

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

R.A. No. 221 of 2017
[Imamuddin v. Abdul Jabbar and others]

Applicant : Imamuddin
through Mr. Faisal Nadeem Abro, Advocate.

Respondents 1&2 : Abdul Jabbar & Abdul Sattar Qureshi
through Mr. Shahzeb Abbasi, Advocate who
is called absent today.

Mr. Wali Muhammad Jamari, Asstt: A.G.

Date of hearing &
Decision : 26.11.2021

ORDER

ADNAN-UL-KARIM MEMON, J.- The applicants through this Civil Revision Application have called into question the judgment and decree dated 05.08.2017 passed by learned District Judge, Hyderabad in C.A. No. 97 of 2016 whereby the learned Judge while dismissing the appeal of applicant maintained the order dated 9.4.2016 passed by learned 1st Senior Civil Judge, Hyderabad rejecting the plaint of applicant under Order VII Rule 11 CPC.

2. Brief facts of the case as per memo of the plaint are that applicant filed suit for specific performance of contract & permanent injunction against respondents stating therein that respondent No.1 executed an additional sale agreement dated 15.05.2004 in continuation of previous two sale agreements and thereby paid Rs.20,000/- to him from balance sale consideration of Rs. 2,00,000/- and for payment of remaining sale amount of Rs. 1,80,000/- the same was required to be paid at the time of registration of sale deed of entire 700 sq. ft of suit property and mutual sale transaction was extended for further period of four months which was to be ended on 15.09.2004. In case of failure, as per clause 10 of the last agreement of sale dated 15.05.2004, respondent No.1 if failed to execute the registered sale deed, then the applicant had to approach the court for specific performance of contract. The applicant further asserted that it was also agreed that the backside portion of the shop i.e. 17 x18

feet was in possession of respondent No.2 was to be delivered to the applicant within one month.

3. That, before the time fixed, applicant approached several times to respondents to receive the remaining sale consideration and to get registered sale deed in his favor but they kept him on false hopes and finally failed to perform their part of contract; therefore, he served legal notice dated 11.03.2014 upon the respondents but they failed to reply therefore, he filed the suit.

4. After service of summons, respondents 1 & 2 stated that the applicant is the tenant of respondent No.2 and he let out the shop to him in the year 1996 through rent agreement dated 13.10.1996 at the rate of Rs. 700/- per month and another agreement dated 11.09.1998 was made between the parties. They denied sale of property or receiving of any amount and further the agreements are false. According to them in February 2014 respondent No.1 asked the applicant to vacate the shop as he wanted to use it for bonafide use on which he requested him to give time so he could arrange another shop upon which respondent No.1 agreed to give him two months time but after one month applicant sent legal notice dated 11.03.2014. Respondent No.1 replied the same on 29.03.2014 denying execution of any sale agreement and raised legal pleas that suit is not maintainable under the law; that applicant has no cause of action to file the present suit as it has been filed just to usurp the properties of respondents with ulterior motives; that suit is hit / barred by Section 42 of Specific Relief Act and Section 10, 54 and 55 of Contract Act as well as Section 49 of Registration Act; the suit is badly time-barred by Section 113 of Limitation Act; the applicant has no legal character and locus standi to file the present suit, and the applicant was tenant which was verbally terminated hence suit may be dismissed with special costs.

5. During pendency of the suit, an application under Order VII Rule 11 CPC was filed on behalf of respondents 1 & 2, which was allowed vide impugned order. The applicant being aggrieved by the said order preferred C.A. No. 97 of 2016 which was dismissed, hence the applicant has now filed the instant Civil Revision Application.

