

IN THE HIGH COURT OF SINDH KARACHI

SUIT NO. 1673 of 2020

Plaintiffs : Shankar Lal Ochani & another
through Mr. Hamza H. Hidayatullah,
advocate

Defendants : Siddique Construction Company
& others

Date of hearing : 22.10.2024

Date of Judgment : 14.11.2024

JUDGMENT

OMAR SIAL, J. On 13.08.1983, **Haji Mohammad Siddique** (a partner in the firm of Siddique Construction) entered into a Sale Agreement with **Shankar Lal Ochani**. The parties agreed that Shankar Lal would buy from the Haji Flat No. 6-A, on the Second Floor of a building known as Siddique Court, constructed on a sub-plot of Plot No. 3-A in the Gulshan-e-Faisal Co-operative Housing Society situated in the Bath Island area of Karachi.

2. Out of the sale consideration of Rs. 400,000, Shankar Lal paid Rs. 100,000, whereas the balance was to be paid in three yearly installments of Rs. 100,000 each, after which the title would be transferred to Shankar Lal. Possession of the apartment, however, was handed over to Shankar Lal the same day, i.e., on 13.08.1983.

3. Shankar Lal claims he paid the remaining Rs. 300,000, but the title was not transferred to his name. On 22.01.2020, Shankar Lal transferred and assigned his rights in the apartment to his brother Veer Kumar Ochani upon the terms of the Sale, Transfer, and Assignment Agreement executed between the two individuals.

4. On 02.11.2020, Shankar Lal and Veer Kumar filed this Suit against Siddique Construction Company and seven other apartment building residents, primarily seeking a declaration that Veer Kumar (being Shankar Lal's assignee) is entitled to the execution of a Conveyance Deed in his favor.

5. The Defendants took the position that the Suit was barred by limitation, that the Plaintiffs were merely tenants, that section 42 of the Specific Relief Act, 1877, barred the suit, and that the Plaintiffs had not given the remaining sale consideration.

6. On 11.10.2022, the following issues were settled for determination:

- (i) Whether the Plaintiffs are entitled to the performance of the sale agreement dated 13.08.1983 and sale, transfer, and assignment agreement dated 22.01.2020 in respect of Apartment No. 6-A, Block A, Second Floor, Siddique Court, Gulshan-e-Faisal Co-operative Housing Society, Bath Island, Karachi?
- (ii) What should the decree be?

7. I have heard the learned counsel for the Plaintiffs. None appeared for the Defendants despite the caution on the previous date that the matter would be heard and decided in their absence if they did not appear.

Issue No. 1

8. The Defendants admit execution of the Sale Agreement dated 13.08.1983. Rs. 100,000, having been paid as advance money, is also not denied. What they deny is that the remaining sale consideration was not paid. At trial, the Plaintiffs produced receipts issued by Siddique Construction Co., which show the following.

- (i) Rs. 100,000 paid, evidenced by a receipt dated 13.08.1983

- (ii) Rs. 100,000 paid, evidenced by a receipt dated 01.09.1984
- (iii) Rs. 25,000 paid, evidenced by an undated receipt.
- (iv) Rs. 75,000 paid, evidenced by a receipt dated 15.09.1985
- (v) Rs. 100,000 was paid, as evidenced by an undated receipt, which shows this as the full and final payment for the apartment.

9. All the receipts have been issued on the letterhead of Siddique Construction Co. and have been signed by Haji Muhammad Siddique on behalf of Siddique Construction Co. The receipts evidence that the entire sale consideration was paid to Haji Muhammad Siddique and that he had also clarified that the conveyance deed would be registered whenever Shankar Lal desires.

10. At trial, only one witness was examined for the Defendant. He was Saeed Ahmed, the son of Haji Muhammad Siddique, as the Haji had expired by then. When shown the receipts that evidence payment, he replied, "*It is not in my knowledge. If my father had received the payment, then the flat transfer should have been done*". He also said that he was not aware if the signature on the receipts was his father's. Saeed did not give a compelling reply. It was apparent that he was completely unaware of the facts, which is unsurprising, as he admitted that he was ten years old when the transaction occurred.

11. As regards the signature of the Haji on the receipts, a forensic expert Ghulam Abbas Jafri was examined. His report was exhibited at trial. This report concludes that the signatures on the sale agreement and the receipt issued when the contract was executed are of the same person who had signed the abovementioned receipts. Article 84 of the Qanun-e-Shahadat Order, 1984 says that to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or

proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose. The signatures on the admitted agreement to sell and the admitted first receipt issued for the advance money, when compared with the Haji's signatures on the remaining receipts, show that, likely, the receipts have been signed by the same person who had signed the payment receipts.

12. Admittedly, Shankar Lal Plaintiff No. 1 assigned all his rights and liabilities in the apartment to his brother Veer Kumar Plaintiff No. 2 vide an unregistered document on 22.01.2020. No challenge has been raised to this assignment. The Sale Agreement includes the assigns of Shankar Lal within the term "Vendee" used for him.

