

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1625 of 2016

Plaintiff : M/s. Fine Enterprises Traders,
through Mr. Zia Ul-Haq
Makhdoom, Advocate.

Defendants Nos.
1, 3, 7, 8, 10, 11,
15, 23, 25 and 25 : M/s. Constellation Co-Operative
Housing Society Limited & others,
through Mr. Muhammad Nauman
Jamali, Advocate.

Defendants Nos.
4, 9, 17, 20, 21,
22, 30, 36 and 37 : Mrs. Faiza Basir & others, through
Mr. Muhammad Orangzeb,
Advocate.

Defendant No. 26 : Mrs. Rahila Wali Malik, through
Mr. Muhammad Aziz Khan,
Advocate.

Defendant No. 28 : Mrs. Oankar Lal, through Mr.
Bhajandas Tejwani, Advocate.

Dates of hearing : 22.08.19, 04.09.19, 24.09.19 and
09.10.19.

ORDER

YOUSUF ALI SAYEED, J – The Plaintiff seeks specific performance of a Memorandum of Understanding dated 27.05.2016 (the “**MOU**”), which, per the Plaintiff, constitutes a binding and enforceable agreement in respect of the sale and transfer of the 36 flats constructed on Survey No. 16, Sheet No. F.T. 2 Measuring 3621 Sq. Yds., Chaudhry Khaliq-uz-Zaman Road, Frere Town, Karachi, in the building known as Rimpa Apartments.

2. The salient facts of the case, as set up by the Plaintiff, are as follows:

- (a) That the MOU had been executed between the Plaintiff and the office bearers of the Defendant No.1, which is a Co-operative Society registered under Co-operative Societies Act, 1925, incorporated apparently for the purpose of handover of the ownership of the flats along with transfer the proportionate share of the underlying plot to all of the individual unit owners.
- (b) That during a Meeting of its Members (i.e. the owners of the 36 flats) held on 16.05.2016, the constituent owners are said to have agreed in principle amongst themselves that they would sell their respective units to a developer/builder at a uniform price of Rs. 41,500,000/- (Rupees Forty-One Million Five Hundred Thousand) per unit.
- (c) It is said that such a scheme was necessitated as the lease of the underlying plot of land had expired and a demand had been raised by the Karachi Metropolitan Corporation (i.e. the Defendant No. 38) for renewal thereof, and as the individual unit owners lacked the means to bear the same, the aforementioned formula was devised for purpose of generating funds to meet the requirement and provide a mechanism for disinvestment.
- (d) That in furtherance of the arrangement envisaged in the MOU, Agreements of Sale were individually executed inter se the Plaintiff and 18 flat owners, in terms of which 10% earnest money is said to have been paid to them through the Defendant No.1.

3. It is in this backdrop that the Plaintiff has brought this suit, arraying the Society as the Defendant No.1 and all the 36 individual flat owners as the Defendants Nos. 2 to 37, eliciting final relief in the following terms:
 - a). Direct the Defendants 1 to 37 to specifically perform the Agreement under the title of Memorandum of Understanding dated 27.05.2016 and transfer the Suit Property i.e. 36 Flats constructed on Survey No. 16, Sheet No. F.T. 2 Measuring 3621 Sq. Yds., Chaudhry Khaliq -uz-Zaman Road, Frere Town, Karachi to the Plaintiff for which the Defendants No. 2 to 37 have already received part sale consideration.
 - b). Declare that the Plaintiff has already performed significant part of the Agreement under the title of Memorandum of Understanding dated 27.05.2016 as also admitted and acknowledge by the Defendants No. 2 to 27 through receipt of part payment out of agreed sale consideration.
 - c). Declare that the Plaintiff is lawful owner of the Suit property i.e., 36 Flats constructed on Survey No. 16, Sheet No. F.T. 2 Measuring 3621 Sq. Yds. Chaudhry Khaliq -uz-Zaman Road, Frere Town, Karachi.
 - d). Grant permanent injunction restraining the Defendants No. 1 to 37 from transferring, alienating, selling and making any agreement(s) / arrangements to transfer or sell the Suit Property i.e., 36 Flats constructed on Survey No. 16, Sheet No. F.T. 2 Measuring 3621 Sq. Yds. Chaudhry Khaliq -uz-Zaman Road, Frere Town, Karachi either as a whole or otherwise any individual Flat(s) as well as from creating any third party interest in any manner whatsoever / except in favour of the Plaintiff or its nominee.
 - e). Any other relief(s) which this Honorable Court may deems fit and proper in the circumstances.
 - f). Cost of the Proceedings.

