

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1702 of 2000

Mrs. Najma Vaseem Adenwalla

Versus

Mrs. Abida Jawed

A N D

Suit No.1151 of 2008

Mrs. Abida Jawed

Versus

Mrs. Najma Vaseem Adenwalla

BEFORE:

Mr. Justice Mohammad Shafi Siddiqui

Date of Hearing: 15.08.2012 & 27.08.2012

Plaintiff: Mrs. Najma Vaseem Adenwalla
Through Mr. Muhammad Arif along with Mr.
Liaquat Hussain Advocates.

Defendant: Mrs. Abida Jawed:
Through Mr. M. Shahid Qadeer Suharwardy
and Mr. Muhammad Idrees Sukhera along with
Mr. Zahid Abbas Advocates.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- These are the two suits arising out of the agreement of sale dated 25.04.1994 entered into between the plaintiff and the defendant. The agreement pertains to a property which

is a bungalow built on plot bearing No.B-170, measuring 355 sq. yards situated in Block 18, Works Cooperative Housing Society Limited, Gulshan-e-Iqbal, Karachi, for the sake of brevity hereinafter it will be referred to as the "said property". The total sale consideration agreed was Rs.2.5 Million.

2. The suit bearing No.1702 of 2000 was filed by the plaintiff (vendee) for specific performance, compensation and damages against the defendant (vendor) whereas the other suit bearing No.1151 of 2008 which is consolidated with suit No.1702 of 2000 has been filed by the vendor against the vendee for cancellation of agreement and mesne profit. The issues have been framed in Suit No.1702 of 2000 vide order dated 16.12.2002 whereas issues in other suit bearing No.1151 of 2008 were framed by order dated 27.08.2012 with the consent of the parties. Since both the suits pertain to the same property arising out of the same agreement, the counsel appearing for the respective parties agreed for the disposal of both the suits after consolidation and framing of additional issues in the other suit. For sake of convenience Suit No. 1702/2000 may be considered as leading suit.

3. Learned counsel for the plaintiff in support of their case contended that pursuant to agreement dated 25.04.1994 the plaintiff paid a sum of Rs.6,75,000/- vide pay order No.665136 and Rs.200,000/- through pay order No.665137 both dated 25.4.1994 drawn on Allied Bank Limited, Sindhi Muslim Housing Society, Karachi and Rs.1,25,000/- in cash and the vendor has already acknowledged and received an amount of Rs.415,000/- through pay order No.665131 dated 17.04.1994 drawn on Sindhi Muslim Housing Society Limited, Karachi in favour of one Ch. Muhammad Ismail son of Ch. Wali Muhammad issued at the request of the above said vendor and a sum of Rs.85,000/- in cash as advance part payment on 17.04.1994. Thus making a total of Rs.15,00,000/-. In

support of the aforesaid amount the vendor has issued a receipt dated 25.04.1994 acknowledging the receipt of the above amount and agreeing for the payment of the final balance of Rs.1 Million up to 17.10.1995. Pursuant to this aforesaid payment of 1.5 Million which constitute 60% of total sale consideration, it is submitted that the defendant/vendor handed over physical vacant possession of the said property on the same day i.e. 25.04.1994.

4. It is further submitted by the learned counsel for the plaintiff that on 17.09.1995 the plaintiff got a letter issued to the defendant at the address mentioned in the agreement of sale dated 25.4.1994 whereby the plaintiff disclosed that they were ready to make balance payment subject to clearance of the dues and completion of the documents to finalize the deal. It is submitted by the learned counsel that they had been requesting the defendant to complete her obligations in terms of the agreement of sale so that the property be conveyed in favour of the plaintiff and/or her nominee. However, the defendant could not finalize as she was unable to obtain original documents from the National Bank of Pakistan.

