

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

**Suit No. 1399 of 2017**

Date	Order with signature of Judge
------	-------------------------------

- For orders as to maintainability of the Suit in view of orders dated 09.11.2020 and 27.01.2021 :
- For examination of parties / settlement of issues :

**08.04.2021 :**

Plaintiff : Nasir Mirza, through Mr. Aftab Ahmed advocate.

Defendant No.1 : Syed Muzaffar Ejaz, through Ms. Sofia Saeed Shah advocate.

Defendant No.2 : Sub-Registrar, Jamshed Town, Karachi, called absent.

Defendant No.3 : PECH Society, through its Administrator, called absent.

**ORDER**

**NADEEM AKHTAR, J.** – Through the instant Suit for specific performance of contract and permanent injunction, the plaintiff has prayed that defendant No.1 be directed to execute a sale deed in his favour in respect of the suit property viz. Plot No.63-A, Block 2, P.E.C.H. Society, Karachi, measuring 400 sq. yds., with a house constructed thereon, and the said sale deed be ordered to be registered in his name with the Sub-Registrar concerned. Consequential relief of injunction has also been sought by the plaintiff against the defendant in relation to the suit property. It is the case of the plaintiff that the parties entered into a verbal agreement whereby the defendant agreed to sell the suit property to him in consideration of Rs.20.000 million, out of which an amount of only Rs.100,000.00 was paid by him to the defendant as “*token money*” vide cheque dated 05.10.2011 ; it was agreed that the plaintiff will arrange completion of the title documents of the suit property, which he did by spending an amount of Rs.1,000,000.00 ; despite his repeated requests and demands, the defendant did not take any step for the execution and registration of the sale deed in his favour ; and, thus the defendant failed to perform his agreed part of the contract.

2. Along with the Suit, an injunction application bearing CMA No. 8860 of 2017 was also filed by the plaintiff which was dismissed on 26.09.2019 for non-prosecution. On 09.11.2020, it was pointed out to the Court by learned counsel for the defendant that the balance sale consideration had not been deposited in Court by the plaintiff. On that date, it was observed by the Court that the deposit of balance sale consideration is a mandatory requirement in view of Messrs

Kuwait National Real Estate Company (Pvt.) Ltd. and others V/S Messrs Educational Excellence Ltd. and another, 2020 SCMR 171. Accordingly, the plaintiff's counsel was directed vide order dated 09.11.2020 to argue the question of maintainability of the Suit in the light of the above authority, which direction was again given vide order dated 27.01.2021. On 09.03.2021, the plaintiff's counsel requested for time to deposit the balance sale consideration, which was allowed vide order dated 09.03.2021 as an indulgence, however, with the observation that in case the plaintiff fails to deposit the balance sale consideration with the Nazir of this Court within one week, the Suit shall be deemed to have been dismissed. As the plaintiff failed to comply with the above order, an application for urgent hearing was filed by the defendant which was taken up on 07.04.2021 when the following order was passed :

*“Learned counsel for defendant No.1 points out that the plaintiff has not addressed the question of maintainability of this Suit in terms of order dated 09.11.2020 and has also not deposited the balance sale consideration in terms of order dated 09.03.2021. According to her, the instant Suit is liable to be dismissed in view of the law laid down by the Hon’ble Supreme Court in Hamood Mahmood V/S Shabana Ishaque and others 2017 SCMR 2022. Let this matter be fixed on 08.04.2021 at 11:00 a.m. after notice to the plaintiff’s counsel. ....”*

3. The above mentioned orders passed in this Suit from time to time show that the plaintiff's counsel was specifically directed to satisfy the Court regarding maintainability of the Suit in view of the above-cited authorities, and sufficient opportunity was granted to him to prepare himself in order to assist the Court. Instead of addressing the question of maintainability, he has requested that further time be granted to the plaintiff to deposit the balance sale consideration. No explanation whatsoever has been offered by him for not depositing the amount despite specific direction by this Court nor has any application been filed by the plaintiff seeking further time for depositing the amount. It may be noted that in paragraph 9 of the plaint, the plaintiff has stated that he was and is still ready and willing to perform his contractual obligations. However, at the time of institution of the Suit he did not file any application seeking permission of this Court to deposit the balance sale consideration, and even up till now he has not filed any application for this purpose. The verbal request to deposit the said amount in Court was made on behalf of the plaintiff for the first time on 09.03.2021 and that too after he was put on notice vide order dated 09.11.2020 to satisfy the Court regarding maintainability of this Suit in view of his said default. Moreover, despite the indulgence shown by this Court, he failed to deposit the amount within the time granted to him at his request.

