

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.315 of 2007

[Syed Mazahir Hussain Naqviv.....M/s. Rofi Builders & Developers & another]

Date of Hearing : 22.10.2021
Date of Decision : 18.03.2022
Plaintiff : Mr. Mahmood Hussain, Advocate.
Defendant : Nemo.

JUDGMENT

Zulfiqar Ahmad Khan, J:-This lawsuit has been brought forward seeking specific performance of a contract, possession of the suit property as well as seeks injunction against the defendants.

2. Quintessentially, facts as described in the plaint are that the plaintiff booked a Bungalow bearing No. 35, measuring 200 sq. yards in a project of defendant No.1 for the total sale consideration of Rs. 27,45,000/-. Plaintiff alleged in his pleadings that he paid installments, against which acknowledgment receipts were issued by the defendant No.1, but abruptly the said defendant through its letter dated 01st August, 2005 cancelled the said booking which lead the plaintiff to send a legal notice to the defendant No.1 alongwith a cheque of Rs. 2,42,000/- which cheque was accepted by the defendant No.1. It is further averred in the plaint that as the time went by, the plaintiff made additional payments and timely requests to the said defendant to complete construction of the suit property, but all such efforts remained in vain. Thereafter, plaintiff came to know that the defendant No.1 had allotted the suit property in the name of defendant No.2 and having come to know about this, the plaintiff filed the present suit beseeching as follows:-

- (a) Pass Judgment and Decree against the defendant for specific performance of the contract by completing the construction, directing the defendant to execute proper deed of conveyance in favour of the plaintiff in respect of Bungalow No.35, measuring 276 sq. yards in the defendant project known as "Rufi Dream Land" with physical possession thereof, and, on failure on his part, Nazir of this Court to execute the sale deed transferring the aforesaid Bungalow in favour of the plaintiff.
- (b) To cancel the allotment of Bungalow No. 35, situated in Rufi Merry Land, Sector No. 39/A & 39/B, Scheme No. 33, issued in favour of defendant No.2 Muhammad Tahir son of Muhammad Kamil, and restore the allotment earlier issued in favour of plaintiff.
- (c) To permanently restrain the defendant, its agents, servants or any person claiming through or under it from transferring the aforesaid Bungalow by anyone else other than the plaintiff or from inducting any person other than the plaintiff into possession or from creating any third party interest in any manner whatsoever from transferring the aforesaid Bungalow by anyone else other than the plaintiff or from inducting any person other than the plaintiff into possession or from creating any third party interest in any manner whatsoever.
- (d) Cost of the suit.
- (e) Any other relief, in the peculiar circumstances of this case as deemed expedient be also granted.

3. The Defendant No.1 contested the matter by filing a written statement. The defendant No.1 in operating part of the written statement raised objection that the suit was not maintainable and asserted that after cancellation of the provisional allotment of the plaintiff owing to non payment of the outstandings, the defendant No.1 sold out the suit property to defendant No.2 and physical

possession thereof was also handed out to the said new buyer. The defendant No.1 meted out assertions made by the plaintiff in the plaint with sheer denial.

4. The record shows that originally this suit was filed only against the defendant No.1 (Builder), however, with the passage of time, the plaintiff moved an application under order VI Rule 17 CPC for amendment of plaint and vide order dated 04.05.2009, the plaintiff was allowed to amend the plaint, thereafter, the defendant No.2 joined the suit. The defendant No.2 upon having been served by this court, filed his stance through a written statement in which he denied the assertions of the plaintiff. According to him, he is bonafide purchaser of the suit property and that the suit property was allotted to him after furnishing full and final sale consideration and that the suit property was also in his possession.

5. Record reflects that on the application of the plaintiff, this Court vide order dated 24.03.2008 appointed Mr. Dilawar Hussain, Advocate as commissioner for inspection of the suit property and in compliance thereof, the Commissioner inspected the suit property and submitted his report on 04.04.2008 reporting that no utility connection was made available to the suit property, whilst the suit property was not well furnished but the structural work of the suit property was completed.

