

Order Sheet
IN THE HIGH COURT OF SINDH, KARACHI

Suit No.1331/2017

Date	Order with signature of Judge
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FOR HEARING OF

1. CMA 14922/2021 permission of deposit
2. CMA 8526/2017 injunction
3. CMA 13545/2018
4. CMA 4948/2021 rejection
5. CMA 5511/2021
6. For Examination of Parties /Settlement Of Issues

Date of Hg: 11.11.2021

Qazi Hifzur Rehman, Advocate for the Plaintiffs.
Mr. Abdul Qadir Khan, Advocate for the Defendants.

ARSHAD HUSSIN KHAN, J.- This order will dispose of three of the listed Applications viz: **CMA 14922/2021**, under Section 151 CPC filed by the Plaintiff seeking permission of this Court to deposit the balance amount with Nazir of this Court, **CMA 8526/2017**, under Order XXXIX Rules 1 & 2 CPC filed by the plaintiff seeking temporary injunction and **CMA 4948/2021**, under Order VII Rule 11 read with Section 151 CPC, filed by Defendant No.1 seeking rejection of the Plaint.

Briefly the facts essential for disposal of the aforesaid Applications are that the Plaintiff filed the present Suit for Specific Performance of Contract, Damages and Permanent Injunction in respect of the Agreement dated 30th October, 2015, entered into between Mst. Yasmeen Sohail, [Defendant No.2] and Mst. Sufia Nasim [Plaintiff No.1]. It has been stated that Defendant No.1 namely; Muhammad Hasan Khan had purchased the Plot bearing No. B-71, Sector 6-F, Mehran Town, Korangi, Karachi, admeasuring 400 Sq. Yds., [**Suit property**] in the year 2005 from Defendant No.2 [Yasmin Sohail] and Defendant No.2 upon receiving the sale consideration executed registered General Power of Attorney in favour of Defendant No.1, wherein he was also authorized to sell or make any charge upon the above said plot. It has been further stated that on the strength of the said

General Power of Attorney, Defendant No.1 entered into an oral partnership with the Plaintiffs' predecessor [Muhammad Naseem Siddiqui] to raise construction of the suit property. After completion of the construction differences were cropped up between the partners resultantly the plaintiffs' predecessor had filed suit No.1141/2014 before this Court. During pendency of the said case, on 30.20.2015 a compromise/settlement [subject agreement] was arrived at between the parties and pursuant thereto the said suit was withdrawn. It has been further stated that in pursuance of the terms of the said settlement, the share of the present defendants [first party of the agreement] was fixed at Rs.45,48,000/- out of which the predecessor of the plaintiff had paid Rs.25,11,000/- whereas remaining payment of Rs.20,37,000/- plus 75,000/- was to be paid at the time of registration of the sale deed or execution of transfer documents in the name of the second party or the nominee [present plaintiff], however, when the defendants failed to perform their part of obligation despite legal notices, the plaintiff filed the present suit. Along with the case an application bearing CMA No 8526/2017 for interim injunction to restrain the defendants from creating any third party interest as well as illegally dispossessing the plaintiffs from the suit property was also filed. Upon notice of the case, the written statement as well as counter affidavit to the said CMA were filed wherein while denying the allegations levelled in the plaint as well as application they sought dismissal of the suit.

Record shows that on 13.03.2021 defendant No.1 filed the Application [CMA 4948/2021] seeking rejection of the plaint as the plaintiff failed to deposit the balance sale consideration before this Court even after the lapse of three years despite obtaining ex parte ad-interim orders against the defendants. The plaintiff also filed an Application [CMA 14922/2021], seeking permission of this Court to deposit the balance sale consideration with Nazir of this Court. Counter and Rejoinder affidavits on the listed applications have also been filed and exchanged.

