

# THE HIGH COURT OF SINDH AT KARACHI

## II- Appeals No. 122 and 123 of 2021

Present: Mr. Justice Salahuddin Panhwar

Appellant : Abdul Razzak through Mr. K. Jahangir  
advocate.

Respondent(s) : Mst. Nabeela Mustafa and Mst. Gul Bibi  
through Mr. Aijaz Shirazi advocate

Date of hearing : 13th September 2023.

Date of judgment : 13th September 2023.

## JUDGMENT

**SALAHUDDIN PANHWAR, J.**--- By the dint of this single judgment, I intend to decide both the captioned II-Appeals as they involve common question of law.

2 The appellant in these appeals has assailed judgments and decrees dated 27.04.2021, passed by learned District Judge, Karachi Central in Civil Appeals No. 94 and 103 of 2020, whereby orders dated 15.09.2020 of learned IV-Senior Civil Judge, Karachi Central through which applications under Order VII Rule 11, C.P.C. were allowed and consequently plaints of the Civil Suits filed by appellant were rejected as being barred by Limitation Act, were upheld.

3. Succinctly, but relevant facts, as pleaded by the appellant are that respondent No.1 in II-Appeal No. 122 of 2021 is owner of plot No.96 measuring 245 sq. yards, whereas respondent No.1 in II-Appeal No. 123 of 2021 is owner of Plot No.107 measuring 330 square yards; both the plots are situated at Dost Muhammad Baloch Goth, Sindh Gothabad Scheme, Deh Gujru Karachi Central, by virtue of Sanad duly issued by Assistant Commissioner in 1995 as well as the respondents also got Form-II maintained in their names in the record of Mukhtiarkar Gothabad (hereinafter referred to as the subject properties). On 27.02.2006, the appellant entered into agreement with the respondent Mst. Nabeela Mustafa in respect of subject property for total sale consideration of Rs.36,75,000/- and on 08.04.2006, the appellant entered into agreement with respondent Gul Bibi with respect to subject property for total

sale consideration of Rs.49,50,000/-and it is claimed by the appellant that entire sale consideration of both the subject properties were received by the respondents and peaceful possession along with all the relevant papers were handed over to the appellant. However, no time was fixed for completing the sale transaction. It is further stated that although appellant was handed over the possession of the subject properties, but respondents were also allowed to reside in the subject properties as licensees as they had no other accommodation with an understanding that respondents shall hand over the subject properties as and when asked by the appellant; that matter regarding declaration of the land as Katchiabadi was not finalized, hence, the appellant did not ask the respondents to vacate the subject properties, however, the appellant filed C.P.No.D-1030 of 2016 before this Court against Katchiabadi Authority; that in the said petition, the respondents and other vendees filed an application under Order 1 Rule 10 CPC for impleading them as parties as they denied execution of any Sale Agreement as well as receipt of sale consideration with malafide intention, as such, the appellant withdrew the petition and filed separate Civil Suits against the respondents praying therein for a decree of specific performance and in alternative prayed for damages to the amount of Rs.2 Million with 14% markup per annum.

4. On presentation of plaint(s), notices were issued to the respondents, who filed their respective written statements in the civil suits, wherein maintainability of the suits was challenged on the ground of limitation. Respondents also filed applications under Order VII Rule 11 CPC for rejection of plaints being time barred. The learned trial court heard arguments and rejected the plaints of the appellant through separate orders dated 15.09.2020 finding the same to be barred by Limitation Act. The appellant filed the separate Civil appeals bearing Nos.94 and 103 of 2020 before District Judge, Karachi Central, which were met the same fate, hence these II-Appeals are preferred by the appellant.

5. Learned counsel for the appellant contended that both the courts below did not consider the averments of the plaints and thus have committed serious error; that entire sale consideration was given to the respondents and the possession of the subject properties was handed over to the appellant, as such, under Section 53(A) of Transfer of Property Act possession was protected and no period of limitation to seek performance of contract started; that since the appellant has also sought a relief of 'damages' therefore, plaint(s) of the appellant was not liable to rejection; that both the Courts below have wrongly

held that the suits were barred by limitation. Lastly, it is prayed that both the findings recorded by the Courts below may be set aside and the matters may be remanded to the trial Court for their adjudication on merits.

6. On other hand, the learned counsel for the respondents contended that appeals are not maintainable and that both the learned courts below have rightly recorded the findings to the effect that the suits were barred by law of Limitation; that the findings recorded by the Courts below are based on sound grounds, hence the same do not require any interference by this Court.