6. On 19.04.2010, issues were framed and parties were directed to file list of witnesses and documents. Mr. Dilawar Hussain, Advocate was appointed Commissioner for recording evidence. The issues settled by this court are as under:-

1. Whetherone Bungalow No.35 to be constructed on a plot of land situated in Scheme No.33 near Racecourse Karachi on an area or 276 sq. yds was got booked by the plaintiff in the scheme launched by the defendant No.1 under the name and style “Rufi Merry Land - Rufi Dream Land”?
2. Whether the defendant No.1 subsequently added an extra land and was intimated to the plaintiff if so? Whether the plaintiff is liable to pay its cost?
3. Whether the possession of the booked bungalow was to be delivered by the defendant to the plaintiff in the first quarter of 2006?
4. Whether the defendant failed to complete the bungalow till filing of the suit. If so what is its effect?
5. Whether the plaintiff was under obligation to pay the loan amount to the defendant No.1 in case the loan was not arranged by the defendant No.1 from concerned authority?
6. Whether the plaintiff was intimated by the defendant No.1 about the rejection of loan?
7. Whether the remaining outstanding was only Rs.45,000/- on the plaintiff excluding loan amount
8. Whether the defendant No.2 is a bonafide purchaser?
9. Whether despite repeated approaches and payment of nearly the entire agreed amount by the plaintiff the defendant refused to deliver the suit bungalow. If so what is its effect?
10. Whether the suit bungalow has not been transferred to any other person till date and that the documents relied upon by the defendant regarding such alleged transfer are false, maneuvered and bogus, having been created only to defeat the claim of the plaintiff. If so what is its effect?
11. Whether the plaintiff never defaulted in the payment and was never intimated by the defendant about any claim or alleged cancellation of the suit bungalow?
12. What should the decree be?

7. Thrust of the arguments of learned counsel for the plaintiff is that plaintiff is the lawful allottee of the suit property but the defendant No.1 was bent upon to deprive the plaintiff from his right of ownership and that the plaintiff had paid reasonable consideration towards the suit property which has been admitted by the witness of the defendant No.1. He next submits that not only the witness of the defendant No.1 admitted payment of amount as per schedule but also the veracity of acknowledgment Receipts issued by the defendant No.1 strengthens the claim of the plaintiff. He vociferously argued that the defendant No.1 surreptitiously wanted to create third party interest in the suit property by manufacturing the false and fabricated documents and the defendant No.2 is nothing but a landgrabber acting under the guidance and control of the defendant No.1. While drawing attention of the Court to the Commissioner's Report, he showed that the suit property was neither completed by the defendant No.1 as per agreed terms and conditions nor has been allotted the said property to anyone else, but the plaintiff is the lawful allottee of the suit property. He strenuously argued that it has been order of the day that that the innocent citizens are being deprived and a foul is being played with them through such arrangements, therefore, it is prime duty of the Court to save the innocent citizens from the clutches of mafia of like nature. While summing up his submission, learned counsel for the plaintiff pleaded for a decree of the suit as prayed.

8. Despite various notices to the defendants even last resort to the counsel for the defendants, none has affected appearance on behalf of the defendants.

9. Heard the arguments considered the record and evidence. In my considerate view, the Issue No.1 to 4, 7 & 9 and 11 are inextricably linked and based upon the identical evidence of the plaintiff and his witness, therefore, it would be advantageous to discuss the same in one go.

10. The plaintiff to strengthen his case for the issues under discussion introduced on record through his attorney the annexure "C/exhibit P/4" which is a schedule of payment reflecting that the suit property was booked by the plaintiff in the project known as "Rufi Merry Land" launched by the defendant No.1 subject to payment of consideration as per schedule and the said schedule was issued by the defendant No.1 in the name of plaintiff on 05.09.2003. What I perceived from the tenor and sagacity of annexure "C/exhibit P/4" (available in evidence file) that the suit property was allotted to the plaintiff by the defendant No.1. Examination of annexure "C/exhibit P/4" unequivocally demonstrates and confirms that an extra land by 76 sq. yds was also allotted to the plaintiff by the defendant No.1. It is worthwhile to mention here that the plaintiff having natural interest in the suit property paid consideration there against to the defendant No.1 and as the time went by, the defendant No.1 issued payment receipts acknowledging that the plaintiff was paying the installments. The said payment receipts issued by the defendant No.1 were also brought on record in evidence. Exh. "D" to "D-12" (available in evidence file) suggest that the plaintiff paid such sums and the defendant No.1 acknowledged the same by issuing exhibits "D" to "D-12" in the name of plaintiff.

