

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

SUIT NO. 77 OF 2003

Plaintiff : Mst. Shamshad Begum, through
Mr. Abdul Razzak, advocate

Defendant No.1 : Muhammad Arshad (Late),
through Legal Heirs, through S.
Ali Ahmed Tariq, Advocate

Defendants : Mst. Mahjabeen & Nisar Ahmed
Nos. 2 and 3 through Mr. Muhammad Saleem
Mangrio, Advocate

Defendant No.5 : Defence Housing Authority,
through Mr. Sohail H. K. Rana,
Advocate

Date of hearing : 02.04.2019

J U D G M E N T

YOUSUF ALI SAYEED, J - The Plaintiff claims a right in respect of a part of an undivided plot of land bearing Plot No.77, First Commercial Street, Phase-IV, Defence Housing Authority Karachi (“**Plot 77**”) and has brought this Suit seeking that the Court be pleased to pass Judgment and Decree in her favour as against the Defendants in the following terms:

- “a) Declaring that the Plaintiff is absolute and lawful owner of 77-A i.e. half of Plot No.77, First Commercial Street, Phase-IV, Defence Housing Authority Karachi (i.e.77-A) and that Defendant 2 & 3 have no legal title/ownership rights in the subject land and neither Defendant 1 have such rights nor could he transfer the title.
- b) Set aside the purported sale documents (Agreement & Deed) and all other relevant documents between Defendant 1 & Defendant 2 as illegal and without lawful effect in respect of the subject property and pass orders to reverse necessary entries.

- c) Decree & Judgment for possession in favour of the plaintiff directing the defendants 2 & 3 or any body else in possession to handover vacant & peaceful possession of Property No.77-A, 1st Commercial Street, Phase IV, Defence Housing Authority to the Plaintiff/her attorney.
- d) Directing Defendant No.1 or Defendant No.2 to execute the necessary sale deeds in favour of the plaintiff and in case of failure of the Defendants to execute the sale deeds in favour of the Plaintiff, direct Nazir of the Court to execute the sale deeds in favour of the Plaintiff.
- e) Directing Defendant No.1 and 2 to pay profit/Rent Rs.12,000/- per month being equivalent to rental value and continue to pay such sum till the possession of the subject Plot is handed over to the Plaintiff by the Defendants No.1 to 3.
- f) To grant injunction restraining Defendant No.1 to 3 from selling, alienating, renting out, carrying any sort of structure building or construction, creating any lien or any encumbrance etc over the Plot 77 or handing over the physical possession of the subject Plot to any one else till disposal of this case.
- g) Grant injunction against Defendant 4,5 & 6 from sanctioning any plan for construction of a building on Plot No.77 and not to treat the Defendants 1 to 3 or their successors as owners of this subject plot till decision of this suit.
- h) Direct Defendant 4,5, & 6 to bifurcate the subject Plot 77 into two equal halves and enter the name of the Plaintiff as owner of subject Plot i.e. "half portion" (300 Square Yards) of Plot 77, 1st Commercial Street, Phase IV, in their records and treat her accordingly.
- i) Defendant No.1 to 3 be restrained from obtaining loan from any loan giving agency by Mortgaging the subject property.
- j) Decree in the sum of Rs.10 Million on account of damages against Defendant No.1 to 3 for demolishing the house for dispossessing her and causing unnecessary expense.
- k) Any appropriate and further relief this Hon'ble Court may deem fit and proper in the circumstances of the case.
- l) Costs of the Suit.
- m) Grant interest/compensation."

