

IN THE HIGH COURT OF SINDH AT HYDERABAD

R.A 315 & 316 of 2021 : Sharif Polani vs. SITE and Others.
Sohail Polani vs. SITE and Others.

For the Applicant/s : Mr. Rehan Kayani Advocate

For the Respondent/s : Mr. Parkash Kumar Advocate

For Official Respondent/s : Mr. Muhammad Sharif Solangi AAG.

Date/s of hearing : 13.12.2023

Date of announcement : 13.12.2023

ORDER

Agha Faisal, J. Two suits, F.C Suit 2 of 2021 and F.C Suit 3 of 2021, were filed before the Senior Civil Judge Jamshoro for *declaration, possession, cancellation and permanent injunction* in respect of immovable property. The respective plaints were rejected by the trial court *inter alia* on account of limitation and patent absence of cause of action. Appeals there against were also dismissed, hence, the present revisions. Represented to be similar in nature, save for the fact that the claim was in respect of two distinct plots, between the same parties and upon the same grounds, these revisions were listed and argued conjointly and shall be determined by this common order. The facts of R.A. 315 of 2021 are representative of the matter *inter se*, hence, by consent of the counsel the same shall be relied upon to undertake the present determination.

2. Briefly stated, a suit for declaration, possession, cancellation and permanent injunction was filed against 4 defendants: (1) Sindh Industrial Trading Estates Limited, (2) Aman Elahi (*admittedly dead much before the suits were filed*), (3) Shaban Elahi and (4) Imran Elahi; and the following relief was sought:

- A. *Declare that the Plaintiff is the lawful and sole owner of the undivided Subject Property, bearing Plot No. D-58, situated in Sindh Industrial Trading Estate, Nooriabad, measuring 2.50 acres.*
- B. *Declare that the Mutation Letter dated 25.04.2014 in favour of Mohan Das, Sketch Plan dated 2006, amalgamating the Subject Property into Plot No. D/62 are patently unlawful and stand cancelled.*
- C. *Declare that the Certificate for Transfer of Mutation, Agreement of Sale to Transfer Right of Lease dated 2015 and Sketch Plan dated 07.09.2015, amalgamating the Subject Property into D/62 are patently unlawful and stand cancelled.*
- D. *Direct Defendant No. 2 to 4 to restore possession of 2.5 acres of the Subject Property to the Plaintiffs.*
- E. *Restrain the Defendant No. 2 to 4 from interfering in the lawful ownership and constructive possession of the Plaintiff on the Subject Property.*

F. *Restrain the Defendant No. 1 and its officers from issuing any further allotment letters, executing any lease deeds and/or altering the sketch Plan of the Subject Property.*

G. *Grant costs of the instant proceedings to the Plaintiff.*

H. *Grant any other relief as this court may deem fit and appropriate.*

3. An application under Order VII Rule 11 CPC was filed and the same was allowed vide order dated 25.09.2021. Pertinent content is reproduced herein below:

“It is settled law that for purpose of deciding the application the contents of plaint and its annexures are to be considered. From perusal of contents of the plaint and the documents annexed therewith it appears that the plaintiff had applied for allotment of the plot admeasuring 2.50 acres in SITE area Nooriabad in the year 2002 in the application at the bottom of the application certain terms and conditions are available, to which the plaintiff had agreed at the time of submission of the application. The relevant clauses 2, 4 and 7 are reproduced as follows:

2. Immediate steps should be taken to take over the possession after allotment of the allotted lad to take over the possession within 3 months, the allotment should be considered withdrawn and the earnest money fortified.

4. Construction must be started within three months and completed within 18 months of receiving possession transfer according to plan approved by SITE and covered area will be upto 80% of the area allotted.

8. Allotment is liable to cancellation for any breach of any condition.

The defendant No. 1 SITE considered the application of the plaintiff and issued the provisional allotment letter dated 25-10-2002 subject to the compliance of certain terms and conditions. The clause No. 5 and 6 of those terms and conditions are relevant as follows:

5. That you shall take immediate steps to take over the possession of after allotment. If you fail to take over the possession within 03 months, allotment/license will be cancelled withdrawn and the 10% earnest money fortified.

