

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1063 of 2016

- Plaintiffs : Abdul Rauf and others, through Mr. Haider Waheed, Advocate.
- Defendants Nos.1 to 4 : Muhammad Amin Lakhani and others, through Mr. Zaheer Ul Hassan Minhas, Advocate.
- Defendants Nos. 5 & 9 : Mrs. Razia Hameed & another, through Mr. Ishrat Zahid Alavi, Advocate.
- Defendants Nos. 6 to 8 : Mehboob Jabbar Lakhani and another, through Mr. Rajinder Kumar, Advocate.
- Defendants Nos. 12 to 15 : Saadia Lakhany and others, through Mr. Muhammad Ali Lakhani, Advocate.
- Dates of hearing : 16.09.2019, 02.10.2019, 10.10.2019 and 22.10.2019

ORDER

YOUSUF ALI SAYEED, J – In terms of the Suit, the Plaintiffs seek specific performance of an Agreement to Sell dated 07.08.2015 (the “**Sale Agreement**”) entered into between them and the Defendants Nos. 1 to 9 (collectively, the “**Contracting Defendants**”) in respect of immovable property bearing Survey No.538, 1300 sq. yards Business Recorder Road, Garden East, Karachi (the “**Subject Property**”) for a sale consideration of Rs.96,000,000/-, of which Rs.19,000,000/- was paid at the time of signing thereof, with payments being made to them ratably as per their respective shares.

2. Apparently, the Contracting Defendants represented in terms of the Sale Agreement that, barring a 4% share that vested in one of the co-owners, namely Aurangzeb Lakhani (i.e. the Defendant No.10), remaining interest in the Subject Property otherwise collectively vested in them, whereas one of their kin, namely Muhammad Ashraf Lakhani (i.e. the Defendant No.11), who had since sold out his 1/5th share to persons from amongst their number, was still in possession thereof. As such, Clauses 4 and 5 of the Sale Agreement envisaged that a Suit for Administration would be filed by the Contracting Defendants and upon resolution thereof 80% of the balance sale consideration would be paid to them by the Plaintiffs, with the remaining amount of Rs.20,000,000/- then being payable to them upon physical possession being handed over to the Plaintiffs by the Defendant No.11.

3. It is said that the Contracting Defendants failed to abide by their obligations under the Sale Agreement, due to which the Plaintiffs filed this Suit for Specific Performance on 02.05.2016, along with CMA No. 7310/16 under Order 39, Rules 1 and 2 CPC, seeking an interim injunction to restrain the Defendants from creating any third-party interest in respect of the Subject Property, with an ad-interim Order having been made on 02.05.2016 directing the parties to maintain status quo. It is this Application that has been proceeded on, along with CMA No.16782/17 filed by the Defendants Nos. 5 and 9 seeking that the Plaintiffs be directed to deposit the balance sale consideration.

4. Learned counsel for the Plaintiffs pointed out that the execution of the Sale Agreement and receipt of the payments, as recorded therein, had not been denied by the Contracting Defendants, and in terms of their respective Written Statements, the Defendants No.6 to 8, have stated that they are willing to perform the agreement but have cited the recalcitrance on the part of the Defendants Nos. 1 to 5 as the reason for transaction not being able to proceed, whereas the other Contracting Defendants have taken the plea that in view of Clauses 4 and 5 of the Sale Agreement, the same was contingent upon certain future happening, but had been rendered void by virtue of such happenings not coming to pass. He pointed out that whilst some of the Contracting Defendants had raised the plea of frustration, they had never come forward to return the sale consideration received by them and in fact, in the case of the Defendant Nos. 5 and 9, had gone on to assert that the remaining sale consideration ought to be deposited. He submitted that the Contracting Defendants could not be allowed to rely on their own inaction to claim frustration of the Sale Agreement, and contended that even if the Contracting Defendants could not ensure that the 4% share of the Defendant No.10 was brought into the fold, they nonetheless remained bound by the Sale Agreement to the extent of their own respective shares as co-owners of the Subject Property, reliance being placed on Section 44 of the Transfer of Property Act, 1882, which provides as follows:

“44. Transfer by one co-owner. Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor’s right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same,

but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.”