7. I have heard learned counsel for the parties and have minutely perused the relevant record.

8. Before dealing with the case in hand, firstly, I would like to examine the scope of the 2<sup>nd</sup> Appeal in the matter of concurrent findings of the courts below. The scope of the 2<sup>nd</sup> appeal is *narrow* and it could be exercised *only* if the decision is being contrary to law; failure to determine some material issue of law, and substantial error or defect in the procedure provided by the Code or law for the time being in force which may possibly have emanated an error or slip-up in the determination or decisiveness of the case on merits. Guidance is taken from the case of the *Gulzar Ahmad and others vs. Ammad Aslam and others (2022 SCMR 1433)* wherein the Apex Court has held that:

*“7. Compliant with section 100, C.P.C., the second appeal only lies in the High Court on the grounds that the decision is being contrary to law; failure to determine some material issue of law, and substantial error or defect in the procedure provided by the Code or law for the time being in force which may possibly have emanated an error or slip-up in the determination or decisiveness of the case on merits. Meaning thereby, it does not lie to question the findings on facts. In the case of Madan Gopal v. Maran Bepari (PLD 1969 SC 617), this court held that if the finding of fact reached by the first appellate court is at variance with that of trial court, such a finding by the lower appellate court will be immune from interference in second appeal only if it is found to be substantiated by evidence on the record and is supported by logical reasoning, duly taking note of the reasons adduced by the first court which have been disfavored in the contrary finding. It was further held that interference would be justified if the decision of the lower courts is found to be contrary to law or some usage having the force of law has failed to determine some material issue of law. Whereas in another case reported as Amjad Ikram v. Mst. Asiya Kausar (2015 SCMR 1), the court held that in case of inconsistency between the trial court and the appellate court, the findings of the latter must be given preference in the absence of any cogent reason to the contrary as has been held by this court in the judgments reported, as Madan Gopal and 4 others v. Maran Bepari and 3 others (PLD 1969 SC 617) and Muhammad Nawaz through LRs. v. Haji Muhammad Baran Khan through LRs. and others (2013 SCMR 1300).”*

9. The above legal position, *prima facie*, makes it clear and obvious that to succeed in second appeal, the appellant must establish that the finding of fact arrived at by the first appellate court is not found to be substantiated by evidence on the record and is result of its failure in determining the material issue or that conclusions, so drawn, are contrary to settled principles of law.

10. Learned counsel for the appellant emphatically relied upon section 53-A of the Transfer of Property Act by arguing that since the possession of the land was with the appellant pursuant to the agreement, as such section 53-A of the Transfer of Property Act, 1882 would be applicable. Section 53-A of the Act does not confer or create a right and its use is defensive as has been held by Apex Court in number of pronouncements including in case of *Shamim Akhtar v Muhammad Rasheed (PLD 1989 S.C 575)*. However, it is well settled that it cannot be utilized by a person in possession of immovable property under an unregistered document, which is compulsorily registerable under the Registration Act, as a weapon of offence to assert his title over the property. In any event, where the main relief is barred, the incidental and consequential relief would also go away and the suit is liable to be dismissed. Reliance is placed upon the case reported as *Dr. Muhammad Javaid Shafi vs. Syed Rashid Arshad and others (PLD 2015 S.C 212)*, wherein the Apex court has held:

*“If the main relief is time barred and the bar is not surmounted by the respondent, the incidental and consequential relief has to go away along with it and the suit is liable to be dismissed on account of being time barred.”*

11. Hence, now it would be seen whether the main relief prayed by the appellant in the suits is time barred as held by the Courts below. In order to deal with this question, it would be conducive to refer Article 113 of the Limitation Act 1908, which stipulates that a suit for specific performance may be filed within three years. Article 113 of the Limitation Act is reproduced as under:-

Description of suit	Period of limitation	Time from which period begins to run
113. 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.

12. Perusal of Article 113 of Limitation of Act, 1908, it appears that the period of limitation for institution of legal proceedings consists of two parts. In the first part, the right to sue accrues within three years if the date is specifically fixed for performance in the agreement itself, whereas in its next

part, a suit for specific performance may be instituted within a period of three years from the date when plaintiff has noticed that performance has been refused by the vendor. Obviously, the first part refers to the exactitudes of its application when time is the essence of the contract, which means an exact timeline was fixed for the performance of contract/agreement, as such in this situation, the period of limitation would be calculated from that date, rather than from the date of refusal. However, if no specific date was fixed for performance of agreement and time was not considered essential, then the right to sue will accrue from the date when the executant becomes aware of the refusal.

13. Reverting back to the facts of the present matters, from the contents of the plaints it transpires that appellant brought the suits of Specific Performance of contract(s) where it is claimed that no time was fixed for completing the sale transaction(s), in the sale agreement(s) allegedly executed between the parties, hence, second limb of Article 113 of the Limitation Act would be applicable in the circumstances. Record reflects that in the year 2010, Manzar-e-Jilan Co-operative Housing Society filed a suit bearing No. 1888/2010 before this Court against Province of Sindh and others for a decree of declaration, cancellation and permanent injunction claiming therein that an area of 3.05 acres of Dost Muhammad Goth was under the grant of land by the Revenue Authorities and due to interim order passed by this Court, the land including the subject property did not regularize, hence on 11.04.2015, the appellant filed an application under Order 1 Rule 10 CPC for impleading him as party along with affidavit wherein in para-8, it has been stated that:

*"8. That the said villagers with the passage of time became dishonest and are now trying to deceive the Applicant/Intervener by secretly entering into some sort of compromise with the plaintiff though these villagers ceased to have any legal right in their respective houses/plots having sold the same to the Applicant/Intervener for valuable consideration."*

14. Above paragraph clearly demonstrates that prior to the filing of the application Under Order 1 Rule 10 CPC in the said suit, the appellant got the cause of action to file suit, but he remained kept till September 2019 and in October 2019 he filed the suit against the respondent No.1.

