

IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal No. 133 of 2014

Present:

Mr. Justice Sajjad Ali Shah.

Mr. Justice Muhammad Junaid Ghaffar.

Abdul Waheed Usman ----- Appellant

Versus

Gul Hameed Ghanchi and others ----- Respondents

Date of hearing: 24.08.2015

Date of judgment: 29.09.2015

Appellant: Through Mr. Mirza Sarfaraz Ahmed Advocate.

Respondent No. 1: Through Khawaja Shamsul Islam Advocate.

J U D G M E N T

Muhammad Junaid Ghaffar, J. Through instant appeal, the appellant has impugned order dated 25.3.2015 passed in Suit No. 306 of 2012 whereby, a learned Single Judge of this Court has been pleased to reject the plaint by holding that the Suit is barred by Limitation, as well as under Order II Rule 2 CPC and Section 42 of the Specific Relief Act 1877.

2. Briefly the facts are that the appellant claims to be the owner of property bearing plot No. 33, Block-B admeasuring 600 square yards situated in Gulshan-e-Faisal Cooperative Housing Society, Bath Island, Karachi (*Suit property*) on the basis of Irrevocable Power of Attorney dated 10.11.1987 executed by the original allottee in favour of the appellant's father, after which the possession and the original documents were handed over to the appellant's father. On 16.6.2000 one Riazuddin @ Rajoo allegedly dispossessed the appellant from the said property and also filed Suit No. 816 of 2000 before this Court and succeeded in obtaining an ex-parte restraining order against the appellant. Subsequently, the appellant also filed a Suit bearing No. 1669 of 2001 against the said Riazuddin @ Rajoo seeking Cancellation, Declaration, Possession and

Permanent Injunction, whereafter both the Suits were consolidated and are being fixed together for evidence. It is further stated that a public notice dated 14.11.2006 was published through which objections were invited in respect of sale / purchase of plot bearing No. B-33/1, Gulshan-e-Faisal Cooperative Housing Society, Bath Island, Karachi, by respondent No. 2 & 3 which was responded to by the appellant on 17.11.2006 by informing them about pendency of litigation in respect of the said property before this Court in Suit No. 816 of 2000 and Suit No. 1669 of 2001. It is further stated that the appellant also came across to a public notice dated 17.1.2012, whereby respondent No.1 invited objections on sale / purchase of plot No B-33/1 to which the appellant responded through his Counsel about pendency of litigation as referred to hereinabove. Thereafter the appellant in March, 2012 observed that some construction was being carried out on the suit property by respondent No.1 and thereafter filed Suit bearing No. 306 of 2012 wherein the impugned order of rejection of plaint has been passed.

3. Counsel for the appellant has contended that the learned Single Judge has failed to appreciate that Suit No 306 of 2012 (the second / subsequent Suit) filed by the appellant was in respect of a different cause of action, hence the provision of Order II Rule 2 CPC is not applicable. Counsel further contended that neither the provision of Section 91 of the Limitation Act, 1908, was applicable, nor the Suit was barred under Section 42 of the Specific Relief Act, for the reason that the aforesaid Suit was filed, only when it came to the knowledge of the appellant that some construction is being raised on the said plot; hence the Limitation would start running from the date of knowledge regarding such construction. It has been further contended that the cause of action arose at the time of construction on Plot No B-33/1 as the said plot has been carved out by reducing the area of appellant's plot which has been encroached upon by Respondent No.1 Counsel has further contended that since the appellant is in possession of lease / irrevocable power of attorney from its original allottee in respect of the said property, therefore, the Suit is also not barred under Section 42 of the Specific Relief Act.

4. On the other hand the learned Counsel for respondent No. 1 has contended that the appellant was dispossessed on 16.6.2000 by one Riazuddin @ Rajoo against whom the appellant has already filed a Suit bearing No. 1669 of 2001 through which the appellant