2. Succinctly, the case set up by the Plaintiff in terms of the Plaintiff is as follows:

- (a) That in the year 1983, there were two independent residential units partially constructed on the Plot, unofficially numbered as 77-A and 77-B respectively.
- (b) That the Plaintiff contracted with the Defendant No.1 in terms of a Sale Agreement dated 23.05.1983 (the "**Sale Agreement**") for the sale/purchase of one of those units, being Unit 77-A, for a total consideration of Rs.265,000/-, of which Rs.190,000/- was paid by cash and the balance was to be paid to the House Building Finance Corporation ("**HBFC**") towards ratable adjustment of a loan of said to have been obtained by the Defendant No.1 for construction of those units.
- (c) That possession of Unit 77-A was handed over to the Plaintiff, who then installed her tenant therein.
- (d) That the Plaintiff called upon the Defendant No.1 vide letters dated 22.06.1988, 18.03.1989 and 03.09.1998 to complete the transaction through official sub-division of the Plot and execution of a Sale Deed in respect of Unit 77-A, but such compliance was not forthcoming, and instead, Suit Number 1484/1998 was instituted by the Defendant against the Plaintiff alleging revocation of the Sale Agreement due to non-performance on the part of the Plaintiff, and seeking a declaration in that regard as well as possession and mesne profits.
- (e) That during the pendency of Suit Number 1484/1998 the Defendant No.1 sold Plot 77 in its entirety to the Defendant No.2, following which that Suit was unconditionally withdrawn on 08.04.2002 and the Plaintiff then forcibly dispossessed from Unit 77-A on 08.05.2002, when it was demolished.

3. The Defendant No.1 filed his Written Statement, wherein, whilst accepting that there had unofficially been two independent units on Plot 77 and that the Sale Agreement had been executed, he raised objections as to the maintainability of the Suit, including on the point of limitation, and also otherwise categorically denied the entitlement of the Plaintiff to the reliefs claimed, alleging *inter alia* that the Plaintiff had failed to pay the sale consideration and also to adjust the liability towards HBFC, due to which the Defendant No.1 had intimated her vide a legal notice dated 01.04.1998 that the Sale Agreement stood revoked/cancelled.

4. The Defendants Nos. 2 and 3 also filed a common Written Statement, wherein similar objections were raised as to maintainability and it was pleaded that Public Notices had been issued in the Daily Dawn on 16.11.2001 and 21.11.2001, in response to which no objection had been forthcoming, following which title to Plot 77 had then been conveyed to the Defendant No.2 vide a registered Sale Deed dated 11.05.2002, at which time Plot 77 was an open plot of land without there being any indication on the ground or in any official record of Unit 77-A or of any interest in favour of the Plaintiff. It was contended that, as such the Defendant No.2 was a bona fide purchaser for value without notice of any transaction in favour of the Plaintiff.

5. On 25.04.2005, out of the respective pleadings, issues were settled for determination, which are as follows:
 - “1. Whether the suit is barred by time?

 2. Whether the Plaintiff entered into an Agreement of Sale with the Defendant No.1 and paid the entire sale consideration and in part performance was put in possession of suit property? If so its effect?

3. Whether the Defendant No.1 during operation of stay order in Suit No.1484/1994, executed sale deed in respect of suit property in favour of Defendant No.2? If so, its effect?
4. Whether the Defendants Nos.2 and 3 played fraud on Plaintiff in connivance with the Defendant No.1 and entered into the fictitious transaction and Defendant No.1 to deprive the plaintiff of his rights in the suit property? If so, its effect?
5. Whether the Plaintiff is entitled for mense profit? If so, what amount and against which of the Defendant?
6. To what relief, if any, the Plaintiff is entitled to?"
[Sic]

6. Evidence was recorded on Commission, during the course of which the Plaintiff herself did not come forward. Instead, one Ahmed Saeed, son of Abbas Khan (PW-2), an employee of the law firm representing her in the Suit, filed an Affidavit-in-Evidence on her behalf as her attorney. Affidavits-in-Evidence of two other witnesses were also filed, one of whom was the Plaintiff's son, Faisal Riaz (PW-1), and the other, namely Maqbool Ahmed (PW-3), professed to have been the Plaintiff's tenant at Unit 77-A. All three persons were then examined and crossed. From the side of the Defendants, an Affidavit-in-Evidence was filed on behalf of the Defendants Nos. 2 and 3 by the latter acting for himself and for the Defendant No.2 in his capacity as her attorney, and he was then examined and crossed accordingly.

