

Order Sheet
IN THE HIGH COURT OF SINDH, KARACHI
Suit No.1029/2019

Date	Order with signature of Judge
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FOR HEARING OF CMA NO.8595/2019
Under Order 39 Rules 1 & 2 CPC

Date of Hg:12.10.2021

Mr. Sohail Hameed, Advocate for the Plaintiff
M/s. Syed Maqbool Hussain Shah and Khawaja Naveed Ahmed
Advocates for Defendant No.1
Mr. Asif Rasheed, Advocate for Defendant No.2.

ARSHAD HUSSAIN KHAN, J.- Through the listed Application [CMA No.8595/2019] under Order XXXIX Rules 1 & 2 CPC read with Section 151 CPC, the Plaintiff seeks interim injunctive order restraining Defendant Nos. 1(i), (ii) & (iii), their attorneys, agents, consignees, and any other persons acting through and/or under them and/or on their behalf from intimidating, threatening the Plaintiff and illegally/forcefully dispossessing him from the suit property.

2. The facts of the case, which are necessary for disposal of the above application, in nutshell, are that the predecessor of the Plaintiff [namely Amtur Rehman, widow of Syed Kazim Ali] initially filed a Civil Suit No.526/1984 before this Court for Declaration & Specific Performance of an Agreement of Sale dated 30.01.1978, in respect of a residential bungalow bearing No. 6-B, admeasuring 1200 Sq.Yrds., Central Avenue, DHA, Karachi [**Suit property**] against Defendant No.1 [Flight Lt. Farouk Aziz Effendi], the predecessor of Defendants 1(i), (ii) & (iii) in the present suit, which on account of enhancement of pecuniary jurisdiction of this Court was transferred to the court of 2nd Senior Civil Judge, Karachi South, where it was allotted a new number as Suit No.731/2003 and subsequently on 04.05.2009, it was decreed in terms of the compromise reached between the parties. Pursuant to terms of the compromise decree, being a full and final settlement, the plaintiff had to pay Rs.10,000,000/-[rupees one crore only] out of which Rs. 56,89,714 [rupees fifty six lac, eighty-nine thousand, seven hundred and fourteen only], was paid whereas remaining amount of Rs.

43,10,286/- (rupees forty-three lac, ten thousand, two hundred and eighty six only) was to be paid at the time registration of conveyance deed. In terms of clause (h) of the Decree the plaintiff's possession over the suit property was admitted and in terms of clause (b), Defendant No.1 undertook to get the "B" Lease of the suit property executed and registered in his name upon compliance of all the requisite formalities, as required by the DHA and any other Department / Authority. The Plaintiff in the month of March, 2015, came to know that there are other outstanding dues of DHA against Defendant No.1 and further that membership of defendant No.1 and his family has been suspended because of non-payment of outstanding dues of DHA. It has also been stated that in order to fulfill the requirements for "B" Lease, the Plaintiff personally paid Rs.2,46,228/- towards refurbishment charges and the membership of Defendant No.1 was restored on 16.03.2015. It is further stated that after completion of all the requirements for issuance of "B" Lease of the suit property, and the financial support as well as full cooperation on behalf of the Plaintiff, the Plaintiff demanded from Defendant No.1 to obtain "B" Lease of the DHA and to execute the conveyance deed in terms of the compromise decree. However, when Defendant No.1 despite lapse of sufficient time, failed to execute the conveyance deed in terms of the said compromise decree, the plaintiff on 21.04.2015 filed Execution Application [Ex.No.32/2015-Suit No.731/2003], which was dismissed by order dated 03.02.2016 as being time barred. Thereafter, Plaintiff's Civil Revision Application 23/2016, filed before VIIth ADJ Karachi was also dismissed on 07.09.2016 and the order of learned IInd SCJ Karachi South was maintained. It has also been stated that against both the aforesaid orders of lower courts, CP No.D-5585/2016, filed by the Plaintiff, was also dismissed, however, learned Division Bench of this Court maintained that since the possession of the suit property is with the Plaintiff as such the Plaintiff has a right and title in the property. It has been stated that Defendant No.1 on 29.05.2015 had also filed a Suit No.924/2015 before this Court, inter alia, seeking declaration of ownership of Defendant No.1 in respect of suit property, however, the said suit was subsequently withdrawn. It has been further stated that during pendency of C.P. No.5585/2016, the Flight Lt. Farouk Aziz Effendi expired and Defendants 1(i), 1(ii) & 1(iii) have been impleaded

