

**IN THE HIGH COURT OF SINDH AT KARACHI**

**HCA No. 149 of 2014**

**Present:-**

**Mr. Justice Sajjad Ali Shah.**

**Mr. Justice Muhammad Junaid Ghaffar.**

**Muhammad Saleem & Others----- Appellant**

**Versus**

**Saleem Ahmed Mirza ----- Respondent**

**HCA No. 207 of 2003**

**Muhammad Saleem & another ----- Appellant**

**Versus**

**Saleem Ahmed Mirza & Others ----- Respondents**

**Date of hearing: 15.12.2015**

**Date of judgment: 15.12.2015**

**Appellants: Through M/s Ayan Mustafa Memon and Ahmed Ali Hussain Advocates.**

**Respondents: Through Mr. Abdul Qadir Khan Advocate in HCA No. 207 of 2003.**

**Respondent: Through M/s Arshad Hussain, Abdul Qadir Mirza and Muhammad Eshan Advocates in HCA No. 149 of 2014.**

**J U D G M E N T**

**Muhammad Junaid Ghaffar, J.** Through this common judgment, we intend to decide both the aforesaid appeals as the dispute between the parties is in respect of the same property i.e. Plot No. D-94 KDA Scheme No. 1, Karachi, admeasuring 595 square yards together with

construction thereon (hereinafter referred to as “property”). In High Court Appeal No. 149 of 2014, the appellant has impugned judgment and decree dated 13.3.2014 passed in Suit No. 365 of 1994, whereby, it has been held that respondent is the lawful owner of the property in question, and, is entitled for its vacant possession along with mesne profit from the appellants, jointly and severally, with costs of the Suit. Whereas, in HCA No. 207 of 2003, the appellant has impugned order dated 7.7.2003, whereby, the application filed under Order 12 Rule 6 CPC, by respondent No.1, seeking dismissal of Suit No. 1361 of 1997 filed by the appellant on admission, has been allowed.

2. Briefly, the facts as stated are that respondent entered into a preliminary agreement of sale dated 12.9.1993, and confirmatory sale agreement dated 20.10.1993 for a total sale price of Rs. 12,00,000/- in respect of the property with one Mst. Shahida Ghafoor (respondent No. 2 in HCA No. 207 of 2003), hereinafter referred to as “respondent No. 2”, who claimed to be the sole legal heir of one Ghulam Ali, who was the original allottee / owner of the property in question. The said property was transferred in the name of respondent vide mutation order dated 6.1.1994, and on 6.4.1994, a registered indenture of lease conferring ownership was also executed in favour of respondent. Whereas, it is the case of the appellants that they had entered into an agreement of sale with one Ghulam Ali, (predecessor in interest of respondent No.2) dated 16.5.1973 and upon payment of the entire sale consideration, as part performance of the agreement, they were put into possession of the property in question, whereas, the said Ghulam Ali had also executed a power of attorney in favour of one Muhammad Ali. However, since Ghulam Ali passed away on 19.7.1973, the appellants could not trace out his family members and since they were in possession of original documents, including the allotment order, they continued in possession in part performance of the said agreement. The respondent on the other hand after execution of the Indenture of Lease in his favour, could not take over the possession, and made a complaint in this regard to SDM Ferozabad on or about 10.2.1994, which was disposed of by observing that the matter was purely of a civil nature, whereafter, respondent filed a Suit bearing No.365 of 1994 on or about 29.5.1994, for Declaration, Possession and Mesne Profits, initially against appellant No.3, whereafter appellants No.1 & 2 were allowed to join proceedings on an application

filed by them under Order 1 Rule 10 CPC. Issues were framed and after recording of evidence through Commissioner, the Suit of respondent has been decreed as stated hereinabove. Insofar as HCA 207 of 2003 is concerned, it is further stated that the appellants on 30.9.1997, also filed a Suit bearing No. 1361 of 1997 by asserting that pursuant to agreement of sale by late Ghulam Ali on 16.5.1973, the matter was referred for arbitration to resolve the dispute amongst the parties to the agreement, whereafter, an award dated 22.10.1993, was passed which had become Rule of the Court through decree dated 20.2.1994, and therefore, they filed the Suit and according to para 5 of the plaint in the Suit, they were put in possession once again in March 1994. It is further stated that thereafter the respondent filed an application under Order 1 Rule 10 and Section 12 CPC, before the Court of IInd Senior Civil judge, Karachi East, and on the basis of such information, they came to know that the respondent had purchased the said property from respondent No.2, vide agreement of sale dated 12.9.1993, who claimed herself to be as daughter and sole legal heir of late Ghulam Ali. The judgment and decree obtained on the basis of award by the appellants was set aside by the Court under Section 12(2) CPC, whereafter, an application under order 12 Rule 6 CPC was filed by respondent in Suit No.1361 of 1997 which has been allowed by order dated 7.7.2003 and such dismissal of Suit has been impugned through HCA No. 207 of 2003.