13. An aspect of the case I have looked at, even though no issue was framed on this point, is one of limitation. The sale agreement was signed on 13.08.1983, and the last payment was made sometime in 1986. When the final payment was made, the Haji had represented to the plaintiff that the conveyance deed was to be executed when he desired. The Suit was filed on 02.11.2020. Article 113 of the Limitation Act, 1908 stipulates that a suit for specific performance should be filed within three years from the performance date, or if no such date is specified when the plaintiff has notice that the performance was refused. According to the learned counsel for the plaintiff, the defendants never denied performance, and the first time they declined to register the conveyance deed was on 04.02.2020, when the plaintiffs sent a legal notice to the defendants. The suit was filed within three years of the date of refusal. Saeed Ahmed made a verbal statement at trial but had no documentary or other evidence to establish that performance had been declined earlier. The plaintiff has been living in the property for nearly four decades and has not once been asked to vacate the property or pay rent

(which was the stance of the defendant), nor has any attempt been made to seek cancellation of the Sale Agreement, tilts the balance in favor of the plaintiff, i.e., performance was not declined by the defendant earlier.

14. Regarding limitation, there is another crucial aspect, section 53-A of the Transfer of Property Act. To facilitate reference, section 53-A is reproduced below:

*53A. **Part performance.** Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part, performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:*

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or the part performance thereof.

15. In essence, to take advantage of the provisions of section 53-A, the following conditions have to be fulfilled:

- (i) The contract must be in writing, signed by or on behalf of the transferor;
- (ii) the transferee should be in possession of the immovable property covered by the contract;
- (iii) the transferee had done some act in furtherance of the contract and,
- (iv) the transferee had either performed his part of the contract or was willing to perform his part of the contract

16. All the above conditions are satisfied in the present case. The Sale Agreement is in writing; the Ochanis are in possession and have been in possession since 1983; according to the contract, payments were made by the Ochanis for three years, and the Ochanis have performed their part of the contract. Thus, the benefit of section 53-A would thus be available to the plaintiffs.

17. A similar issue on the applicability of limitation where section 53-A comes into play came before the Supreme Court in the case of **Syed Hakeem Shah and others vs. Muhammad Idrees and others, reported at 2017 SCMR 316**. The Supreme Court approved an earlier decision of the High Court of Sindh, **Muhammad Nawaz Magsi vs. Illahi Bux (2010 CLC 407)**. The High Court had held that:

5. It may also be mentioned here that though for filing a suit for the specific performance of a contract, the prescribed period of limitation is three years but as the applicant has filed his suit on the basis of agreement to sell, which is coupled with the transfer of possession and has also sought the relief of, permanent injunction, the statute of limitation would not come in his way.

Where a plaintiff continues to enjoy a right, the statute of limitation cannot take away such a right as the law of limitation is not meant to take away an existing right. It

only bars remedy to gain one's lost right. The right created under section 53-A of the Transfer of Property Act is an existing right and is not extinguished by any length of time. There cannot be any expiry date for the enjoyment of a right conferred upon a transferee in possession under section 53-A of the Transfer of Property Act.

Therefore, the law of limitation does not come in the way of a transferee in possession when he, as a plaintiff, files his own suit to preserve his right to retain possession that is granted to him under section 53-A of the Transfer of Property Act.

18. Later, in 2023, the Supreme Court in **Rehmat Wali Khan and another vs. Ghulam Muhammad and others (PLD 2023 SC 506)** observed:

7. Learned counsel for the appellants had also argued that the suit filed by the predecessor-in-interest of the respondents was barred by time. However, we have noted that neither the appellants ever tried to get an issue framed on this point, nor was this question ever considered by the courts below. Therefore, the same cannot be raised before this Court at this stage. Even otherwise, when pursuant to the un-registered sale deed, the respondents were put in possession of the suit land in the year 1971, a vested right had been created in their favor, which cannot be taken away merely based on technicalities.

19. The Supreme Court in the *Rehmat Wali Khan* cited the judgment in the *Syed Hakeem Shah* case (mentioned above) to support its observation.

Given the above, I believe the Suit is not barred by limitation.

20. The evidence reflects that a Sale Agreement was entered into between Shankar Lal and the Haji; Rs. 400,000 was the sale consideration; Rs. 100,000 was paid by Ochani when the

Sale Agreement was executed; Rs. 300,000 was to be paid to the Haji within three years from the date of the Agreement; the requisite payment was made within the stipulated time frame; the Sale Agreement did not specify a date by which the transaction should be completed; Shankar Lal was entitled to have the conveyance deed executed in his favor or the name of his assign or nominee.

Issue No. 2

21. Suit is decreed as prayed with no order as to costs.

JUDGE