Learned counsel for the plaintiffs during course of the arguments while reiterating the contents of his applications has contended that when the defendants, despite lapse of sufficient time, have failed to fulfill their part of contractual obligation under

settlement agreement dated 30.10.2015, the plaintiffs filed the present suit, inter alia, for specific performance. It is contended that pursuant to the settlement, the predecessor of the plaintiff paid more than 50% of the settled price and he was put into possession of the suit property whereas remaining amount was to be paid at the time of execution and registration of sale deed, which till date has not been done. It is also contended that the plaintiffs all along were/are ready to fulfill their part of obligations and to pay the balance amount of settled price of the suit property as per the agreement and even otherwise the plaintiffs in order show their readiness to pay the amount has filed the application seeking permission to deposit the same in the Court to which the defendants are showing resistance, which shows malafide on the part of the defendants. It is also argued that the application filed by the defendant for rejection of the plaint is frivolous and misconceived. Lastly, argued that in the interest of justice the applications filed by the plaintiffs may be allowed whereas the defendants' application may be dismissed with cost. Learned counsel in support of his arguments has relied upon the cases of *Mst. Rehmat and others v. Mst. Zubaida Begum and others* [2021 SCMR 1534], *Messrs Kuwait National Real Estate Company (Pvt.) Ltd. and others v. Messrs Educational Excellence Ltd. and another* [2020 SCMR 171] and *Peer Dil and others v. Dad Muhammad* [2009 SCMR 1288].

Conversely, learned counsel for the defendants while reiterating the contents of his application as well as counter affidavits to the applications filed on behalf of the plaintiffs has argued that the plaintiffs filed the present suit for specific performance of the settled agreement, however, they have failed to show their willingness and readiness to pay the balance sale consideration by depositing the same before this Court at the time of filing of present suit. He has further contended that it is mandatory for the person whether plaintiff or defendant who seeks enforcement of the agreement under Specific Relief Act 19877, that on the first appearance before the Court or on the date of institution of the suit, it shall apply to the Court for getting permission to deposit the balance amount and any omission in respect thereof would entail in dismissal of the suit. It is also contended that the plaintiffs neither in the plaint have shown their willingness to pay the

balance amount nor filed any application along with the suit for seeking permission to deposit the amount. It is also contended that the Plaintiffs' application seeking permission of this Court to deposit the balance amount with the Nazir of this Court is misconceived and not sustainable in law as the same has been filed after a delay of more than 04 years from the date of institution of the suit and obtaining an ad-interim restraining orders, as such filing of the said application is nothing but an attempt to cover up inordinate delay on their part. Lastly, he has contended that the Plaintiffs are not entitled for the relief as claimed and their application may be allowed and plaint may be rejected. In support of his arguments, learned counsel has relied upon the case of *Hamood Mehmood v. Mst. Shabana Ishaque and others* [2017 SCMR 2022].

Heard learned counsel for the parties and perused the material available on the record.

Since, at this stage, the interlocutory applications are to be decided as such, only those facts, which are not disputed would be considered. From the record, it appears that the plaintiffs through instant proceedings have sought specific performance of an agreement of settlement and transfer of the suit property, which was entered into between the Defendants and the Plaintiffs on 30.10.2015. The terms of the agreement, for the sake of ready reference are reproduced as under:

- “1. That the second party has agreed to pay the share of the first Party in the building totaling Rs.45,48,000/- (Rupees Forty Five Lacs and forty eight thousands only) out of which they have paid Rs.25,11,000/- (Rupees Twenty five lacs and eleven thousands only) to the first party as partial payment while the balance amount of Rs.20,37,000/- (Rupees Twenty Lacs and thirty seven thousands only) + Rs.75,000/- as additional charges will be paid at the time of registration of sale deed or execution of transfer in the name of second party or their nominee and the original documents will be handed over to the second party at the time of final payment.
2. That the first party has totally handed over the possession of the whole building to the second party and now from this date the second party have the exclusive right to manage, rent out or sell the said property according to their own wishes and requirement to the which first party will have no objection.
3. That the first party shall transfer the above property in the name of the second party or their nominee as they wish on

the cost of registration to be paid by the second party within a period of two months while all the dues till the date of this agreement will be paid by the first party.