4. Counsel for the appellants has contended that the learned Single Judge while passing the impugned judgment in HCA No.149 of 2014 has failed to appreciate the evidence on record, and, has in fact misread the entire evidence led by the parties, by arriving at a conclusion which is contrary to the record. He has further contended that the possession of the appellant, pursuant to part performance of the sale agreement dated 16.5.1973, has not been dislodged or objected to, by the respondent, as they have failed to lead any evidence to the contrary, and therefore, the appellant's possession is protected under Section 53(A) of the Transfer of Property Act, 1882. He further submits that no documentary evidence has been brought on record to ascertain as to whether, Mst. Shahida Ghafoor, respondent No.2, was in fact the sole legal heir of late Ghulam Ali, whereas, pursuant to Public Notice dated 15.9.1993 by the respondent, the appellants had approached KDA with objections, wherein, status quo orders were passed, and despite such status quo

order, mutation was executed in the name of respondent, whereafter, the lease deed was also executed. Insofar as the order impugned in HCA No. 207 of 2003 is concerned, Counsel submitted that it was never a case of admission as contemplated under Order 12 Rule 6 CPC, as though, admittedly the appellants do not rely anymore on the judgment and decree obtained after the award which was made as a Rule of the Court, after it stood set aside against which no further appeal was preferred, but, in the circumstances, the request for amendment of the pleadings by the appellants under Order 6 Rule 17 CPC, should have been allowed as no limitation runs in allowing such amendment, whereas, the Suit filed by the appellants was not entirely based on such award, as they had also sought specific performance of the agreement in question. In support of his contention learned Counsel has relied upon the case of *Syed Waqar Haider Zaidi V. Mst. Alam Ara Begum through legal heirs and others (PLD 2015 SINDH 472)*, *Echo West International Pvt. Limited V. Pakland Cement Ltd. (2008 CLD 85)*, *Muhammad Anwar V. Syed Saleemuddin and 2 others (2009 YLR 17)*, *Mir Akbar V. Sher Bahadur and others (2006 SCMR 315)*, *Mrs. Mussarat Shaukat Ali V. Mrs. Safia Khatoon and others (1994 SCMR 2189)*, *Muhammad Shafi V. Muhammad Hussain (2001 SCMR 827)* and *Javaid Iqbal V. Abdul Aziz and another (PLD 2006 SC 66)*.

5. As to the objection with regard to delay in filing of HCA No. 149 of 2014, the Counsel contended that the appellants could not obtain the copy of impugned judgment as the Counsel earlier representing the appellants, did not inform them about passing of such judgment, and it only came to the knowledge of the appellants through search on the website of this Court, whereafter, the certified copy was obtained and the appeal was filed and the same was within time from the date of knowledge of the impugned judgment.

6. Conversely, Mr. Abdul Qadir Khan, learned Counsel for respondents in HCA No.207 of 2003 has contended that the appellants claim ownership merely on the basis of an agreement, whereas, the respondent is in possession of a registered lease document executed by the owner of the property in accordance with law and no ownership can be claimed merely on the basis of alleged possession, which even otherwise is disputed by the respondent. He has further contended that in fact the Suit filed by the appellants was collusive in nature, as according to the contents of the plaint itself, the agreement of sale was