Upon a written plea moved under Order XXVI Rule 1 CPC by the plaintiff wherein he prayed for appointment of the Commissioner to inspect the suit property as the plaintiff vociferously claimed that the defendant No.1 failed to complete construction work of the suit property which was to be completed by 2006, the said plea of the plaintiff was granted vide order dated 24.03.2008. The relevant excerpt of the order is delineated hereunder for completeness of record:-

“...Since the possession of the property in question is disputed it will be appropriate to appoint Commissioner which will be in the interest of both the parties and by such report further encumbrance and handing over the property to someone else will be protected.

In view of the above, this application is allowed. Mr. Dilawar Hussain, Advocate, having office at 195, 1stFoor, Al-Sehat Center, Rafiq Shaheed Road, Off. Shahrah-e-Faisal, Karachi is appointed Commissioner to immediately visit the site and to submit his report with regard to the present possession and condition of the suit property. The learned Commissioner will also require to take measurements of the entire disputed property and will also take photographs of the suit property and to submit the same alongwith his report. The fees of the learned Commissioner will be Rs.10,000/- to be paid by the plaintiff before the inspection. The Commissioner should submit his report within 10 days..”

11. In compliance to the said order, the learned Commissioner submitted his report. According to the learned Commissioner, the suit property was seen to be uninhabitable. To answer the issues under discussion, it would be more advantageous to reproduce the relevant constituent of the report of Commissioner which reads as follows:-

“...That neither windows nor shutters of the doors were fixed either on the ground floor or on the first floor of the bungalow which was clearly visible from outside of the bungalow while standing along the boundary walls. Tiles floor

was made in the ground floor but finishing work was not done. Complete structure of the bungalow was standing with partition walls duly plastered with white colour/paint and wooden frames of the doors and main gate were also fixed. Construction's material is also lying there. **However, the bungalow in question is not habitable.**

The Site Incharge of the Respondents also disclosed that there is neither electricity connection nor gas or water connection in the disputed bungalow. **The bungalow was found to be incomplete in all respects.** A lock was also fixed in the main gate, as such measurements of the disputed bungalow from inside could not be obtained.

At the site there were several other bungalows, for which the Site Incharge disclosed that the said bungalows have also been construction by the Respondents and there is no water, gas or electricity connection in any of those bungalows. **According to the site Incharge none of these bungalow has been allotted to anybody and the same are also inhabitable....”** [emphasis added]

12. It is gleaned from appraisal of the foregoing that the defendant No.1 being a Builder was under an obligation to complete the construction work of the suit property within the stipulated time whilst the foregoing showed that the suit property was not habitable even after filing of the suit.

13. Apart from the above, the general principle for the enforcement of specific performance is that every contract creates not only a right, but also corresponding obligations. Every contract entails an obligation on each of the contracting parties to perform such terms of the contract as covenanted, failing which the other party has right to insist on the actual performance of the contract or to seek satisfaction of his debts accrued on account of the non-performance plea. So as to invoke specific performance, the following aspects are to be considered by courts:-

- (i) there should be a contract enforcement of which is not barred by law;
- (ii) the act to be done is in respect of trust;
- (iii) there is no standard for ascertaining the actual damages caused;
- (iv) pecuniary compensation is not adequate relief and finally that
- (v) the Court deems it fit to exercise its discretion in favour of the plaintiff.