as Respondents. It has further been stated that the plaintiff challenged the dismissal order of the aforesaid petition before the Honourable Supreme Court in CPLA, which is pending adjudication. It has also been stated that the defendants during pendency of the proceedings before the Honourable Supreme Court, have extended threats to the plaintiff for her forcible dispossession from the suit property and as such in order to avert their illegal dispossession, the plaintiff has filed the present suit. Along with the suit instant application was also filed seeking injunctive order till disposal of the case.

3. Upon notice of the case, defendant No.1(iii) has filed Counter Affidavit wherein while raising legal objections with regard to the maintainability of the suit, he has refuted the allegations. It has been stated that the answering defendants are lawful owners of the suit property, which was originally acquired by their deceased father through allotment. It has also been stated that the predecessor of the Plaintiff had entered into an agreement to sell dated 30.01.1978 in respect of the suit property with the deceased father of the defendant, however, instead of performing her part of contractual obligation under the agreement she maliciously instituted Suit No.526/1984, inter alia, for Specific Performance of the sale agreement against the predecessor of the defendants. During pendency of the proceedings, Mrs. Amtur Rehman expired and subsequently the said suit was compromised with her legal heirs represented by Mubarak Ali Shah, however, he has also failed to honour his commitments and obligations under the compromise decree including but not limited to payment of the balance sale consideration to the deceased in respect of the suit property in the sum of Rs. 43,10,286/-. It has been further stated that the Plaintiff also instituted a frivolous Execution Application No. 32/2015 on 21.04.2015, which was dismissed being barred by time. Thereafter, the Plaintiff instituted Civil Revision Application No.23/2016, which was also dismissed on 07.09.2016. Subsequently, the Plaintiff filed CP No.D-5585/2016 against the concurrent findings of the orders of the lower courts below dated 03.02.2016 and 07.09.2016. A Division Bench of this Court dismissed the said petition upholding the concurrent findings of the courts below by virtue of order dated 24.04.2019. It is further stated that during pendency of the petition, said

Farouk Aziz Affendi expired on 15.09.2017 and the answering defendants were impleaded as Respondents in the said petition. Thereafter, the Plaintiff maliciously filed instant suit based on an erroneous understanding of para-54 of order dated 24.04.2019, passed by the Division Bench of this Court in the petition and sought an ad-interim injunctive order dated 12.06.2019, against the answering defendants.

Counter and rejoinder affidavits to the above application have been filed and exchanged between the parties.

4. Learned counsel for the Plaintiff while reiterating the contents of the listed application, its accompanying affidavit as well as rejoinder affidavit has contended that the Defendants predecessor namely, Flt. Lt. (R) Farouk Aziz Effendi fraudulently delayed the execution of the compromise decree dated 04.05.2009 and thereafter, illegally and malafidely shifted his own wrong doings to the decree holders of Suit No.731/2003 to evade the execution of the consent decree. It is further contended that as per compromise decree after issuance of "B" Lease of the subject property in favour of the predecessor of the defendants, the sale deed of the subject property was to be executed by the predecessor of the Defendants. It is also contended that in terms of the compromise the total sale consideration of the suit property was fixed at 1,00,00,000/- (Rupees One Crore) out of which the Defendants in Suit No.731/2003 withdrew Rs.56,89,714/- from the Nazir of this Court. It is also contended that the predecessors of the defendants delayed the matter for 05 years from 04.05.2009 to 31.08.2014 by firstly demanding concessional rates for payment of extra land measuring 72.67 Sq. Yds., then extension of time to pay the amount of extra land and finally withdrew the claim of the extra land on 31.08.2014. It is also urged that for issuance of "B" Lease in favour of Flt. Lt. (R) Aziz Effendi by the DHA the payment of outstanding dues of Rs.2,46,228/- was the responsibility of the defendant, however, the said amount was paid by the Plaintiff to the DHA through pay orders. It is further urged that in the compromise decree, physical possession of the plaintiff over the suit property was admitted. It is contended that the Defendants are illegally claiming right in the suit property though the predecessor of the defendants under the said compromise decree had agreed that after

