

Judgment Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal No. 93 of 2013

Date	Order with signature of Judge
------	-------------------------------

Present

1. Mr. Justice Ghulam Sarwar Korai
2. Mr. Justice Nadeem Akhtar

1. For orders on Misc. No.1277/2013:
2. For orders on Misc. No.1278/2013 :
3. For orders on office objection & reply of advocate as at 'A' :
4. For orders on Misc. No.1279/2013 :
5. For KatchaPeshi :
6. For orders on Misc. No.1280/2013 :

Appellant : Rashid Naeem, through Syed Ehsan Raza Advocate.

Respondents 1 to 4 : Abdul Aziz Hashim Chhutani (through L.Rs.) & 3 others.

Respondent No.5 : Pakistan Defence Officers' Housing Authority.

Date of hearing : 17.07.2013.

J U D G M E N T

NADEEM AKHTAR, J. : Through this High Court Appeal, the appellant has impugned the order dated 18.04.2013 passed by a learned single Judge of this Court in Suit No.1451 of 2011, whereby the plaint of the said Suit filed by the appellant against the respondents for declaration, specific performance and possession, was rejected.

2. As per the averments made in the plaint, the appellant and respondents 1 to 4 entered into an agreement to sell, dated 09.01.2006 (**'the agreement'**), whereby respondents 1 to 4 agreed to sell to the appellant and the appellant agreed to purchase from them Plot No.52, Khayaban-e-Ittehad, Phase VI, D.H.A., Karachi (**'the plot'**), for a total sale consideration of Rs.25,000,000.00. The appellant paid Rs.3,500,000.00 as part payment to the said respondents, and the balance amount was to be paid at the time of completion of the sale in favour of the appellant. The agreement was executed by respondents 1 to 4 as the legal heirs of one Hashim Noor Muhammad Chhutani and claiming to have inherited the plot from him, who had purchased the same from one Major Syed

Asghar Ali Shah. At the time of the agreement, respondents 1 to 4 had informed the appellant that the plot was still in the name of Major Syed Asghar Ali Shah, and the matter of its transfer in the name of Hashim Noor Muhammad Chhutani, and after his death, in the names of respondents 1 to 4, was under process before respondent No.5 / D.H.A. In July 2008, respondent No.1 informed the appellant that respondents 1 to 4 had filed a Suit for declaration and permanent injunction against the legal heirs of Major Syed Asghar Ali Shah, as they had also applied for transfer of the plot in their names. The appellant was assured by the said respondents that the sale would be completed in his favour. Thereafter, the appellant came to know that the Suit filed by respondents 1 to 4 at the original side of this Court had already been decreed in terms of a compromise arrived at therein by respondents 1 to 4 and the legal heirs of Major Syed Asghar Ali Shah, whereby the plot was to be transferred in their names in equal proportions ; then it was to be sold to a third party ; and, the sale proceeds were to be divided by them equally. It was alleged in the plaint that, as respondents 1 to 4 had already agreed to sell the plot to the appellant, the said consent decree was obtained behind his back through fraud and misrepresentation. In this background, the appellant filed the Suit against the respondents for declaration, specific performance and possession.

3. Respondents 1 to 4 filed their joint written statement, wherein it was pleaded that the Suit was barred by limitation, and also under Section 42 of the Specific Relief Act, 1877, and Section 52 of the Transfer of Property Act 1882. It was specifically pointed out in the written statement that the appellant had filed an application on 01.10.2009 under Section 12(2) CPC bearing J. Misc. No.41/2009 for setting aside the aforementioned consent decree passed in Suit No.811/2008, which was dismissed on 05.08.2010 ; and, High Court Appeal No.161/2010 filed by the present appellant against the said order of dismissal, was also dismissed on 14.12.2011 by a learned Division Bench of this Court. It was pleaded that the appellant's Suit was barred also in view of the above. Respondents 1 to 4 filed an application bearing CMA No.10696/2012 for rejection of the appellant's plaint, which was allowed by the learned single Judge through the impugned order.

4. Syed Ehsan Raza, learned counsel for the appellant, contended that when the application for rejection of the plaint was fixed for hearing, the appellant made a request to adjourn the matter on the grounds that he had engaged a new counsel to represent him in the Suit and had filed an application for withdrawal of the Suit with permission to file a fresh one. He submitted that the learned single Judge turned down the request, heard and decided the application for rejection of the plaint in the absence of the appellant's counsel,

and passed the impugned order rejecting the plaint. It was urged that proper opportunity of hearing ought to have been allowed to the appellant and he ought to have been allowed to withdraw the Suit with permission to file a fresh one. It was further urged that the appellant, whose valuable vested rights in the plot were involved, has been seriously prejudiced by the impugned order.

5. On our query, learned counsel for the appellant conceded not only that the appellant had challenged the consent decree by filing an application under Section 12(2) CPC, but also that the order of its dismissal attained finality in High Court Appeal No.161/2010 as the same was not challenged further by the appellant. It is important to note that the order of dismissal of the appellant's High Court Appeal No.161/2010 was passed on 14.12.2011, and Suit No.1451/2011, out of which this appeal has arisen, was instituted on the very next day, that is, on 15.12.2011. Thus the appellant had no legal character or right in the plot on the day when he filed the Suit, and as such the Suit was barred under Section 42 of the Specific Relief Act, 1877. The above facts about the dismissal of his application under Section 12(2) CPC and High Court Appeal No.161/2010, were suppressed / concealed by the appellant in his plaint. As far as the relief of specific performance prayed for by the appellant, the same could not be granted to him in view of the findings of the learned Division Bench in High Court Appeal No.161/2010 prior to the filing of the Suit.

6. Admittedly the appellant came to know in July 2008 about Suit No.811/2008 filed by respondents 1 to 4, but he did not file the Suit for specific performance within the prescribed limitation of three (03) years, and filed the same on 15.12.2011. We, therefore, agree with the findings of the learned single Judge that the Suit of the appellant was barred by limitation. In view of the above, it is our considered opinion that the plaint was rightly rejected by the learned single Judge. Therefore, the impugned order does not require any interference, and this appeal is liable to be dismissed.

Foregoing are the reasons of the short order announced by us on 17.07.2013, whereby this appeal was dismissed in limine along with all pending applications.

J U D G E

J U D G E