

Judgment Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No. 84 of 2014

Appellant : Parvaiz Iqbal, through Mr. Adnan Iqbal Chaudhry
Advocate.

Respondent : Faisal Akram, through Mr. S. M. Mustafa Advocate.

Dates of hearing : 05.05.2017, 09.05.2017, 15.05.2017, 29.05.2017
and 30.08.2017.

J U D G M E N T

NADEEM AKHTAR, J. – Through this second appeal, the appellant has impugned concurrent findings of the two learned Courts below whereby Suit No.563/2010 for specific performance of contract and permanent injunction filed by the respondent against the appellant was decreed by the learned trial Court vide impugned judgment and decree dated 31.08.2013, and the said decree was maintained by the learned appellate Court vide impugned judgment dated 17.09.2014 and decree dated 22.09.2014. The main question involved in the present appeal is whether the learned Courts below were justified in holding that the above Suit was within time despite the fact that limitation for filing the Suit was to be governed by second part of third column of Article 113 of the Limitation Act, 1908.

2. Relevant facts of the case are that the above mentioned Suit for specific performance of contract and permanent injunction was instituted by the respondent on 02.07.2010 seeking specific performance of sale agreement dated 04.09.2004 against the appellant in respect of Shop No.22, measuring 11 X 30 sq. ft., situated on the ground floor of project known as ‘Gulburg Square’, Block No.16, Federal B Area, KDA Scheme No.16, Karachi, (**‘the suit property’**). The case of the respondent / plaintiff before the learned trial Court was that the appellant had agreed to sell the suit property to him in consideration of Rs.650,000.00 out of which an amount of Rs.600,000.00 was received from him by the appellant on the date of the agreement when possession of the suit property was handed over to him ; the balance amount of Rs.50,000.00 was to be paid by him at the time of registration of the sale deed and transfer of the suit property in his favour ; despite repeated requests by him, the appellant failed to complete the sale in his favour and finally the

appellant demanded an additional amount of Rs.100,000.00 from him for this purpose ; he paid the said additional amount of Rs.100,000.00 plus balance sale consideration of Rs.50,000.00 to the appellant on his assurance that the sale will be completed within one week, which was not done ; and, a legal notice was issued by him calling upon the appellant to complete the sale in his favour, but the appellant failed to do so.

3. The appellant filed his written statement wherein it was pleaded by him that the sale was to be completed within 90 days from the date of agreement as the respondent was obligated to pay the balance amount of Rs.50,000.00 within the said period as specifically stipulated in the agreement ; the respondent never approached the appellant to pay the said balance amount nor was any attempt made by him to pay the same within the stipulated period ; the subsequent payment of Rs.150,000.00, as alleged by the respondent, was denied, and it was asserted that the said payment had no nexus with the subject sale transaction ; and, the respondent was not entitled to any relief as he himself had violated the agreement. It was specifically pleaded by the appellant that the sale agreement filed and relied upon by the respondent was manipulated and forged, and the actual agreement of the same date was filed by him wherein 90 days' time for completion of the sale was stipulated. It was also pleaded by the appellant that the Suit was barred by time.

4. In view of the divergent pleadings of the parties, following seven issues were settled by the learned trial Court :

- “1. *Whether Suit is not maintainable under the law ?*
2. *Whether sale agreement dated 04.9.2004 of plaintiff or of the defendant is genuine ?*
3. *Whether plaintiff has paid Rs.600,000/- out of total sale consideration and additional amount of Rs.150,000/- to the defendant ?*
4. *Whether defendant after receiving Rs.600,000/- out of total sale consideration handed over the vacant possession of suit property to the plaintiff ?*
5. *Whether plaintiff or defendant has failed to perform his part of contract ?*
6. *Whether plaintiff is entitled to the relief (s) claimed ?*
7. *What should be the decree ?”*

5. After examining the evidence adduced by the parties and hearing their learned counsel, the Suit of the respondent was decreed by the learned trial

