

IN THE HIGH COURT OF SINDH AT KARACHI

Constitution Petition No.D-4843 of 2013

[Maj. Rtd. Tariq Lodhi Versus Mst. Khalida Jilajni and others]

Present:

Mr. Justice Irfan Sadaat Khan and

Mr. Justice Muhammad Faisal Kamal Alam

Date of hearing : 10.08.2017

Date of order : _____

Petitioner

[Maj. Rtd. Lodhi]; : Represented by Choudhary Abdul Rasheed, Advocate.

Respondents No.1

[Mst. Khalida Jilani]

Respondent No.2

[Mst. Sana Asad]

Respondent No.3

[Mst. Asma Abid]; : Represented by Mr. Raja Mansoor Mir, Advocate.

Respondent No.4

[Senior Civil Judge-X,
Karachi-South)]; :

Respondent No.5.

[Additional District Judge-V,
South, Karachi]; : Nemo for Respondents No.4 and 5.

Case law cited by the Petitioner's counsel.

- 1. 2009 SCMR Page-589 [Supreme Court of Pakistan]**
(Gul Rehman Versus Gul Nawaz Khan) [**Gul Rehman case**]
- 2. PLD 2010 Supreme Court Page-906**
(Bashir Ahmed Versus Mst. Taja Begum and others) [**Bashir case**]
- 3. 2010 CLC Page-407 [Karachi]**
(Muhammad Nawaz Magsi Versus Haji Illahi Bux and others)
[**Magsi case**]

4. **2011 SCMR Page-1009 [Supreme Court of Pakistan]**
(*Mubashir Ahmed Versus Syed Muhammad Shah through Legal Heirs*) [*Mubashir case*]
5. **2012 CLC Page-284 (Lahore)**
(*Muhammad Sarwar Versus Ahmed Khan through LRs and 2 others*) [*Sarwar case*]
6. **2017 SCMR Page-316 [Supreme Court of Pakistan]**
(*Syed Hakeem Shah (Deceased) through LRs and others Versus Muhammad Idrees and others*) [*Shah case*]

Case law relied upon by Respondents' counsel.

1. **PLD 2010 Karachi Page-17**
(*Haji Abdul Karim and 4 others Versus Messrs Florida Builders (Pvt.) Ltd.*) [*Florida case*]
2. **PLD 2012 Supreme Court Page-247**
(*Haji Abdul Karim and others Versus Messrs Florida Builders (Pvt.) Limited.*) [*Florida case*]

- Law under discussion:**
- (1). The Constitution of the Islamic Republic of Pakistan, 1973.
 - (2). Civil Procedure Code, 1908 {*CPC*}
 - (3). The Transfer of Property Act, 1882. {*Property Law*}
 - (4). The Specific Relief Act, 1877.
 - (5). The Limitation Act, 1908. {*Limitation Law*}
 - (6). Sindh Chief Court Rules {*SCCR*}

ORDER

Muhammad Faisal Kamal Alam, J: The Petitioner has called in question the Judgment dated 07.11.2013 passed by learned Vth Additional District Judge, Karachi (South) (Respondents No.5), whereby, the order of learned Trial Court (Respondent No.4), dismissing the Application for rejection of Plaint of Suit No. 1059 of 2011 filed by present Petitioner, was

overturned; consequently, rejecting the plaint of the above Suit. Petition contains the following prayer clauses:

“It is, therefore, prayed that this Hon’ble Court may be pleased to pass the orders:

a. Declaring the judgment dated 07.11.2013 passed by the Respondent No.5 is illegal, unlawful, improper, unjust, and being null and void has no legal effects.

b. To set aside the impugned judgment dated 07.11.2013 with the direction to the Respondent No.4 to decide the Suit No.1057 of 2011 on merits.

c. Cost.

d. Any other relief(s) deemed to be fit under the special circumstances of the case.”