has sought cancellation of documents as well as declaration of ownership in respect of Plot No. 33 Block 'B' admeasuring 600 square yards in Gulshan-e-Faisal Cooperative Housing Society Limited, Bath Island Karachi, whereas, the said Riazuddin had earlier filed a Suit bearing No. 816 of 2000 against the appellant and his father in respect of the property bearing Plot No. B-33 as referred to hereinabove. Counsel has further contended that insofar as respondent No. 1 is concerned, he is the owner of Plot No. B-33/1 Gulshan-e-Faisal Cooperative Housing Society, Bath Island, Karachi and has no concern with the property in dispute between the appellant and Riazuddin which is in respect of Plot No. B-33, and since the appellant had earlier filed a Suit in respect of the said property, therefore, a subsequent Suit seeking declaration in respect of the same is barred under Order II Rule 2 CPC which objection has been correctly upheld by the learned Single Judge. Counsel has also relied upon the layout plan dated 20.6.1998, filed in Suit No. 1669 of 2001 and contends that according to this plan Plot No. B-33/1 was very much in existence since 1998, and was also in knowledge of the appellant when Suit No. 1669 of 2001 was filed, however, no declaration and / or any relief in respect of the said plot was ever sought, therefore, the subsequent Suit is also hit by Limitation in terms of section 91 of the Limitation Act, 1908, as well as under Order II Rule 2 CPC.

5. We have heard both the learned Counsel and perused the record. By consent instant appeal is being finally decided at Katcha Peshi stage. On perusal of the record it appears that there is no dispute with regard to the fact that a Suit bearing No. 816 of 2000 was filed by one Riazuddin against the present appellant seeking Declaration, Cancellation and Permanent Injunction, whereafter a counter Suit bearing No.1669 of 2001 was filed on 3.12.2001 by the present appellant against Riazuddin in respect of property bearing No.B-33 admeasuring 600 square yards or thereabout in Gulshan-e-Faisal Cooperative Housing Society Limited, Bath Island Karachi. Perusal of the record though reflects that a Site Plan dated 20.6.1998 annexed with the Memo of plaint in Suit No.816 of 2000 reflects that a Plot bearing No.B-33/1 was in existence and despite such fact, the appellant while filing Suit No.1669 of 2001 had not challenged or sought any relief in respect of Plot No.B-33/1. However, it is also an admitted position that the title documents, on the basis of which the appellant claims ownership duly annexed with the

plaint; do not reflect existence of Plot No.B-33/1 at the time when the appellant had purchased the Suit property. The fact that Plot No.B-33/1 has been carved out subsequently cannot be denied as otherwise, there was not need to number it as B-33/1, and any other number could have been allotted to such plot. We have also examined the R&P of Suit No. 306 of 2012 and other connected Suits and have noticed that the lay out plan of the entire area issued in favor of Respondent No 6 (Society) does not reflect existence of Plot No.33/1. Though the claim of the appellant since beginning is in respect of Plot No.B-33, however, while filing the subsequent Suit it has been averred on behalf of the appellant in the plaint, that since the plot in question i.e. B-33/1 has been carved out by encroaching upon the area of Plot No.B-33/1 as well as Plot No.B-34, therefore, the cause of action, if any, accrued to the appellant when construction was being carried out on Plot No.B-33/1. It is further observed that the plan dated 20.6.1998 in which newly carved out Plot No. 33/1 is shown does not reflect that its carving is by reducing the area of Plot No. B-33, if it was so, the cause would have arisen. Therefore, insofar as invoking the provisions of Order 2 Rule 2 CPC and the bar of filing a subsequent Suit is concerned, we are of the view that since the cause of action for filing instant Suit arose only when it transpired that the area in question of Plot No.B-33/1 includes the area of Plot No.B-33 as well of Plot No.B-34, such bar of Order 2 Rule 2 CPC would not be applicable in the instant matter. This is for the reason that when Suit No.1669 of 2001 was filed, the question that whether Plot No.B-33/1 was carved out after allegedly encroaching upon the area of Plot No.B-33 and B-34 had not arisen and no relief in that regard could have been sought by the appellant.

6. Similarly, with regard to the objection that the Suit was time barred, we may observe that the aforesaid reasoning recorded by us in respect of non applicability of the bar contained in Order 2 Rule 2 CPC, would equally apply in respect of the objection of limitation. Since we have already observed that it was only when construction work started on Plot No. B-33/1, the appellant got knowledge about such fact in 2012, the period of limitation would start from thereon, and not from the date of site plan dated 20.6.1998 through which existence of Plot No. B-33/1 is being claimed. It cannot be expected that the appellant could have presumed that for some reason the area of Plot No.