5. In terms of clause 5(a) of the subject agreement, per learned counsel, the defendant was under obligation to obtain the title documents of the said property from the National Bank of Pakistan after its redemption. Learned counsel submitted that since she was unable to obtain the documents of the said property from the National Bank of Pakistan, the balance payment of Rs.1 Million was withheld by the vendee/plaintiff. However, they were ready and willing to perform their obligation subject to clearing the title and redemption of documents from the National Bank of Pakistan.

6. As against this learned counsel for the defendant submitted that although the plaintiff and defendant entered into agreement of sale

dated 25.04.1994 against sale consideration of Rs.2.5 Million and also admitted the payment of Rs.1.5 Million from the plaintiff against which physical vacant possession of the said property was handed over to her, the plaintiff pursuant to the subject agreement was under obligation to pay a sum of Rs.1 Million on or before 17.10.1995 and thus it was settled between the parties vide clause 11 of the agreement of sale that if the vendee fails to pay the balance amount of total sale consideration within the stipulated period of time then the vendor reserves the right to forfeit the amount of advance payment of the vendee whereas on the other hand if the vendor fails to finalize the deal then she was under obligation to pay the double amount to the vendee. Per learned counsel for defendant, pursuant to the agreement the plaintiff/vendee failed to pay the requisite amount within the stipulated time and hence the defendant forfeited the amount of Rs.1.5 Million. Per learned counsel the terms of the agreement are clear and there is no ambiguity that the payment of the balance amount was to be made by 17.10.1995 and this payment has no nexus with the registration of the sale deed or redemption of the documents as the possession of the suit property was handed over to the plaintiff.

7. On the above facts and pleadings this Court framed following issues:-

1. Whether the defendant or the plaintiff has committed any breach of the agreement to sell?
2. Whether the defendant had made out a valid, subsisting and marketable title in terms of the said agreement to sell or the plaintiff has failed to make payment of the balance sale consideration?
3. Whether the time for completion of sale was the essence of the agreement to sell?
4. Whether the plaintiff is entitled to specific performance or compensation?

5. Whether the plaintiff is entitled to financial and mental losses/damages and mesne profit due to the failure of the defendant to complete the sale?

6. Whether the defendant has suffered losses because of the failure on the part of the plaintiff?

7. What should the decree be?

8. In addition to the above issues, additional issues were framed on 27.08.2012 which issues are arising out of the pleadings of Suit No.1151 of 2008 and reproduced as under:-

1. Whether agreement dated 25.04.1994 is liable to be cancelled?

2. Whether the amount given by the defendant to the plaintiff pursuant to the agreement is liable to be forfeited?

3. What should the decree be?

9. From the plaintiff's side one Vaseem Ahmed Adenwalla has filed his affidavit-in-evidence who has exhibited documents as Ex.1 to Ex.38 whereas from the defendant side the defendant examined herself as Ex.D. Both the witnesses were duly cross examined by the respective counsels.

10. I have heard the learned counsel for the parties and with their assistance have gone through the evidence and material placed on record. My findings on the above issues with reasons are as under:-

Issue No.1

11. Learned counsel for the plaintiff submitted that on the crucial date i.e. 17.10.1995 the letter requiring the defendant to complete the sale transaction was issued with the information that the plaintiff had arranged the balance amount. This letter has been exhibited as Ex.13 along with TCS, Pakistan Postal Service receipt. Another notice dated 08.06.1996 claimed to have been issued by the plaintiff which is also

supported by a receipt of the registry along with acknowledgement slip exhibited at Ex.16, 17 and 18 respectively. The third letter was also issued by the plaintiff on 12.06.2000 through the registered post A/D which is exhibited as Ex.19, 20 and 21. Lastly the legal notice was issued on 06.10.2000 through registered post and the acknowledgment receipt is also attached as Ex.22, 23 and 24 respectively. It is claimed by the deponent Vaseem Ahmed Adenwalla that the plaintiff is also proprietor of M/s Adenwalla Associates and at all relevant time had sufficient funds to pay the balance sale consideration and has produced NTN certificate dated 04.09.2000, income-tax, PICIC bank certificate dated 27.02.2007, Bank Al-Habib Limited certificate 26.02.2007 and also a sale agreement (though not relevant) executed between the plaintiff and one Jehangir Wali son of Muhammad Wali was also produced in order to establish that by selling one of the properties she had acquired sufficient funds and also three certificates issued by the Pakistan Herald Publication (Pvt.) Limited for 2004, 2005 and 2006 as Ex.28 to 38 which shows that they had sufficient funds available and they were financially sound.