Court through the impugned judgment and decree by holding inter alia that the appellant had failed to examine attesting witnesses of the sale agreement (Exh. D/1) produced by him, whereas the respondent had examined both attesting witnesses of his sale agreement (Exh. P/1), therefore, his agreement was genuine ; it was an admitted fact that the appellant had received the last payment of Rs.150,000.00 from the respondent through cheque dated 08.09.2008, therefore, time was not of the essence of the contract and as such the Suit was within time ; the appellant did not initiate any legal proceedings against the respondent for recovery of possession of the suit property ; and, the respondent had fulfilled his part of the contract by paying the entire sale consideration to the appellant. Through the impugned judgment and decree, the learned appellate Court maintained the above findings of the learned trial Court by dismissing the appeal filed by the appellant.

6. Mr. Adnan Iqbal Chaudhry, learned counsel for the appellant, contended that both the parties had produced sale agreements of even date i.e. 04.09.2004 before the learned trial Court, the respondent / plaintiff / vendee produced agreement (Exh. P/1) in which no date was stipulated for performance of the agreement, and the appellant / defendant / vendor produced agreement (Exh. D/1) wherein 90 days were specifically mentioned for performance which period was to expire on 04.12.2004. He submitted that under Article 113 of the Limitation Act, 1908, where time for performance is fixed in the agreement then limitation for filing Suit for specific performance is three years from the date so fixed, and as per the second part of this Article, where no time for performance is fixed in the agreement, then limitation starts from the date when the plaintiff acquires knowledge / notice of refusal to perform. He contended that in the present case if the agreement produced by the appellant was accepted, then the first part of Article 113 would apply and in such an event the limitation for filing the Suit within three years expired on 04.12.2007, whereas the Suit was instituted on 02.07.2010 which was hopelessly barred by time ; and on the other hand, if the agreement produced by the respondent was accepted, then the second part of Article 113 would be attracted. Learned counsel submitted that if it is assumed that the respondent's agreement was genuine, even then the Suit was time barred as he admittedly came to know in the year 2005 about the appellant's alleged refusal. In support of this submission, he referred to paragraph 3 of the plaint and paragraph 3 of the respondent's affidavit-in-evidence wherein the respondent had stated that he continuously approached the appellant to perform the sale agreement, and

cross-examination of the respondent wherein he had stated that after 3 to 4 months of execution of the sale agreement dated 04.09.2004, he approached the appellant for performance, but the latter kept him on false hopes. Learned counsel submitted that the above pleading and evidence of the respondent was sufficient to show that it was an admitted position that he acquired knowledge of the appellant's alleged refusal in January 2005, and as such the limitation in terms of second part of Article 113 expired in January 2008. In support of the above submission, he relied upon Bomanshaw Burjorji Gazdar and another V/S Mst. Mumtaz Begum and others, **1985 SCMR 554** and Zafar Iqbal V/S Sher Muhammad and 3 others, **2003 YLR 673**.

7. It was further contended by learned counsel for the appellant that the main reason that prevailed upon both the learned Courts below for holding that the Suit was not time barred was that time was not of the essence of the contract as no period for performance was stipulated in the agreement. He submitted that such finding was erroneous as the limitation prescribed in Article 113 of the Limitation Act, 1908, could not be determined on the basis of the above as the said Article does not prescribe any such test. He relied upon Haji Abdul Karim and others V/S Messrs Florida Builders (Pvt.) Limited, **PLD 2012 S.C. 247** and Haji Muhammad Yaqoob through Legal Heirs V/S Shah Nawaz, **1998 CLC 21** in support of this submission. He further contended that the other reason given by the learned Courts below for holding that the Suit was within time was that fresh period of limitation had begun on 08.09.2008 when the appellant accepted cheque for Rs.150,000.00 from the respondent towards balance sale consideration. He submitted that the learned Courts below failed to appreciate that the appellant had specifically denied that the said cheque was received by him towards the balance sale consideration or in connection with the sale agreement ; and, he had also produced counter foil (Exh. P/5) of the said cheque and receipt (Exh. P/4) to prove that the aforesaid payment was not received by him towards sale consideration as alleged by the respondent. He further submitted that the respondent did not produce any evidence before the learned trial Court in support of his above assertion, and copies of the cheque and bank's letter dated 15.05.2012 were filed by him for the first time with his objections in the appeal filed by the appellant, and the said cheque filed by him had no concern with him as it related to 'Micro Labs'. It was urged that the learned Courts below failed to appreciate that there was no evidence on record to show that after four years of the sale agreement the aforesaid cheque was given to the appellant towards sale consideration. It was further urged that

