

IN THE HIGH COURT OF SINDH KARACHI

Suit No. 1710 of 2018

[Tahera Iqbal Kazi and another versus Mrs. Naseem Abid Khan and others]

Plaintiffs : Mrs. Tahera Iqbal Kazi and another,
through Rehan Kayani, Advocate.

Defendant No.1 : Mrs. Naseem Abid Khan through M/s.
Amna Warsi and Ayesha Warsi,
Advocates.

Defendants 2&3 : Nemo.

Date of hearing : 08-02-2021 & 18-02-2021

Date of decision : 07.05.2021

ORDER

Adnan Iqbal Chaudhry J. - By CMA No. 12658/2018 under Order XXXIX Rules 1 and 2 CPC, the Plaintiffs seek a temporary injunction against the Defendant No.1 from creating third-party interest in property No. 108/1, Khayaban-e-Badar, Phase-V, DHA, Karachi (suit property). Subsequently, the Plaintiffs also moved CMA No. 1763/2020 under Order XII Rule 6 CPC praying for judgment on admission. Since underlying facts are common, this order decides both applications.

2. The suit is for specific performance of contract dated 07.03.2018 whereby the Defendant No.1 agreed to sell the suit property to the Plaintiffs for a sale consideration of Rs. 87,000,000/-. An advance of Rs. 8,750,000/- was paid by the Plaintiffs, duly acknowledged, and the balance was payable on or before 27.04.2018 whereupon the Defendant No.1 was to execute a conveyance deed in favor of the Plaintiffs.

3. It is the case of the Plaintiffs that by 27.04.2018, the date fixed in the contract for performance, the Plaintiffs had paid Rs. 25,000,000/- to the Defendant No.1, but were unable to pay the

remaining sale consideration as proceeds expected from the sale of their own property had been delayed; that the Defendant No.1 orally agreed to extend the date to 30.05.2018 by which time the Plaintiffs were ready with the balance sale consideration, but the Defendant No.1 said that she required payment of the balance amount to nominees whose names she would be able to communicate by 05.08.2018; that all along, the Defendant No.1 accepted part payments from the Plaintiffs making the total amount paid as Rs. 38,050,000/- and the balance sale consideration payable came to Rs. 48,950,000/-; that surprisingly, by notice dated 12.07.2018 the estate agent of the Defendant No.1 called upon the Plaintiffs to make the balance payment by 16.07.2018 failing which the contract would be forfeit; that when the Defendant No.1 was confronted with such notice and offered the balance payment, she stated that the estate agent had acted without authorization and under a mistake, and that as already agreed the Defendant No.1 would inform the Plaintiffs of the names of the nominees by 05.08.2018; that on 20.07.2018 the Plaintiff received another notice from the estate agent of the Defendant No.1 contending that the sale agreement stood terminated and the amount already paid had been forfeited; that again the Defendant No.1 assured the Plaintiffs that the notice by the estate agent was without authorization; that on 04.08.2018 when the Defendant No.1 sought more time, the Plaintiffs sent legal notice dated 07.08.2018 calling upon the Defendant No.1 to perform the sale agreement; that in reply dated 17-08-2018 the Defendant No.1 relied on the notices sent by her estate agent to the Plaintiffs to contend that the sale agreement had already been terminated; hence suit was filed on 10-09-2018.

4. By an interim order dated 10-09-2018 passed in this suit, the Defendant No.1 was restrained from creating third-party interest in the suit property subject to the Plaintiffs depositing in Court the balance sale consideration of Rs. 48,950,000/-, which deposit was made by the Plaintiffs on 15-09-2018.

5. The Defendant No.1 admits the sale agreement and receipt of the advance of Rs. 8,750,000/-, but denies receipt of any further payment from the Plaintiffs. Per the written statement, all other receipts produced by the Plaintiff are forged and fabricated; that the date of 27.04.2018 fixed for performance under the sale agreement was never extended; that time was of the essence of the contract within the meaning of section 55 of the Contract Act, 1872; that when the Plaintiffs failed to make payment within the date fixed, the estate agent of the Defendant No.1 sent notice dated 12.07.2018 calling upon the Plaintiffs to make payment, and thereafter, when the Plaintiffs did not, the sale agreement was terminated and the amount received was forfeited vide the estate agent's notice dated 19.07.2018.

6. Heard the learned counsel and perused the record.

7. Though the Plaintiffs accept that they were not in a position to pay the balance sale consideration by 27.04.2018, the date fixed in the sale agreement, it is their case that said date was extended to 30-05-2018 by an oral agreement, which, per learned counsel for the Plaintiffs, is evidenced by the fact that the Defendant No.1 accepted partial payments from the Plaintiffs even after 27.04.2018. Per the Plaintiffs, on the date so extended, the Plaintiffs were ready with the balance sale consideration, but then it was the Defendant No.1 who avoided the contract.

8. On the other hand, the Defendant No.1 denies receipt of any payment apart from the advance of Rs. 8,750,000/-. Ms. Amna Warsi, learned counsel for the Defendant No.1 submitted that all subsequent receipts produced by the Plaintiff are forged and fabricated; and that most of the cheques relied upon by the Plaintiffs are cash cheques not in the name of the Defendant No.1 and have not been drawn on the bank account of the Plaintiffs. Learned counsel further submitted that though time was of the essence of the contract, the Defendant No.1 still gave an opportunity to the

Plaintiffs to make payment by sending notice dated 12.07.2018 through her estate agent, but still the Plaintiffs did not comply.

