IN THE HIGH COURT OF SINDH AT KARACHI.

High Court Appeals No.118 of 2005

Present:
1. Mr. Justice Musheer Alam.
2. Mr. Justice Muhammad Afzal Soomro

JUDGMENT

Date of hearing	:	28.10.2007.
Appellants		Saeed Naseem Cheem, through Mr. Malik Amjad Pervaiz Advocate
Respondent:		Mrs. Rukhsana Khan through M/s. Akhtar Hussain and M. Masood Ghani, Advocates.

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-MUSHEER ALAM, J.- The plaintiff has filed Suit for Specific performance of Contract dated 5.7.1995 (Ex. P/2) in respect of the property bearing No. 26, Khayaban-e-Ghazi, Phase V, Defense Housing Authority, measuring 1000 square yards, for a total sale consideration of Rs.53,50,000/- It is not disputed that Rs.5,00,000/= were paid at the time of signing of the agreement. Balance consideration of Rs.48,50,000/= was payable on or before 4.11.1995. It was further stipulated in the agreement that since the property is under the tenancy possession may be handed over after termination on 2.9.1996. In terms of clause 10 Penal consequences were provided against the defaulting party. From the record it appears and is not disputed that the plaintiff herein filed the Suit for Specific performance on 1.11.1995 in the Court of Senior Civil Judge, Lahore Suit was valued for Rs.1000/= only. In that Suit ad-interim orders were passed and the plaintiff was directed to pay the Court fee within one month, it was not paid. Defendant filed written statement therein and contested the matter. It appears that ultimately the plaint was return on 12.3.1996 and where after the plaintiff filed the instant Suit before this Court on 21.3.1996. Written Statement was filed beside raising preliminary objection on merit suit was contested out of the pleading of the parties. Following issues were stuck down:-

1. Whether the plaintiff has no cause of action, if so, to what effect?

2. Whether the plaintiff has failed to perform his part of the agreement specifically in terms thereof if so, to what effect?

3. Whether the plaintiff is entitled to any relief?

4. Whether the plaintiff is entitled to have sale deed executed in his favour?

5. What should the order be?

The plaintiff examined himself as P.W.1 and one Muhammad Saleem the State Agent as P.W.2. The defendant examined herself as D.W.I and examined her husband Group Captain (Rtd) Inshah Allah Khan as D.W.1.

The learned Judge after evaluating the evidence of the parties, perusal of the record and hearing both the learned counsel dismissed the Suit observing that the specific performance is discretionary remedy and the conduct of the plaintiff disentitle him for the grant of the relief.

Learned counsel for the plaintiff present in Court vehemently argued that the time stipulated in the agreement was 4.11.1985, whereas he apprehended mischief at the hands of the defendant. Suit was filed on 1.11.1995 at Lahore as both the parties resided in Lahore and so also agreement was executed at Lahore. According to the learned counsel in the written statement the defendant conceded the relief prayed for subject to the deposit of balance consideration formula. It was further stated that the then the counsel of the defendant conceded that if amount is deposited on 7.2.1996 the plaintiff shall execute the conveyance, however on the latter date the defendant resiled, on such statement, consequently the plaint was return on technical ground on 12.3.1995. According to learned counsel for the plaintiff very filing of Suit for specific performance, it is clearly the intention of the parties to seek specific performance and willingness, to perform his demonstrative of part their part of the contract. In support of his contention reliance was placed on Maksud Ali and others Vs. Eskandar Ali, PLD 1964 SC 381, Hakim Ghulam Rasool vs. Sh. Imdad Hussain and another, PLD 1968 Lahore 501, Mrs.

Dino Manekji Chinoy and 8 others Vs. Muhammad Matin, PLD 1983 SC 693. It was next urged that in the instant case time was not the essence of the contract. It is further urged that no issue was struck yet the Court decided the matter on such score. According to him in cases of immoveable properties time is not the essence of the Contract. Reliance is laid on Seth Essabhoy Vs. Saboor Ahmad, PLD 1973 SC page 39, Mst. Munawar Bibi Vs.Mst. Maheen Quddusi, 1986 CLC page 1887, Ziauddin Siddiqui Vs. Mrs. Rana Sultana, 1990 CLC page 645 and Faqir Muahmmad and 8 others Vs. Abdul Momin and 2 others, PLD 1995 Lahore 405. It was contended that Suit for specific performance is discretionary relief but the discretion has to be exercised judicially, fairly and equitably. It was urged that the subject property is under tenancy, even the tenancy has not been terminated and Respondent is collecting rent to which defendant is entitled which shown defendant had no intention on to perform agreement. In the instant case it is the defendant who committed breach; the discretion should have been exercise in favour of the plaintiff. Reliance was placed on Ghulam Nabi and others Vs. Seth Muhammad Yaqub and others, PLD 1983 SC page 344. He prays for setting aside of the judgment and decree of the Court and request for the grant of the prayer of the specific performance.

