

# IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

R.A. No. 157 of 2016

Date of hearing  
& decision : 02.12.2019

Applicants: Through Mr. Nazeer Hussain Jarwar, Advocate.

Respondent: Nemo for the respondent.

## **ORDER**

**ADNAN-UL-KARIM MEMON, J:** - Applicants are asking for setting aside the Judgment and Decree dated 10.03.2016 passed by learned District Judge, Mirpurkhas, in Civil Appeal No.09 of 2015 as well as the judgment dated 11.08.2014 and decree dated 12.08.2014 passed by learned 3<sup>rd</sup> Senior Civil Judge, Mirpurkhas in F.C Suit No.02 of 2013, whereby the suit filed by the applicants / plaintiffs was dismissed.

2. Case of the applicants is that they filed Suit No.02 of 2013 against the respondent No.1 for Declaration, Specific Performance of Contract & Permanent Injunction on the premise that they had purchased the suit land from respondent No.1 in the year 1974 for valuable consideration with possession, for that an agreement to sale was executed. The sale deed could not be finalized during his life time due to cordial relationship between the parties, however, in the year 2012, legal heirs of respondent No.1 avoided to execute the sale deed in favour of the applicants and negotiated with third party to sale out the subject land, compelling the applicants to institute proceedings against them in the year 2013. The suit of the applicants / plaintiffs was proceeded ex-parte against as none from the respondents came forward to defend the same. The learned trial Court examined the material witnesses and after hearing the applicants dismissed their suit vide judgment dated 11.08.2014. The applicants being aggrieved by and dissatisfied with the aforesaid Judgment and decree preferred statutory Appeal, which too was dismissed vide Judgment and Decree dated 10.03.2016. The applicants have now filed the instant Revision Application against the concurrent findings of both the Courts below.

3. Mr. Nazeer Hussain Jarwar, learned Counsel for the Applicants has mainly contended that the judgments of both the courts below are contrary to the law and facts; that there was nothing in rebuttal, therefore, suit of the applicants was liable to be decreed as prayed; the judgments of both the Courts below are based upon misreading / non-reading of evidence brought before the learned trial court, as such, instant revision application may be allowed and judgments of both the Courts below

may be set-aside; that the findings recorded by learned courts below were based on notion which is not substitute of law; that the sale transaction in favour of the applicants had been admitted by some of the legal heirs of deceased and witnesses who were examined by the applicants and the factum of possession of the subject land had also been admitted by them; that there being no period for execution of the sale-deed fixed in the sale agreement in question, the period of the limitation would be 3 years from the date of execution of the sale-agreement and not from the date of denial which allegedly was made after the death of deceased when they were called upon to execute the sale agreement being legal heirs and on refusal the applicants instantly filed the suit for specific performance of agreement to sale.

4. During the course of arguments, I asked learned counsel that the relief of specific performance of contract is governed by Article 113 of the Limitation Act and the period of three years is to be reckoned from the week preceding the filing of the suit when the private respondent refused to take steps for registration of the sale-deed. Learned Counsel states that due to good relationship between the parties sale deed of the subject property could not be executed during life time of deceased as he assured the applicants from time to time on the premise that since the applicants are in possession of the suit-land therefore they should not be worried and further assured that as and when legal documents of the subject property become ready he would do the needful; that since agreement to sale does not speak about the date of execution of sale deed and as such the relief is not barred by limitation as portrayed in the impugned orders. He next submitted that there was nothing in rebuttal as such the suit of the applicants ought to have been decreed as they have been able to prove the execution of sale agreement between the parties, through cogent evidence.

5. I again asked learned counsel to show the agreement of sale; he replied that the same is not available with him as the same pertains to the year 1974; however the same was produced before learned trial court. I again asked him that he has approached learned trial Court in the year 2013, and the alleged cause of action accrued to him when deceased avoided to execute sale deed during his life time, he reiterated his submissions as discussed in the preceding paragraphs; however, no cogent reason has been assigned for approaching the trial Court after considerable delay.

6. I have heard learned counsel for the applicants on the issue of maintainability of the instant revision application and also reviewed the record available before me.

7. The crucial points involved in the matter are; *whether the applicants during the course of trial proved the existence of sale agreement under the law?* and *whether the limitation period for filing suit for specific performance is three years and the time from which such period begins would be from the date fixed in the agreement for its performance and if no such date is fixed in the agreement itself,*

*then the period of limitation would be computed from when the plaintiff has notice that performance is refused?*

8. To appreciate the first proposition, it is expedient to have a look at the evidence brought on record by the applicants. Admittedly, the suit filed by the applicants in the year 2013 for Declaration, Specific Performance of Contract & Permanent Injunction. The applicants have based their case on two folds i.e. Sale agreement dated 12.03.1974 and possession of the subject land. The findings of learned trial court on the issue of sale agreement are that the same was purportedly executed on 12.03.1974, having L.T.I's and signatures, respectively; that the applicants had filed civil suit on 11.01.2013 while the sale agreement was made on 12.03.1974. The aforesaid factum explicitly show that the applicants were in better position to pursue the matter for registration of sale deed. Record does not show that they made any attempt for the purpose of completing the documents; sufficient time was available with the parties; that purchaser is not supposed to remain mum for the purpose of registry. This means that during the life time of respondent No.1, there was complete silence on the part of applicants in respect of suing for legal remedy; that sale agreement does not disclose the NIC numbers of the parties and witnesses, creating strong doubt about the credibility of the sale agreement. The learned trial court found the following discrepancies in the evidence of the applicants:-