getting the “B” Lease executed and registered in his name he shall execute the sale deed of the subject property. It has been argued that the Plaintiff’s right to have the possession of the subject property is protected under Section 53-A of the Transfer of Property Act. Learned counsel lastly contended that he has set up a prima facie case and the balance of inconvenience also lies in favour of his client for grant of injunction and the plaintiff will be gravely prejudiced and shall be suffered irreparable harm unless instant application is granted. Learned counsel in support of his contention has relied upon the cases of *Taj Wali Shah v. Bakhti Zaman* [2019 SCMR 84], *Muhammad Nasim Siddiqui v. Ali Akbar* [PLD 2018 Sindh 703], *Syed Hakeem Shah (deceased) through LRs and others v. Muhammad Idrees and others* [2017 SCMR 316], and *Muhammad Matin v. Mrs. Dino Manekji Chinoy and others* [PLD 1983 Karachi 387].

5. On the other hand, learned counsel for the Defendants while reiterating the contents of his Counter Affidavit has contended that the Plaintiff is illegally and unlawfully occupying the suit property by misconstruing and misinterpreting the order dated 24.04.2019, passed in the said petition and abusing the mechanism provided under Section 53-A of the Transfer of Property Act. It is further contended that instant suit has been maliciously instituted to cause permanent injury to the proprietary and inheritance rights of the defendants by usurping the suit property. It is also contended that instant application as well as present suit is nothing but an abuse of process of this Court as such the same are liable to be dismissed with special costs. It is further contended that the entire premise of filing the present suit and seeking injunctive orders through instant application is to facilitate to the plaintiff in her unlawful claim over the suit property in sheer disregard of order dated 24.04.2019, passed by learned Division Bench of this Court in CP No.D-5585 of 2016. It is also contended that the Plaintiff has approached to this Court with unclean hands seeking relief beyond the purview of the listed application as a money claim by its very nature cannot be irreparable. Lastly, it is contended that the plaintiff has neither prima facie arguable case nor the balance of convenience or inconvenience lies in her favour. On the contrary, the balance of inconvenience lies in favour of the defendants and unless instant

application is dismissed, the defendants shall be seriously prejudiced and shall be suffered irreparable loss and injury. Learned counsel in support of his contention has relied upon the cases of *Mst. Hussain Bibi v. Siraj Din* [PLD 1998 Lahore 548], *Messrs Maxim Advertising Company (Pvt.) Ltd. v. Province of Sindh and 4 others* [2007 MLD 2019], *Syed Yousuf Husain Shirazi v. Pakistan Defence Officers Housing Authority and 2 others* [2010 MLD 1267], *Peer Ahmad Yar v. Muhammad Jamal* [1989 MLD 4168], *Tariq Gul v. Zarar-ul-Yamin Khan* [2019 CLC 566], *Port Qasim Authority v. Industrial Management and Investment Co. Ltd., and 2 others* [2020 CLC 721], *Peer Dil and others v. Dad Muhammad* [2009 SCMR 1268], *Khalid Mehmood v. Shabbir Ahmed and another* [2017 MLD 1497] *Touqeer Ahmed v. Muhammad Younus Lakhani and others* [SBLR 2020 Sindh 2010], *Mst. Shirinbai v. Saleem Jamal and 7 others* [PLD 1970 Karachi 657] and *Hamood Mehmood v. Mst. Shabana Ishaque and others* [2017 SCMR 2022].

6. Heard learned counsel for the parties, perused the record and the law relied upon by both the parties.

Since, at this stage, the interlocutory application is to be decided as such, only those facts, which are not disputed would be considered. From the record, it appears that on 04.05.2009 a compromise decree was passed in suit No. 731 of 2003, filed by Mst. Amtul Rehman, the predecessor of the present plaintiff against Flt. Lt. Farouk Aziz Affendi, the predecessor of the present defendants and the DHA, inter alia, for specific performance of the agreement to sell in respect of suit property. The relevant terms of the compromise agreement mentioned in the decree, for the sake of ready reference are reproduced as under:

- a) That the defendant No.1 has agreed to transfer plot No. 6-B, Central Avenue, Phase II, Pakistan Defence Officers' Housing Authority (DHA) Karachi measuring 1,200 Sq. Yds. Or thereabout along with construction thereon, hereinafter referred to as "Suit Property" in favour of plaintiff No. 1 namely Mubarak Ail Shah or his nominee by fulfilling the part of contract by the defendant No. 1 as required by the plaintiff No. 1 and the DHA in accordance with procedure and formalities prescribed by DHA for such purpose.
- b) That "A" Lease of the suit property has already been issued by DHA. However "B" Lease has not been executed so far. The defendant No. 1 undertakes to get the "B" Lease Executed and registered in his name upon compliance of all requisite formalities as required by DHA or any other department / authority.