2. The relevant facts leading to the present litigation are that private Respondents No. 1 to 3, being owners of an Apartment/Flat No.A-3, Ground Floor, Block-A, located in a multistoried project “Bath Island Apartment”, Karachi (**the subject Property**), entered into an Agreement of Sale dated 04.02.2003 with present Petitioner, in respect of the subject property for a total sale consideration of Rs.13,50,000/- (Rupees Thirteen Hundred fifty Thousand Only) out of which a part payment of Rs.2,50,000/- (Rupees Two Hundred Fifty Thousand only) was made to the above private Respondents (No.1, 2 and 3); however, the said Sale Agreement could not be completed which resulted in multiple litigations amongst the parties hereto.

3. The Agreement to Sell dated 04.02.2003 is appended as Annexure “P/2” (at Page-37 of the Petition), which is an undisputed document and will be referred to as the **Contract**. Initially, the private Respondent No.1 filed a Suit No.1911 of 2003, for taking the possession of the subject property from Petitioner, which was handed over to the latter for carrying

out certain repairs, however, the stance of Petitioner is that the said possession was handed over as part performance of the **contract**. The said suit was contested by present Petitioner by filing a Written Statement; Issues were framed and the Parties led their evidence.

4. The Trial Court by its Judgment dated 10.08.2011, dismissed the above Suit of present Respondent No.1, *inter alia*, by holding that the possession of the subject property was handed over to Petitioner as part performance of the Contract and latter is ready and willing to fulfill his part of obligations. This Judgment was challenged in First Appeal No.202 of 2011, by the present Respondent No.1, which too was dismissed in favour of present Petitioner by the Judgment dated 20.04.2013 (available at Page-107 of the Court file), which has been challenged by the private Respondents in Second Civil Appeal No.64 of 2013, which is *sub judice* before this Court, as specifically mentioned in their Objections to the main Petition, which assertion has not been controverted by the Petitioner's side.

5. Choudhry Abdul Rasheed, learned counsel for the Petitioner has argued that the impugned Judgment passed in Civil Revision Application No.164 of 2012 is erroneous as it has misapplied Article 113 of the Limitation Law, while holding that subsequent *lis* (Suit No.1059 of 2011) filed by the present Petitioner was time barred, as three years limitation for filing the suit for Specific Performance is not applicable to the facts of the present case, because Petitioner was already in possession of the subject property as part performance of the contract by private Respondents as envisaged in Section 53-A of the Property Law. The leaned counsel has strenuously argued that the impugned Judgment warrants interference by this Court, as while exercising revisional jurisdiction, a plaint of the suit cannot be rejected by reversing the decision of the Trial Court, which has refused to reject the Plaint; the revisional jurisdiction under Section 115 of

CPC is not a continuation of the original/suit proceedings like the appellate jurisdiction. The Plaintiff thus seeking issuance of writ of *certiorari* and has placed reliance on the case law, already mentioned in the opening paragraph of this Judgment.

6. The above stance of Petitioner is controverted by Mr. Raja Mansoor Mir, learned counsel representing Respondents No.1, 2 and 3. According to him, the Petitioner was / is in illegal possession of the subject property, which was initially handed over to him for carrying out only some repair and maintenance works and not as part performance of the contract. Learned counsel has argued that possession was handed over in terms of Clauses 5 and 8 of the said contract, perusal whereof shows that Respondents were handed over keys of the said property to the Petitioner to carry out repairs at the latter's cost. Learned counsel further argued that Clause 8 supplements Clause 5, which clearly provides that till the date of handing over vacant and physical possession to the Petitioner, all dues, rent and taxes as well as utility charges shall be the responsibility of Respondents as Vendors. Certified copy of deposition recorded in aforesaid Suit No.1911 of 2003 (filed by present Respondent No.1) has also been appended with the Objections as "**R-1**". In his cross examination, the present Petitioner has acknowledged that the subject property was handed over to him under above referred Clause 5 of the contract. Present Petitioner further testified that before living in the subject property he was residing in an accommodation at Zamzama Boulevard as tenant. Learned counsel argues that it is not just logical that a physical and vacant possession was handed over to the Petitioner but all the charges and taxes in relation to the subject property was being paid by the present Respondent No.1. He further argued, by referring to Annexure "**R-2**" with his Objection, that even before the present *lis* (Suit No.1059 of 2011), the Petitioner also instituted a Suit for Permanent Injunction and Damages

being Suit No.1469 of 2003 against the present Respondent No.1 and impleaded the Police Officials as Defendants. In that previous suit also Petitioner never pleaded specific performance of the contract though at that relevant time admittedly the above contract was there, as is also evident from the pleading of that earlier suit of the Petitioner. Learned counsel for Respondents has cited the reported Judgments which have already been reproduced in the opening paragraph of this Order.

