

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 665 of 2005

PRESENT:**Mr. Justice Arshad Hussain Khan.***Dr. Abid Mehmood*

Vs.

Mubashir Iqbal Khan

Plaintiff: Dr. Abid Mehmood
Through Mr. Zubair Qureshi & Rehan Qureshi
Advocates.

Defendant Mubbashir Iqbal Khan
Through Mr. Pervaiz Iqbal Butt Advocate.

Date of Hg: 07.11.2019, 03.12.2019 & 10.12.2019

JUDGMENT

ARSHAD HUSSAIN KHAN, J. This suit was presented by the plaintiff on 16.05.2005 for Specific Performance, Possession, Damages, and Injunction with the prayer to pass judgment and decree in favour of the plaintiff against the defendant as follows:-

- i) For specific performance of agreement of sale dated 14.12.2004 in respect of property / flat bearing No.102 on ground floor, measuring 1500 sq. feet, constructed on plot No.186/1, Block-5, situated at KDA Scheme No.5, Clifton, Karachi, by executing the sale deed in favour of plaintiff and in case of failure to execute the sale deed by the defendant, the Nazir of this Honourable Court be appointed to execute and get the sale deed registered before the concerned Sub-Registrar, at Karachi, at the cost of the plaintiff.
- ii) For vacant physical possession of property/flat bearing No.102 on ground floor, measuring 1500 Sq. Feet, constructed on Plot No.186/1, Block-5, situated at KDA, Scheme No.5, Clifton, Karachi, and put the plaintiff in vacant physical possession of the said property/flat and do perform all the act which the defendant is liable to do under the above agreement of sale.
- iii) In the alternative a decree for Rs.800,000/- paid as advance / part payment and Rs. Fifty Lacs for loss and damages suffered by the plaintiff for breach of contract with 14% markup per annum from the date of filing the suit till its realization.
- iv) Grant permanent injunction restraining the defendant his agents, attorneys, whatsoever from entering into any sale agreement, to gift or let it out with respect to the said

property, whatsoever from transferring possession and/or creating any charge or lien or alienating or transferring the said property or part thereof in question in any manner other than the plaintiff.

- v) Cost of the suit.
- vi) Any other/further/additional relief/reliefs which this Hon'ble Court may deem fit and proper in the circumstances of the case.

2. The brief facts of the case are that the plaintiff has entered into an agreement of sale with the defendant on 14.12.2004 in respect of a residential flat bearing No.102 on ground floor, measuring 1500 sq. feet, constructed on plot No.186/1, Block-5, situated at KDA Scheme No.5, Clifton, Karachi [suit property], and the plaintiff also paid Rs.2,00,000/- on 07.12.2004, as earnest money, and Rs.600,000/- on 14.12.2004 as part payment to the defendant. It is stated that amongst other terms and conditions, it was also agreed that defendant shall personally execute the deed of conveyance and that the defendant shall deliver photocopies of the documents of property/flat to the plaintiff i.e. sub-lease deed, NIC and photographs to enable him to have the conveyance deed completed as these are necessary to be annexed to the conveyance deed before the registration by the concerned Sub Registrar, Karachi. It is stated that the plaintiff repeatedly requested to the defendant to provide the photocopies of the documents but the defendant did not provide the same on one pretext or the other. It is also stated that the plaintiff has always been and still ready and willing to have the sale completed and he has persuaded the defendant for execution of conveyance deed but the defendant gained time on one pretext or the other for achieving his evil design. It is further stated that the defendant's conduct amounts to refusal to perform his part of the contract and unless the defendant comes forward and supply photocopies of the documents as requested, the sale cannot be completed. It is stated that the defendant totally failed to perform the sale agreement in time and he is illegally utilizing the earnest / advance money and he has also put the plaintiff in trouble who had to purchase the property for his residence due to which the plaintiff has sustained wrongful loss and mental torture and the plaintiff is legally entitled to claim damages from the defendant and the plaintiff has claimed damages against the defendant, which is Rs.50,00,000/-, which the

defendant is liable to pay in all respect. And that the defendant has acted in this transaction of sale with malafide intention and he has dishonestly trying to usurp the amount paid on 07.12.2004 and 14.12.2004. The plaintiff having no alternate served legal notices through his counsel on 23.12.2004 and thereafter on 02.05.2005 through registered post A/Ds, however when the plaintiff did not receive any reply from the defendant he has filed the present suit.

