

IN THE HIGH COURT OF SINDH AT KARACHI

EXECUTION NO.12/2013

PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR

Plaintiff : Delhi Mercantile Cooperative Housing Society Ltd, through Mr. Muhammad Haseeb Jamali, advocate.

Defendants : Province of Sindh and others, through Mr. Khawaja Shamsul Islam, advocate for Judgment Debtors No.2 and 4. Mr. Iqbal Khurram, advocate for Judgment Debtor No.3.

Date of hearing : 08.04.2015.

Date of announcement: 21.04.2015.

ORDER

This order shall dispose of the instant Execution Application whereby the Decree Holder seeks satisfaction of the compromise / consent decree dated 12th September, 2012, in Suit No.27/2010. The decree, drawn in the above matter follows as under:-

- i. According to the defendant No.2, the plaintiff has been allotted 211.98 acres of land in Sector 45, Taiser Town, Karachi and according to them a sum of Rs.15,89,85,000/- (Rupees Fifteen Crores Eighty Nine Lacs Eighty Five Thousand only) is outstanding against cost of land and a sum of Rs.5,29,95,000/- (Rupees Five Crores Twenty Nine Lacs Ninety Five Thousand Only) is outstanding against Ouster Development Charges. The Learned counsel for the plaintiff and defendant No.2 & 4 have agreed this amount which according to them is properly calculated and except this amount nothing is outstanding and liable to be paid by the plaintiff to the

defendant No.2 on account of cost of land or outer development charges;

- ii. The plaintiff will deposit this amount through different cross cheques / Pay Orders with the Nazir of this Court , one is for the cost of land and other for Outer Development Charges. The cross cheques / pay orders will be prepared in the name of defendant No.2 and the same will be handed over by the plaintiff to the Nazir of this Court within two weeks from today;
- iii. After receiving cross cheques / pay orders from plaintiff, the Nazir shall immediately deposit cross cheques / pay order in any account of defendant No.2 for which cheques books have already been handed over to the Nazir by the Acting Manager Director of the defendant No.2 on 6.9.2012 except Nazir nobody will operate the bank accounts of the defendant No.2 until and unless, the interim order passed by this court in Suit No.545/2012 are recalled, vacated or modified;
- iv. After encashment of cross cheques / pay orders, the Nazir shall pay amount of cost of land directly to MDA through cross cheques in the name of Malir Development Authority (MDA). The remaining amount i.e the cost of outer development cheques shall remain intact in the account of defendant No.2 for which the Nazir has been authorized to solely operate in view of the order passed in Suit No.545/2012 on 5.6.2012 which order was merged in the earlier interim orders passed by this Court in the same suit on 19.5.2012.
- v. The Nazir shall provide copy of paid challan / receipt of Acting Managing Director of the defendant No.2 evidencing the payment of cost of land to MDA, upon receiving the copy of paid challan / receipt issued by MDA, the Acting Managing Director of the defendant No.2 who is present in court undertakes to hand over peaceful and physical vacant possession of 211.98 acres of land to the duly authorized representative of plaintiff within 10 days in presence and under the supervision of the Nazir of this Court. As soon as peaceful and physical vacant possession of land is handed over to the plaintiff, the plaintiff will be at liberty to make necessary arrangement for security by raising boundary wall and deployment of security guards or as it may deem fit;
- vi. Mr. Munir-ur-Rehman appearing for MDA submits that compromise is being effected between the plaintiff and defendant No.2 & 4. He reiterated that the allotment of land is still intact and no cancellation order of letter was ever issued by MDA to the defendant No.2 and possession of land is also with the defendant No.2 However, it is their responsibility to perform the task of Outer Development Charges should be paid to MDA while Mr.

Sham-ul-Islam, counsel for the defendant No.2 argued that Outer Development Charges will be collected by the defendant No.2 because it is their responsibility to perform the job of Outer Development. The issue of outer development whether it will be performed by the defendant No.2 or the MDA is a matter between them as per the terms and conditions of grant of land and its allotment. However, it is clarified that the plaintiff shall not be liable to pay the amount over and above the amount of cost of land plus outer development charges agreed and being paid in pursuance of this consent decree. In this regard, the plaintiff shall remain indemnified by the defendant No.2 and in case of any dispute between MDA and the defendant No.2, the defendant No.2 will sort out the matter with MDA and shall not claim any additional amount from the plaintiff either against the cost of land or the outer development charges. If at any point of time, it is resolved between the MDA and defendant No.2 that outer development charges will be paid to MDA then the defendant No.2 will pass on / pay the amount to MDA, which is being paid / deposited by the plaintiff in the defendant No.2 account through Nazir against the demand of outer development charges.