4. It is important to note that the readiness and willingness by a party to a contract to perform its agreed part of the contract is a condition precedent for

that party for instituting a Suit for specific performance of such contract under the Specific Relief Act, 1877, against the party committing breach of the contract. Such readiness and willingness must be genuine, real and meaningful, and not merely a statement without any meaning and intention as there is a vast difference between the capability or ability to perform the agreed part of the contract, and the readiness and willingness to do so. A party may be fully capable and able to fulfill its obligation under the contract, and yet it may not be ready or willing to do so. The main object and essence of this condition precedent in a Suit for specific performance, as I understand, is to ensure that specific performance is sought only by such party to the contract who is serious, capable, ready and willing to perform its agreed or remaining, as the case may be, part of the contract despite the fact that the other party has committed breach thereof ; and, to discourage such persons who are not serious, capable, ready and or willing to perform their agreed / remaining part of the contract and who are interested only in dragging the other party in unnecessary litigation in order to pressurize them. It must always be kept in mind that specific performance cannot be claimed as a matter of right, and the grant of such relief is purely discretionary which depends upon the facts and circumstances of each case.

5. My above view is fortified by Hamood Mehmood V/S Mst. Shabana Ishaque and others, **2017 SCMR 2022**, wherein it was held by the Hon'ble Supreme Court that it is mandatory for the person, whether plaintiff or defendant, who seeks enforcement of an agreement under the Specific Relief Act, 1877, that on the first appearance before the Court or on the date of institution of the Suit, they shall apply to the Court for permission to deposit the balance amount, and any contumacious / omission in this regard would entail in dismissal of the Suit or decretal of the Suit, if it is filed by the other side. As noted above, in the instant Suit the plaintiff not only failed to apply for permission to deposit the balance amount in Court, but also failed to deposit the said amount despite specific direction by this Court. The view is further fortified by a recent pronouncement viz. Messrs Kuwait National Real Estate Company (Pvt.) Ltd. supra, wherein the Hon'ble Supreme Court was pleased to hold that it is now well-settled that a party seeking specific performance of an agreement to sell is essentially required to deposit the sale consideration in Court ; in fact, by making such deposit the plaintiff demonstrates its capability, readiness and willingness to perform its agreed part of the contract, which is an essential pre-requisite to seek specific performance of a contract ; and, failure of a plaintiff to meet the said essential requirement disentitles him to the relief of specific performance, which undoubtedly is a discretionary relief. In the above context, I may also refer to Allah Ditta V/S Bashir Ahmad, **1997 SCMR 181**, and Haji

Abdul Hameed Khan V/S Ghulam Rabbani, 2003 SCMR 953, wherein the order of dismissal of the Suit for specific performance passed by the trial Court due to the plaintiff's failure in depositing the balance sale consideration in Court, was upheld the Hon'ble Supreme Court.

6. In a Suit for specific performance, 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 serious, capable, ready and willing to perform his agreed part of the contract. Such readiness and willingness of the plaintiff is the essence of and a condition precedent for seeking specific performance of contract, and in the absence thereof, the equitable and discretionary relief of specific performance cannot be granted. The seriousness, capability, readiness and willingness to perform its agreed part of the contract, being the condition precedent for seeking specific performance, can be judged from the conduct of the party seeking such relief. In the instant case, the conduct of the plaintiff, from the very inception of the Suit, does not reflect that he was/is serious, capable, ready and or willing to perform his agreed part of the contract. He filed this Suit after admittedly paying Rs.100,000.00 i.e. only 0.5% amount of the agreed sale consideration of Rs.20,000,000.00. His conduct and the reluctance on his part to deposit the balance sale consideration despite the Court's order undoubtedly reflects his deliberate and intentional unwillingness to perform his agreed part of the contract.

7. It was contended on behalf of the plaintiff that the above authorities of the Hon'ble Supreme Court cannot be applied in the instant case as this Court, and even this Bench, has granted time in many cases to deposit the balance sale consideration in Court. The above contention is misconceived and misplaced as time was granted in the said cases in view of the request made by the plaintiffs therein on the first date of appearance, and there was no default on their part in complying with the direction of this Court to deposit the amount in Court. Whereas, in the instant case, the plaintiff admittedly failed not only in making any such request on the first date of appearance, but also failed to deposit the amount despite the order of this Court. Thus, the Suit has to be dismissed because of the plaintiff's failure in making such request or deposit on the first date of appearance, as held by the Hon'ble Supreme Court in Hamood Mehmood supra ; and, also in view of his failure to deposit the amount despite the order of this Court which is an essential pre-requisite to seek specific performance of a contract as held by the Hon'ble Supreme Court in Messrs Kuwait National Real Estate Company supra.

8. In view of the above discussion, particularly the law laid down by the Hon'ble Supreme Court in the above-cited authorities, this Suit for specific performance is liable to be dismissed with special compensatory costs to defendant No.1 who has been dragged into this uncalled for litigation by the plaintiff due to which defendant No.1 was unable to enjoy and exercise his valuable proprietary rights in respect of his own property for a long period of four (04) years.

Foregoing are the reasons of the short order announced by me on 08.04.2021 whereby this Suit was dismissed with costs of Rs.100,000.00 (Rupees one hundred thousand only) to be paid by the plaintiff to defendant No.1 within thirty (30) days.

---

J U D G E