THE HIGH COURT OF SINDH, KARACHI

Suit No. 645 of 2010

[Mst. Shabana Hanif and another versus M/s. New Chali Trade Centre & another]

Plaintiffs	:	Mst. Shabana Hanif and Muhammad Hanif through Mr. Imran Ahmed, Advocate.
Defendant 1	:	M/s. New Chali Trade Centre through Mr. Shabbir Ahmed Sheikh, Advocate.
Defendant 2	:	Sindh Building Control Authority through M/s. Ali Azad Salim and Kashif Rehman, Advocates.
Date of hearing	:	19-10-2023
Date of decision	:	01-11-2023

J U D G E M E N T

Adnan Iqbal Chaudhry J. - Suit was originally filed by the Plaintiff No.1 on 27-04-2010 through her husband and Attorney for specific performance of two agreements, both dated 17-09-2003, whereby the Plaintiff No.1 had booked office No. B-1007, and her husband office No. B-1008, in the building project of the Defendant No.1. The husband realizing that his wife could not seek specific performance of his agreement, moved CMA No. 8068/2012 on 27-08-2012 under Order I Rule 10 CPC for addition as co-plaintiff. The application was allowed on 21-08-2017 and the husband was added as Plaintiff No.2.

2. Counsel for the Defendant No.1 submitted at the outset that the relief of specific performance sought by the Plaintiff No.2 was time-barred. Though that point was not framed as an issue in the suit, in view of section 3 of the Limitation Act, 1908, the Court is nonetheless required to examine the same.

3. Per counsel for the Defendant No.1, the suit by the Plaintiff No.2 was time-barred *inasmuch* as under section 22(1) of the Limitation Act

where a new plaintiff is added, "the suit shall, as regards him be deemed to have been instituted when he was so made a party". For assistance, learned counsel also pointed out that in *Hayat v. Amir* (PLD 1982 SC 167) the Supreme Court held that the words "when he was so made party" in section 22(1) are to be construed as the date on which the application under Order I Rule 10 CPC is filed, and not the date when such application is allowed by the Court. That being so, the date on which the suit was instituted by the Plaintiff No.2 would be deemed to be 27-08-2012 when he filed the application under Order I Rule 10 CPC.

4. Limitation for a suit for specific performance is governed by Article 113 of the Limitation Act, 1908 which has two parts to it. In the first part, limitation of 3 years commences from the date fixed for performance. In the second part, limitation commences from the date the plaintiff has notice that performance is refused.[1]

5. Admittedly, the booking agreement between the Plaintiff No.2 and the Defendant No.1 did not fix a date for delivery of possession, nor is it the case of the Defendant No.1 that a date was subsequently communicated. Instead, counsel for the Defendant No.1 relies on para 4 of the plaint where it is pleaded that the date of completion of the project was 30-09-2007. But, that date is a reference to the "*proposed date of completion*" given by the Karachi Building Control Authority **[KBCA, now SBCA]** in publishing its NOC for public sale of the project under section 12(1) of the Sindh Building Control Ordinance, 1979 **[SBCO]**. It did not amount to a 'date fixed' in the agreements between the Plaintiffs and the Defendant No.1. In fact, in para 10 of the plaint it has been categorically pleaded that the Defendant No.1 had never stipulated a date for completion of the project. In para 3 of his written statement the Defendant No.1 itself has denied that 30-09-2007 was the date fixed for completion of the project. Therefore, the first part of Article 113 of the Limitation Act is not attracted. It is not the case of the

[1] *Haji Abdul Karim v. Florida Builders* (PLD 2012 SC 247).

Defendant No.1 that the suit by the Plaintiff No.2 is time-barred under the second part of Article 113. Thus, in light of *Hayat v. Amir (supra),* the suit by the Plaintiff No.2 is within limitation. In any case, by a subsequent public notice issued on 30-10-2009[2], the SBCA had, on the application of the Defendant No.1, extended the date of completion of the project to 30-12-2012. By that time the Plaintiff No.2 had already moved his application in the suit for addition as co-plaintiff.

