

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision Application No.S- 145 of 2011

Khadim Hussain and others.....Vs.....Tarique Hamayoon & others.

Hearing of Case

- 1.For hearing of CMA 729/2021
- 2.For Hearing of Main Case.
- 3.For hearing of CMA 674/2011

Date of Hearing: **22-11-2021**

Date of Decision: **22-11-2021**

Mr. Raj Kumar D. Rajput, Advocate for the Applicants.
Mr. Mehboob Ali Wassan, Assistant Advocate General.

J U D G M E N T

Muhammad Junaid Ghaffar J., Through this Civil Revision Application, the Applicants have impugned Judgment dated 30.06.2011, passed by learned District Judge, Ghotki in Civil Appeal No.16 of 2003, whereby, while allowing the Appeal, Judgment dated 24.12.2002 passed in F.C Suit No.133 of 1995 by Senior Civil Judge, Ubauro through which the Suit of the Applicants was decreed, has been set aside.

2. Counsel for the Applicants has argued that the Appellate Court has erred in law, and on facts as well, in setting aside the Judgment and Decree passed by trial Court; that the Suit was within time and was filed as soon as performance of the agreement was refused, therefore, impugned Judgment be set aside by restoring the Judgment of the trial Court.

3. None is in attendance on behalf of the Respondents; whereas publication was effected and they stand duly served; but nobody has turned up. Therefore, matter has been heard and is being decided with the assistance of Applicants' Counsel and on the basis of material available on record.

4. It appears that the Applicants filed a Suit for declaration, specific performance, permanent, mandatory and prohibitory injunction and in paragraph No. 3 and 16 of the Plaint, it was stated as follows:

“3. That on 28.09.1966 Kalimullah the father of the defendant No.7 agreed to sell the suit land to Choudhry Muhammad Ismail s/o Muhammad Ibrahim the defendant No.8

Choudhry Muhammad Abdullah s/o Ch. Muhammad Ibrahim the ancestor of the defendants No.1 to 6 to the extent of 105-09 acres and to Ahmed Bux Soomro the ancestor of the plaintiffs to the extent of 12-20 acres for the total consideration of Rs.84755/- plus amount of two installments of Rs.2340/- already paid by Kalimullah out of which an amount of Rs.30,000/- was paid to the deceased Kalimullah the father of the defendant No.7 in an advance who in return executed such sale agreement in favour of the defendant No.8, Muhammad Ismail, Choudhry Muhammad Abdullah the ancestor of the defendants No.1 to 6 and the deceased Ahmed Bux the ancestor of the plaintiffs and handed over the vacant possession of the same as owners to the vendees and the Khata of the suit land was to be mutated in favour of the vendees on receiving the remaining consideration by the Kalimullah the vendor by 31.12.1966.

16. That the cause of action accrued to the plaintiffs to bring this suit on 18.11.1991 when the defendants No.1 to 6 refused to settle the account with the plaintiffs in respect of the yield of the suit land and declared themselves to be the full owners of the suit land to have purchased the same from the defendant No.7 since 25.1.1988. It still continues to arise within the local limits of jurisdiction of this Honourable Court”.

5. Learned Trial Court after exchange of pleadings settled various issues including issue that whether the Suit was within time or not. The Trial Court came to the conclusion that not only the Suit was within time; but so also Applicants had made out a case and Suit was decreed. Civil Appeal was preferred and learned District Judge has also formulated the points for determination including point regarding limitation. Findings of the learned District Judge on point No.1 are as under:-

“Point No.1.

On this point, both the parties have vehemently argued on the point of limitation of the suit. The learned counsel for the appellants/defendants has argued that; the suit of the respondents/plaintiffs was governed by article 14, 91 and 93 of the Limitation Act. Whereas learned counsel for the respondents/plaintiffs has argued that the suit was within time as the limitation has been provided under article 113 for filing suit for Specific Performance within three months from the date of refusal and limitation for filing suit for declaration has been provided under article 120 for six years. According to article 14 part-4 first schedule of the Limitation Act, the limitation is one year from the date of the act or order to set-aside any act or order of an officer of Government in his official capacity, not hear in otherwise expressly provided for. As per article 91 part-4 first schedule of the Limitation Act, the limitation has been provided three years to cancel or set-aside an instrument not otherwise provided when the facts entitling the plaintiffs, to have the instrument cancelled or set-aside become known to him. Similarly three years limitation has been provided from the date of attempt to declare the forgery of an instrument attempted to be enforced against the plaintiffs. The article 120 of the Limitation is not applicable in the present case as the limitation for setting aside the order and an act of an officer of government has been provided for a period of one year under