6. That you shall start the construction of the factory building within a period of three months and complete it with in a period of eighteen months from the date taking over possession of the plot accordingly to the plans approved by the SITE and the covered area will be upto 80% of the area allotted. In case of non-compliance of non-utilization fee will be charged @ 10% of prevalent rate of.

In the letter dated 25-11-2002 the defendant No. 1 had asked the plaintiff to visit estate engineer for earmarking of plot 2.50 acres in SITE area Nooriabad. In letter dated 11-06-2003 final notice was given to the plaintiff for making compliance of the letter dated 28-11-2002 in case of failure the provisional allotment shall be cancelled/withdrawn.

In the letter dated 25-08-2003 plot No.D-58 (Suit Plot) was forwarded by the estate engineer for approval of the competent authority; meaning thereby the period of limitation for obtaining the possession of the suit plot No. D-58 had started from 25-08-2003. The article 136 provides limitation period to the purchaser for possession of immovable property. The same is reproduced as under:-

Article	Description of suit	Period of limitation	Time form which period begins to run
136	By a purchase at a private sale for possession of immovable property sold when the vendor out of possession at the date of the sale	Twelve years	When the vendor is first entitled to possession.

As per article 136 of Limitation Act, the limitation period would start when the vendor/purchaser shall first entitled to the possession. The documents available before me show that the limitation period for obtaining the possession of the suit plot had started from 25-08-2003, after computing the period of limitation of 12 years the same would end in the year 2015. Admittedly the plaintiff has bought this suit in the year 2021 as such the suit of the plaintiff appears to be hopelessly time barred. It is also pertinent to mentioned here that the plaintiff in the prayer clause A has sought declaration of the ownership on the basis of agreement to license. In 2018 CLC N 9 the Honourable High Court of Sindh has observed that the license to agreement does not fall within the definition of lease agreement as such the suit for declaration is not maintainable. It is also pertinent to add here that the request of the plaintiff for allotment of the suit plot was considered for raising / developing Industrial zone. The purpose for which the allotment of the suit plot was made to the plaintiff was not complied. In CP No.D-109/2005 the Division Bench of Honorable High Court of Sindh as observed as follows:

“While parting with his arguments, learned counsel submitted that there are many other allottees, who have been allotted plots for a number of years and who have similarly not taken any step to set up any industrial units and no action whatsoever has been taken against them. If it is so, respondent No. 1 is directed to take steps to ensure that within a reasonable periods preferably within three months, all the allottees take concrete steps and initiate process for establishment of the industrial units for which the plot was allotted to them and any allottee, who is in violation of the terms of the deed, is dealt with in accordance with law”.

In view of above discussed facts and circumstances, I am of the considered opinion that the suit of the plaintiff is hopelessly time barred and no cause of action has accrued to him to institute the instant suit, hence the plaint is hereby rejected under order 7 Rule 11 CPC.”

4. Civil Appeal 62 of 2021 was filed before Additional District Judge-II Jamshoro and the same was dismissed vide order dated 15.12.2021. Pertinent content is reproduced herein below:

"I have heard the learned counsel for the appellant and learned counsel for the respondents No.03, 05 and 06 and also given my careful consideration to the advanced arguments and perused the R&Ps of the case suit No.03/2021 and pleadings/averments of the plaintiff made in the plaint and examined the order dated 25-09-2021 passed by the learned Senior Civil Judge-II Kotri on the application u/o VII Rule 11 C.P.C, filed by the defendants No.02 to 06 through their counsel, after hearing the parties counsel, the learned trial court allowed the same application and rejected the suit plaint as provided U/O VII Rule 11 C.P.C and held that the suit is not maintainable and barred by limitation. The appellant counsel being aggrieved from the same order challenged in this appeal.

The main contention of the appellant counsel is that the suit filed by the appellant/plaintiff is very much maintainable as he was allotted the plot No.D-58 by the Sindh Industrial Trading Estate Limited and after allotment the agreement of license was also executed between the owner and the plaintiff but after allotment of the same plot the physical possession of the same plot was not handed over to the plaintiff but the agreement to license which clearly shows that the plaintiff is in a constructive possession of the same plot and boundaries of the plot is also mentioned in the agreement to license. The plaintiff is owner of the same plot and defendant No.3, 4, 5 & 6 have encroached the plot of the plaintiff/appellant illegally and suit has been filed by the plaintiff against them and sought relief from the court for restoration of the same property to the plaintiff.