12. Vaseem Ahmed Adenwalla in his cross examination has agreed to a question that as per clause 2 of Ex.2 they had to pay Rs.1 Million till 17.10.1995 and that till date they had not paid that amount. It was further clarified that the reasons for withholding the said amount was their (defendant's) failure to get the property redeemed from the concerned bank after clearing outstanding dues as there was huge outstanding against the said property and only for security reason same was withheld. The witness also admitted that the said clause 2 of the agreements in respect of the payment of balance sale consideration of Rs.1 Million. However, the witness agreed to a suggestion that the property documents were to be redeemed and the dues to be cleared after payment of Rs.1 Million. The witness also admitted that in case of

the failure to pay the balance amount within the stipulated period the defendant was entitled to forfeit the advance amount paid. The witness also deposed that the plaintiff had issued notices to the defendant regarding the availability of funds and willingness to pay the balance amount of Rs.1 Million and that it was not issued on incorrect address. The witness also conceded that he has not produced any pay order of Rs.1 Million along with alleged notices nor any notice was published in the newspaper for inviting objections against the sale and purchase of subject property. Learned counsel also conceded that he has also not deposited the said amount of Rs.1 Million in Court. The witness deposed that the notices were issued at the address mentioned in the agreement, however, the block number of Clifton was not provided by the defendant in the agreement, whereas the building name i.e. Al-Habib Apartment is mentioned in all notices along with flat number.

13. As against this, the evidence recorded by the defendant clarified that the said property was mortgaged with National Bank of Pakistan and that the National Bank of Pakistan has filed suit for recovery in the year 1998 and the property documents were redeemed in the year 2006. Defendant has agreed that no letter regarding the cancellation of the agreement was issued to the plaintiff nor the defendant refunded the advance payment to her at the time of cancellation. Voluntarily she deposed that since the possession was not handed over the advance payment was not refunded. She refused to accept the suggestion that she requested the plaintiff for extension of time so that the property documents may be redeemed. She deposed that vide sale agreement the balance amount was to be paid by 17.10.1995 whereas the date of execution of the sale deed is not mentioned as the documents were to be redeemed from the bank and she had no clue when the documents would be redeemed. She deposed that only after receipt of the amount

of Rs.1 Million she could have got the subject documents redeemed as she did not have sufficient funds. She claimed that she had neither received any letter nor she issued any notice to the plaintiff for cancellation.

14. It appears from the reading of the agreement and from the pleadings that although the time for the payment of balance amount of Rs.1 Million was settled as 17.10.1995 but there was no time stipulated in the agreement with regard to registration of the sale deed. To some extent the plaintiff was able to show that before and after 17.10.1995 the plaintiff issued notices through registered post A/D and TCS, however, the address apparently was not complete as the block number "8" of Clifton was not shown to be incorporated in the address. Here the question arises as to on which address these notices or any correspondence were to be made by plaintiff. The only document which can be relied upon is the agreement of sale and I see the address of the vendor in the said agreement as under:-

"Z-506, Al-Habib Apartment, Clifton, Karachi"

15. It does not show "any block number of Clifton". This sale agreement is signed by the vendor and the vendee. This is also the agreement which is heavily relied upon by the vendor. There appears to be no evidence available that plaintiff was aware of the block number or that she deliberately send the letters on wrong address which he came to know subsequently through estate agent. It is very surprising that even the defendant did not write any letter regarding balance payment or cancellation of agreement.