6. Moving on to the merits of the Plaintiffs' case, the suit has come up for final arguments without the parties adducing evidence. That is at the instance of the parties as the Plaintiffs had dropped the relief for specific performance to seek instead compensation on undisputed facts, i.e. a refund of the amount paid to the Defendant No.1 under the booking agreements, plus interest envisaged under the SBCO read with the Karachi Building & Town Planning Regulations, 2002 **[KBTPR]**. Hence, the order dated 17-12-2020 recorded that the parties agree to determine the suit on certain issues that do not require the recording of evidence. Here, I may observe that under section 19 of the Specific Relief Act, a person suing for specific performance of a contract may ask for compensation for its breach in substitution for such performance.[3] Such compensation may include a refund.[4]

7. It is not a disputed fact that the project was a 'public sale project' as defined in Regulation No. 2-105 of the KBTPR, and as per the NOC issued by the SBCA under section 12(1) of the SBCO, the project was to be completed by 30-07-2007 for ground + 10 upper floors. Though that date was extended by the SBCA up to 30-12-2012 owing to the fact that the building site had come under litigation, but admittedly, the project was constructed only up to 6 floors, whereas the premises booked by the Plaintiffs were for the 10th floor. It is also admitted by the Defendant No.1 that under the respective booking agreements, it received Rs. 865,000/- from the Plaintiff No.1, and Rs. 815,000/- from the

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[2] Page 239, Part-II of the file.
[3] For a discussion on section 19 of the Specific Relief Act, see *Ansar Ali v. Altaf Ahmed* (2019 YLR 979).
[4] *Liaquat Ali Khan v. Falak Sher* (PLD 2014 SC 506).

Plaintiff No.2, making a total of Rs. 1,680,000/-, leaving a balance of Rs. 76,000 payable by each Plaintiff on delivery of possession. The receipts issued by the Defendant No.1 for said payments are Annexures P-6 to P-15 to the plaint, also not denied.

8. When confronted with the above facts, counsel for the Defendant No.1 stated that his client had offered to make a refund which was not accepted by the Plaintiffs. In that regard he pointed to the statement dated 15-02-2021 filed by the Defendant No.1 offering to refund Rs. 1,680,000/- along with compensation of Rs. 1,260,000/- (total Rs. 2,940,000/). Learned counsel for the Plaintiffs stated that the offer was not accepted as it did not include markup as provided in Regulation 5-1.22 KBTPR.

9. The refund having been conceded by the Defendant No.1, the dispute between the parties is confined to the markup claimed by the Plaintiffs on that refund. Both counsel thus submitted that out of the issues settled by the Court on 17-12-2020, only the following require determination:

> *3. Whether the Defendant has only raised the construction up to 6 floors on the project 'New Chali Trade Centre' and rest of the project is abandoned or not ? If yes then what is its consequence ?*
>
> *4. Whether the Defendant is liable to refund the payment received from the Plaintiff along with interest and compensation in terms of section 13 of the SBCO, 1979, Regulation 5-1.22 of the KB&TPR and section 19 of the Specific Relief Act, 1877 or not ?*

In addition to the above, the following issue is necessitated, and is so added in exercise of power under Order XIV Rule 4 CPC:

> *5. What should the decree be ?*

10. Heard the learned counsel and perused the record.

11. Counsel for the Plaintiffs had read out Regulation 5-1.22 KBTPR as it stands today. The version of that Regulation as on the date of the

booking agreements in 2007, is reproduced below along with the other relevant provisions.

> **SBCO**:
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> "13(3). Where a building has not been completed by the date mentioned in the advertisement or offer and the application under sub-section 2 has been rejected, the builder shall be liable to pay interest at such rate not exceeding the rate charged by a Scheduled Bank and in such manner as may be prescribed, to the buyer of the building, on the amount of the sale price paid by such buyer for the period by which the completion of the building has been delayed".
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> **KBTPR**:
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> "5-1.21. **Delay in Completion & Compensation for Period of Delay.** The Builder/Developer shall complete the project and hand over physical possession of the unit complete in all respect to the allottee by the time specified by the Authority. In case of delay in handing over possession the Developer shall pay mark-up to the allottee at the rate of prevailing banks rate on the total amount paid, for the period of delay calculated from the completion time specified by the Authority or extension made thereof.
>
> 5-1.22. **Abandonment of the Project.**
> If, for any reason, the project is abandoned by the Developer, the Developer will refund the total amount received from the purchaser with mark up at the prevailing bank rate on the same, for the whole period of retention of the money, along with an additional compensatory amount equal to 10% of the amount received from the allottee up-to-date against the booked unit, within 60 days of the announcement to the effect of the abandonment of the project."

12. It will be seen that the starting point for computing markup under Regulation 5-1.22 KBTPR is materially different from the one under section 13(3) SBCO. Under Regulation 5-1.22, markup is computed for the whole period the money is retained by the developer/builder, whereas under section 13(3) interest/markup is computed only for the period by which completion of the building has been delayed, i.e. from the date of completion specified either by the builder or by the SBCA in its NOC for sale.

13. Adverting to issue No.3, learned counsel for the Plaintiffs submitted that it was an undisputed fact that offices booked by the Plaintiffs on the 10th floor of the project were not constructed even after the date of completion was extended by the SBCA upto 30-12-2012, and

hence that part of the project was 'abandoned' within the meaning of Regulation 5-1.22 KBTPR.