5. He pointed out further that the Contracting Defendants, particularly the Defendants Nos. 5 and 9, had also failed to disclose the interest espoused by the Defendants Nos. 12 to 15, who claimed through a common chain to the Defendant Nos. 5 and 9 and had then been added as parties on their own application. On the contrary, the Defendants Nos. 5 and 9, being the mother and brother of the Defendants Nos. 12 to 15 had represented that the 20% share of their common forebearer stood transferred entirely to the two of them.

6. Conversely, respective counsel appearing on behalf of the Contracting Defendants reiterated the stances reflected in their separate Written Statement, with learned counsel for the Defendants Nos. 6 to 8 reaffirming that they remained ready and willing to perform, whereas learned counsel for the Defendants Nos. 1 to 4 and the Defendants Nos. 5 and 9 respectively contended that the Sale Agreement, being contingent on the specified events coming to pass, stood frustrated, hence incapable of performance. Furthermore, learned counsel for the Defendants Nos. 5 and 9 also sought to contend that they had entered into the Sale Agreement due to undue influence having been exercised by the Defendants Nos. 1 to 4, with it being averred that the Defendant No.5 was a ‘pardanashin’ lady whereas the Defendant No.9 was ‘young’, hence susceptible to such influence and lacking a complete understanding of the

terms and conditions of the Sale Agreement. However, none were able to satisfactorily explain as to why the presence of the Defendants Nos. 12 to 15 had not been disclosed and if, as contended, the transaction envisaged in the Sale Agreement had become incapable of performance, why those of the Defendants alleging so had not then made any overture to return the amounts received by them.

7. Additionally, learned counsel for the Defendants Nos. 12 to 15 asserted that they, along with the Defendants Nos. 5 and 9, were legal heirs of (Late) Abdul Hameed Lakhany; a co-owner of the subject property, but were not signatories to the Sale Agreement and had come to be joined as defendants through the Order made on 17.04.2018 in respect of CMA No.1649/2018 that had been filed by them seeking such joinder on that basis. It was contended that those Defendants had their own vested interest as well as a right of first refusal in respect of any sale by the other co-owners of their interest in the Subject Property, which took precedence over the claim of the Plaintiffs.

8. Under the given circumstances, where the execution of the Sale Agreement and the receipt of payments at that time are not denied by the Contracting Defendants, it is not necessary to dwell into a detailed discussion stance taken by the Contracting Defendants as to the Sale Agreement being a contingent contract and the plea as to its frustration so as to dissect the same and digress upon the legitimacy or disingenuousness thereof, which needless to say, would properly fall to be decided at the final stage along with the further pleas of the Defendant No.5 and 9 as to undue influence having been exercised upon them by their co-defendants and the competing claim espoused by the Defendants Nos. 12 to 15. Suffice it to say that at

present, a prima facie case stands made out as against the Contracting Defendants for the purposes of CMA No. 7310/16 and the balance of convenience is also in favour of confirming the interim injunction operating in the matter so as to preserve the corpus of the dispute, it being apparent that irreparable loss would be caused to the Plaintiffs in the event that the Contracting Defendants were left at liberty to create third party interests in relation to their shares.

9. As to CMA No.16782/17, whilst it was submitted on behalf of the Plaintiffs that the payment obligation would only crystallise upon the fulfilment of the conditions envisaged in Clauses 4 and 5 of the Sale Agreement, in view of the fact that the Suit seeks specific performance and it is claimed that the Sale Agreement remains implementable as against the Contracting Defendants even if such conditions remain unfulfilled, it would be fit and proper for the Plaintiffs to then demonstrate their ability and willingness to perform through deposit of the balance sale consideration.

10. As such, CMA Nos. 7310/16 and 16782/17 are both allowed, with the interim Order made on 02.05.2016 being confirmed, but subject to the deposit of the balance sale consideration with the Nazir within 30 days of announcement of this Order, failing which CMA No. 7310/16 would be deemed to have been dismissed.

JUDGE

Karachi
Dated _____