15. The Apex Court in a judgment passed in the case of *Abdul Karim v. Florida Builders (Pvt.) Ltd. (PLD 2012 SC 247)*, held that:--

*'F'---.....Whereas, the limitation is a command of law, prescribing the statutory period within which the right has to be exercised and enforced. The Courts thus shall have no lawful authority to ignore the date/period stipulated*

*in the contract, which as a legal consequence is meant to regulate the period of limitation in terms of first part of Article 113 ibid, and on the touchstone of the equitable, discretionary principle, and to hold against the void and clear provisions of law, by extending, enlarging or exempting the said period in violation thereof.*

16. It is settled principle of law that if a petition or a suit is filed beyond limitation each day's delay has to be explained and if from statement in plaint suit appears to be barred by limitation, court is obliged to reject plaint under R. 11, Order VII, C.P.C. Reliance, if any case be made to **Hakim Muhammad Buta and another v. Habib Ahmed and others (PLD 1985 SC 153)**, wherein it is held that:--

*"Matter of limitation is not left to pleadings of parties.---It imposes a duty in this regard upon court itself---As such if from statement in plaint suit appears to be barred by limitation, court is obliged to reject plaint under R. 11, Order VII C.P.C.--- Similarly, limitation plea cannot be waived and even if waived it can be taken up by party waiving it and by Courts themselves---In exceptional cases, a defendant would, however, be debarred from rising plea of limitation.--- This would be a general principle of estoppel arising from defendant's conduct and would be particularly so if plea belatedly taken involves an inquiry on facts".*

17. In case of **Lal Khan v. Muhammad Yousaf (PLD 2011 SC 657)**, it is held that:--

*'Aggrieved person has to pursue his legal remedies with diligence and if a petition or a suit etc. is filed beyond limitation each day's delay has to be explained. Where vague explanation was given without even specifying the date of knowledge, nor any explanation tenable in law was provided to justify condonation, delay condoned was violative of law and, was not sustainable'*

18. In the case of **Abdul Karim v. Florida Builders (Pvt.) Ltd. (PLD 2012 SC 247)**, it is held that:--

*'9. We have already noticed that the court is bound by the use of the mandatory word 'shall' to reject a plaint if it "appears" from the statements in the plaint to be barred by any law. What is the significance of the word "appears"? It may be noted that the legislative draftsman has gone out of his way not to use the more common phraseology. For example, in the normal course, one would have expected that the language used would have been "where it is established from the statements in the plaint that the suit is barred by any law" or, alternatively, " where it is proved from the statement in the plaint that the suit is barred by any law". Neither of these alternatives was selected by the legislative draftsman and it must be assumed that this was a deliberate and conscious decision. An important inference can therefore be drawn from the fact that the word used is "appears". This word, of course, imports a certain degree of uncertainty and judicial discretion in contradistinction to the more precise words proved' or "established". In other words the legislative intent seems to have been that if prima facie the court considered that it "appears" from the statements in the plaint that the suit was barred then it should be terminated forthwith.'*

19. From the foregoing discussion, it appears that appellant has not filed the suit(s) within time, hence the suits of the appellant were rightly found to be barred by Article 113.

20. With regard to the plea of learned counsel for the appellant that since the appellant has also sought a relief of 'damages' therefore, plaint(s) of appellant was not liable to rejection. At this juncture, a reference to Section 19 of the Specific Relief Act shall make things rather clear which reads as under:-

*'19. Power to award compensation in certain cases.-Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.*

*If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.*

*If in any such suit the Court decides that specific performance ought to be granted but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.*

21. The above provision makes it evident that even to claim 'compensation/damages' one can competently bring a suit for 'compensation' as in addition or in substitution to 'specific performance of contract', therefore, right to claim compensation to plaintiff for breach of contract accrues coincidentally with the right to sue for specific performance of Contract hence limitation for such right shall be the same as for Specific Performance of Contract because such right of compensation is either 'in addition or in substitution.

22. In view of above discussion, I am clear in my view that both the court(s) below have committed no illegality in finding the plaint(s) of the appellant as barred by law of Limitation, hence rightly rejected the plaint(s). Accordingly, the appeals of the appellant are hereby dismissed with no order as to costs.

JUDGE