14. Admittedly, the litigation that had afflicted the project had ended by 2008, and for this reason the SBCA had extended the date of completion of the project to 30-12-2012. Still, the Defendant No.1 was not able to construct beyond the 6th floor. Under such circumstances, I am inclined to agree with the Plaintiffs' counsel that construction of the upper floors were, for all intents and purposes, 'abandoned' by the Defendant No.1 within the meaning of Regulation 5-1.22 of the KBTPR. The fact that such abandonment was not 'announced' by the Defendant No.1 was immaterial as such announcement was at best an obligation imposed by the Regulation upon the Defendant No.1 and a not a *sine qua non* of the Regulation. **Therefore, the first part of issue No.3 is answered in the affirmative**. The second part is tied to issue No.4.

15. Regards issue No.4, the submission of the counsel for the Defendant No.1 was that Regulation 5-1.22 of the KBTPR is *ultra vires* section 13(3) of the SBCO as it exceeds the period of interest allowed under the parent section.

16. The KBTPR is subordinate legislation, framed under section 21A of the SBCO for carrying out the purposes of the SBCO. The test for examining whether a provision of the KBTPR is *ultra vires* the SBCO is provided by section 21A itself *viz.* that unless the Regulation is "inconsistent" with the provisions of the SBCO, it has the force of law.[5]

17. On a closer examination it becomes clear that section 13(3) SBCO and Regulation 5-1.22 KBTPR deal with different scenarios. Section 13(3) envisages that completion of the project and delivery of the unit to the allottee is likely but with delay, hence interest/markup is only for the period of delay. On the other hand, Regulation 5-1.22 deals with the scenario where possession of the unit to the allottee is not possible, hence a refund with markup for the entire period the amount was

[5] *Multiline Associates v. Ardeshir Cowasjee* (1995 SCMR 362).

retained plus 10% compensation. Since Regulation 5-1.22 works in different circumstances than section 13(3), there is no inconsistency between the two provisions.

18. The other question is whether section 13(3) SBCO is intended to be exhaustive of the circumstances in which the builder/developer is liable to pay interest/markup. It is clearly not. It would be absurd to suggest that he is liable to pay markup for delayed delivery of the unit but not for non-delivery of the unit. The SBCO is not intended to be the entire legislation on building regulation, and hence legislation is delegated by section 21-A thereof. *Ergo*, Regulation 5-1.22 KBTPR is not *ultra vires* section 13(3) SBCO, and the Defendant No.1 is liable to make payment to the Plaintiffs as stipulated in Regulation 5-1.22. **Issue No.4 is answered accordingly**.

Issue No.5: What should the decree be ?

19. Since markup under Regulation 5-1.22 KBTPR is to be computed from the date the payment was made by the Plaintiffs, those dates, as per Annexures P-6 to P-15 to the plaint (also admitted), are as follows:

Table 'A'

Date	From Plaintiff No.1 for office No. B-1007 (Rs.)	From Plaintiff No.2 for office No.B-1008 (Rs.)
17-09-2003	450,000	200,000
17-07-2004	200,000	450,000
22-10-2005	90,000	90,000
17-01-2006	50,000	50,000
08-04-2006	75,000	25,000
Total	865,000	815,000

However, since the Defendant No.1 had offered to refund the above amount to the Plaintiffs *vide* statement dated 15-02-2021, which was declined by the Plaintiffs, the Defendant No.1 cannot be saddled with markup from that date onwards till the date of the decree.

20. Under Regulation 5-1.22 KBTPR, the Defendant No.1 is also liable to pay additional compensation equal to 10% of the amount received from the Plaintiffs, which works out as follows:

Table 'B'

To the Plaintiff No.1	To the Plaintiff No.2
Rs. 86,500/-	Rs. 81,500/-

21. Having determined the issues as above, the suit is decreed against the Defendant No.1 as follows:

(a) to refund of Rs. 865,000/- to the Plaintiff No.1 and Rs. 815,000/- to the Plaintiff No.2 along with markup at the prevailing bank rate computed from the dates set-out in Table 'A' above up till 15-02-2021, and then at the same rate from the date of the decree till the date of payment ['bank rate' shall have the same meaning as in the Explanation clause to section 34-A CPC];

(b) pay compensation of Rs. 86,500/- to the Plaintiff No.1 and Rs. 81,500/- to the Plaintiff No.2 plus markup @ 16% per annum from the date of the decree till the date of payment; and

(c) for costs of the suit.

JUDGE

Karachi
Dated: 01-11-2023