6. Mr. Faisal Nadeem Abro learned counsel for the applicant has argued that the Judgment and order passed by the courts below are

opposed to law, facts, and equity; that the Judgment of learned appellate court is blind endorsement of order of the trial court; that both the courts below have failed to consider the material aspect of the case while passing the impugned Judgment and order; that respondent No.1 in continuation of sale transaction, executed additional sale agreement dated 15.5.2004 and extended further period for finalization of sale transaction up to 15.09.2004 and when the respondents did not honor the terms and conditions of sale agreement, a legal notice was served, hence the suit was not time-barred; that the impugned Judgment and order of both the courts below amounts to pre-trial verdict. According to law the trial court had to lead evidence to decide intricate questions of law and facts; that both the courts below have failed to consider material aspects of the case while passing the impugned Judgment and order that limitation starts from the date of refusal and from the date of refusal the suit was within time and not barred under Section 113 of the Limitation Act; that both the courts below have failed to consider the material aspects of the case while passing the impugned Judgment and order for the purpose of rejection of plaint, maintainability of the suit is no ground and besides maintainability of the suit is a mixed question of law and facts which can only be adjudged after recording evidence and framing of appropriate issues; that both the courts below have failed to consider material aspect of the case while passing the impugned Judgment and order; that it is settled law that for deciding application under Order VII Rule 11 CPC the court had to look into the averments of plaint and for all intents and purposes the same be treated as correct; that both the courts below have failed to consider this material aspect of the case while passing the impugned Judgment and order; that the application was malafidely moved to hoodwink the trial court; that both the courts below have failed to consider this material aspect of the case while passing the impugned Judgment and order that provision of Order VII Rule 11 CPC are not exhaustive in every situation and instant application was not attracted to the facts of above suit; that both the courts below have not assigned any cogent reasons for passing the impugned Judgment and order, hence both are liable to be set-aside. He lastly prayed for allowing the instant Civil Revision Application.

7. I have heard learned Counsel for the applicant on the maintainability of instant revision application and perused the material available on record.

8. The order dated 09.04.2016 passed by learned 1st Senior Civil Judge, Hyderabad whereby he rejected the plaint of F.C. Suit No. 335 /2014 filed by the applicant under Order VII Rule 11 C.P.C. The learned Presiding Officer of the appellate Court vide judgment dated 5.8.2017 concurred with his view with the following reasons:

“POINT NO.1.

13. The appellant has filed the above suit, wherein, it is mentioned at Para 5 of the plaint that respondent No.1 with the consent of his brother viz. Respondent/defendant No. 2 executed agreement of sale dated 10.12.1999 and sold out the suit property and an amount of Rs. 1, 80,000/- (Rupees One Lac Eighty thousand only) was paid to the respondents and possession was handed over to the appellant. Thereafter in continuation of the above said agreement, another agreement dated 12.12.1999 was also executed, copy of which is annexed with the plaint as Annexure “B”. It is further stated that in continuation of above both agreements, an additional sale agreement dated 15.05.2004 was also executed by mutual consent, thereby the period for payment of remaining consideration amount was fixed within 4 months of the agreement dated 15.05.2004 and the same was too produced alongwith the plaint, wherein clause 10 clearly mention that the respondent No.1 if, fail to execute registered sale deed then the appellant shall have to seek the relief from the court of law in accordance with law . From averments of plaint, it transpired that after expiry of four months, the appellant allegedly issued legal notice on 11.03.2014 after a period of near about 10 years and prior to 11.03.2014, admittedly, no notice was issued but at Para No.13 of the plaint, the appellant has mentioned that the respondents avoided to perform their part of contract without mentioning the date, time and place when the appellant approached the respondents for execution of sale deed. No other evidence adduced by the appellant to corroborate the facts of the refusal of respondent No.1 to execute the sale deed in favour of the appellant. The period of execution of sale deed since expired on 14.09.2004, four months after execution of last agreement dated 15.05.2004 and in case the respondents failed to execute the registered sale deed till the due date viz. 14.09.2004, the appellant was liable to have filed the suit for specific performance of the contract within period of Three years from the due date viz. 14.09.2004 to 14.09.2007, as provided under Article 113 of Limitation Act but he filed the above suit on 02.05.2014, which on the face of it is not maintainable being barred under Article 113 of Limitation Act. It is well settled law that in a case when the time was essence of the contract, the seller had failed to perform his part of agreement up till the due date; the agreement had become void and unenforceable. In the case Muhammad Umar Gull Vs. Nasir Javed reported in 2016 Y.L.R. 1350, such suit for specific performance of the contract was held not maintainable and plaint in above suit was held rightly rejected by the learned trial Court.