7. Addressing the aforementioned issues, learned counsel appearing on behalf of the parties advanced their respective submissions, essentially reiterating the case set up in the pleadings, as previously summarized herein above. Having considered the same in light of the evidence on record, the finding as to Issue No. 1 is in the affirmative whereas the findings in respect of Issues Nos. 2 to 5 are all in the negative, for the reasons as follow.

8. On the point of limitation, it was submitted by learned counsel for the Plaintiff that as the Plaintiff had been ousted from possession and has sought that the same be restored to her, the matter fell within the scope of Article 142 of the Limitation Act, which prescribed a time period of 12 years from the date of dispossession, which, per learned counsel, was to be reckoned from 08.05.2002, and it was contended on this basis that the Suit was accordingly within time. However, paradoxically, on it being pointed out with reference to Prayer "A" that the Plaintiff had not sought specific performance of the Sale Agreement and instead sought a declaration of title on the basis thereof, which could not be granted in view of S.54 of the Transfer of Property Act in as much as it the same stipulates that a contract for sale does not of itself create any interest in or charge on property, it was submitted that the Suit could be treated as one for specific performance and relief extended accordingly. Indeed, when Prayers (b), (c) and (d) are viewed in their prospective perspective, it is apparent that the principal relief being sought is essentially that of specific performance as against firstly the Defendant No. 1, and -, due to the changed circumstances, also against the subsequent purchaser (i.e. the Defendant No.2).

9. This brings the matter squarely within the realm of Article 113 of the Limitation Act whereby a three-year period of limitation has been prescribed, which in the case of a date for performance being fixed in terms of the agreement would begin to run from that date, and if no such date is fixed, would begin to run from the date that a plaintiff has notice that performance is refused. As no such date was fixed in terms of the Sale Agreement, the matter accordingly falls within the scope of the second limb of Article 113 and for purposes of reckoning when time would begin to run, the date on which performance was refused has to be determined.

10. Such date would apparently be the date of receipt of the legal notice dated 01.04.1998, whereby the Defendant No.1 allegedly intimated the Plaintiff that the Sale Agreement stood revoked/cancelled. Indeed, the legal notice dated 03.09.1998 addressed on behalf of the Plaintiff to the Defendant No.1, as produced in evidence on her behalf by PW-2 and marked as Exhibit P-5/5, refers to a notice dated 01.04.1998 having been received and replied to vide a letter dated 23.04.1998. Furthermore, the Plaintiff's attorney and witness, whilst submitting that he did not remember whether the legal notice dated 01.04.1998 had been received, nonetheless did go on to concede under cross-examination with reference thereto that "It is correct that the plaintiff had given reply of the said notice but I do not remember if it was dated 23-08-1998". Moreover, even if the aspect such notice is disregarded, it beyond doubt that the Plaintiff was put on notice of refusal upon filing of Suit Number 1484/1998 by the Defendant No.1, and even if the date of her knowledge of that suit is taken as 11.03.1999, being the date on which date the Written Statement was filed, that would still mean that the period of three years lapsed on 10.03.2002, whereas the present Suit was filed on 21.01.2003.

11. The point that still needs to be considered is whether the relief claimed for possession and for cancellation can be sustained independently of such relief of specific performance even if those reliefs, going by the averments in the plaint, are not taken to be time-barred. Such a question arose in a case before the Honourable Supreme Court reported as Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad PLD 2015 SC 212, where the majority view was that in cases where a several causes of action have been joined and multiple remedies sought, it is not an absolute rule that the remedy entailing the maximum

period of limitation should be the yardstick for determining limitation for purpose of the entire suit; rather such aspect should be examined by taking into consideration the facts of each case and particularly the frame and the object of the suit; *“And thus it should be determined what main relief is being sought by the plaintiff and whether the other remedies asked for (may be carrying larger period of limitation) are ancillary, dependent and consequential to the main relief.The true test for determining the period of limitation is to see the true effect of the suit and not its formal or verbal description.”*