- vii. The Acting Managing Director of the defendant No.2 undertakes that after handing over peaceful and physical vacant possession of the land, the defendant No.2 shall also allocate proper sector number to the plaintiff and as soon as master plans / layout plans will be finalized by MDA and the defendant No.2 with the consent of its members, the defendant No.2, shall also issue / hand over copies of duly certified / verified blueprints to the plaintiff;
- viii. The Learned counsel for the plaintiff argued that through matter has been amicably resolved but his prayer clause (c) with other ancillary and incidental prayers is still intact in which declaration was sought that the defendant No.2 is not entitled to run the affairs of defendant No.2. Mr. Shams argued that Suit No.545/2012 is pending in this court in which the notifications superseding the defendant No.2 is under challenge and operation of both notifications has been suspended. Mr. Haseeb Jamali submits that in the suit, he has also filed application under Order 1 Rule 10 CPC on behalf of the plaintiff (Dehli Mercantile Co-operative Housing Society) for impleading them a party. Let the said application be decided in that suit on its own merits. However, keeping in view the pendency of above application in Suit No.545/2012 the learned counsel for the plaintiff does not press the prayer clauses in the suit which are related to the defendant No.2;

- ix. The suit against the defendant No.1 & 5 is dismissed as withdrawn;
- x. The Nazir fee is fixed at Rs.40,000/- Fifty percent shall be paid by the plaintiff and remaining amount shall be paid by the defendant No.2;

2. The record shows that the plaintiff has deposited two cheques i.e one in sum of Rs.158,986,000/- towards cost of land while other in sum of Rs.52,995,000/- towards outer development charges, however, defendant No.2 did not hand over peaceful physical and vacant possession of 211.98 acres land to the plaintiff which necessitated filing of instant Execution application.

3. The record also reveals that parties remained at variance on location of the land to be handed over which resulted in passing number of orders, followed by meetings e.t.c, however, on 02.5.2014 the judgment debtors No.2 and 4 filed a statement whereby allocating an area of 211.98 acres (140.00 acres in Sector 42 and 71.98 acres in Sector 49) to the plaintiff / Decree holder out of the total area of 344.98 acres available land with J.D No.2 (193.0 acres in Sector 42 and 141.98 acres in Sector 49) to which the plaintiff / decree extended his no objection. Such order was passed whereby referring matter to the Nazir in following words:-

*'Accordingly, the matter is referred to learned Nazir of this court for handing over peaceful vacant possession of 211.98 acres of land to the decree-holder strictly in terms of the decree dated 12.9.2012 (passed on 01.01.2013) **within ten (10) days from the date of receipt of this order**'*

4. In result thereof, Nazir did number of meetings with parties, which are evident from the report(s), so placed on record. The para-5 of the report of the Nazir dated 29.5.2014, being relevant to make certain fact clear, is referred hereunder:-

‘5. Mr. Haseeb Jamali, Advocate for Decree Holder, Mr. Salman Noor, Advocate for Karachi Union Society, Mr. Muhammad Imran..... when Advocate for MDA stated that he (the) defendant No.2 is defaulter of MDA and not yet paid remaining balance amount against which he has filed Suit No.230 of 2013 and **further stated that the possession of land comprise of 875 acres had been handed over to Defendant No.2.** He further stated that the MDA has no concern with it and the land of 2.11 (211) acres to be handed over to Decree Holder and MDA was not involved in the proceedings nor would it provide necessary assistance for demarcation of the land **since the land in question was already demarcated at the time of handing over possession to Defendant No.2**’

Underlining has been supplied for emphasis)

The defendant / JD No.2 has filed objections to such report of the Nazir with request :-

‘...to discard and reject both the aforesaid reports dated 3.7.2014 and 19.8.2014, submitted by the former Nazir, together with the so-called demarcation plans, with further directions to the Nazir, to engage independent and neutral town planners and surveyors, to complete the demarcation process with the help of engineers of M.D.A, in presence of representatives of all the members societies, as ordered by this Hon’ble Court on 24.5.2013

The defendant / JD No.4 also filed objections to above report with request:

‘...judgment debtor No.3 be directed to carry out the demarcation of the entire land allotted to the judgment debtor No.2’

5. I have heard respective sides and have also perused the record.

6. At the very outset, I would like to make it clear that the jurisdiction of the Executing Court is limited to the '**decree**' alone and it has to make all legal and permissible efforts for satisfaction of the '**decree**'. Since the satisfaction of a decree cannot be achieved unless liabilities and obligations, arising thereof. The Executing Court, *thus*, has to ensure performance of such liabilities not by the judgment debtor alone but by the Decree Holder too, if there are any. Thus, it would be proper to shape the liabilities of the parties (Decree holder & J.Ds), per the terms of the decree were /are :

- i) allotment of 211.98 acres land in Sector 45, Taiser Town, Karachi in favour of plaintiff stood acknowledged;
- ii) The plaintiff was to deposit outstanding amount of Rs.15,89,85,000/- towards costs of land while an amount of Rs.5,29,95,000/- towards Outer Development Charges; which plaintiff will deposit with nazir through two different cheques / pay orders but in name of defendant / JD No.2;
- iii) On receipt of amount of cost of land, the defendant No.2 through its Acting MD to hand over peaceful and physical vacant possession of 211.98 acres land to duly authorized representative of plaintiff within 10 days;
- iv) The defendant No.2 shall be responsible to perform task of outer development charges and dispute between defendant No.2 and MDA over such task shall not result in causing any prejudice to rights of plaintiff but he shall remain indemnified by defendant No.2;
- v) Defendant No.2 was to allocate proper sectors number after handing over peaceful and physical vacant possession and to issue / hand over copies of duly certified / verified blue prints to the plaintiff;

The liability of the plaintiff / DH was to make the payment, which the plaintiff / DH has done hence the defendants J/Ds were liable to put the plaintiff / DH into peaceful physical vacant possession of 211.98

acres land, out of available land in their possession and to allocate proper sector number(s) couple with handing over the certified/verified blue prints. The plaintiff / DH was indemnified from consequences of any dispute between the defendant No.2 and MDA.