7. We have thoughtfully considered the submissions of both the learned counsel representing the parties and with their assistance have gone through the record of the case.

8. Three reported Decisions have been cited by the learned counsel representing Petitioner; (i) **Shah case**, (ii) **Magsi case**, and (iii) **Mubashar case** in support of his plea that in the impugned judgment, the Limitation Law has been misapplied, because Petitioner is already in possession of the subject property as part performance of the Contract, in terms of Section 53-A of the Property Law.

9. The above mentioned case law relied upon by the learned counsel for Petitioner are distinguishable, as in all these cases it was not a disputed fact that in pursuance of a sale transaction for an immovable property, the Appellant / Petitioner of these reported decisions were handed over the property as part performance of contract, but on account of certain unavoidable circumstances, the sale deed could not be executed, however, suit for Specific Performance were filed when possession of these persons/ petitioners were threatened. In the **Mubashir case**, possession of land was handed over under an oral contract, which was proved in the evidence. In this case, the suit for specific performance was filed although after ten years but for reason that in all these years his possession never came under threat.

With these set of facts, it was held by the Court in **Magsi case** (ibid) as well as by the Hon'ble Supreme Court in **Shah** and **Mubashir cases** (supra) that since Section 53-A itself creates a right in favour of a transferee to retain the possession in performance of the contract, therefore, this statutory right being an existing and a recurring one, cannot be extinguished by any length of time. It was further held that **even the Court granting a relief for Permanent Injunction to such a transferee in respect of his possession under Section 53-A, can also direct the parties to complete the sale transaction under the contract.** The second reason that these reported Judgments are not applicable to the present set of facts at this stage, because this particular issue of possession of present Petitioner in respect of subject property is already *sub judice* in afore referred Second Appeal No.64 of 2013. Any finding on this particular plea, will surely prejudice the matter in the said Second Appeal. Thirdly, this issue of possession of present Petitioner is an issue of fact, as already acknowledged by the learned counsel for the Petitioner, regarding which, favourable concurrent findings have been given by the Courts below, which is now impugned in the above referred Second Appeal and it otherwise falls outside the scope of the extra ordinary writ jurisdiction of this Court.

10. Adverting to the second limb of Petitioner's contention about limited scope of revisional jurisdiction. Per learned counsel for Petitioner, even if the learned Respondent No.5 (Additional District Judge-V, South) was of the view that the Trial Court while passing order on Application under Order 7, Rule 11 (of CPC) has acted illegally, then at the most, the Case should have been remanded to the Trial Court (Civil Court), but the said Revisional Court itself does not have power to reject the Plaint of Petitioner's suit. First case is of **Gul Rehman**, in which, the Hon'ble Apex Court remanded the case to the Ist Appellate Court, regarding which, it was observed that it did not apply its judicial mind in exercising the Appellate