The appellant counsel has also assailed that the learned trial court has wrongly held that the suit is time barred but the cause of action accrued to the plaintiff/appellant when the encroachment was made by the defendants/respondents over the same property and they filed the suit within time, therefore no question of limitation arises and the suit is maintainable according to the Limitation Act.

Moreover, the learned counsel for the appellant has argued that the learned trial court considered the application under order VII Rule 11 C.P.C filed by the defendants/respondents No.03 and 04, who were not owners of the plot and they also stated that they sold out the same plot to one Choudhary Shafiq despite of that they moved application and contested the matter and on the same application the learned trial court wrongly decided the same application and rejected the suit plaint.

The learned counsel for the respondents No.03, 04, 05 and 06 has forcefully opposed the argument of learned counsel for the appellant and argued that the suit filed by the plaintiff/appellant is not maintainable in law. The plaintiff is licensee but he is claiming as owner of the property in his suit plaint/averment of plaint in para No.01 as well as in prayer clause "A". The written statement was filed by the site respondent No.02 and denied the ownership even the license agreement of the plaintiff/appellant but this fact has been concealed by the appellant from this court.

The agreement to license produced by the plaintiff/appellant, which is clear that he is only licensee and he cannot claim as owner or seek declaration from the court being sole owner of the same property. He further argued that the plaintiff/appellant filed his suit against the respondents/previous owners of the suit property and they had sold out to their property to Chowdhary Shafiq and it was their legal and lawful right to protect and defend their previous title

as they are bound to defend their title. Therefore, the application under order VII Rule 11 C.P.C filed by the defendants is very much maintainable.

Now I would like to re-produce the para No.01 of the suit plaint filed by Sharif Polani in the court of learned Senior civil Judge-II Kotri as under:-

1. That the Plaintiff is a renowned businessman and the lawful owner of plot No.D-58, situated in Sindh Industrial Trading Estate (hereinafter "SITE"), Nooriabad District Jamhsoro Sindh, measuring 2.50 acres (hereinafter "Subject property"). The instant suit is being filed on behalf of the Plaintiffs through their duly authorized attorney Mr. Asif Iqbal.

I also would like to re-produce the prayer clause "A" and prayer clause "D" of the suit plaint as under:-

A. Declare the plaintiff is the lawful and sole owner of the undivided Subject Property, bearing plot No.D-58, situated in Sindh Industrial Trading Estate, Nooriabad measuring 2.50 acres.

D. Direct the defendant No.2 to 4 to restore possession of 2.5 acres of the Subject Property to the plaintiffs.

A perusal of the agreement to license produced by the plaintiff with his pleadings, which clearly shows that he is licensee and license was granted to the appellant/plaintiff by the Sindh Industrial Trading Estate Limited Manghopir road Karachi-16 Company Limited and company is the owner of the same property, the appellant/plaintiff is licensee. Therefore, the appellant/plaintiff cannot claim as sole owner of the same plot and sought relief of declaration from the court as a owner, hence suit of the plaintiff/appellant on this sole ground is not maintainable in the law.

The appellant has also prayed for consequential relief from the court and prayed in clause "D" of the prayer for restoration of possession of 2.5 acres of the subject property to the appellant on the basis of constructive possession. The written statement has been filed by the real owner/respondent No.02 before the trial court and denied the averments of the appellant even denied the license agreement having been intact with the appellant, since the physical possession as well as constructive possession was denied by the respondent No.02, therefore, seeking the relief from the court for restoration of whole property of 2.5 acres from the respondents No.02 to 04 is not maintainable.

I see force in the arguments of the learned counsel for the respondents that the suit filed by the plaintiff/appellant for declaration on the basis of agreement to license is not maintainable. The decisions of Honourable Apex Court referred by the learned counsel for the respondents are very much applicable to the facts of present case.