12. In the case of Dr. Muhammad Javaid Shafi (supra) the Apex Court concluded that where the main relief was one for cancellation of a document under section 39 of the Specific Relief Act, 1877, the relief for possession of the immovable property that was the subject of such document was merely ancillary, incidental and dependent upon the primary relief, and where the main relief for cancellation was time-barred, the incidental and consequential relief of possession, even if attracting a larger period of limitation, had to go away along with it. Applying the ratio of that case to the facts of the present Suit, it is apparent that same is essentially one for specific performance of the Sale Agreement, and the relief for possession of Unit 77-A is ancillary and consequential, while the relief for cancellation of the documents conveying title in favour of the Defendant No.2 is also dependent on such main relief. In no way can the Plaintiff maintain the Suit for any of these other reliefs *sans* the relief of specific performance, for then she would have no viable cause of action. Thus, notwithstanding that the other reliefs sought in the Suit may not be time-barred, if the relief for specific performance is time-barred, the entire suit is time-barred. Whilst it was sought to be argued that limitation

would not shield a fraudulent act, viz. the alleged fraud said to have been committed through the dispossession of the Plaintiff; again, the challenge to the alleged fraud being predicated on the relief of specific performance is not an independent one. Under such circumstances, it is apparent that the Suit is barred by limitation.

13. The plea of counsel for the Plaintiff that Article 142 of the Limitation Act would apply is also misconceived in view of the underlying circumstances case and nature of the relief sought, as the Suit is predicated on the plaintiffs claim to title, whereas the aforesaid Article would not apply to a suit for possession on that basis, as held in the judgment of the Honourable Supreme Court in the case reported as Maqsooda Begum v. Ghulam Qadir 1996 SCMR 1539.

14. Turning to the issue of execution of the Sale Agreement and performance thereunder, it merits consideration that the aspect of execution is not a matter in doubt, having been accepted in the pleadings in this Suit as well as in terms of Suit Number 1484/1998, however, the stance of the Defendant No.1 is that the Plaintiff has failed to perform and discharge her obligations in respect of the payments that were to be made to the Defendant No.1, either directly or through settlement of the liability owed to HBFC. On this aspect, it is noteworthy that in terms of Paragraph 4 of the Plaint, it has been pleaded as follows:

“That the Plaintiff made payments of cash sale price according to the schedule agreed between parties in the Sale Agreement. Copy of the receipt dated 9.1.1984 is annexed as Annexure ‘B’. The Sale Deed was to be executed and registered after clearance of loan of House Building Finance Corporation and official bifurcation of the said property from concerned authorities.”

15. By and large, the original documents were not produced by the witnesses who appeared on behalf of the Plaintiff. Whilst this aspect may not be of relevance from the standpoint of proving the Sale Agreement in as much as the execution thereof has not been denied and the content thereof is also not in doubt from the stance of the Defendant No.1, it has to be borne in mind that the Defendant No.1 has categorically denied that payment of the amounts specified in Clause 2 were made by the Plaintiff and has also denied that the liability towards HBFC was cleared, as required in terms of Clause 3. On the contrary, whilst the copy of a receipt dated 9.1.1984 was filed along with the Plaintiff to show that the entire sum of Rs.190,000/- due under the Sale Agreement apart from the HBFC settlement component had been paid as on that date, the original receipt was not produced. The statement of the Plaintiff's witnesses on the subject of such payments also belie the content of the receipt in as much as it was conceded by PW-1 under cross-examination that "We had not made payment of balance consideration to defendant No.1", and it was stated by PW-2 that "out of that amount, Rs.75,000/- was paid vide receipt produced with the plaintiff. The remaining amount was washed out as a consequence of withdrawal of suit No. 1484 of 1998." Such statements clearly contradict and negate the statement made in terms of Paragraph 4 of the Plaintiff, as reproduced herein above, and the receipt annexed thereto. Furthermore, the Plaintiff has not pleaded that she discharged her obligations in respect of satisfying the liability owed to HBFC, nor was any assertion made by her witnesses and no documents were introduced to show that the loan had been paid. In fact, it was conceded during the course of arguments that this had not been done, it being contended that the Plaintiff had not been called upon to do so by the Defendant No.1. Accordingly, it is apparent that the Plaintiff did not perform under the Sale Agreement and the sale consideration was not fully paid.