3. Upon notice of the present suit, the defendant filed his written statement wherein it has been stated that the plaintiff entered into an agreement of sale dated 14.12.2004 with the defendant in respect of the suit property against a sale consideration of Rs.78,50,000/- and the plaintiff has paid Rs.8,00,000/- and promised to pay the remaining sale consideration of Rs.70,50,000/- on or before 07.01.2005, but despite repeated requests, the plaintiff failed to pay the remaining sale consideration in terms of the sale agreement whereas the defendant was ready to execute conveyance deed in favour of the plaintiff up to 07.01.2005. It has also been stated that the time for the performance of the sale agreement was the essence of the sale agreement and the plaintiff committed breach of contract and made himself liable to face penal consequence thereof, and as such the amount paid by the plaintiff forfeited as per the practice in vogue. It has been further stated that the defendant waited for up to 28.01.2005 for response of the plaintiff being a gentleman however when he did not receive any response, having no option with him, the defendant sold out the suit property on 29.1.2005 to a person of his choice. It has been sated that the defendant sustained a loss of Rs.10,00,000/- due to breach of contract by the plaintiff. The defendant has further submitted that the plaintiff sent a legal notice dated 02.05.2004 from Kutchery P.O. Karachi-74200, which was received by defendant on 03.05.2005 and the defendant replied the same on 04.05.2005, vide TCS through his counsel. It has also been stated that no cause of action has accrued to the plaintiff against the defendant and as such the suit is liable to be dismissed.

4. On 01.09.2008, out of the pleadings, in presence of the learned counsel for the parties, following issues have been settled by this Court:

1. Whether the plaintiff failed to perform his part of contract within the time specified in the agreement of sale ?

2. Whether the plaintiff or the defendant failed to comply with their respective obligations under the sale agreement ?
3. Whether the defendant shall be entitled to forfeiture of Rs.8,00,000/- paid by the plaintiff in case it is established that the plaintiff has committed breach of contract ?
4. What should the decree be ?

5. On 27.09.2012, by consent of learned counsel for the parties Commissioner was appointed for recording of evidence in the matter, who after completing the commission submitted his report, which was taken on the record on 20.10.2014.

6. From perusal of the commissioner's report it appears that the plaintiff in support of his stance in the case has examined himself only whereas the defendant examined his attorney namely Mudassir Iqbal and one witness namely Mr. Naveed Abdul Malik in the case.

The plaintiff [Dr. Abid Mehmood] during his evidence has filed his affidavit-in-evidence and produced the following documents :-

DOCUMENTS	EXHIBIT
Affidavit in evidence	P
Certified copy of sale agreement dated 14.12.2004	P/1
Copy of receipt dated 07.12.2004	P/2
Copy of legal notice dated 23.12.2004	P/3
Another copy of legal notice dated 02.05.2005	P/4
Certified copies of postal receipts dated 23.12.2004 and 02.05.2005	P/5 & P/6
Copy of reply of notice dated 04.05.2005	P/7
Newspaper Clipping of Daily Nawa-e-Waqt dated 28.05.2005	P/8
Copy of complaint to the SHO Boat Basin, Clifton, filed by defendant against the plaintiff dated 28.06.2005	P/9

The Plaintiff was also cross-examined by learned counsel for Defendant on 21.09.2013.

7. Defendant's Attorney Mudassir Iqbal son of Muhammad Iqbal khan during his evidence has filed his affidavit-in-evidence as Exhibit D, Special Power of Attorney dated 04.10.2013 as Exhibit D-1, Photocopies of Sale Agreement dated 14.12.2004, a/w Receipt of token money, and reply of legal notice dated 04.05.2005, as well as TCS

receipt, marked A to C. The said attorney was cross-examined by learned counsel for the plaintiff. Thereafter, the defendant's witness namely Naveed Abdul Maalik son of Abdul Maalik adduced his evidence and during his evidence he has produced affidavit-in-evidence as Exh.D-5 and he was also cross-examined by learned counsel for the plaintiff. After the completion of the commission the matter was posted for final arguments.