article 14 of the Limitation Act as discussed above. No doubt the limitation for filing suit for specific performance of contract is provided for a period of three years under article 113 of the Limitation Act from the date fixed for the performance, or if no such date is fixed when the plaintiff has notice that performance is refused. In the present case the agreement to sell has been executed on 25.9.1966 and date fixed for performance was 31.12.1966 as per agreement to sell and litigation ended before the Land Commission of Pakistan in 1979-80 and mutation entries had been effected in the revenue record in favour of deceased Muhammad Abdullah and the appellants/defendants No: 1 to 6 vide order dated 25.1.1988 and 02.3.1988 respectively, whereas present suit has been filed on 18.8.1991, even then the suit is time barred by law of limitation, if the limitation is computed from the date of the last mutation entry made in favour of the appellants/defendants No:1 to 6. The sale of the land in suit is legal and valid, not hit by any provision of law as same has been challenged in 1991. The act of the Mukhtiarkar is protected by the standing orders. The respondents/plaintiffs have no locus standi to challenge the mutation entries in 1991, which effected in 1988, after ending of the litigation before the Land Commission authorities as well as on the basis of agreement to sell dated 25.9.1966 in which date was fixed for performance was 31.12.1966. The respondents/plaintiffs or their predecessor in interest have neither appeared before the land commission authorities nor got confirmed the sale of suit land in their favour before the land commission authorities. According to orders dated 04.7.1972, 14.5.1974 and 28.4.1979, passed by the land commissioner Sindh, Chief Land Commissioner and Member Federal Land Commission of Pakistan have confirmed the sale of the suit land in favour of Choudhry Muhammad Abdullah and Muhammad Aslam (as mentioned in the order dated 04.7.1972) their names are mentioned in the order as disclosed by claimant Muhammad Kaleemullah on the basis of agreement to sell but said orders are silent regarding sale of suit land in favour of Ahmed Bux the predecessor in interest of the respondents/plaintiffs. Neither Ahmed Bux within the period of agreement to sell nor before the land commission authorities during his life time when the litigation before the land commission authorities ended approached Muhammad Kaleemullah or his legal heirs for performance of their part of contract. The respondents/plaintiffs have also failed to prove that; they have paid or offered the remaining sale constitution amount of suit land to the executants Muhammad Abdullah during his life time or his daughter Mst. Alia Begum the appellant/ defendant No:7 except oral evidence, which is weak type of evidence and always not regarded as sufficient piece of evidence until and unless corroborated by strong circumstantial evidence.

It has been held in case of Mst.Qalsoom and others Vs. Mrs Maryam and others (1988 CLC-870) that;

"We are also inclined to hold that it is a well settled position in relation to article 113 of the first schedule to the limitation act that if the date for performance of a sale agreement of an immovable property is specified therein, the period of three years shall commence from the specified date, but where no date for performance is mentioned in the sale agreement, the three years period will commence from the date of refusal to perform"

It has also been held in case of Haji Muhammad Yaqoob through legal heirs Vs. Shahnawaz (1998 CLC-21) that;

“It is evident that; the only difference between time being of the essence and not being essence is that while in the former case the promisy acquired the option to avoid the contract, in the latter cases his remedy only confined to claiming compensation for non performance within stipulated time. In either case the promiser is required to suffer the compensation of his breach”.

The same view has been approved by the Honourable Apex court in case of Rabnawaz and 13 others Vs. Mustaqeem Khan and 14 others (1999 SCMR-1366).

In the light of above position, discussion and circumstances, I am of the humble opinion that the suit of the respondents/plaintiffs is badly time barred. The point No.1 is therefore answered in affirmative.”

6. Learned Counsel for the Applicants was also confronted as to how Suit filed by the Applicants was within time inasmuch as Plaint does not disclose any proper facts as to when the predecessor-in-interest of the Respondent No.7 was approached for executing sale deed or transfer; whereas, in paragraph 16 regarding cause of action, it has been stated by the Applicants themselves that the cause of action accrued in the year 1991. In response, Applicants’ Counsel could not refer to any material on record or even in evidence, which could suggest that the Applicants were vigilant and had filed Suit within time. Admittedly, agreement pertains to year 1966 and during life time of the father of the Respondent No.7 no efforts were made to seek performance of agreement and it was only after demise of the seller, that such efforts were made and Suit was filed.

7. Learned Counsel for the Applicants also made submissions that since ownership of the property was in dispute therefore, no legal remedy was sought and final decision of the Land Commission was waited. Again confronted as to when such dispute ended and to this, his response was that in the year 1970. In that case also, by the conduct of the Applicants and their own pleadings, Suit filed by them in the year 1991 was hopelessly time barred. Counsel also made an attempt to rely upon Article 113 of the Limitation Act 1908 and has submitted that limitation shall start from the date when performance of the contract was refused. No doubt, to this effect there is no cavil; however, from Applicants’ conduct in this case it has not been proved that as to when such performance was refused. By merely saying that the Suit was filed as soon as it was refused would not

suffice. In terms of Article 113 of the Limitation Act, a Suit for specific performance can be filed within three years from the date fixed for performance of the agreement or if no such date is fixed, then from the date when performance is refused by a party. Reliance may be placed on the case of *Haji Abdul Karim*¹. Here in this case, if the case of the Applicants was that no legal remedy was sought since some dispute was pending, then even that dispute ended in 1970; but no effort was made to seek any such remedy. In the cause of action clause, it has been stated that it accrued in the year 1991. By this statement, the Suit was time barred. Nonetheless, even if this argument is accepted, there is nothing on record to support such claim and since the limitation had already expired, therefore, it was incumbent upon the Applicants to prove that as to when finally, the performance was refused. Insofar as the Appellate Court is concerned, on perusal of aforesaid findings, it appears that the Appellate Court was fully justified in holding that the Suit was time barred and I am fully in agreement that the findings of the learned Appellate Court, wherein it is held that the Suit is time barred. As to remaining issues, once it is held that the Suit was by itself time barred, then other issues were not required to be decided and for this reason I need not go into other aspect of the matter. Since the Suit was time barred; therefore, no case is made out; hence, this Civil Revision Application was dismissed by means of a short order passed in the earlier part of the day and these are the reasons in support thereof.

Ahmad

J U D G E

¹ *Haji Abdul Karim v Florida Builders (Pvt.) Limited* (PLD 2012 SC 2470)