Mr. Akhtar Hussain learned counsel for defendant contended that the agreement dated 5.7.1995 postulate specific time frame in Paras 2, 8, 9 and 10 and the time was made essence of the contract. It was further urged that it was even in the knowledge of the plaintiff that the subject property was in possession of the tenant and it can not be asserted that it was not got vacated. It was stated that Issue No.2 in fact relates to the time as essence of the Contract. According to him consequence for non performance were stipulated in the agreement in Para 10 thereof. He further points out that what the defendant was required; defendant has performed and handed over the copies of title documents as evident from the page No. 103 of the evidence file. Even the notice for specific performance was issued which is still disputed to have been served or otherwise. It is stated even in CMA 17 of 1996, seeking the restraining order was dismissed and no exception thereto was taken. As regard service of notice he has placed reliance on Khuda Bux Vs. Muhammad Yaqoob etc., 1981 SCMR 179 and Muhammad Ahsan Vs. Mst.

Nasim Khatoon and 2 others, 1988 CLC 1226. According to him the main thrust of the hearing was contract in evidence and the tenant was in possession and defendant was not ready to perform his part of the contract and that the appellant was ready and willing to perform the contract. According to him time could be made essence of the contract. Looking at the circumstances reliance was placed on Muhammad Sharif Vs. Mst Fajji @ Phaji Begum through Legal heirs and another, 1998 SCMR page 2485. It was further urged that agreement was entered into between the parties on 5.7.1995 and more then a decade has lapsed and the plaintiff has not deposited the amount nor has made any application to deposit the amount. The value of the property has tremendously increased and it would be inequitable to consider the prayer for specific performance at this stage. He has relied on **1987 Lahore 207 (wrong)**, Syed Muhammad Saleem Vs. Ashfaq Ahmed Khan, 1989 CLC 1883 and Sarfraz Haider and another Vs. Mst. Khatija Bai and 4 others, 1990 CLC 1649. It was lastly urged that the plaintiff is counsel and he is well aware of the requirements of law. He preferred to file Suit at Lahore to get benefit of ad-interim order without depositing amount in court and even despite the directions of the court admittedly has not paid the Court fee.

Learned counsel for defendant contends that no where the defendant has disputed the authority of his counsel who conceded to deposit the amount, no action was taken against him.

We have heard the arguments of both the counsel, the main thrust of the case revolve on the question whether the time was essence of the contract or otherwise for which purpose it is essential to examine the contract itself (Ex. P/2). Para 2 of the agreement it is provided that the balance consideration shall be paid on or before 4.11.1995 and possession of the property was committed to be formally handed over on 2.9.1996. In terms of Section 55 of the Contract Act, rest on the intention of the parties which could be gathered from terms of the contract. In the instant case in terms of clause 10 the parties out of their own violation committed that in case of breach defaulting party would be liable for penal consequences. It is clear that the parties have made contract time bound, therefore we are of the view that in the instant case time was the essence of

the contract. To a specific query of the Court, whether the appellant had seen or offered pay order of the balance consideration to the Respondent, when it was purportedly not received in favour Court, Learned Counsel for the appellant candidly conceded that it was not rendered. He could have sought direction for deposit of the amount in court by making efforts to deposit the amount in this Court. In our opinion more then a decade has lapsed. It would be highly inequitable at this point of time to order specific performance of the Contract when the properties in the recent past have shown tremendous increase in valuation.

In the circumstances, in our opinion it would just and equitable to direct the Respondent/defendant to return the amount of the advance in terms of clause 10 of the agreement. Mr. Akhtar Hussain raudly concedes. Accordingly, under given facts and circumstances of the case, while declining the relief of the Specific Performance of agreement, in terms of clause 10 of the agreement Respondent is directed to return the earnest amount of Rs.5,00,000/= together with matching sum total to Rs.10,00,000/= (One Million) on or before 15th of November 2007 through pay order/Demand Draft as the case may be to the appellant directly or through Courier service, in case appellant refuses to receive deposit the amount in this Court, within 10 days thereafter. On deposit, amount be paid to the appellant on proper verification and identification.

Appeal in terms above stands dispose off.

Judge

Judge

Karachi,
Dated: 29.10.2007.