8. During the course of the arguments, learned counsel for the plaintiff while reiterating the contents of the Complaint and affidavit-in-evidence of the plaintiff has submitted that the plaintiff entered into a sale transaction with the defendant to purchase the suit property vide agreement to sell dated 14.12.2004 and in this regard he paid Rs.8,00,000/- [Rs.2,00,000/- as token money and Rs.600,000/- as part payment to the defendant]. It is argued that as per the terms of the aforesaid agreement, the plaintiff repeatedly requested to the defendant to provide photocopies of documents of the suit property but the defendant did not do so on one pretext or the other. Learned counsel further argued that the plaintiff having no other alternate served legal notices dated 23.12.2004 and 02.05.2005 but the defendant did not respond the same. Learned counsel further argued that the defendant failed to perform his part of obligation under the agreement in time and he illegally kept the earnest money to disadvantage the plaintiff's interest, which caused severe distress and mental torture, therefore, the plaintiff has claimed damages for Rs.50,00,000/-, which the defendant is liable to pay to the plaintiff. It has been also argued that the defendant has acted in the said transaction of sale with malafide intention and he is dishonestly trying to usurp the amount paid to him by the plaintiff. It is further argued that the defendant is legally bound to fulfill his legal obligations in this regard and the defendant has deliberately and intentionally delayed the registration of conveyance deed for which the defendant is responsible himself and the plaintiff is also legally entitled for vacant possession of the suit property. Learned counsel for the plaintiff urged that the suit of the plaintiff may be decreed as prayed. Learned counsel for the plaintiff in support of his stance has relied upon the cases of MUHAMMAD SULAIMAN MALIK and another v. ROYAL TRUST CORPORATION OF CANADA and

others [1979 CLC 48], and KASSAMALI v. Mst. SHAKRA BEGUM [PLD 1968 Karachi 307].

9. On the other hand, learned counsel for the defendant has argued that the sale transaction between the plaintiff and the defendant is the admitted fact. He further argued that pursuant to the terms of sale agreement, the plaintiff had to pay the remaining balance amount of Rs.70,50,000/- on or before 07.01.2005, but he failed to pay the same to the defendant and also failed to come forward for execution of conveyance deed, whereas the defendant had remained ready to execute conveyance deed in favour of the plaintiff up to 07.01.2005. It is argued that time i.e. 07.01.2005 for performance of the sale agreement was the essence of the contract and the plaintiff committed breach of contract as well as made himself liable to face penal consequence, that is, forfeiture of the amount paid by the plaintiff at the time of sale agreement as per the practice in vogue. It is further argued that the defendant had waited for plaintiff till 28.01.2005, however, upon no response of the plaintiff, the defendant sold out the suit property on 29.1.2005. Learned counsel for the defendant has further argued that the plaintiff with malafide intentions and for ulterior motives to save himself from penalty and to recover his forfeited amount sent legal notice dated 02.05.2004, which was received by defendant on 03.05.2005 and the defendant replied the same on 04.05.2005, through his counsel. Learned counsel further argued that filing of present suit by the plaintiff is nothing but an attempt to put pressure upon the defendant for recovery of forfeited amount. It is also argued that the plaintiff has failed to produce any evidence to show that he had requisite amount of balance sale consideration with him on the stipulated date for performance of the agreement. So much so, the plaintiff neither in the plaint mentioned this fact that the balance sale consideration is ready with him nor, in order to show his good faith, he ever tried to deposit the same in the Court. The plaintiff has also failed to produce any evidence before this Court in respect of alleged losses he suffered. Lastly, argued that the plaintiff has failed to establish his case during the course of evidence by not producing any reliable document in his support, therefore, the suit is liable to be dismissed.

10. I have heard learned counsel for the parties, perused the record, and have also gone through the relevant law as well as the case law cited at the bar and my findings on the above issues are as follows:-

ISSUES 1 & 2: Since these issues are interrelated to each other therefore, the same are taken up together.

From perusal of the record, it appears that the plea of plaintiff is that he entered into a sale transaction with the defendant to purchase the latter's property bearing residential apartment/flat bearing No. 102, ground floor, measuring 1500 Sq. Ft. constructed on plot No. F-186/1 Block-5, Situated at KDA Scheme No.5, Clifton Karachi [Suit Property], vide agreement of sale date 14.12.2004 [Exh.P/1] for a total sale consideration of Rs.78,50,000/- and out of which the defendant paid Rs.8,00,000/- till the date of execution of the agreement. Balance sale consideration, that is, Rs.70,50,00/- was to be paid by the plaintiff on or before 07.01.2005. Thereafter, the plaintiff sent a legal notice dated 23.12.2004 [Exh.P/3] to the defendant, demanding photocopies of sub-lease, CINC and photographs for preparation of conveyance deed. Thereafter, the plaintiff sent another legal notice dated 02.05.2005 [Exh.P/4] demanding the same documents however when he did not receive any reply from the defendant he filed the present suit.