16. Although the plaintiff has also not been able to establish her intent by depositing the balance amount in Court voluntarily though she tried to show this Court that sufficient funds were available with them. Mere non-deposit of balance amount in court though would not be

considered as breach of agreement, but plaintiff prima facie should have come forward and deposited the balance sale consideration; particularly when she was enjoying the possession of the said property.

17. By reading the agreement of sale and also the deposition of the witnesses it is not crystal clear that the defendants were under the obligation to complete the registration of the sale deed by any particular time and it is apparently clear that it is for this reason that the possession of the said property was handed over to the plaintiff on payment of Rs.1.5 Million which constitutes 60% of sale consideration as agreed. Thus the above discussion lead me to conclude that none of the parties have committed any serious breach of the “terms of agreement” which could be fatal for their contractual rights, however the effect of non-deposit of balance sale consideration and non-providing a proper address by defendant shall be discussed in subsequent issues.

Issue No.2

18. This issue has two parts. The 2nd part which relates to payment of balance sale consideration has been answered in the first issue, however, my finding and reasoning with regard to 1st part of second issue is as under:

19. As far as this part of 2nd issue is concerned, the grievance of the plaintiff was that the defendant was unable to make out a valid, subsisting and marketable title in terms of the agreement of sale on account of the fact that the property was mortgaged with the National Bank of Pakistan. The fact regarding property being mortgaged with the National Bank of Pakistan although not concealed by the defendant, however, such mortgage would have made the specific performance difficult so long as the documents of said property were not redeemed. The fact that the property was mortgaged with the National Bank of

Pakistan is incorporated in clause 5(a) of the subject agreement which is reproduced as under:-

“5-A. That it’s the responsible of the Vendor to repay the amount of loan amounting to Rs.10,00,000/- (Rupees Ten Lac Rupees only) which has be obtained by him/her from the National Bank of Pakistan against the said property and to get the redemption of the same and obtain all the original documents of the said property from the mortgagor.”

20. It is thus admitted that the property was mortgaged with the National Bank of Pakistan and the documents were to be redeemed by the defendant. The title of the subject property may not have been cloudy but the charge of NBP is clear by admission of defendant. More importantly when there is no certificate of N.B.P showing their consent to sell such mortgaged property, its clearance and redemption by the defendant becomes all that important to make this agreement a lawful transaction. Hence, I observe that defendant by not getting the property documents redeemed have not provided clear subsisting and marketable title by 17.10.1995. However, it is to be seen that such amount of Rs.1 Million was required to be paid by plaintiff for redemption which she tried to pay as demonstrated by her, though not deposited in Court. The answer to this 1st part of 2nd issue is in negative.

Issue No.3

21. From the plain reading of the agreement it appears that the time for the completion of the sale deed was never the essence of the agreement of sale. In fact 17.10.1995 is the time fixed for payment of Rs.1 Million. It has been admitted by the defendant in her deposition that she herself was not aware about the time when the deal was to be completed. The time for the payment of the final balance sale consideration amount of Rs.1 Million cannot be equated with the time

for the registration of the sale deed hence this issue is answered in negative.

Issues No.4 and 1 & 2 from Additional issues:

22. In view of findings of issue No.1 it has become a difficult task to meet the situation and to do justice with both the parties. At one hand the plaintiff claimed that he was and is ready to perform the part of her obligation pursuant to which she had issued notices at the address provided by the defendant and on the other hand she failed to deposit such amount in Court which she was willing to pay her. If the plaintiff could be exempted from the payment of Rs.1 Million at the required time on account of non-availability of the address or on account of the avoidance for the registration of the sale deed than at least the time when she filed suit, she should have come forward and should have deposited the sum of Rs.1 Million in Court. The fact that she was/is enjoying the possession of the said property, it became all that important for her to discharge this obligation as her first priority, which she failed but this non-deposit in Court does not constitute breach of agreement. The Court is also conscious of the fact that the plaintiff has not just made the payment of the token amount, in fact she has paid 60% of the total sale consideration against which the possession was handed over to her. This 60% was utilized by defendant. I am also conscious of the fact that the suit for cancellation of the agreement was filed by the defendant in the year 2008 i.e. after 14 years of the execution of the agreement and on handing over possession of the said property. It is difficult to understand as to what the defendant was doing in these 14 years when the plaintiff was enjoying the possession. Defendant did not issue a single letter regarding sale agreement and about its fate.