9. Notably, the notice dated 12.07.2018 sent to the Plaintiffs by the estate agent of the Defendant No.1 acknowledged receipt of a sum of Rs. 38,050,000/- when it called upon the Plaintiffs to pay the balance sale consideration of Rs. 48,950,000/-. The relevant excerpt from said notice is as follows:

“However. You as buyer fail to honour commitment to make full payment by or before 27th of April, 2018. It is further stated that till date of this intimation you have not made the remaining payment of Rs.48,950,000/-.

In case you fail to pay the said amount of Rs.48,950,000/- by or before July, 16, 2018 all the amount paid will stand forfeited as per your undertaking without any further notice and the Seller will stand absolved of its obligations under the said Agreement to Sell.”

10. The above mentioned notice dated 12-07-2018 sent by the estate agent on behalf of the Defendant No.1 is owned, rather relied upon by the Defendant No.1 in her written statement. Therefore, *prima facie* the estate agent's notice belies the contention of the Defendant No.1 that she did not receive any payment except the advance of Rs. 8,750,000/-. The Plaintiffs have also produced receipts *prima facie* signed by the Defendant No.1 which acknowledge receipt of Rs. 38,050,000/- from the Plaintiffs and stipulate that the balance sale consideration stood at Rs. 48,950,000/-. These receipts also show that part payments towards the sale consideration were accepted by the Defendant No.1 after 27.04.2018, and thus there is force in the Plaintiffs' contention that the date for paying the balance sale consideration was extended beyond 27.04.2018. Given said receipts, the argument on behalf of the Defendant No.1 that the underlying cheques were of cash and not drawn on the bank account of the Plaintiffs, does not inspire much confidence at least at this preliminary stage of the case. The balance sale consideration of Rs. 48,950,000/- was then deposited by the Plaintiffs in Court on 15-09-2018 promptly upon filing suit. Therefore, for the purposes of the temporary injunction prayed, the Plaintiffs have made out a *prima facie* case and the other two

conditions viz., the balance of convenience and the apprehension of irreparable loss are also met.

11. The Plaintiffs' application for a decree under Order XII Rule 6 CPC is also premised on the notice dated 12.07.2018 received by them from the estate agent of the Defendant No.1, reproduced in para 9 above. Mr. Rehan Kyani, learned counsel for the Plaintiffs submitted that since the estate agent's notice dated 12.07.2018 is owned and relied upon by the Defendant No.1 in her written statement, that constitutes an admission by her of the fact that only Rs. 48,950,000/- remained to be paid towards the agreed sale consideration, which amount has already been deposited by the Plaintiffs in Court, and hence the suit ought to be decreed under Order XII Rule 6 CPC. As regards the categorical denial in the written statement that no sum over Rs. 8,750,000/- was received by the Defendant No.1, Mr. Kyani submitted that it was obvious that the same was a frivolous denial. However, even if said denial in the written statement were to be ignored, the admission is at best of the amount received and the balance sale consideration outstanding, and the plea in the written statement that time for performance of the contract was of the essence, still remains to be considered.

12. Though the Plaintiffs make a case for the grant of a temporary injunction, their application for a decree under Order XII Rule 6 CPC has to meet an altogether different test. It is settled law that to attract Order XII Rule 6 CPC, an admission should be specific, clear, unambiguous and categorical; that the Court is duty bound to examine the written statement to ascertain the nature of the admission; and even where an admission is made, to pass or not to pass a decree thereupon is a discretion of the Court which is to be exercised on judicial principles.¹

13. The plea by the Defendant No.1 that time for performance of the contract was of the essence is to say that on the failure of the

¹ See *Macdonald Layton & Company Pakistan Ltd. v. Uzin Export Import Foreign Trade Co.* (1996 SCMR 696); and *Amir Bibi v. Muhammad Khursheed* (2003 SCMR 1261).

Plaintiffs to make payment within the date fixed, the Defendant No.1 was entitled to treat the contract voidable under the 1st part of section 55 of the Contract Act, 1872. Mr. Kyani, learned counsel for the Plaintiffs submitted that once the Defendant No.1 had accepted part payments after 27.04.2018, that showed that said date had been extended, and then in terms of the 3rd part of section 55 of the Contract Act it was implied that time was not of the essence. That submission of Mr. Kyani would have been worthwhile had it been the Plaintiffs' case that they paid the entire sale consideration to the Defendant No.1. Admittedly, when the Plaintiffs received the warning notice dated 12-07-2018 from the estate agent of the Defendant No.1, an amount of Rs. 48,950,000/- was outstanding as the balance sale consideration, and even though such notice had called upon the Plaintiffs to make payment by 16.07.2018, they still waited to do so. Now, whether the sale agreement had intended that time for performance would be of the essence, and if so, whether the Plaintiffs were duped by the Defendant No.1 to hold onto the balance payment, are matters for evidence. It has been held by the Supreme Court in *Amina Bibi v. Mudassar Aziz* (PLD 2003 SC 430) that the intention that time was of the essence of the contract has to be inferred from what passed between the parties before, and not after the contract is made; and that equity will not assist where there has been undue delay on the part of the party who has been given reasonable notice that he must complete the contract within a definite time.

14. To conclude: while the Plaintiffs have made out a case for the grant of a temporary injunction, the prayer for judgment on admission cannot be granted at this stage of the case. Resultantly, CMA No. 12658/2018 under Order XXXIX Rules 1 and 2 CPC is allowed as prayed, while CMA No.1763/2020 under Order XII Rule 6 CPC is dismissed.

JUDGE

Karachi
Dated: 07-05-2021