in any event and by any stretch of imagination the alleged receipt (Exh. P/4) was not an acknowledgment of liability by the appellant within the meaning of Section 19 of the Limitation Act, 1908 ; firstly, as it did not specify that the said payment was received by the appellant in connection with the sale agreement ; and secondly, as the alleged receipt had been issued after expiration of the original period of limitation. It was strongly urged that Section 19 ibid had no application in this case under any circumstances in view of the above.

8. Learned counsel for the appellant further contended that there was sufficient material before the learned Courts below to show that the alleged sale agreement (Exh. P/1) produced by the respondent was forged and fabricated, but such material evidence was misread / not read by both the learned Courts below. He pointed out to the several discrepancies in the date of attestation of Exh. P/1 and name of purchaser of its stamp paper and the respondent's cross-examination in this context. He also referred to the evidence of the respondent's witness PW-3 who had categorically admitted in his cross-examination that it was decided at the time of agreement (Exh. P/1) that registration of documents and payment of balance amount will be made within 90 days, and that the respondent had not paid the balance sale consideration of Rs.50,000.00 to the appellant. It was urged that the above testimony of PW-3, which had completely invalidated Exh. P/1, was admissible evidence under Proviso (1) to Article 103 of the Qanun-e-Shahadat Order, 1984 ; and, in view of such testimony the respondent was required to prove signature of the appellant on Exh. P/1 under Articles 78 and 84 of the Qanun-e-Shahadat Order, 1984, which was not done by him, and despite all the above, his stance was accepted by the learned Courts below. In support of his above submissions, he placed reliance on *Ghulam Muhammad Shah etc. V/S The United Bank Ltd.*, **1982 CLC 1898**.

9. Learned counsel for the appellant argued that the Limitation Act, 1908, has to be construed strictly and there is no scope in the said Act for granting any equitable or discretionary relief to overcome limitation. He placed reliance upon *Khushi Muhammad through L.Rs. and others V/S Mst. Fazal Bibi and others*, **PLD 2016 SC 872** in support of this submission. He also argued that the concurrent findings of both the learned Courts below are liable to be set aside as the same are contrary to Article 113 and Section 19 of the Limitation Act, 1908. In support of this submission, he relied upon *Messrs Anwar Textile Mills Ltd. V/S Pakistan Telecommunication Company Ltd. and others*, **2013 SCMR 1570** and *Alamdar Hussain V/S Nazir Hussain and others*, **2004 SCMR 595**. In the end, learned counsel submitted that if it is assumed for the sake of

argument that the Suit was not barred by time and the sale agreement (Exh. P/1) produced by the respondent was genuine, even then the delay in filing the Suit had disentitled him to discretionary relief in terms of Section 22 of the Specific Relief Act, 1877.