Whereas the stance of the defendant is that the plaintiff after entering into the sale transaction failed to fulfill his part of obligation as he failed to pay the balance sale consideration in time as stipulated in the agreement, hence he committed default and as a consequence thereof the amount so paid by the plaintiff at the time of execution of agreement was forfeited. Furthermore, the defendant denied to have received notice [Exh.P/3] he however admitted that he had received legal notice dated 02.05.2005 [Exh.P/4] which was immediately replied by him through legal notice dated 04.05.2005 [Exh.P/7]. It is also the stance of the defendant that when the plaintiff failed to perform his part of obligation under the agreement he sold out the suit property to a person of his choice and the said fact was already brought into the knowledge of the plaintiff through reply notice [Exh.P/7]. It is also the stance of the defendant that the plaintiff, neither at the time stipulated in the agreement nor at the time of filing

of the present proceedings, had required amount for payment of sale consideration, he is not entitled to seek relief of the nature in the present proceedings and the defendant has rightly forfeited the amount paid to the defendant.

Record transpires that the Agreement of sale [Exh.P/1] and the amount paid by the plaintiff under the said agreement are not disputed. Hence, before going into any further discussion, it would be appropriate to reproduce the relevant portion of the agreement of sale date 14.12.2004 [Exh.P/1] as under:

- “1) That the Vendor already had received a sum of Rs. 2,00,000/- (Rupees Two Lacs only) as token money dated 07.12.2004 and further payment of amount sum of Rs.6,00,000/- (Rupees Six Lacs only) through bank pay order NO.0224892 dated 11.12.2004 drawn on Habib Bank Ltd. (JPMC Br. Karachi) from aforesaid Vendee at the time of signing of this agreement being part payment towards the above said sale price, and the remaining balance amount of Rs.70,50,000/- (Rupees Seventy Lacs Fifty Thousand only) will be paid on or before 07.01.2005, receipt whereof the said vendor do hereby fully admits and acknowledges and passed a separate receipt as well.
- 2) That the time of full and final payment, the vendor has to execute conveyance deed of the said property in favour of the Vendee, before the concerned Sub-Registrar “T” Division-II (B), Karachi, as well as hand over vacant peaceful physical possession of the ‘SAID PROPERTY’ along with the original documents of the Sub-Lease Deed, papers, receipts, etc., to the above name vendee.”
- “6) That the cost of TRANSFER FEES, Registration charges, Documentation charges, etc., in respect of the “SAID PROPERTY” shall be borne by the VENDOR alone.”

From perusal of the above, it clearly transpires that under the terms of the agreement the vendee (plaintiff) had to pay the balance sale consideration on or before 07.01.2005 and in lieu thereof the vendor (defendant) had to execute conveyance deed before the concerned Sub-Registrar as well as hand over vacant peaceful physical possession of the suit property along with the original title documents to the vendee. Furthermore, the documentation charges in respect thereof had to be borne by the defendant.

Record further transpires that the plaintiff before the cut of date through his advocate had sent a letter dated 23.12.2004 [Exh.P/3] to the defendant. Even though, the defendant denied to have received the said letter, however, a perusal whereof reflects that the plaintiff through

this letter demanded photocopies of the property documents for preparation of conveyance deed whereas under the terms of agreement the documents' charges etc. was the responsibility of the defendant. Moreover, surprisingly there is nothing in the said letter about the payment of balance sale consideration whether the same was ready with him or not. After four months of the cut of date, the plaintiff again written a letter dated 02.05.2005 [Exh.P/4] demanding the same documents without mentioning that the amount of balance sale consideration is ready with him and or showing his willingness and readiness to pay the defendant the balance sale consideration. The said letter was immediately replied by the defendant through his legal notice dated 04.05.2005 [Exh.P/7], wherein it has been stated that since the plaintiff failed to perform his part of obligation under the agreement, he has sold out the suit property to a person of his choice. From perusal of the plaint, it appears that the plaintiff concealed the fact that he has received defendant's reply legal notice [Exh. P/7], as it has been categorically stated in the plaint that he has not received any reply of his legal notices. Whereas in the evidence, the plaintiff himself has produced the said reply notice.