23. In view of the above facts, it requires a serious consideration as to how and on what terms the suit are to be disposed of and if at all suit of the plaintiff is to be decreed then what should be the remaining consideration which is required to be paid by the plaintiff to the defendant. Such situation was met by the Hon'ble Supreme Court in the case of Muhammad Siddiq Vs. Muhammad Akram (2000 SCMR 533) when on account of slackness on the part of the party approaching the Court for specific performance, the grant of the specific performance was made on payment of Rs.100,000/- instead of Rs.2000 which remained unpaid in terms of agreement.

24. Applying same principle to the case in hand I, therefore deem it proper to grant specific performance of the agreement but only subject to payment of unpaid 40% of the sale consideration on the basis of "current value" of the property since this is the amount which has remained unpaid and the defendant should not suffer on account of this delayed payment as she was neither enjoying the possession of the property nor could enjoy the final balance amount of Rs.1 Million at the relevant time. Similarly, the plaintiff also cannot get away by paying Rs.1 Million to defendant realizing the fact that she not only enjoyed the possession of the property but also enjoyed fruits of that Rs.1 Million.

25. The Nazir of this Court is thus directed to evaluate the current value of the said property by inquiring and calling quotations from three renowned Estate Agents or property evaluator and the aggregate of such three evaluation shall be considered as the current market value of the said property out of which 40% shall be paid by the plaintiff to the defendant, in the alternative the amount (Rs.1.5 million) paid by the plaintiff to the defendant shall be adjusted towards mesne profit which shall be paid by plaintiff at the rate as under:-

Rs.10,000/- per month from October, 1995 to September 2002 (7 years)	Rs. 8,40,000/-
Rs.15000/- per month from October 2002 to September, 2012 (10 years)	Rs.18,00,000/-
Rs.20,000/- per month from 18.10.2011 to 31.10.2012 (one month)	Rs. 20,000/-
Total	Rs.26,60,000/-

In addition to the above the plaintiff shall also pay Rs.20,000/- w.e.f November 2012 onwards and the possession of the said property shall be handed over to the defendant by the plaintiff forthwith. The two options that are available to be exercised by plaintiff. The issues are thus answered accordingly.

Issue No.5 & 6

26. The plaintiff as in Para 14 of her affidavit-in-evidence has stated that she has suffered financial loss and mental agony due to the failure of the defendant to complete her obligation. She was not able to fully enjoy the property as she could not make new construction nor she could sell, gift, lease or transfer the said property on account of inordinate delay. The claim of mental torture and agony has not been sufficiently established by the plaintiff as just by asserting these facts that she could not sell, gift, transfer or she could not make new construction is not sufficient to prove financial losses and mental agony, more importantly when she was enjoying balance sale consideration with possession of property. The plaintiff by confidence inspiring evidence had to establish the bonafide claim of financial losses and mental agony, which is not born out from evidence. The claim of losses that defendant claimed to have suffered has been addressed pursuant to the terms in which specific performance was ordered as she could not get the required amount of 1 million in time. The two alternatives referred above in Para 24 and 25 would constitute a lawful compensation for the

defendant in such a way that she cannot complain of getting the same amount as agreed in 1994.

Issue No.7 and Additional Issue No.3

27. The suit of the plaintiff i.e. Suit No. 1702/2000 is therefore, decreed and suit of defendant bearing No. 1151/2008 is disposed of in terms of Para 24 and 25 above.

JUDGE