allegedly entered into in the year 1973, whereas, the allegedly the award was passed somewhere in 1993, and during this entire period of more than 20 years, they never made any attempt to either seek specific performance of the said agreement, or any declaration regarding ownership of the property in question from any Court of law. He has further submitted that even otherwise, the prayer in their Suit is only to the extent of cancellation of documents of the respondents, but no affirmative prayer in their favour has been sought by them, so as to get a declaration of ownership on the basis of part performance of the alleged agreement. In the circumstances, learned Counsel has contended that the Suit itself as presented by the appellants was liable to be dismissed. He has further contended that insofar as the respondents are concerned, without prejudice, they are even otherwise protected under the proviso to Section 53(A) of the Transfer of Property Act, 1882, whereas, the respondent had purchased the property in question after fulfillment of requisite formalities, including issuance of Public Notice and mutation in favour of the predecessor in interest of late Ghulam Ali. Learned Counsel further submitted that after setting aside of the judgment and decree under Section 12(2) CPC, there was nothing left in the Suit filed by the appellants, as it was primarily based on the collusive award, and therefore, an application under Order 12 Rule 6 CPC was filed on behalf of respondent which was allowed by order dated 7.7.2003, wherein, in addition to an admission on the part of the appellants, the learned Single Judge has been pleased to further observe that even otherwise, the Suit was hopelessly time barred as the period of limitation for seeking cancellation of document under Article 91 of the Limitation Act, 1908, is three years from the date of knowledge, whereas, admittedly they were in knowledge of such transaction as early as on 15.9.1993 when a Public Notice was issued, and, thereafter on 6.4.1994 when the lease deed was executed in favour of respondent and therefore, the Suit in question filed by them on 30.9.1997, was time barred.

7. We have heard all the learned Counsel and perused the record as well as the R & P. It appears that the appellants claim ownership of the property in question on the basis of a Sale agreement dated 16.5.1973 as well as an Award passed subsequently in the year 1993 in their favour. However, while arguing the matter the Counsel for the appellants candidly stated that the appellants do not wish to press any further, the

claim on the basis of proceedings which culminated in their favour pursuant to the passing of the award. It therefore, follows that it is only the agreement dated 16.5.1973 on the basis of which the appellants claim ownership of the property in question in which according to them they had been handed over the possessions as part performance. However, on perusal of the record, it transpires that the Suit filed by the appellants was never entirely and or exclusively based on such agreement, as no specific performance of the said agreement was ever sought by them. It was in fact based on the award and its culmination into a Rule of the Court. Moreover, they did not made any efforts, either for seeking specific performance of the said agreement, or in any other manner, for more than 20 years, and, it is only after the respondent entered into an agreement to purchase the property on 12.9.1993 and advertised it through a Public Notice dated 15.9.1993, that they came into motion and asserted their ownership on the basis of an agreement entered into with late Ghulam Ali and the alleged possession with them. It is also noteworthy that though the agreement was dated 16.5.1973, which also included an arbitration clause as alleged, however, the said arbitration proceedings were initiated after Publication of the Notice in the Newspaper on behalf of the respondent, and thereafter the award dated 22.10.1993 was passed. Despite our repeated query, no justifiable explanation was tendered as to why the appellants kept sleeping on their rights for more than 20 years, except that they were not properly advised. Notwithstanding, that the respondent came thereafter and claimed ownership of the property in question, however it was also incumbent upon the appellants to seek their own remedy independently, and could not in law claim ownership merely on the basis of continuous possession, which they claim to have been handed over as part performance of an agreement of which no specific performance was ever sought by them. It would not be out of place to observe that the protection provided under Section 52(A) of the Transfer of property Act, 1882, could not in any manner, be construed so as to continue with possession without seeking any further remedy and having no title document in favor, till such time the other party claims possession or ownership of the property. Moreover, contents of the plaint filed on behalf of the appellants also reflect that the appellants were not always in possession of the property in question, as in Para 5, they have themselves stated that they were put into possession