16. As to Issue Nos. 3 and 4, regarding whether a Sale Deed was executed in favour of the Defendant No.2 during operation of a stay order in Suit No.1484/1994 and whether a fraud was perpetrated against the Plaintiff by the Defendant No.1 in concert with the Defendants Nos. 2 and 3, it is pertinent to observe that the Order operating in that Suit served to restrain the defendant (i.e. the present Plaintiff) from creating any third party interest, and has no bearing on the capacity of the present Defendant No.1 on the sale and transfer of the Plot to the Defendant No.2. Indeed, this was conceded by PW-1 under cross-examination, it being stated that "I say that the Court passed restraining orders in this Suit No. 1484/1998 to the effect that pending adjudication of the suit my mother should not create third party interest". Even otherwise, Suit No.1484/1994 was withdrawn on 08.04.2002 and the Sale Deed in favour of the Defendant No.2 executed thereafter by the Defendant No.1 on 11.05.2002. As such, any Order as may have earlier been passed had no effect on such transaction.

17. The allegation of the Plaintiff that a fraud was perpetrated by the Defendants 1 to 3 through a so-called 'fictitious transaction' for the purpose of depriving her of her rights in Unit 77-A has also not been satisfactorily established, and no admissible documents of relevance as to the Plaintiff's alleged ouster from possession were produced so as to have been exhibited and be brought on record. It has also been stated by the son of the Plaintiff (PW-1) during the course of cross-examination as regards the allegation of fraud that "It is correct that the fraud was committed with us by defendant No.1. It is correct that defendant No.2 and 3 had no interaction with us". This is completely opposed to the statement made by him in his Affidavit-in-Evidence that the Defendant No.3 had extended threats of dispossession and then orchestrated the same.

18. In fact, as far as PW-1 is concerned, it was admitted by him during cross-examination that he was a child at the time of the transaction and still an adolescent at the time of alleged dispossession, and it was conceded that the averments presented by him as statements of fact were based on what had been told to him by his father, who himself did not come forward for evidence despite it being contended that applications to police authorities (photocopies of which were produced and placed under objection) complaining of the dispossession were lodged by him. PW-2 also admitted that the information given to him in relation to the case had come from the husband of the Plaintiff, and despite professing to be the Plaintiff's attorney, was not in a position to even state at the time of cross-examination whether she was alive or not. The statements of these witnesses were not corroborated through legally admissible documents and do not independently carry such weight as to demonstrate a case of fraud or establish that the transaction in favour of the Defendant No.2 was fictitious. In an endeavour to show that the Defendants Nos. 2 and 3 had knowledge of the transaction with the Plaintiff prior to execution of the Sale Deed in favour of the Defendant No.2 on 11.05.2002, reliance was placed on the fact that under cross-examination the Defendant No.3 had made a statement that "Till 08.02.2002, I did not know that suit No.1484/1998 was pending in court". It was contended that this statement demonstrated knowledge of the Suit on such earlier date, hence also knowledge of the Sale Agreement and dispute in relation to Unit 77-A. However, such statement has to be viewed in proper context and taken as a specific denial to a question posed as to whether the Defendant No.3 had knowledge of the pendency of the earlier Suit on a particular date (i.e. 08.02.2002), rather than an admission thereof. To interpret the statement as an admission would be to misread of the evidence.

19. The further issue of whether the Plaintiff is entitled for mesne profits turns entirely on the point of whether the Plaintiff had a proprietary right in Plot 77-A to the exclusion of the Defendants Nos. 2 and 3 over the period after they came into possession of the Plot, and is largely dependent on the findings as to Issues Nos. 2 to 4. In view of the finding against the Plaintiff on these issues, no entitlement to mesne profits stands made out.

20. In view of the findings on the substantive issues arising for determination as well as the issue of limitation, it is apparent that the Plaintiff is not entitled to any relief, and Issue Number 6 is decided accordingly.

21. The Suit is therefore dismissed, with no order as to costs.

JUDGE

Karachi
Dated _____