14. I would like to reproduce the provisions of Section 55 of the Contract Act, 1872, attracting in above suit as under:

“55. Effect of failure to perform at fixed time in contract in which time is essential.-When a party to a contract promises to do a certain thing at or before a specified time or certain things at or before specified time, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable, at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential.—If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time’ but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon.—If, in case of a contract voidable on account of the promisor’s failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.”

15. It has been admitted in the agreement of sale dated 15.05.2004, that the remaining consideration amount was to be paid within four months and as per clause 10 it was also obligatory upon the appellant that in case the respondent No.1 failed to execute the registered sale deed within the period of 4 months, then the appellant has to seek remedy from the court of law and such period expired on 14.09.2007 as provided under Article 113 of the Limitation Act and the appellant apparently found not vigilant for getting equitable relief and the law adds the vigilant and not the indolent. The reliance is also placed upon the case of **Muhammad Ilyas vs. Muhammad Waseem and 3 others, reported in 2017 Y.L.R 1448-Peshawar**, wherein it has been observed that when agreed time expired, contract would become voidable upon the option of the parties and the suit for specific performance of contract where time is specifically stipulated, as in above suit in hand, then the prescribed period of limitation for filing the suit would be such which was given in the contract. Consequently, the plaint in above suit is barred under Article 113 of Limitation Act. Resultantly, the point under discussion is answered accordingly “Affirmative. “

POINT NO.2.

16. In view of above discussion under point No.1 , since the specific stipulated period of 4 months clearly mentioned alongwith clause 10 with regard allowing the appellant to approach the court of law in case the respondents fails to perform their part of contract with regard to execution of registered sale deed, after expiry of four months of agreement dated 15.05.2004 and the time was essence of the agreement, therefore, the case law relied upon by the learned counsel for the appellant is not applicable in the above suit in hand . The appeal merits no consideration and is hereby dismissed with no order as to costs. Consequently, the impugned order dated 09.04.2016 is hereby maintained.”

9. For interpreting the scope of Order VII, Rule 11 of Code of Civil Procedure, 1908 its provisions are reproduced as follows:

The plaint shall be rejected in the following cases:

- a) Where it does not disclose a cause of action;
- b) Where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
- c) Where the relief claimed is properly valued; but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- d) Where the suit appears from the statement in the plaint to be barred by any law.

10. I have noted that the above provision of law is mandatory as the word “shall” has been used. Meaning thereby that the Court is bound to reject plaint if it “appears” from the statement in the plaint to be barred by any law.

11. I have examined the plaint and the learned appellate court has already taken care of each aspect of the case.

12. The pivotal question which needs to be addressed to reach a just decision is whether the plaint of the applicant /plaintiff was barred under the law?

13. in my humble view the findings of learned trial court was/is quite correct that the period of execution of sale deed arising out of purported sale agreement since expired in the year 2004, the applicant failed to file the suit for specific performance of contract within three years from the due date viz. 14.09.2004 to 14.09.2007, as provided under Article 113 of Limitation Act but he filed the above suit on 02.05.2014, which on the face of it was / is not maintainable being barred under Article 113 of the Limitation Act. It is well-settled law that in a case when the time was the essence of contract, the seller had failed to perform his part of agreement upto the due date; the agreement had become void and unenforceable. On the aforesaid proposition, I am fortified with the decision of Honourable Supreme Court in the case of Haji Abdul Karim and others Vs. Messrs Florida Builders (Pvt) Limited (PLD 2012 SC 247).

14. In the light of above and other material produced before this court, I have concluded that the applicant has failed in all aspects to prove his case through cogent material concerning his specific performance of contract within the period provided under the law. The learned trial Judge has rightly opined against the applicant and dismissed his Suit being barred by limitation under Order VII Rule 11 CPC. The learned appellate Court vide judgment dated 5.8.2017 concurred with the view as discussed supra.

15. In view of the foregoing discussion, I do not find any illegality, infirmity, or material irregularity in the impugned Judgments and Decrees passed by learned trial Judge and appellate court warranting interference at my end.

16. In the light of above facts and circumstances of the case, the Revision Application filed by the applicant is found to be meritless and is dismissed along with the listed application(s).

JUDGE