10. In reply to the arguments advanced by learned counsel for the appellant, Mr. S. M. Mustafa, learned counsel for the respondent, contended that it was an admitted position that an amount of Rs.150,000.00 was received by the appellant from the respondent on 08.09.2008, and in view of this admitted position, the burden was not on the respondent to prove that time was not of the essence of the contract or that the Suit was within time. He further contended that the burden was in fact upon the appellant to prove that time was of the essence of the contract and the above payment was not received by him towards sale consideration. He argued that the appellant had miserably failed in discharging such burden and in case he had discharged the same, the respondent was even then entitled to a decree as the appellant had admittedly received and accepted the above amount on 08.09.2008, whereafter he had waived his right, if any, to raise objection regarding the delayed payment by the respondent. He further argued that in any event it is well-settled that time cannot be deemed to be of essence of the contract in case of sale of immovable property. He pointed out that it was also an admitted position that the appellant never issued any notice for cancellation of the agreement on the ground that the respondent did not pay the sale consideration to him within time. In support of his above submissions, learned counsel for the respondent relied upon (1) Fazal-ur-Rehman V/S Ahmad Saeed Mughal and 2 others, **PLJ 2004 S.C. 73**, (2) Abdul Bari V/S Khushi Muhammad and others, **1994 CLC 1576**, (3) Eidoo Khan V/S Abdul Majeed and 3 others, **2001 YLR 2634** and (4) Rana Allah Bakhsh V/S Ghulam Sakina, **2005 MLD 1700**. No other argument was advanced on behalf of the respondent.

11. I have heard the learned counsel for the parties at length and with their assistance have perused the material available on record as well as the law cited at the bar. The sale agreements produced by both the parties were disputed by the other side, however, the sale transaction, sale consideration and the date of agreement were not disputed. The only dispute with regard to the terms and conditions of sale was whether or not the respondent was required to pay the balance sale consideration to the appellant within 90 days of the agreement. According to the respondent no date or time was agreed upon or fixed by the parties for performance of his obligation and in any event the

time for filing the Suit stood extended on 08.09.2008 when the appellant received Rs.150,000.00 from him. On the contrary, the appellant has all along asserted that there was a stipulation in the agreement whereby the respondent was obliged to pay the balance sale consideration to him within 90 days of the agreement which was of the essence of the contract. It may be noted that despite the above, the appellant has not restricted his attack in this appeal to the extent that the Suit was barred by time as it was not filed within three years from the said period of 90 days. It has been vehemently argued on behalf of the appellant that whether time was of the essence of the contract or not, the Suit was barred by time in any event as it was not instituted within three years from the 90 days' time claimed by him or within three years from the date of alleged refusal or notice of refusal. In my humble opinion, this aspect of the case requires serious consideration as it goes to the root of this case, and more importantly as this aspect has not been considered or dealt with by any of the learned courts below.

12. From the above, it appears that the main controversy between the parties revolves around interpretation of Article 113 of the Limitation Act, 1908, and its application to the facts and circumstances of the present case. For the sake of convenience and ready reference, Article 113 is reproduced below :

<i>Description of suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
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.

13. Article 113 presupposes the existence of a concluded contract between the plaintiff and defendant the performance whereof has been refused by the defendant and the plaintiff has notice of such refusal. The second column of Article 113 prescribes a limitation period of three years for filing a Suit for specific performance, and its third column describing two different situations consists of two parts ; namely, if time or a date for performance of contract is fixed in the contract itself, limitation for a Suit for its specific performance under the first part of the third column starts from such date irrespective of refusal of performance by the defendant and whether the plaintiff has notice of such refusal or not ; and if no such date is fixed, then under the second part of third column, limitation would start from the date when performance of contract is

refused by the defendant or from the date when the plaintiff had notice of such refusal. It may be noted that if no date or time is fixed and the second part is attracted, there would be no question of time being of the essence of the contract ; and, such claim can be made by the parties only when a time or a date is fixed and the case falls under the first part ; and yet the first part does not specifically provide that limitation thereunder would apply only when time is of the essence of the contract. Thus, it follows that the question whether time is of the essence of the contract in any particular case will not be relevant at all for determining the question whether such case falls under the first or the second part of third column of Article 113, and both these questions are independent of each other, having no effect one another.