7. It is well settled principle of law that when two parties enter into a document (contract) then it always carries presumption that both the two have active knowledge of all liabilities and consequences, arising out of such document unless at subsequent stage '**mistake of fact**' e.t.c is proved / alleged by the party, seeking avoiding any of the arisen obligation / liability. Needless to add here that scope and limitation of the '**execution proceeding**' does not allow entertaining such plea or question, which, *however*, is the domain of the trial Court.

8. As already observed that issue of difference between D.H and J.Ds with regard to location of the land in question stood agreed on the statement of the defendant / J.D Nos.2 and 4 dated 02.5.2014, therefore, the defendant / J.Ds No.2 and 4 were / are legally bound to perform their obligations / duties which they themselves took on their shoulders at time of compromise / consent decree.

9. Let me add that the act of defendant No.2 and 4, by filing the statement dated 02.5.2014 showing their readiness to give 211.98 acres to plaintiff from specified sector numbers, was / is sufficient to show allocation of areas in their possession to have been given sector numbers else they would not have made such statement.

At this juncture, the operative portion of the report of Nazir dated 03.9.2014, being material, is referred hereunder:-

'3. It is submitted that.....The Honourable Court vide order dated 11.6.2014 directed the MDA to carry out demarcation and such exercise was completed as desired. After completion of the demarcation and such exercise was completed as desired. After completion of the demarcation the copies were supplied to the J.D. no: 4 for handing over possession of the land as per demarcation plan. On 25.8.2014 the Law Officer of J.D no: 4 appeared and stated that they intent (intend) to file objections over the demarcation plan before the Honourable Court. **However, they did not issue possession letter in favour of the D.H as per order of this Honourable Court'**

The fact of defendant / JD No.2 to be in possession was not disputed at the time of decree rather the defendant No.2 while taking responsibility to put the plaintiff into peaceful physical vacant possession confirmed his such capability / authority hence the act of the defendant / JD Nos.2 and 4 avoiding their obligations / duties under different stands, including that of object of members of society / union cannot be legally approved, particularly when defendant / JDs did not make their obligations to any such plea while entering into consent / compromise decree. It needs not be mentioned that the defendants / JDs cannot act as **'objectors / bonafide claimants'** hence cannot legally resist or obstruct delivery of possession more particularly when fact of land (agreed by both) to be delivered is in possession of the defendant / JD No.2. The instant plea of the defendants / JDs not falling within scope of Order XXI rule 97 CPC rather such resistance / obstruction may result to resort to provision of Order XXI rule 98 of the Code.

10. The defendants / JDs, at no stage of the instant proceedings, have denied their obligations and duties with regard to putting the plaintiff / DH in peaceful physical vacant possession of the land in question. This stand is even evident from the instant objections, so filed by the present defendants / JDs through which they are not denying their liabilities but requesting for fresh demarcation. It is on record that the defendant / JDs were in possession of their lands and it is the defendants / JDs who are to put the plaintiff / DH into possession into the area, which was proposed by the defendants / JDs themselves (with specification and details of sector numbers and area to be given thereof) and accepted by the plaintiff / DH. In such eventuality the stand of the defendants / JDs delaying, *but not denying*, the delivery of possession is strange, particularly when it is not the case of the defendants / JDs that the area, demarcated, is out of the agreed numbers. The purpose and object of the execution proceedings is not meant to keep things hanging but to take steps for proper enforcement thereof. This has been the object because of which an **'inquiry'** (summary in nature) is permitted which too where question of bonafide claimant is involved.

11. In view of above discussion, I am inclined to accept the execution application and direct the defendants / JDs to put the plaintiff / DH into chalked out / demarcated area, as per last report of the Nazir; issue the possession certificate to the plaintiff/ DH of the area which has been demarcated in their presence and chalked out as land in question followed by issuance of possession certificate and handing over of certified / verified blue prints, without any further delay, preferably within one month.

12. While parting, I feel it proper to say that to make the title of the allottee (plaintiff / DH) is the absolute and exclusive responsibility of the defendants / JDs by executing necessary document of title. The execution of title document is to be executed without any restriction to right of owner which *otherwise* he (it) is entitled to have to claim perfect title. However, this would not be an exception to the principle that a transferor cannot give a better title than he (it) holds, hence execution of the title document be also not delayed and proposed draft be submitted which the Nazir shall scrutinize in view of above principle and that of Transfer of Property Act and after approval thereof same be executed. This exercise be completed within a period of fifteen days.

Imran/PA

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