In a Suit for specific performance, which is a discretionary relief, it is obligatory upon the plaintiff to demonstrate in unequivocal terms in his pleadings, as well as by his conduct throughout the proceedings, that he has always been and is still ready and willing to perform his agreed part of the contract. The plaintiff though in his para-5 of the plaint and para-6 of his affidavit in evidence has stated that he has always been and still ready and willing to have the sale completed, however mere statement is not sufficient, the plaintiff through his conduct had to prove such statement. The plaintiff also failed to bring on record any document and produce any witness which could show that when he did not receive any reply of his first notice from the defendant what efforts he had taken to communicate his willingness and readiness to perform his part of obligation under the contract. Besides, the plaintiff before filing of present case, was well aware of the fact that the defendant had sold out the suit property to someone else, however, the plaintiff not shown any effort either to know the name of the new buyer or to implead him as party in the

proceedings, which fact reflects the lack of seriousness of the plaintiff for seeking specific performance of contract.

It is now well settled that a party seeking specific performance of an agreement to sell is essentially required to deposit the balance 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]

In the present case, the plaintiff neither in the plaint attached any document nor he produced any documents in his evidence, which could show his capability, readiness and willingness to pay the amount balance sale consideration. It is also a fact that the plaintiff in order to demonstrate his capability, readiness and willingness to perform his part of the contract, which is an essential pre-requisite to seek specific performance of a contract, neither at the time of filing of the plaint nor subsequently, either deposited the balance sale consideration or sought any permission in respect thereof. Hence, I am of the opinion that the plaintiff's failure to meet the said essential requirement disentitles him to the relief of specific performance. In the circumstances, these issues are answered accordingly.

11. **ISSUE NO.3:** Insofar as the forfeiture of the amount paid by the plaintiff at the time of execution of the agreement of sale is concerned, the stance of the defendant is that when the plaintiff failed to perform his part of obligation on the date stipulated in the agreement, he forfeited the amount and sold out the suit property to a person of his choice.

From the perusal of the agreement [Exh.P/3], it transpires that firstly there is no clause in the agreement showing that the time stipulated in the agreement was the essence of contract and secondly,

there is no mention in the agreement that in the event if the vendee fails to perform his part of obligation under the contract the amount paid by him at the time of execution of the agreement shall be forfeited. Insofar as the term ‘time is essence of contract’ is concerned, it has now been well settled that time is not of the essence of the contract in the cases of sale of immovable properties. The Honorable Supreme Court in the case of Mst. KUBRA AMJAD v. Mst. YASMEEN TARIQ and others [PLD 2019 Supreme Court 704] while dealing the issue, inter alia, has observed as under;

“Time not essence of contract--Even where time was not of the essence of the contract, the plaintiff must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property’

In the present case, there is nothing available on the record which could show that whether before and/or after the cutoff date, the defendant had sent anything in writing to the plaintiff either for asking performance of the contract or cancellation of the agreement and/or forfeiture of the amount paid by the plaintiff. While, according defendant’s own stance, he sold out the property in the very same month to someone else of his choice, in which month the plaintiff had to complete the sale transaction. The defendant also took the stance that he has suffered losses on account of plaintiff’s failure to perform his part of the contract owing to which he had to sell out the property to someone else, however, he has failed to substantiate his stance through evidence. In the circumstances, I conclude that the defendant is not entitled to forfeit the amount paid by the plaintiff under the agreement.

12. **ISSUE NO.4:** For the foregoing discussion and my findings on issues 1 and 2, I am of view that the plaintiff has failed to substantiate his claim for specific performance of the contract in the suit and as such he is not entitled to the relief of specific performance of the contract. However, the plaintiff, in view of the findings of issue No.3, is entitled to the grant of the alternative relief i.e. refund of the consideration, paid by him to the defendant, which is Rs.800,000/- (Rupees eight lacs), currently lying with Nazir of this Court in profit bearing scheme under the Court’s order, along with profit accrued thereon and as such the

instant suit is decreed to that extent only. Accordingly, the Nazir of this court is directed to release the amount of Rs.800,000/- (Rupees eight lacs) to the plaintiff along with profit accrued thereon upon proper verification and identification.

The suit is decreed in the above terms.

JUDGE

Karachi

Dated: 21.02.2020.