

IN THE HIGH COURT OF SINDH KARACHI

Suit No. 133 of 2001

Plaintiff : **Syed Aslam Shah**
through Mr. Aneel Kumar, advocate

Defendant No.1 : **Muhammad Hassan**
(Nemo for Defendant No.1)

Defendant No.2 : **Mehmood Trunkwala**
through Mr. Abdul Qayyum Abbasi,
advocate

Date of hearing : 29.10.2024

Date of Judgment : 21.01.2025

JUDGMENT

OMAR SIAL, J.: Syed Aslam Shah (Plaintiff) has filed the instant suit for the specific performance of an agreement to sell dated 27.06.1992 executed between himself and Mahmood Trunkwala (Defendant No.2) as attorney of Muhammad Hasan (Defendant No.1). The particulars of the suit property for which the agreement was executed are as follows; "Plot No. B-1/A, admeasuring 560 square yards, Block 17, KDA Scheme No. 24, Gulshan-e-Iqbal, Karachi." (Suit Property)

2. Shah has pleaded in his plaint that the sale consideration, i.e., Rs.4,600,000, was received in full by Muhammad Hassan, against which possession of the Suit Property was handed to Shah. Further, copies of the title documents concerning the Subject Property were also handed to him. It was agreed that the necessary Conveyance Deed should be executed in favor of Shah after the redemption of the mortgage of the Suit Property with Muslim Commercial Bank. However, Shah filed the instant suit on the Defendant's omission to do what was necessary with the mortgage and their failure to make good on their promise.

3. Muhammad Hasan, in his written statement, admitted the facts, as pled by Shah, in its entirety except that the Defendants had to redeem the mortgage with MCB and avoided performing their part of the contract. Mahmood Trunkwala has admitted to executing the sale agreement but denied the privity of the contract.

4. Vide Order dated 17.05.2010, the plaint was rejected under Order 7, Rule 11 C.P.C. for want of cause of action. This Order was challenged in appeal (HCA No. 132 of 2010), which was disposed of on 24.12.2010. Via the same, the appeal was allowed, and the Single Bench was directed to proceed with the following preliminary issue: "Is the suit barred by limitation?" My findings in light of the evidence are as follows.

5. Shah led his evidence in person and brought forth the two attesting witnesses of the sale agreement: Muhammad Hashim and Abdul Ghaffar. No cross was conducted on behalf of Muhammad Hasan. In the cross to the counsel of Mahmood Trunkwala, Shah maintained that the sale agreement was executed and that Trunkwala had mortgaged the Subject Property for his business. Further, during litigation, the mortgage stood discharged by Trunkwala. After this, the original title documents of the Subject Property were handed over to Shah.¹ Shah's attesting witnesses confirm this position. Neither of the Defendants led any evidence. Muhammad Hasan failed to appear during the trial. Mahmood Trunkwala declined the need to lead any evidence, as is evident from his statement dated 19.04.2024.

6. As per the Sale Agreement, the execution of which has been denied by neither of the Defendants, no time had been stipulated for the performance of the contract. Clause 9 of the Sale Agreement stated, *"That the Vendor shall appear before the concerned*

¹ "...It is correct that the suit property was mortgaged with the MCB when I had purchased it. It is correct that the suit property was mortgaged by the defendant no.2 with MCB, for taking finance for his group of companies. It is correct that the property has been released from mortgage as defendant no.2 has repaid the liability of MCB. It is correct that the original documents have been received by me through defendant no.2..."

authorities for execution of transfer documents in favour of the Vendee and shall be ever ready and willing to assist the Vendee as and when required for its mutation in the concerned authorities.” Hence, time was not of the essence.

7. In the absence of any stipulated time frame, the second head of Article 113, Limitation Act, 1908, would apply that provides for the time to accrue from the date “...when the plaintiff has notice that the performance is refused.”² In the plaint, Shah states that he approached Hasan and Trunkwala in the third week of January 2001, and on account of their refusal, he instituted the instant suit in the same year. No question has been put to Shah in relation to this statement, which stands admitted.³ Accordingly, there is no legal impediment to my holding that the suit was instituted within time. The issue is answered in the negative.

8. The preliminary issue, having been answered in the negative, the office shall fix the case for further proceedings so that the remaining issues can be decided.

JUDGE

² 2022 SCMR 933, Khudadad v. Ghazanfar Ali Shah

³ 2021 SCMR 1805, Muhammad Rafiq v. Abdul Aziz