B-33/1 includes some area of Plot No. B-33 or it has been carved out after bifurcating and or encroaching his plot, until construction started and counting from the date of such knowledge about construction, the Suit is within the period of limitation. It is also a settled proposition that for the purpose of limitation, prima facie, the date of cause of action, as averred in the plaint is to be looked into wherein it has been categorically stated by the appellant that the cause of action for filing the Suit in the instant matter accrued only when construction was started on Plot No.B-33/1 somewhere in the year 2012 and had come to the knowledge of the appellant that Plot No.B-33/1 had been carved out by allegedly encroaching upon the area of Plot No.B-33 and B-34, therefore, we are of the view that the plaint could not have been rejected on the point of limitation, as the Suit in the instant matter was filed immediately in the year 2012.

7. It has also been noticed that along with this Suit, there are three other Suits pending before this Court bearing Nos.667 of 2000, 816 of 2000 and Suit No.1669 of 2001, out of which Suit No.667 of 2000 was withdrawn by the plaintiff for filing a fresh Suit and thereafter Suit No.1669 of 2001 has been filed. The perusal of the record reflect that the plaint has only been rejected in respect of Suit No.306 of 2012, whereas, at some point of time, all the Suit(s) were being heard together as they involved the question of ownership and possession in respect of Plot No.B-33, B-33/1, initially and thereafter in respect of Plot No.B-34 as owner of the said plot has come before this Court as intervener/defendant Nos.4 to 8 in Suit No.816 of 2000. They have taken a specific plea that they are the legal heirs of one Dr. Muhammad Abdul Jalil who had been allotted Plot No. B-34 vide order dated 9.9.1975, which was thereafter allotted to one Imtiaz Ahmed Khan vide allotment order dated 29.6.1998, whereafter, in Revision No. SO (t) 6(7)2000 vide order dated 6.8.2001 the same was restored. Thereafter in Execution proceedings, a final order dated 26.3.2013 has been passed by the Executing Court to hand over the possession of Plot No. B-34, against which the Plaintiff in Suit No. 816 of 2000, had filed CMA 38639/2013 which has been dismissed vide order dated 28.10.2014. The claim of the Interveners / Defendant No. 4 to 8 is that in fact no Plot bearing No. 33/1, ever existed in the original Lay Out plan of the Society dated 24.1.1990, whereas, the then Administrator while carving out Plot No 33/1 in the year 1998, had encroached upon

some area of Plot No. B-34. Similarly, the Plaintiff in Suit No. 816 of 2000 has stated that the Society after proper approval of Revised Lay out Plan by KDA Master Plan department vide letter dated 4.9.1997 had allowed bifurcation of two Plots bearing No. B-34 & B-33 into three Plots and allotted Plot No. B-34 measuring 325 Sq.Yds to Mr Imtiaz, and other Plot bearing No. B-33 measuring 487 Sq. Yds to him and Plot No B-33/1 measuring 500 Sq. Yds to other allottee. It appears on the basis of statement made on behalf of the contesting parties, that Plot No. B-33/1 was created after bifurcation of Plot No. B-33, whereas such aspect of the matter, that whether Plot No.B-33/1 existed in the Original Lay out Plan or not, and whether any area of Plot No. B-33 or B-34 has been encroached upon or reduced to carve out Plot No. B-33/1 now appears to be Sub-judice, before the learned Single Judge and is a pending lis.

8. In view of hereinabove discussion we are of the view that in the given circumstances, the bar of fresh Suit as contemplated under Order 2 Rule 2 CPC is not applicable, whereas, the plaint in the instant matter could also not have been rejected on the point of limitation as apparently, counting from the date of knowledge about construction as well as activity on the Site of the plot, the Suit appears to be within the period of limitation. In the circumstances the impugned order does not appear to be sustainable and is accordingly set aside. However, in the interest of justice we would direct the trial Court to frame issues with regard to the objections taken in the application under Order 7 Rule 11 CPC, regarding bar of fresh Suit under Order 2 Rule 2 CPC as well as limitation under Article 91 of the limitation Act, 1908, and let the parties lead their respective evidence in this regard. The appeal stands allowed in these terms. Since we have allowed the appeal by setting aside the order of rejection of plaint, interim order dated 26.3.2012 passed in Suit No. 306 of 2012, stands restored.

JUDGE

JUDGE

ARSHAD/