14. Coming back to the present case, if the stance taken by the respondent that no time or date was fixed by the parties for performance of the contract is believed and the agreement produced by him in support of this stance is accepted, then the limitation of the Suit for specific performance filed by him on the basis of the said agreement was to be governed by the second part of third column of Article 113. In such an event, the Suit ought to have been instituted by him within three years from the date of refusal by the appellant or from the date of notice of such refusal. Thus, the starting point of the limitation in the present matter was the date of refusal by the appellant or the date on which the respondent had the first notice of such refusal, and such starting point could be ascertained only by the pleadings and evidence of the parties. It may be noted that no such specific date was disclosed by the respondent in his plaint and affidavit-in-evidence / examination-in-chief, and in his cross-examination he had stated that he had approached the appellant after three / four months of execution of the sale agreement for registration of documents by repeatedly offering the balance amount to him and his father had also accompanied him, but the appellant kept him on false hopes. It is pertinent to note that the respondent did not produce his father as his witness in support of the above assertion. Except for the above vague and general statement without any specific date, without disclosing how many times he approached the appellant and without disclosing the mode through which the balance amount was offered by him, there was no other evidence on record in this context by the respondent. Moreover, the evidence of the respondent's own witness PW-3 Syed Akbar was clearly contrary to the case set up by the respondent, as he had admitted in his cross-examination that "*It is correct to suggest that at the time of agreement Ex.P/1 it was decided that registration of documents will be*

made within 90 days and the balance amount will also be paid within 90 days. It is correct to suggest that plaintiff has not yet made balance sale consideration of Rs.50,000/- to the defendantst.

15. If the evidence of the respondent is believed on its face value, whether it was strong or weak and unconvincing, he became aware for the first time after three / four months of execution of sale agreement dated 04.09.2004 that the appellant had refused to perform his agreed part of the contract. Thus, according to his own evidence, the respondent had notice of refusal by the appellant in December 2004 / January 2005. If maximum benefit is given to him by assuming that he had such notice in January 2005, then the starting point of the limitation would have been January 2005 and the Suit ought to have been instituted by him latest by January 2008 as per the limitation of three years prescribed in Article 113. This being the position, the alleged payment of Rs.150,000.00 by the respondent on 08.09.2008, which has been strongly disputed by the appellant, was inconsequential as the limitation for filing the Suit had already expired in January 2008 and there was nothing on record to show that the appellant acknowledged his liability in favour of the respondent prior to January 2008. Thus, the Suit instituted by the respondent on 02.07.2010 was miserably barred by time.

16. From the above I have come to the conclusion that the learned courts below failed to appreciate the applicability and implications of second part of third column of Article 113 to the case at hand, and erred in holding that the Suit was within time as no time or date was fixed by the parties for performance of the contract. Such finding by the learned courts below itself is sufficient to show that second part of third column of Article 113 was fully applicable, and yet it was not applied. This is also a case of misreading and non-reading of material evidence as the evidence of PW-3, which had clearly negated and destroyed the case of the respondent, was completely ignored, and discretionary relief of specific performance was granted to the respondent in the absence of any material showing that he was ready and willing to perform his agreed part of the contract or that his Suit was within time. My above findings are fortified by the law laid down by the Hon'ble Supreme Court in PLD 2016 SC 872 (supra). In the above circumstances, the impugned judgments and decrees cannot be allowed to remain in the field, and as such are liable to be set aside in view of the law laid down by the Hon'ble Supreme Court in 2013 SCMR 1570 and 2004 SCMR 595 (supra).

17. Foregoing are the reasons of the short order announced by me on 30.08.2017 whereby this appeal was allowed with no order as to costs, the impugned judgments and decrees were set aside and Suit No.563/2010 for specific performance of contract and permanent injunction filed by the respondent against the appellant was dismissed.

J U D G E