

IN THE HIGH COURT OF SINDH AT KARACHI**Suit No.202 of 2012****Mrs. Zakia J. Rahman ----- Plaintiff.****Versus****Syed Abdul Majid Moini & others -----Defendants****Dates of hearing: 31.01.2017 & 21.02.2017.****Date of Judgment: 28.02.2017.****Plaintiffs: Through Mr. Mazhar Imtiaz Lari,
Advocate.****Defendant No.2. Nemo.****J U D G M E N T**

Muhammad Junaid Ghaffar, J. This is a Suit for Declaration and Specific Performance in respect of Property bearing No. 39/U, Block-6, Pakistan Employees Co-operative Housing Society, Ltd., Karachi (“Suit Property”).

2. Precisely, the facts are that the plaintiff entered into an Agreement dated 24.04.1961 with Defendant No.1 for purchase of the Suit Property, which was owned by Defendant No.1 on the basis of an allotment by Defendant No.2. On payment of the sale consideration, the Defendant No.1 executed a General Power of Attorney in favour of the Plaintiff empowering her to act on his behalf in relation to the said plot. Such Power of Attorney was executed as according to the Rules of Defendant No.2, the allotment was not transferable but once a house was constructed on a plot, it could be sold out through a Conveyance Deed. Thereafter possession was handed over and plaintiff constructed house on the Suit Plot and obtained a Completion Plan dated 26.01.1971 from KDA and approached Defendant No.2 for execution of Form “A” Sub-Licence on the basis of General Power of Attorney and Defendant No.2 executed a duly registered Form “A” Sub-Licence in favour of Defendant No.1 through Attorney of the Plaintiff. Thereafter the Plaintiff approached Defendant No.2 for transfer of the Plot in her name and for a lease of 99 years on which a registered Power of Attorney was demanded. The Defendant No.2 was replied that the plaintiff is not in possession of a

registered Power of Attorney as at the relevant time, it was not required. After having being satisfied, Defendant No.2 issued a Payment Challan of Rs.24,200/- and after payment of the same recommended to Defendant No.3 for grant of a 99 years lease, however, the same was refused by Defendant No.3 for producing a registered Power of Attorney and copy of NIC (National Identity Card) of the original owner of the plot. The Plaintiff made all efforts to trace out Defendant No.1 but to no avail and finally serviced a Legal Notice dated 04.01.2012 on his last known address but did not get any response, hence instant Suit.

3. After filing of Suit, notices and summons were issued, whereafter Defendant No.1 was declared ex-parte and Defendant No.3 was debarred, whereas, Defendant No.2 filed its Written Statement and has supported the case of Plaintiff. On 23.05.2016, the following Issues were settled as Court issues:-

- i. Whether the plaintiff paid the entire sale consideration to the defendant No.1 and whether any General Power of Attorney in lieu thereof was executed by him, if so its effect?
- ii. Whether the defendants No.2 and 3 on the basis of Power of Attorney dated 24-04-1961 are bound to execute the required 99 years lease and to transfer the plot in Suit in the name of the plaintiff?
- iii. Whether the plaintiff are entitled to specific performance of the sale agreement executed by the defendant No.1?
- iv. What should the decree be?

4. Evidence was recorded on commission. The Plaintiff's evidence was led by P.W-1 namely Zakia J. Rehman, whereas, Counsel for Defendant No.2 supported the version of Plaintiff and made a Statement that he does not wish to cross-examine the Plaintiff's witness.

5. Learned Counsel for the Plaintiff has contended that the Plaintiff is enjoying possession of the property since its purchase and after constructing a house is residing since last more than 50 years. Whereas, Defendant No.1 has not come forward to either deny the Sale Agreement or the possession and construction of the house of the Plaintiff. Per Learned Counsel at the time of purchase of the plot, the Plaintiff was not required in law to obtain a registered Power of Attorney as it was only in respect of the construction and finalization of further proceedings including the execution of a Lease Deed in favour of Defendant No.1 and thereafter its transferred through a Conveyance Deed in