4. Within this framework, an application under Order 39, Rules 1 and 2 CPC (i.e. CMA No. 10471/16) was filed, seeking to restrain the Defendants Nos. 1 to 37 from transferring, alienating, selling or entering into an agreement to transfer the 36 flats, either individually or as a whole, or otherwise creating any third-party interest in respect thereof in any manner during the pendency of the Suit, and on such Application an interim Order was made on 21.07.2016 directing the parties to maintain status quo, which has been continued since. It is this Application which has come up for hearing and determination.

5. Learned counsel for the Plaintiff broadly reiterated the aforementioned facts as are said to have given rise to the Suit, and contended that the MOU constituted a binding agreement entered into by the Society on behalf of its members (i.e. the Defendants Nos. 2 to 37, being the individual flat owners). As to the enforceability of the MOU, reliance was placed on the judgments in the case reported as Shariq-ul-Haq and 5 others v. Pakistan International Airlines corporation Limited and another 2018 PLC (C.S) 975, Pakarab Fertilizers Limited v. Dawood Hercules Corporation Limited through Secretary and 8 others PLD 2015 Sindh 142, and Dewan Development (Pvt.) Ltd. and 2 others vs Messers Mybank Ltd. through Regional General Manager Karachi 2011 MLD 1368. It was submitted that a precursor to the MOU was a demand of Rs.10,721,120/- raised for renewal of the lease of the underlying plot by the lessor, being the Karachi Metropolitan Corporation (i.e. the Defendant No. 38), with a challan being issued in that regard in the name of the Defendant No.1. It was submitted that neither the Defendant No.1 nor the Defendants Nos. 2 to 37 had the means to make such payment, due to which a

mechanism had been devised for disposal of all the individual flats of the constituent owners at a base price of Rs.4.15 crore per unit, as reflected in the Minutes of the Meeting of the Society held on 16.05.2016, with the MOU then being executed by the Office bearers of the Society in furtherance of such understanding.

6. It was emphasized that from the standpoint of the Plaintiff, the transaction hinged on all of the constituent units being brought into the fold as the Plaintiff was desirous of redeveloping the underlying plot and could only proceed along those lines upon all the 36 flats being acquired, hence the arrangement orchestrated through the Society, and it was submitted that the ability and willingness of the Plaintiff to perform as per the MOU was reflected from the fact that an amount of Rupees 7,200,000/- (Rupees Seven Million and Two Hundred Thousand) had been paid to the Defendant No.1 on account of Rs.200,000/- (Rupees Two Hundred Thousand) per flat, apart from which 10% earnest money had been paid to the 18 contracting flat owners. It was submitted that, under the circumstances, the interim Order ought to be confirmed.

7. Conversely, learned counsel for the Defendants impugned the enforceability of the MOU, submitting that the same did not form a binding contract for sale of the 36 flats, in as much as the MOU itself envisaged that individual sale agreements in respect of the flats were to be entered into with the respective owners. Furthermore, it was submitted that the office bearers of the Society did not have any power or authority to make any binding commitment on behalf of the owners of the flats, and whilst 18 flats

owners had then entered into individual sale agreements, the MOU did not serve to bind other non-contracting owners to follow suit, especially as some of those owners had also disavowed participation in the Meeting of 16.05.2016 and denied having even signed the Minutes said to reflect consensus to sell at a uniform price.

