

IN THE HIGH COURT OF SINDH, KARACHI

Suit No.622 of 2016

[Habib Ismail v. Mrs. Syeda Fiza Hashmi & others]

Date of hearing : 21.08.2017
Date of Decision : 31.08.2017
Plaintiff : Habib Ismail, through Mr. Qadir Khan Mandokhail, Advocate.
Defendants 1 & 2 : Mrs. Syeda Fiza Hashmi and Mohsin Abbas, through Mr. Muhammad Ali Lakhani, Advocate.

Case law cited by the Plaintiffs' counsel.

Case law relied upon by Defendants' counsel.

Other Precedent

P L D 2012 Supreme Court page-247

[Haji Abdul Karim and others v. M/s Florida Builders (Pvt.) Ltd.] - Florida case.

Law under discussion: (1) Civil Procedure Code, 1908.
(2) Limitation Act, 1908.

ORDER

Muhammad Faisal Kamal Alam, J: Plaintiff has filed this action at law primarily seeking Specific Performance of the Agreement dated 15.11.2005 with the following prayers_

- (i) *Declare that the Plaintiff is entitled to execution and possession of the suit property to his name upon payment of balance amount of sale consideration.*
- (ii) *A decree of Specific Performance for the transfer of the property being Plot No.19-A/1, Khayaban-e-Tanzeem, Phase-V, D.H.A. Karachi, measuring 508 Sq. Yards, along with construction of a*

double storey bungalow thereon against the Defendants. In the event of the failure of the Defendants to complete the formalities for the transfer of the suit property in favour of the Plaintiff. Nazir of this Honourable Court may be directed to complete the formalities for the transfer of the said property in favour of the Plaintiff.

- (iii) *Permanently restrain the Defendants No.1, 2 and 3 from transferring the suit property No.19-A/1, Khayaban-e-Tanzeem, Phase-V, D.H.A., Karachi, measuring 508 Sq. Yards, along with construction of a double storey bungalow thereon, to anyone else, except to the Plaintiff above named.*
- (iv) *Direct the Defendants to deposit an amount of Rs.100,000/- per month as Mesne Profit from the date of execution of the agreement till finalization of the suit before the Nazir of this Honourable Court.*
- (iv-a) *To cancel the Gift Deed executed by Defendant No.1 in favour of the Defendant No.2 and 3.*
- (v) *Cost of the Suit.*
- (vi) *Any other relief, which this Honourable Court may deem fit and proper in the circumstances of the case.*

2. In the intervening period, Mr. Muhammad Ali Lakhani, learned counsel for private Defendants No.1 to 3 moved an application (C.M.A.No.10934 of 2016) under Order VII, Rule 11 of C.P.C. (the “**Application**”), seeking rejection of plaint of instant *lis*, *inter alia*, on the grounds that earlier also two Suit Nos.339 of 2009 and 1054 of 2010 relating to the same Agreement to Sale dated 15.11.2005 (‘**subject Agreement**’) was withdrawn simplicitor by the present Plaintiff and thus instant *lis* is barred by law and in particular under Article 113 of the Limitation Act, 1908, whereunder three years period is prescribed for bringing an action of the nature. To substantiate his stance, record of earlier proceeding of the above referred suits have been appended by the Defendants with their aforereferred Application (under Order VII, Rule 11 of C.P.C.).

3. Mr. Qadir Khan Mandokhail, learned counsel for the Plaintiff has refuted the arguments of Defendants' counsel and set up a defense that the Application for rejection of plaint, moved by the Defendants is liable to be dismissed, as the relationship between the private parties hereto; Plaintiff and Defendants No.1 to 3, is not only that of Vendor and Vendee but they are partners in other transactions also, which relationship is a continuing one. It is further stated by learned counsel for the Plaintiff by referring to another Settlement Agreement of subsequent date, that is, 28.03.2009, available at page-53, as annexure "D" to the plaint, that since the parties hereto had earlier settled their dispute amicably, thus withdrawal of earlier Suit No.339 of 2009 by present Plaintiff is of no consequence.

4. Respective submissions of learned counsel representing the Plaintiff and private Defendants, who were in fact the contesting Defendants, have been heard and with their able assistance, record of this case is taken into account.

5. The undisputed facts for deciding the present Application are that the Plaintiff and private Defendants have entered into the above subject Agreement in respect of sale of Property No.19-A/1, Khayaban-e-Tanzeem, Phase-V, D.H.A., Karachi, admeasuring 508 Square Yards ("**subject Property**") on the stipulations mentioned in the above Subject Agreement.