once again on the basis of judgment and decree passed on the basis of award in their favour. Though the Counsel for appellants has tried to take us to the evidence led in this regard, however, we are of the view that since the plaint has itself stated the facts regarding possession; therefore, we need not go into reading of the entire evidence in this regard. It is also noteworthy to state that after dismissal of their Suit vide order dated 7.7.2003, the appellants after having filed the appeal against such order, did not pursue their remedy vigilantly and in fact also failed to bring the same on record before the learned Single Judge as the record reflects, that lately none was representing them in the matter. It is also pertinent to state that even otherwise in the Suit filed by the respondent, an issue was framed to the effect that "whether the lease deed dated 16.4.1994 in favour of respondent was obtained by fraud and misrepresentation" and the appellants could not bring on record any evidence to this effect, whereas, despite dismissal of their Suit for cancellation of documents they even had an opportunity in the Suit of respondent, to assert their claim, and if they had been able to lead proper evidence in this regard, they could have succeeded in such efforts. Moreover, the learned Single Judge while recording his finding in this regard has been pleased to observe, *that the evidence of Assistant District Officer KDA has confirmed that no fraud has been committed in leasing the Suit property in favour of the respondent, whereas, the defendants have failed to even remotely suggest the particulars of fraud and misrepresentation and without any tangible evidence suggest fraud. It cannot be held that that the respondent has committed any fraud and accordingly the issue was answered in the negative.* In response, Counsel for the appellants has not been able to lead any argument or refer to any material, whereby, it could be suggested that the lease deed in favor of the respondent dated 5.4.1994 was obtained by fraud or misrepresentation. It has been further observed by the learned Single Judge that the appellants have also failed to bring on record the original agreement dated 16.5.1973, on the basis of which they claim possession of the property in question as a part performance, and, the attorney of the appellants could only produce photo copies of the Power of Attorney as well as the agreement allegedly executed by late Ghulam Ali. It has also come on record through evidence that the original allottee of the plot in question was late Ghulam Ali, and after his death the property was mutated in the name of his daughter Mst. Shahida Ghafoor as the sole legal heir, and thereafter, the lease

deed was executed in favour of respondent on 5.4.1994. The respondent has led its evidence through the Assistant District Officer KDA who entered into the witness box, but the appellants could not discharge the onus on them with regard to the lease and mutation in their favour. In the circumstances, the appellants are not justified to retain the possession anymore and it appears that the Suit has been correctly decreed in favour of the respondent.

8. Even otherwise, perusal of the record further reflects that the Suit filed by the appellants was admittedly time barred, as by their own averments, it was in their knowledge that the lease deed had been executed in favour of the respondent on or about 6.4.1994, whereas, they chose to file Suit for cancellation on 30.9.1997. The period of limitation for filing such Suit is provided under Article 91 of the Limitation Act, which is three years from the date of knowledge of such documents of which the cancellation is being sought. Therefore, admittedly the Suit appears to be time barred, whereas, the Counsel for the appellants could not justify such lapse on the part of the appellants and contended that perhaps the appellants were not properly advised by their previous Counsel. This is hardly a ground in respect of limitation for filing of a Suit, whereas, in terms of Section 3 of the Limitation Act, every such Suit instituted, after the period of limitation prescribed, shall be dismissed although limitation may not have been set up as a defence. Therefore, even if their Suit was not liable to be dismissed under Order 12 Rule 6 CPC, the same was otherwise barred in limitation under Article 91 of the Limitation Act, and would have met the same fate. Moreover, though we have given our finding on merits of the case in HCA No.149 of 2014 however, the same also appears to be time barred by 8 days, whereas, initially the appeal was filed even without any application for condonation of delay as pointed out by the Counsel for respondent. Whereas, on 26.8.2014, after 3 months of filing of the appeal, the appellants filed CMA No. 2291 of 2014 under Section 5 of the Limitation Act, 1908, for condonation of delay. The affidavit in support of such application does not reflect, nor does it give proper date on which it came to the knowledge of the appellants that the matter has been finally decided, and that as to whether, on which date it came into the appellant's knowledge through search on the website of this Court, that the judgment has been announced. The entire affidavit is silent with



regard to explanation of delay of each day. Moreover, it further appears that not less than nine advocates had been engaged by the appellants before the learned Single Judge, whereas, none was appearing on their behalf, and merely by stating in the affidavit that one Mr. Ashiq Hussain Mehar did not inform them about the proceedings in question, would not shift the burden, nor would the onus discharge in such a casual manner. In the circumstances, even otherwise the appeal is dismissed as being time barred.

9. In the circumstances and in view of hereinabove discussion and after having come to the conclusion that both the appeals are meritless as well as frivolous in nature, we had dismissed them by means of a short order on 15.12.2015 by imposing cost of Rs. 50,000/- each and the above are the reasons in support thereof. The appellants shall deposit the cost within 15 days from the date of this judgment with the Nazir of this Court in the account of High Court Clinic; whereafter compliance report shall be placed before us.

Judge

Chief Justice

ARSHAD/