4. That in view of above settlement agreement the second party will withdraw their above suit No.1141/2014 from the court without any condition.”

From perusal of the above, it appears that the agreement is based on reciprocal promises as the parties owed certain obligations against each other and, at this stage, any finding/observation as to who was at fault for non-performance of the agreement may prejudice the case of any of the parties on merits. However, since the factum of part-payment of Rs.25,11,000/- out of Rs.45,48,000/- (total settled price), received by the present defendants as well as the physical possession of the plaintiff over the suit property under the agreement 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 plaintiffs 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.

Insofar as the question of consequence of non-deposit of balance sale consideration by the plaintiffs before this Court at the time of filing of the suit is concerned, learned counsel for the defendants has mainly relied upon the case of *Hamood Mehmood* (supra) wherein the Hon'ble Supreme Court held that non deposit of balance amount before the court either on the date of institution of a case or on the first appearance before the court would entail in dismissal of suit/case.

The case of *Hamood Mehmood* (supra) has been explicitly discussed by the Honourable Supreme Court of Pakistan in its very recent judgment in the case of *Muhammad Asif Awan v. Dawood Khan and others* [2021 SCMR 1270], wherein, inter alia, it has been held as under:

“ 11. At this juncture, it is important to point out that the case of *Hamood Mehmood* (supra) is a leave refusing order and cannot be held to be an enunciation of law by this Court as it has been settled by this Court in number of cases that an

order granting and/or refusing leave is not a judgment which decides a question of law and therefore, it should not be followed necessarily and imperatively. In the referred case, neither any assistance was provided by the bar nor any law was discussed and consequently such order cannot be held to be a judgment of this Court deciding a matter finally or laying a principle upon the basis of law. Reference can readily be made to the case of *Haji Farmanullah v. Latifur Rehman* (2015 SCMR 1708), *Rana Tanveer Khan v. Naseeruddin and others* (2015 SCMR 1401), *Muhammad Tariq Badar and others v. National Bank of Pakistan and others* (2013 SCMR 314) and *Khairullah v. Sultan Muhammad* (1997 SCMR 906).”

[Emphases supplied]

In view of the above, the case of *Hamood Mehmood* (supra) is not required to be considered. Even otherwise, in the present case, since the agreement, which is sought to be enforced is based on reciprocal promises and the factum of payment of more than 50% part sale consideration by the plaintiffs has not been disputed as such non-deposit of remaining balance consideration before this Court either at the time of institution of the suit or at the first hearing of the case would not render the plaint of this suit to be rejected and that too especially when the plaintiffs through their application (CMA No. 14922/2021) seek permission to deposit the balance sale consideration before this Court.

In the wake of above discussion, the listed interlocutory applications are disposed of as under:-

Application at S.No.1 [CMA 14922/2021], under Section 151 CPC, filed by the Plaintiff seeking permission of this Court to deposit the balance amount with Nazir of this Court is allowed. Without prejudice to the case of any of the parties on merits, the plaintiff is directed to deposit the balance payment under the said agreement with Nazir of this Court within fifteen (15) days’ time from the date of this order. Once the said amount is deposited, the same shall be invested in some profit bearing scheme and the fate of the said payment and profit accrue thereon shall be decided at the time of final determination of the case.

Application at S.No.2 [CMA 8526/2017], under Order XXXIX Rules 1 & 2 CPC filed by the plaintiffs for temporary injunction is allowed as prayed subject to deposit of the balance payment in the above terms.

Application at S.No.4 [CMA 4948/2021], under Order VII Rule 11 read with Section 151 CPC, filed by Defendant No.1 seeking rejection of the Plaint is dismissed.

Needless to mention here that the observations made hereinabove are tentative in nature and may not influence the final determination of the case.

JUDGE

Karachi;
Dated: 10.01.2022.

Jamil-*