favour of the Plaintiff. According to the learned Counsel, the defendant No.3's objection is unwarranted in law and has delayed the matter to such an extent. Learned Counsel has read out the Examination-in-Chief of the Plaintiff's witness and so also the relevant documents exhibited in the evidence including Completion Certificate, Form "A" Sub-License, the Application for issuance of Lease and payment of various dues of Defendant No.2. He has also relied upon the written statement filed by the Defendant No.2, which supported the Plaintiff's version and as to query of the Court regarding delay in filing of this Suit, learned Counsel submitted that there is no date fixed for the Specific Performance of Agreement and therefore, it would be covered by the second part of Article 113 of the Limitation Act, hence Suit is within time. He has relied upon the cases reported as **PLD 1966 Supreme Court 505** (*Habibullah Khan and others v. Qazi Muhammad Ishaq and others*), **PLD 1987 Lahore 659** (*Muhammad Yousaf v. Asif Siddique and another*) **PLD 2008 Lahore 42** (*Mir Muhammad Aslam v. Bilqees Begum*), **PLD 2004 Azad J&K 38** (*Muhammad Sharif Khan and others v. Raja Muhammad Farid Khan and Others*) and **1993 CLC 747** (*Muhammad Kabirudding v. Muhammad Muniruddin and another*) to support his contention.

6. I have heard learned Counsel for the Plaintiff and perused the record including the evidence so recorded on plaintiff's behalf. Though no one has come forward to contest this matter on behalf of the defendants, whereas, Defendant No.1 has been declared ex-parte but while going through the record, the learned Counsel was confronted to only one issue and i.e. Whether the Suit is barred in limitation or is hit by the laches. Learned Counsel in order to satisfy the Court's query, referred to the agreement in question specially Clause-2, which provides the execution and limitation for the Sale Deed, and reads as under:-

"2. That as the transfer and sale, however, cannot be effected, under the terms and conditions of the license in favour of the 2nd party, till such time as the building on the plot is completed, it is agreed and the First Party and undertakes to complete the building on the said plot and obtain a lease in his favour from Government and thereafter execute and register a deed of transfer of the plot in question together with the building standing thereon in favour of the Second Party."

7. Perusal of the aforesaid clause reflects that at the time when this Agreement was entered into, the transfer could not have been made in favour of the Plaintiff due to terms and conditions of the License/Allotment issued in favour of Defendant No.1 and the parties mutually agreed that till such time as the building on the plot is completed, Defendant No.1 undertook to complete the building on the said plot and obtain a lease in his favour and thereafter was

required to execute and register a Deed of Transfer in question together with the building in favour of the Plaintiff. For such purposes, the Defendant No.1 executed a Power of Attorney in favour of the Plaintiff and or her nominee, which authorized the Attorney to go through the entire process in this regard. However, it appears that thereafter, the Defendant No.1 having been paid the entire sale consideration did not come forward to assist the plaintiff in getting the lease once an objection was raised with regard to the Power of Attorney in question. This forced the Plaintiff to file instant Suit for Specific Performance. On an overall perusal of the record and the Agreement, it appears that there is no time limit fixed for performance of the Agreement and therefore it cannot be said that the Suit in this matter is barred by limitation or suffers from Laches. In a more or less similar situation, the Honourable Supreme Court in the case of *Habibullah Khan (Supra)* was confronted, whereby, the learned High Court of West Pakistan, Peshawar, came to the conclusion regarding the limitation in respect of a Suit for Specific Performance in the following manner:-

“In the view of the High Court even though the measure of time was, as specified in Article 113, three years from the date of refusal to perform, the latitude was not to be extended for an unreasonable or indefinite period. In other words, in the High Court's opinion the three years should have commenced from a reasonable period after the expiry of the period of 15 years stipulated in the deed of sale as the period during which re-conveyance could not be claimed. The High Court thought that even though this Article of the Limitation Act prescribed a period of three years from the date of non-performance, the suit should have been filed within at most five years from the date of the expiry of the period of 15 years. By waiting for 13 years, therefore, the plaintiffs in the suit had been guilty of laches, which disentitled them to the discretionary relief of specific performance.”

8. However, the Honourable Supreme Court overruled such observation of learned High Court West Pakistan Peshawar by holding as under:-

“The language used in the agreement for re-conveyance is, in our opinion, too indefinite to be regarded as fixing a date for the performance of the contract and the maxim *certum est quod certum redid potest* cannot also be invoked in reference to such a loosely worded agreement, under which the promisor undertook to recovery not on the expiry of the stipulated period but at any, time after the expiry thereof. This could not possibly be construed as meaning simultaneously on the expiry of the period.