jurisdiction properly while maintaining the order of the Trial Court, which has dismissed the pre-emption suit of Respondents (of that case). The learned Peshawar High Court in exercise of its revisional jurisdiction decreed the suit against which a direct Appeal was preferred before the Hon'ble Supreme Court. The ratio of this case is that Revisional Court should have remanded the case to the Ist Lower Appellate Court as it has given a cursory Judgment without looking at the sufficient material / evidence on record. This citation has no application to the facts of the instant Constitutional Petition. The Second Judgment in **Sarwar case** is handed down by the learned Lahore High Court, where Respondents (of that suit) filed an Application under Order VII Rule 11 of CPC for rejection of Plaint in pre-emption suit, which was dismissed by the Civil Court, but the Revisional Court reversed the decision. However, the distinguishable factor between that case and the present case is that in the above cited decision there was a mixed question of law and fact about transfer of right of occupancy and that of ownership regarding which Issue was also framed and trial was pending, but the Revisional Court had given its decision on certain documents, which were to be brought on record as evidence, hence, trial was prejudice. The third decision is the **Bashir case**, in which the Hon'ble Supreme Court has explained the limited scope of Second Appeal and Revision; Sections 100 and 115, respectively of CPC, while discussing the import of Article 184 (3) of the Constitution, that relates to filing leave to appeals to the Supreme Court. Basically in this case the Hon'ble Supreme Court has laid down a criteria for grant of leave to appeal by drawing an analogy from the scope of above Sections 100 and 115 of CPC. This decision too, we are afraid, does not lend any support to the case of present Petitioner.

11. On the other hand, the two cases cited by the Defendants, wherein, Article 113 of the Limitation Law, for bringing an action for Specific Performance is explained, in our considered view, would be applicable to the facts of the present case. The Hon'ble Apex Court has also given legislative history of Article 113, crux of which is that it is activated when Plaintiff has notice that his right is denied. It would be advantageous to reproduce the said Article 113 as follows:

13.	For specific performance of a contract.	[Three years]...	The date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused.
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It has been further explained that the 'refusal' by a party to the contract to perform the same can be ascertained primarily from two things; (i) the date fixed for the performance; and (ii) if no such date is fixed, when the plaintiff has notice that performance is refused.

12. The present case is covered by second part, that is, when the present private Respondent No.1 instituted her afore referred Suit No.1911 of 2003 against the present Petitioner for Possession and Mesne Profit; the date of the institution of the said Suit was 22.10.2003 and the present Petitioner should have brought his claim of Specific Performance within three (03) years from that date, which admittedly he did not. The second inescapable and undisputed fact is that Petitioner did file a subsequent proceeding in the shape of Suit No.1469 of 2003 (previous suit), but admittedly omitted the relief of Specific Performance of the Contract, though at that relevant time that relief of Specific Performance was available to the Petitioner,

therefore, his subsequent *lis* (Suit No.1059 of 2011) is barred by Order II Rule 2 of CPC, which runs as under:

“Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.”

13. The provisions of Specific Relief Act as relied upon by learned counsel for private Respondents have no applicability in the present case as observed in the preceding paragraph, that a Second Appeal is already *sub judice* before this Court in which all such pleas can be taken by both the parties. It is settled principle that the proceeding or suit barred by law should be buried at the earliest, otherwise it would be an abuse of process of Court. The learned Respondent No.4 (Xth Senior Civil Judge, Karachi (South)] considering undisputed factual and legal aspects of the litigation, should have exercised his power under Order VII Rule 11 of CPC, by rejecting the Plaint, which is not only barred by Order II Rule 2 of CPC, but also hit by Article 113 of the Limitation Law, as admittedly the subsequent suit for specific performance has been filed by the present Petitioner after eight years from the date of contract in respect of the subject property as well as the Suit No.1911 of 2003, filed by the private Respondents. Thus, the learned Revisional Court has rightly come to the conclusion that the decision of the Trial Court in not rejecting the Plaint is not only a material irregularity, but the Trial Court has failed to exercise the proper jurisdiction vested in it. Consequently, the impugned Judgment does not suffer from any illegality that requires any interference in this writ jurisdiction. The other reason for not accepting the instant Constitutional Petition is that the Petitioner has concealed the fact about pendency of the afore referred Second Appeal and filing of his earlier Suit No.1469 of 2003, which also subsequently failed.

14. The upshot of the above discussion is that the present Constitutional Petition is dismissed along with listed application. However, it is clarified that any observation made in this decision will not, in any way, influence the proceeding of afore referred Second Appeal.

15. Parties are left to bear their own costs.

JUDGE

JUDGE

Dated _____
M.Javid.P.A.