8. It was also pointed out that whilst the Defendants Nos. 4,9,17, 20, 21, 30 and 37 had stated in their written statements that they were willing to proceed with the sale of their respective flats subject to the sale consideration in respect thereof being paid to them, payment for such purpose had not been forthcoming from the side of the Plaintiff within the timeframe put forward by those Defendants, nor did the Plaintiff otherwise offer to pay such any sum into Court.

9. Having considered the arguments advanced, it merits consideration that the relevant provisions of the MOU, being Clauses 2 to 5 thereof, state as follows:
 - “2. In case any objection comes from the members/owners of the Society, the Constellation Cooperative Housing Society Limited shall bound to resolve/clear said objection from the owners/member. This would be responsibility of the Committee to remove the said objections and the Committee is bound morally, ethically and legally to help out/stand with the First Party in order to vacating the building smoothly and also till resolving any issue of the said flat and up till handing over peaceful possession to the First Party, the remaining amount shall be held by the Second Party.

 3. The First Party is bound to pay 10% amount of the total sale consideration of each apartment to all the 36 owners/members of the said flats who are registered members with the Constellation Cooperative Housing Society Limited and the members are bound to enter into individual sale agreement of their respective flat with the First Party after receiving pay order in their names.

4. The remaining amount would be paid to the members/owners by 31st December 2016 and if any members/owners of flat willingly ready to vacate his/her flat, prior to above mentioned date, the First Party will pay total balance consideration amount within a period of two months and the First Party will occupy the flat. Those owners/members of the Society who are desirous to live in their flats up till 31.12.2016, the remaining amount would be released as per payment schedule which is mutually agreed by both the parties. It is further decided that if the First Party failed to pay the balance amount as mentioned in the said para the amount already received by the owners/members will be forfeited against their said flats and this MOU would be stand cancelled.
5. Both parties mutually agreed that they would not initiate any legal proceedings against each other before any legal forum and the Constellation Cooperative Housing Society Limited is responsible to get vacated the said 36 flats from their owners/members as per record of society within stipulated period.”

10. As is apparent, the flat owners are not parties to the MOU, which accordingly envisages further sale agreements to be entered into by them individually with the Plaintiff, and the only document cited as the basis for the Society taking such an initiative are the Minutes of 16.05.2016, which, even if taken as reflecting an understanding in principle between the participants, does not reflect any authority having been conferred by them on the Society or its office bearers to bind them to a particular arrangement with any particular party. As such, it cannot be said on the basis of that document that the flat owners are in fact bound by the MOU to enter into individual sale agreements in respect of their respective flats, as envisaged. The judgments relied upon by learned counsel for the Plaintiff in support of his submission as to the enforceability of the MOU are distinguishable, as in those cases the point arising for determination was whether, in substance, the document constituted an enforceable contract notwithstanding that it may have been termed a Memorandum of Understanding, whereas in the instant

case the parties against whom the MOU is sought to be enforced are not even signatories thereto. Furthermore, as is apparent, even in respect of the 18 flat owners who have entered into such sale agreements, the Plaintiff has not come forward to tender payment to them or deposit such sum into Court, despite the fact that a number of those parties have since stated in their written statements that they are ready to proceed with the sale subject to payment of the specified sale consideration of Rs.4.15 crores. The contention of the Plaintiff that full payment by the Plaintiff in respect of the flats was only to be made if the transaction proceeded unimpeded in respect of all the flats also appears fallacious in as much as Clause 4 itself contemplates payment being made in advance of the timeframe to those flat owners who come forward to offer up their units. Albeit seeking to rely on the statements of such Defendants as to their willingness to proceed with the transaction at the time, the Plaintiff has not reciprocated on its part. Moreover, on query posed as to whether the Plaintiff was willing and able to even now deposit the balance sale consideration, if not in all cases at least to the extent of the contracting flat owners, learned counsel nonetheless fell back on the same plea that as the transaction allegedly hinged from the standpoint of the Plaintiff on all of the individual flats being brought into the fold, deposit was not imperative.

11. Under the given circumstances, it transpires that the Plaintiff has failed to make out a prima facie case, which is the essential ingredient for an injunction, hence CMA No. 10471/16 is dismissed.

JUDGE

Karachi
Dated _____