The next question that arises is as to whether a different principle should operate in the case of a discretionary relief like that of specific performance of a contract. In a case where such a relief is sought can the defendant be entitled to raise the plea of delay as a defence to the suit, even where the delay does not amount to a bar

under the statute of limitation? The discretion, it is now well-settled must be exercised on principle substantially equitable. Equity does not, however, proceed upon any *a priori* basis. It has, therefore, never treated delay simpliciter as a bar. Unless the delay has caused some prejudice to the other party, equity has not intervened to excuse performance of a contract. So long as matters remain in status quo and there is nothing to show that the party called upon to perform has been misled by the inaction of the other party to alter his position in such a manner as to make it inequitable to force him to perform his part of the contract, lapse of time short of the period prescribed by the Limitation Act should not be allowed to operate as a bar to the claim of the relief.

It may be taken to be fairly well-settled that if the person seeking performance has not committed such delay as would cause prejudice to the other side or would amount to waiver or acquiescence on the part of the person seeking performance, laches by itself would not be a sufficient ground. Thus until it can be shown that the plaintiff in the suit had actively done something to lead the defendant to suppose that he had abandoned his claim against the latter, the doctrine of laches would have no application in cases where the statute of limitation has fixed a date for suing for performance. To take any other view would, as Sir Fredrick Pollock has said in his Tagore Law lectures, 1894, p.37, be "directly calculated to frustrate the purpose of the Indian Legislature in fixing a certain term."

In the present case too we see no reason to depart from the above well-settled principles, since there is nothing on the record to show that there has been any alteration in the position of the parties, which is likely to cause any prejudice to the respondents. The status quo is still, as far as can be gathered, being maintained unaltered. The situation of the parties having, therefore, in no substantial manner been altered, either by the delay or by anything done during the interval, there is in these circumstances nothing to give special importance to the defence founded on time. We are unable, as such, to hold that the High Court acted upon correct principles in dismissing the suit and refusing to allow specific performance of the agreement for re-conveyance."

9. The Defendant No.2 through its written statement placed before the Court has contended in para-5, which reads under:-

"5. Contents of Para No.11,12 & 13 are admitted, however, it is submitted that to the extent of legal position, the defendant under reply has conceived from the law is that for registration of lease in favour of the allottee of the plot no registered Power of Attorney is required even a Special Power of Attorney is sufficient. However for transfer of the plot from the name of the allottee to some other person, a registered Power of Attorney is required."

10. Perusal of the aforesaid stance of Defendant No.2 reflects that according to them insofar as the execution of lease in favour of the allottee of the plot is

concerned, no registered Power of Attorney is required; however, for transfer of the plot from the name of the allottee to some other person, a registered Power of Attorney is must. In this matter initially, the Defendants No.2 & 3 were approached for executing of a lease in favour of Defendant No.1 on the basis of an unregistered Power of Attorney, however, such request was not acceded to by Defendant No.3 through certain objections regarding a registered Power of Attorney as well as NIC. Since in this matter, the Seller of the plot has been declared ex-parte and has not raised any objection as to the ownership of Plaintiff as well as the construction so raised and possession of documents, the objections raised by Defendant No.3 does not seems to be justified. A very long period has passed and it is not disputed that the Plaintiff is in possession of a property as well as Special Power of Attorney executed way back in 1961. Whereas, neither Defendant No.2 has led any evidence to negate the claim of the Plaintiff for seeking a declaration from this Court nor Defendant No.3 has come forward to either adduce any arguments or to lead evidence in this matter. It is needless to mention that Defendant No.1 was declared ex-parte. Even otherwise, this is not a case wherein serious prejudice would be caused to defendants No.2 & 3, if lease is directly executed in favor of Plaintiff as apparently defendant No.1 against whom the entire case rests, has not contested this matter, nor has raised any objection as to the agreement itself, or to the possession and ownership of plaintiff. The objection of defendant No.3 was only to protect the rights, if any, of defendant No.1 and nothing more. One can say that in the given facts and at this stage of the proceedings, it is too technical and that is all. More so, will not do any good to the cause of defendant No.1 against whom specific performance is being sought. After having gone through the record and specifics of this case, I am of the view that there appears to be no impediment in grant of the relief so sought by the plaintiff.

11. In view of hereinabove facts and circumstances of the case, I am of the view that Plaintiff has made out a case for granting Declaration and Specific Performance. Accordingly issue No.(i), (ii) & (iii) are answered in the affirmative, whereas, issue No.(iv) is answered by decreeing the Suit to the extent of Prayer Clauses “a”, “b” & “c”.

Dated: 28.02.2017

JUDGE