- c) That after getting the 'B' Lease executed and registered in his name the defendant No. 1 shall fully cooperate with the plaintiff No. 1 for the purpose of registering the conveyance deed and for the transfer of the suit property by the DHA. For such purposes the defendant No. 1 undertakes to sign, execute all and every documents as required and to appear in person in the DHA and before concerned Sub-Registrar, for signing and executing any transfer documents, affidavit etc. as and when required for the transfer of suit property in favour of the plaintiff No.1 his nominee.
- d)
- e) That in turn the plaintiff No.1 has agreed to pay a sum of Rs.1,0,00,000/- (Rupees One Crore only) as full and final settlement/price of the suit property to the defendant No.1 in the manner that the amount towards sale proceeds lying with the Nazir of Hon'ble High Court of Sindh at Karachi in the above suit amounting to Rs.56,89,714/- (Rupees fifty six lacs eighty nine thousand seven hundred fourteen only) as on 2nd April 2009 shall be adjusted in the aforesaid the plaintiff No. 1 shall pay to the defendant No.1 the remaining amount of Rs.43,10,286/- (Rupees forty three lacs ten thousand eighty six only) at the time of registration of the Conveyance deed of the suit property by defendant No.1 in favour of plaintiff No.1 (Mubarak Ali Shah) or his nominee.
- f)
- g) That in case after compromise and orders passed thereon by this Hon'ble Court the defendant No.1 fails to appear, sign, execute the requisite documents and fails to appear before DHA and Sub-Registrar for execution and registration of "B" Lease thereafter for registration Conveyance Deed before Sub-Registration and then in DHA for transfer of the suit property in favour of plaintiff or his nominee, the Nazir of this Hon'ble Court shall appear, sing and execute all such required transfer documents / deeds, "B" lease and to appear before the Sub-Registration and in DHA for the purpose of execution and registration of "B" lease and for registration Lease and for registration of Conveyance and for transfer of the suit property by DHA / Cantonment Board in favour of plaintiff No. 1 or his nominee.
- h) That the suit property is already in possession of the plaintiffs.
- i)
- j) That henceforth the plaintiffs and defendant No.1 do not have any claim of whatsoever nature against each other subject to the aforesaid agreed terms whereby all claims against each other are settled by the parties in respect of the suit property.
- k)
- l) The parties have agreed to get the above suit decreed in the above terms with no order as to costs.

[emphases supplied]

From perusal of the above, it appears that agreement is reciprocal one as the parties owed certain obligations against each other.

7. From the record, it also appears that the predecessor of the defendant could not obtain the 'B' lease of the suit property and as such apparently conveyance deed in terms of the compromise decree could not be executed, however, since the matter relating to the execution of the said compromise decree is sub judice before the Honourable Supreme Court of Pakistan as such any comments in this regard would not only be inappropriate but would prejudice any of the parties in maintaining the party's action or defense upon merits. Nevertheless, since the factum of part payment of Rs.56,89,714/- out of Rs.10,000,000/- (final settled price of the suit property), received by the predecessor of the present defendants as well as the physical possession of the plaintiff over the suit property under the compromise decree are not disputed, as such a prima facie case appears to have been made out, and the balance of convenience, in my opinion, lies in favour of the plaintiff for maintaining such physical possession pending final adjudication of the present suit on merits, when the questions raised by the Defendants impugning the plaintiff's rights, interests and possession, could properly be determined. In the meanwhile, the interest of the plaintiff as well as the Defendants can best be preserved by maintaining status quo till decision of the suit.

8. In the circumstances, CMA No.8595/2019 is allowed with the directions to the parties to maintain status quo in respect of the suit property till final decision of the case. It is clarified that the observations made above are tentative in nature and may not influence the final determination of the case.

JUDGE

Karachi
Dated : **24.12.2021**

*Jamil**