I see no weight in the objections raised by the appellant counsel that the learned trial court rejected the suit plaint on the application filed by the defendants but the appellant himself filed the suit against them and made party to defendants, hence there was right to the defendants to defend their previous title being a perfect over the same property.

So far as the contention of the appellant counsel is that the suit is maintainable in law and after accrual of cause of action the suit was filed by the appellant against the defendants and sought relief from the court against the private respondents only who encroached his plot, therefore, no question of bar of limitation arises.

Since the appellant/plaintiff has prayed in prayer clause "D" of the suit for restoration of the possession of whole suit property 2.5 acres of the land, the plaintiff/appellant claims to be sole owner of the property but he has not produced any documents which proves his title over the property being sole owner or having status over the same property although the license agreement produced by him shows that being a licensee never approached to the owner for handing over the possession of allotted plot for such a long period. The license agreement was granted to him in the year 2003 with terms and conditions as agreed by the appellant/respondent No.02/owner. The respondent No.02 has denied the existence of license agreement between the appellant and him at present but the plaintiff/appellant has filed the suit with praying for restoration of possession of the whole suit property against the respondents No.2 to 4 in the year 2021 after lapse of 18-years instead of seeking relief of possession from the owner/respondent No.02/ defendant. Therefore, the learned trial court has rightly held that the suit is hopelessly time barred under the Limitation Act. I pay due respect to the decisions of the Honourable Superior Courts referred by the Appellant but same are not applicable with the facts and circumstances of this case and are quite distinguishable.

In the light of above discussed circumstances, I find no merits in the instant appeal filed by the appellant against the order dated 25-09-2021 passed by the learned Senior Civil Judge-II Kotri, hence the appeal is hereby dismissed with no order as to costs."

5. Learned counsel for the applicants submits that the trial court order was unmerited since no relief was claimed against SITE and the relief was claimed solely to the extent of encroachment. It was contended that the plea of the applicants was not appreciated in its proper perspective by the trial court and the same fate befell the applicants before the appellate court. Learned counsel submits that the appellate order is mere repetition of the trial court order and has failed to exercise the appellate jurisdiction.

6. Learned counsel for the private respondents supported the impugned judgments and submitted that the same merited no interference in revision. It was sought to be demonstrated from the record that the defendant No.2 impleaded in the suit was a *dead person* and no relief could have been claimed there against. Attention was next drawn to prayer clause 'B' and demonstrated that *the person whose rights were sought to be cancelled had not even been impleaded in the suit*. It was further added that while there was a plea seeking possession of the property, however, no plea of having been dispossessed there from was ever made. It was concluded that the issue of limitation was held paramount by the trial court and maintained by the appellate court. Learned AAG supports the impugned judgments and adopts the arguments advanced by the learned counsel for the private respondents.

7. Heard and perused. It is *admitted* that the suits were filed against four defendants, one of whom was predeceased. It is also manifest that any effort to implead additional defendants was post filing of the application per Order VII rule 11 C.P.C. It is also apparent that the first

prayer clause is adverse to SITE, being the defendant no 1, and consequently the computation of limitation on such count does not appear to suffer from any infirmity. Primary corroboration on such count is also borne from paragraph 7 of the memorandum of plaint, wherein cause of action has been pleaded to have arisen. Since limitation is of the very essence of the rejection of plaint, the pertinent law merits being considered at the outset.

8. It is settled law that the prescriptions of limitation are not mere technicalities and disregard thereof would render entire law of limitation otiose¹. The Superior Courts have consistently maintained that it is incumbent upon the Courts to first determine whether the proceedings filed there before were within time and the Courts are mandated to conduct such an exercise regardless of whether or not an objection has been taken in such regard². The Superior Courts have held that proceedings barred by even a day could be dismissed³; once time begins to run, it runs continuously⁴; a bar of limitation creates vested rights in favour of the other party⁵; if a matter was time barred then it is to be dismissed without touching upon merits⁶; and once limitation has lapsed the door of adjudication is closed irrespective of pleas of hardship, injustice or ignorance⁷. It is pertinent to observe that the preponderant bar of limitation could not be dispelled by the applicant, either before the trial court or the appellate court.