“Not only this, from the perusal of affidavit in exparte evidence, it appears that one Muhammad Ashraf has filed his affidavit in exparte evidence mentioning therein that the sale agreement bears his L.T.I. However, such evidence of said Muhammad Ashraf is not convincing the mind on the ground that he is not thumb impression expert, therefore, how he identified his father L.T.I. on the document which was written in the year 1974. This aspect too is creating doubt in a mind.

From the perusal of the plaintiff's attorney affidavit in ex-parte evidence, it appears that it is mentioned in the same that due to defendants started avoiding their obligations, plaintiffs approached through Nekomards and defendants kept them in hopes. However, such piece of plaintiff's attorney evidence is not inspiring the mind on the ground that not a single Nekomard affidavit in ex-parte evidence has been filed on the record showing the support to such pleading of the plaintiff, also not a single name of Nekomards is disclosed who approached the defendants on behalf of the plaintiffs for the purpose. This means that there is no support to the plaintiff such pleadings.

So far as the other document i.e. dhal receipt are concerned, it may be mentioned here that mere payment of dhal is not sufficient evidence to prove the sale and purchase of the suit land, more particularly when the above discussed aspects are clearly exposing the credibility of sale agreement in question, therefore, the said dhal receipt cannot be safely relied upon.”

9. From the aforesaid factum of the case, it appears that the applicants have no legal basis to claim enforcement of specific performance of contract. It would be appropriate to refer here the provisions of Section 42 of Specific Relief Act, which provides that **“Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and, the plaintiff need not in such suit ask for further relief.”** Legal character means a character confirmed by law. In the case in hand, though the suit proceeded in ex-parte proceeding against the

respondents but the sale agreement which is base, is itself doubtful, consequently mere possession is not sufficient to prove the existence of sale agreement, therefore, no such legal character is confirmed on the applicants over the suit land.

9. The learned appellate Court concurred with the view of learned trial Court in the following manner:-

“Now the point for determination now would be whether the agreement to sale which the appellants are having is liable to be enforced? It is true that none has put up any defence against the appellants but it does not mean that; for this account, the suit, as filed by the appellants is liable to be decreed, as they have to prove what they have alleged. If for the sake of arguments, it is believed that; the agreement of the sale was executed in favour of the appellants then it was done in year 1974 while they have come before the Court in year 2013. Why they slept over their right for about forty years? No cogent explanation in that respect is offered by them. The point of limitation in that situation could not be overlooked, on the basis of after-thought pleas. If for the sake of arguments, it is believed that; the said agreement to sale was not subject to limitation, even then, it is not liable to be enforced for more than one reason which are to be discussed here-in-after. No doubt, both of the attesting witnesses to the said agreement, it is said have died and instead their sons, PW Liaquat Ali and PW Muhammad Ashraf have been examined by the appellants, who in their affidavits in exparte evidence have stated that; signatures on the said agreement are of their father(s) for purpose of comparing or satisfaction of the Court. If for the sake of arguments, it is believed that; the signatures on the said agreement, as were identified by the said witnesses were of their father(s), then no explanation is offered by the appellants, as to under what circumstances and under what account they failed to examine Jairam Das, the stamp vendor and/or scribe/author of the said agreement. His non examination without any cogent reason reflects something wrong and obviously has made the character of said agreement to be doubtful one. If for the sake of arguments, it is believed that; the appellants are in possession of the suit land then their status over it is not more than that of trespasser and trespasser has hardly has an equitable right.”

10. It appears from the record that the applicants failed to prove the basic existence of the sale agreement between the parties, therefore all other issues are immaterial, as such no further discussion is required on the aforesaid proposition.

11. To answer the next question, it is to be seen from what date the period of three years will commence? The language used by the Legislature is not ambiguous and fixes with certainly the date of the commencement of limitation as the date "*when the plaintiff has notice that performance is refused.*"

12. In view of this clear language there can be no doubt that the date of commencement of limitation is the date on which the party seeking performance has notice, that his right is denied. The cause of action arises from that date and the limitation also begins to run from the same date. The words "**date fixed**" in the first clause of the third column of Article 113 of the Limitation Act are of great

significance. The "**date fixed**" means a particular date fixed expressly by the parties for the performance of the agreement.

13. In the instant case, no agreement to sale was proved and on the aforesaid analogy, the suit of the applicants was dismissed by the learned trial Court on 11.08.2014 and the appeal preferred by the applicants was also dismissed by the learned District Judge, Mirpurkhas, vide judgment dated 10.3.2016.

14. Keeping in view hereinabove facts, I am of the view that the applicants have not been able to point out any illegality or error in the impugned judgment, which requires no interference by this Court. Accordingly, the instant revision application, being devoid of any merits is hereby dismissed with no order as to cost.

**JUDGE**

*\*Fahad Memon\**