6. In order to appreciate the arguments of both counsel, I have gone through the paragraphs containing cause of action for filing of all three suits, viz. Suits Nos.339 of 2009, 1054 of 2010 and finally the present *lis*. The cause of action of present suit and that of last suit (Suit No.1054 of 2010) are identical except that in the instant suit a sub-paragraph(e) is added, which is quite general in nature and alleges violation of "comments" dated 06.03.2016, by present private Defendants, but without mentioning

any detail relating to this purported commitment. Interestingly, the cause of action as mentioned in Paragraph-10 of first suit (Suit No.339 of 2009) is also similar to the cause of action of present case, except, since at that relevant time the subsequent Settlement Agreement (dated 28.03.2009) was not signed, therefore, it has not been mentioned in the cause of action of afore referred first suit. The prayer clause(s) of these three suits relate to the relief seeking the Specific Performance of Subject Agreement, however, in the first suit present Plaintiff also sought the remedy of damages against present private Defendants, which was omitted in subsequent Suit No.1054 of 2010 and present *lis*.

7. The other salient features of earlier litigation is that both suits were withdrawn simplicitor although in subsequent suit (Suit No.1054 of 2010) filed by present Plaintiff together with one Shahzad Ahmed as Plaintiff No.2, who is also one of the Vendees of the Subject Agreement, a compromise application in terms of Order XXIII, Rule 3 of C.P.C. was filed, which is available at page-117; but the order dated 26.04.2012, available at page-129 of the Court file, merely states that suit was dismissed as withdrawn along with listed applications. Undisputedly, present Plaintiff did not prefer any application for review or clarification of the said order, if at all the said order of 26.04.2012 was erroneous, or, if stance of present Plaintiff is that earlier suit should have been decreed in terms of the compromise application (afore-referred), then he should have taken steps for setting aside the said order of 26-4-2012, where under the last suit was allowed to be withdrawn simplicitor. Similarly, it is also an admitted fact that first Suit No.339 of 2009 was also withdrawn by present Plaintiff simplicitor by moving an application under Order XXIII, Rule 1 of C.P.C., available at page-159 of the Court file, followed by the order dated 03.04.2009.

8. Present proceeding is the third one in line regarding the same Subject Agreement (subject matter) with the only difference that the other Vendee (Shahzad Ahmed), who was impleaded as Plaintiff No.2 in the other two suits, has been dropped here; perhaps to overcome a legal objection that the present proceeding is not between the same parties, but this is immaterial, considering the nature of present controversy.

9. Admittedly, Plaintiff is seeking Specific Performance of Subject Agreement, which was signed on 15.11.2005; that is, **after eleven years**. Even if the arguments of learned counsel for the Plaintiff is accepted that the earlier agreement stood amended by subsequent Settlement Agreement dated 28.03.2009, even then the proceeding of the nature should have been instituted much earlier, in order to save the instant suit from the mischief of Article 113 of the Limitation Act. In this regard, a reported decision of the Honourable Supreme Court in **Florida Case (ibid)** provides an answer; wherein the Honourable Apex Court has also given legislative history of Article 113, crux of which is that it is activated and attracted in the event 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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10. 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.

11. The undisputed facts and record of earlier litigation have proved this point that the sale transaction in question could not be completed within the

stipulated time mentioned in both the above subject Agreement and the Settlement Agreement and Plaintiff should have *availed and pursued the remedy* provided under the law, which he did not. Even when a compromise application (as mentioned above) in second Suit No.1054 of 2010 was filed, the said suit did not come to an end by way of a compromise decree, but it was again *simply withdrawn* vide order dated 26.04.2012; Annexure A/6 of instant Application, which, was never challenged by Plaintiff, as already discussed in the foregoing paragraphs. One of the reasons for not impugning the above withdrawal order by Plaintiff, could be tainted with *mala fide*, as under the stipulations of the afore mentioned Compromise Application, *disputes between both present Plaintiff and private Defendants were laid to rest and both have released each other from all claims.* It means that it was the second time a second proceeding regarding the same subject matter and Sale Agreement was withdrawn second time. This is the third suit in a row containing primarily the same cause of action and relief(s), which is not permissible in law and the present suit is also hit by the provisions of Order II, Rules 2 and 3 of C.P.C., which runs as under:

“(2) 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.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.”

12. One of the tests for applicability of Order II, Rule 2 of C.P.C. to a case is that if after comparison of pleadings and particularly cause of action and reliefs claimed of past and present litigation, Court concludes that a party (plaintiff) would lead same set of evidence for proving or disproving

the controversial issues, then the subsequent suit is adversely affected by the provision of Order II, Rule 2 of C.P.C.

13. Applying the above test to the facts of the present case, it is not difficult to hold that in the earlier litigation and the present one, primarily the same set of evidence is to be led, besides, the causes of action in earlier and present *lis* are almost identical. Consequently, present suit is barred by not only Article 113 of the Limitation Act, 1908, but also under Order II, Rule 2 of C.P.C. Accordingly, the Application (under Order VII, Rule 11 C.P.C.) is granted and plaint of present suit (Suit No.622 of 2016) is rejected.

14. Office is directed to draw up a decree as per Rules.

15. Parties to bear their own costs.

JUDGE

Dated: 31.08.2017.

*Riaz Ahmed / P. S.**