9. The entire entitlement pleaded by the applicants is by virtue of purported allotment from SITE, hence, SITE appears to have been impleaded as the defendant no 1 and the primary relief is also sought there against. Per the trial court order, the limitation period to assert such a right expired in 2015, hence, the suit was barred by over six years. Applicants' counsel remained unable to dispel this preponderant finding on limitation before the successive courts and also before this Court. The title of the memorandum of plaint demonstrates that the suit was filed for *declaration, possession, cancellation and permanent injunction*. The pleadings therein coupled with the prayer clause are in due consonance with the title. The belated articulation that the suit was merely in respect of purported encroachment is not borne from the pleadings, hence, the same could not be sustained by the respective courts to vitiate the bar of limitation. Nothing has been articulated before this court to hold otherwise.

10. The manifest absence of a cause of action has been deliberated in detail by the respective courts in their concurrent orders. The appellate order maintains that seeking declaration of title predicated on a mere license found no sanction in law in the facts under scrutiny. The said order also observed that the consequential relief of possession could also not be substantiated from the pleadings. It is also observed by this court that the suit was *admittedly* filed against a dead person and further that relief was claimed against another person not arrayed as a defendant in the memorandum of plaint. Under such circumstances, once again nothing

¹ *Mehmood Khan Mahar vs. Qamar Hussain Puri & Others* reported as 2019 MLD 249.

² *Awan Apparels (Private) Limited & Others vs. United Bank Limited & Others* reported as 2004 CLD 732.

³ 2001 PLC 272; 2001 PLC 143; 2001 PLC 156; 2020 PLC 82.

⁴ *Shafaatullah Qureshi vs. Pakistan* reported as PLD 2001 SC 142; *Khizar Hayat vs. Pakistan Railways* reported as 1993 PLC 106.

⁵ *Dr. Anwar Ali Sahito vs. Pakistan* reported as 2002 PLC CS 526; *DPO vs. Punjab Labour Tribunal* reported as NLR 1987 Labour 212.

⁶ *Muhammad Tufail Danish vs. Deputy Director FIA* reported as 1991 SCMR 1841; *Mirza Muhammad Saeed vs. Shahabudin* reported as PLD 1983 SC 385; *Ch Muhammad Sharif vs. Muhammad Ali Khan* reported as 1975 SCMR 259.

⁷ *WAPDA vs. Aurangzeb* reported as 1988 SCMR 1354.

could be substantiated before this court to take a view contrary to the concurrent findings of the fora below.

11. It is observed that the respective courts have exercised their jurisdiction and no infirmity in such regard is manifest. It is trite law⁸ that where the fora of subordinate jurisdiction had exercised its discretion in one way and that discretion had been judicially exercised on sound principles the supervisory forum would not interfere with that discretion, unless same was contrary to law or usage having the force of law. It is the considered view of this court that no manifest illegality has been identified in the orders impugned and further that no defect has been pointed out in so far as the exercise of jurisdiction is concerned of the subordinate forum.

12. The narrative / observations contained in the respective orders impugned has not been controverted before this Court and the learned counsel made no endeavor to demonstrate that the respective findings could not be rested upon the rationale / law relied upon. Under such circumstances, no case is made out to warrant any interference in the impugned orders.

13. Notwithstanding the foregoing, the applicants' learned counsel was unable to cite a single ground based upon which the jurisdiction of this Court could be exercised under section 115 of Code of Civil Procedure. There is no suggestion that either impugned order is either an exercise without jurisdiction or a failure to exercise jurisdiction or an act in exercise of jurisdiction illegally or with any material irregularity. In view hereof, these revision applications are found to be misconceived and devoid of merit, hence, hereby dismissed along with listed applications. The office is instructed to place a copy hereof in the connected file.

Judge

Ali Haider

⁸ Per *Faqir Muhammad Khokhar J. in Naheed Nusrat Hashmi vs. Secretary Education (Elementary) Punjab* reported as *PLD 2006 Supreme Court 1124*; *Naseer Ahmed Siddiqui vs. Aftab Alam* reported as *PLD 2013 Supreme Court 323*.