14. Reverting back to the merits of the case, the Commissioner Report unequivocally demonstrated that the construction work of the suit property was neither completed by the defendant No.1 who being Builder was under obligation to complete it, hence he failed to perform his part. The plaintiff through his legal counsel addressed two communications to the defendant No.1 alongwith a cheque of balance sale consideration but the defendant No.1. It is noteworthy that the representative of the defendant No.1 at the time of cross-examination admitted that a cheque of Rs.2,42,000/- was received by the defendant No.1. The said witness further admitted that the plaintiff had paid sum of Rs.16,17,000/- upto March 2006 also to the defendant No.1. In order to reach to just and proper conclusion of the issues under discussion, it would be advantageous to reproduce the respective constituent of the cross-examination of the defendant No.1's witness which reads as under:-

“...It is correct that a cheque of Rs.2,42,000/- was received by the defendant No.1. It is correct that after the above amount, further payment of Rs.1,60,000/- and Rs.2,25,000/- were received on 26/11/2005 and 18/3/2006 by the office of defendant No.1. It is correct to suggest that the plaintiff had paid a sum of Rs.16,17,000/- upto March 2006 to the defendant No.1...”

15. The receipts issued by the defendant No.1 bearing the company name of the defendant No.1 stipulates that the plaintiff has made payment towards the suit property but neither the suit property was handed out to the plaintiff nor the construction work was completed according to the Commissioner's Report. It is settled exposition of law that the vendee seeking specific performance of an agreement to sell is essentially required to demonstrate that he is and was always ready and willing to perform his reciprocal obligation to pay balance sale consideration and in the case at hand the plaintiff addressed communication to the defendant No.1 alongwith a cheque showing his readiness to perform his part of performance which is evident from the record, therefore, the issues under discussion cannot be answered in any way other than in **affirmative**, hence answered as such.

16. The nucleus of Issue Nos. 5 & 6 germane to payment of loan amount subject to intimation to the plaintiff by the defendant No.1. The plaintiff's witness was put to the test of lengthy cross-examination and was thoroughly tested on these issues by the defendant No.1's counsel but the plaintiff's witness loudly and vociferously denied the suggestions put by the defendant's counsel. It would be noteworthy to reproduce hereunder the relevant excerpt of the cross examination of the plaintiff's witness which reads as follows:-

“...It is incorrect to suggest that the loan amount if not arranged by the defendant No.1 the same shall be paid by the plaintiff. Vol. says that the defendant No.1 did not inform that the loan was not arranged and the plaintiff was to pay otherwise

he would have paid it. I did not receive any letters dated 1/2/2005 and 1/5/2006 regarding the payment of loan to be paid by the plaintiff....”

17. The cross-examination of the plaintiff’s witness encapsulated as supra connotes that exhibit D-6 (available in the evidence file) produced by the defendant No.1’s witness which is a letter dated 01.02.2005 was never received by the plaintiff. A glance over the exhibit D/6/A (available in the evidence file) produced by the defendant No.1’s witness which is a courier receipt shows that the said document does not even bear the address of the plaintiff and the said annexure in these untrustworthy circumstances suggests it to be an engineered document, created to fill up the lacuna left by the defendant No.1. It is also worth mentioning that the representative of the defendant No.1 in his cross-examination went on to admit the suggestion of the plaintiff’s counsel that (exhibit D/7 available in the evidence file) does not have any proof of sending the letter to the plaintiff. The said admission of the said witness is explicated hereunder:-

“...It is correct to suggest that the Exh. D-7 does not have any proof of sending the letter to the plaintiff. Vol. says that both the letters were sent i.e. Ex. D-7 and Ex. D-8 were sent to the plaintiff through Ex.D-8/A....”

