acceptance and consideration between the parties.

9. Before dealing with the issue of limitation, I would like to discuss issue regarding the maintainability of the case in view of dictums laid down by the Honourable Supreme Court of Pakistan. It is now well settled that a party seeking specific performance of an agreement to sell is essentially required to deposit the sale consideration amount in Court. In fact, by making such deposit the Plaintiff demonstrates its capability, readiness and willingness to perform its part of the contract, which is an essential pre-requisite to seek specific performance of a contract. Failure of a party to meet the said essential requirement disentitles him to the relief of specific performance, which undoubtedly is a discretionary relief. Reliance in this regard can be placed in the case of Messrs KUWAIT NATIONAL REAL ESTATE COMPANY (PVT.) LTD. and others v. Messrs EDUCATIONAL EXCELLENCE LTD. and another [2020 SCMR 171].

The Honourable Supreme Court of Pakistan in the case of HAMOOD MEHMOOD v. Mst. SHABANA ISHAQUE and others [2017 SCMR 2022], inter alia, has held under:

“3. 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.”

10. In the present case, it is an admitted position that the Plaintiff except the payment, which he had made in the year 2006, at the time of booking the apartment, did not make any payment towards his booking and instead indulged himself addressing letters to the Defendants. Such conduct of the Plaintiff also casts doubt upon his bonafide, which disentitles him to the discretionary relief. The Plaintiff has also not shown his willingness to pay the balance sale consideration nor he filed any application for deposit the same in the court. Learned counsel for the Plaintiff at the time of arguments when confronted with such query, he has referred to Para 24 of the plaint, which states as under:

“24. That the Plaintiff has all along been ready and willing to make all the due payments to the Defendant No.1, only upon his intimation of a Firm Completion/payment Plan and signing of an agreement in accordance with Section 12 (2) of Sindh Building Control Ordinance, 1979. However, the Defendant No.1 failed to fulfill the said requirements.

From perusal of the above, it appears that the Plaintiff has qualified the payment with conditions, which is against the spirit of dictum laid down by the Honourable Supreme Court of Pakistan in the case of Hamood Mehmood *Supra*.

In view of the dictum laid down in the case of Hamood Mehmood (Supra), relevant portion whereof has been reproduced above, it is mandatory upon the Plaintiff that on the 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. In the present case, the Plaintiff has failed to meet the said essential requirement, which disentitles him to the relief of specific performance and the suit is liable to be dismissed on this count alone.

11. Insofar as the question of limitation is concerned, Article 113 of Limitation Act,1908, provides period of limitation of three years for filing of a suit for specific performance of contract. For the sake of convenience, Article 113 of the Act is reproduced below.

Description of suit	Period of Limitation	Time from which period begins to run
1	2	3
113 From specific performance of contract	Three years	The date fixed for performance, or, if no such date is fixed, when the Plaintiff has notice that performance is refused.

From perusal of the above article, which runs in two parts, it is manifestly clear that insofar as specific performance of a contract is concerned, a limitation period of three years has been provided and any suit seeking specific performance of a contract is to be filed from the date fixed for the performance in the agreement or if no such date is fixed, then the date on which the Plaintiff has noticed refusal of the

performance by Defendant No.1. In the instant case, from the perusal of the documents annexed with the plaint, it appears that although the project was supposed to be completed within forty (40) months from the date of starting of construction, however, no specific date was mentioned for completion of the project and as such the present case would not fall within first part of the above provision and it would fall in the second part of Article 113 *ibid*.

A letter dated 09.08.2008 (Annexure-N to the plaint), addressed by the Plaintiff to Cantonment Executive Officer, Cantonment Board Faisal, wherein the Plaintiff has categorically mentioned the refusal of Defendant No.1 to execute any agreement and sought refund of his amount along with profit at the prevailing bank rate, which he paid at the time of booking of apartment. However, the Plaintiff despite having knowledge of refusal of Defendant No.1 to execute agreement in respect of the subject apartment, he slept over his right to approach the court for seeking specific performance of the contract within time prescribed under the law (Second part of Article 113 *ibid*), that is, three years from the date of refusal, and thus the cause of action for filing case against Defendant No.1 has ceased to exist on 09.08.2011.

12. The Plaintiff, after passing of the limitation period, although sent legal notice dated 01.12.2016 wherein the Plaintiff's counsel had categorically mentioned that in the event if Defendant No.1 fails to hand over the Plaintiff's apartment within 15 days and to reply the legal notice, he has definite instruction to initiate legal proceeding against Defendant No.1, however, the Plaintiff again despite having no response from Defendant did not approach the court for seeking specific performance of the contract within three years. Nonetheless, the Plaintiff again sent legal notice on 09.12.2019, which was replied by Defendant No.1, the Plaintiff took that reply as extension of cause of action for filing of the present case.

From perusal of the plaint, it appears that the Plaintiff in order to extend cause of action and bring this case within the period of limitation sent legal notices to Defendant No.1. I am of the opinion that the above legal notices appear to have been sent after the extinction of cause of action in the month of August, 2011, and as such merely issuance of the legal notice would not *ipso facto* extend

the cause of action for filing the present case. In the circumstances, it is apparent that the suit is prima facie barred by limitation under the Article 113 of *ibid*.

13. It is also settled law that an incompetent suit should be laid at rest at the earliest moment so that no further time is wasted over what is bound to collapse not being permitted by law. It is necessary incidence that in the trial of judicial issues i.e. suit which is on the face of it incompetent not because of any formal, technical or curable defect but because of any express or implied embargo imposed upon it by or under law should not be allowed to further encumber legal proceedings. Reference is made on the cases of *ALI MUHAMMAD and another v. MUHAMMAD BASHIR and another* (2012 SCMR 930) *ILYAS AHMED v. MUHAMMAD MUNIR and 10 others* (PLD 2012 Sindh 92)

14. The upshot of the above discussion is that the Application filed under Order VII Rule 11 CPC read with Section 151 CPC [CMA No. 2577/2020] is allowed, and consequently Plaintiff of the suit is rejected. However, since Defendant No.1 in his correspondences has shown his willingness to return the amount of the Plaintiff, he paid at the time of booking, and further the Defendant has also sold the said apartment to one Ms. Huma Jafri on a higher price, therefore, Defendant No.1 is directed to deposit the said token amount of Rs.500,000/-, [which he received from the Plaintiff], with the Nazir of this Court along with 10% per annum simple markup from the date i.e. 25.04.2006 till deposit of the amount with the Nazir within a period of thirty (30) days hereof. Once the said amount is deposited with the Nazir, the same shall be given to the Plaintiff upon proper verification and identification. The other pending applications stand dismissed as being infructuous.

JUDGE

Karachi
Dated: 09.10.2020

Jamil*