18. It is gleaned from appraisal of the foregoing that communication addressed to the plaintiff does not have any proof whether it was sent to the plaintiff or not, however, the said witness of the defendant No.1 went on to state voluntarily that the said communications were addressed to the plaintiff through Exh. D-8/A (available in evidence file) which is a courier receipt. It is pertinent

to mention here that not only the said letter lacks address of plaintiff, however, no tracking report was produced by the defendant No.1 proving that the said letter was received by the plaintiff or any of his representatives. Apart from the above, the witness of the defendant No.1 having answered the question posed by the counsel of plaintiff at the time of cross-examination voluntarily stated the exhibit D-8/A is a proof of sending the letters to the plaintiff. It could be pointed out here that any voluntary statement of a witness at the time of cross-examination does not bear any evidentiary value. In Article 133 of the Qanun-e-Shahadat Order, 1984, the order of examination of witnesses has been set down. The witnesses is to be first examined-in-chief, and then if the adverse party so desires, the witness is to be cross-examined. The re-examination, however, is limited to the explanation of matters referred to in cross-examination and can only be conducted if permission in this respect is granted by the Court. It would thus be seen that the voluntary statement by a witness in cross- examination has no legal evidentiary value. It is hence not permissible for a witness to foist into his answer statement of any material which is not in answer to or explanatory of his answer to the questions put to him. In jurisprudence, such voluntary evidence is denominated as "irresponsive" testimony and the introduction of such evidence is considered to be against the rule of re-examination as contemplated under Article 133 of the Qanun-e-Shahadat Order, 1984. The learned Lahore High Court in a case reported as 2003 YLR 406 (Mushtaq Ahmed Malik v. Muhammad Sunawar Chaudhry) held the said principle in the following manner:-

“Voluntary statement by a witness in cross-examination has no legal evidentiary value as a witness is not permitted to foist into his answer statement any material which is not in answer to or explanatory of his answer to the questions put to him and such voluntary evidence is denominated as "irresponsive" testimony and the introduction of such evidence shall be against the rule of re-examination as contemplated under Art.133 of Qanun-e-Shahadat, 1984”

19. It is has been professedly proved by this deliberation in the foregoing issues that the alleged communications through which the plaintiff was to pay the balance consideration was neither addressed to the plaintiff at his address nor it was acknowledged to have been received by the plaintiff. The witness of the defendant No.1 admitted that the address of the plaintiff is not mentioned in the courier receipt nor the tracking report of the courier company was ever produced before the Court showing the plaintiff was ever informed. In view of the reasoning and rationale encapsulated hereinabove, the Issue Nos. 5 & 6 are answered in **negative**.

20. The Issue No. 8 and 10 germane to the principle of lispendence. The plaintiff filed this suit on 17.03.2007 alongwith CMA No. 2175/2007 which is an application filed under Order XXXIX Rules 1 & 2 CPC and this Court vide its order dated 02.04.2007 restrained the defendant No.1 from creating any third party interest in respect of the suit property. It is averred by the defendant No.1 that owing to the failure of plaintiff with regards payment of dues, the defendant No.1 cancelled the suit property in the name of plaintiff and allotted the same in favour of the defendant No.2, which act is clearly barred by Section 52 of the Transfer of Property Act, 1882 (“Act, 1882”). At

this juncture, it would be material to reproduced Section 52 of the Act, 1882 which stipulates as follows:-

“52. Transfer of property pending suit relating thereto.- During the pendency in any Court having authority in Pakistan or established beyond the limits of Pakistan by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.”

21. There is a plethora of precedents of Apex Court dilating upon the issue of lispendence that the property in view of bar under Section 52 of the Act, 1882 cannot be validly transferred/allotted during pendency of proceedings. Furthermore, the defendant No.2 claims to be bona fide purchaser of the suit property as contained under Section 41 of the Act, 1882 but in a case where the provisions of Section 52 of the Act, 1882 are attracted and former's bona fides are established, it resiles to the benefit of a party to suit or proceedings and in that case the doctrine of bona fide purchaser for value stands excluded. In view of the reasoning and rationale herein contained, the issue No.8 is answered in **negative** and issue No.10 in **affirmative**.

22. So far as issue No.12 is concerned, sanguine to the set of circumstances and ramification as well as connotation of statues and on the strength of the evidence adduced, the plaintiff is entitled to the decree as prayed. Office is directed to prepare the decree accordingly.

JUDGE

Karachi
Dated:18.03.2022

Aadil Arab