

IN THE HIGH COURT OF SINDH KARACHI

Suit No. 1446 OF 2007

Masood Khan & others Plaintiffs

versus

Noor Jehan & others Defendants

Mr. Mustafa Lakhani and Ms. Ishrat Siddiqui, advocates for plaintiffs.
None present for the defendants.

JUDGMENT

Omar Sial, J: The legal heirs of Malik Mir Hazar Khan have filed this suit through Masood Khan (also a legal heir) for the specific performance of an agreement dated 22.2.1972. This agreement was allegedly executed for the sale of Survey No. 15 and 16 measuring about 17 acres situated at Lohar Ko Lang Tapo Songal II Gadap Town, Karachi ("Disputed Property") with Noor Jehan & others as sellers. (Defendants No.1 to 20, some of the sellers have since passed and have been impleaded through their legal heirs). The Defendants No.1 to 19 were declared ex-parte vide Order dated 27.02.2009. Whereas, Umer Bux was struck off as Defendant No.20 vide Order dated 12.08.2010. The official defendants from 21 to 23 were also declared ex-parte vide Order dated 04.08.2008. However, Al Rehan Memorial Co-operative Housing Society Limited ("Society") had been impleaded as the Defendant No.24 vide Order dated 18.05.2009. The only written statement on the record is that of the Society.

2. On 22.08.2019, the following issues were framed by the Court;
 1. Whether the suit is maintainable, inter alia, in view of Article-113 of the Limitation Act?
 2. Whether the deceased father of the Plaintiffs, namely, Mir Hazar Khan purchased piece of land bearing Survey Nos.15 and 16. measuring about

17 Acres situated at Lohar Ko Lang Tapo Songal II Gadap Town, Karachi, from its owners namely (1) Umer son of Rehman (2) Khan Muhammad son of Allah Dino (3) Jamal Khatoon daughter of Jumma (4) Baigo daughter of Jumma (5) Haleema daughter of Mubarak (6) Murad Bibi daughter of Noor Muhammad (7) Khan Bibi daughter of Noor Muhammad (8) Noor Jehan daughter of Noor Muhammad vide Sale Agreement dated 22.02.1972 against payment of total sale consideration of Rs.25,000/- (Rupees Twenty Five Thousand only)?

3. Whether the possession of the land was delivered to Plaintiffs' deceased father and still the possession is with the Plaintiffs?
4. Whether the Plaintiffs are entitled to specific performance of Sale Agreement dated 22.02.1972 and Defendants are liable to execute the Sale Deed in respect of the property in question in favour of Plaintiffs?
5. Whether the Defendants No.21 and 22 are liable to mutate / transfer the aforesaid property in the Land Record of Rights; Revenue Record in favour of the Plaintiffs?
6. What should the decree be?

ISSUE NO.1

3. Article 113 stipulates two limbs for the computation of limitation. First prescribes that limitation would accrue from the date fixed for performance in the contract. This does not apply here for no date has been stipulated in the Sale Agreement. In such a case the second limb would apply which is, *"if no such date is fixed, when the*

plaintiff has notice that performance is refused."¹ The performance of it was officially refused on 19.12.2005 (Annexure X/2) in response to the Plaintiffs legal notice dated 16.08.2005 to the District Officer Revenue Gadap Town (Exh.PW/5). The suit was filed on 08.10.2007 and is within time as per the applicability of the second limb of Article 113.

ISSUES NO.2, 4 and 5

4. Masood Khan led evidence on behalf of the Plaintiffs. He was not cross-examined by any defendant. The Defendants led no evidence. The Society who was the only one to have filed the written statement also did not lead evidence. Therefore, as per settled law, the written statement of the Society has no legal standing and does not merit consideration.² However, in the absence of any defence, the duty of this Court becomes even more onerous to ensure that the Plaintiffs have duly discharged their burden of proof and demonstrate a case for the grant of relief.³

5. There are no two ways about the fact that a sale agreement is not a title to the Disputed Property.⁴ It is merely a mutual understanding to effect the formal transfer of title. A sale agreement encapsulates future and financial obligations. Accordingly, it falls within the purview of Article 17(2) of the Qanun-e-Shahadat Order, 1984 which provides that; "*(a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men...*"⁵ Article 79 requires that an instrument that is required to be attested, "*shall not be used as evidence unless two attesting witnesses at least have been called for the purpose of proving its execution...*" The test to prove such an instrument, in the absence of the opposing party's admission⁶, is to bring forth the two attesting witnesses and have them examined in Court as per Article

¹ 2022 SCMR 933, Khudadad v. Ghazanfar Ali Shah & others

² PLD 1972 SC 25, Khair ul Nissa v. Mohd. Ishaque

³ 2013 SCMR 137, C.N.Ramappa Gowda v. C.C.Chandregowda (Dead)

⁴ 2019 SCMR 974, Haji Muhammad Nawaz v. Aminullah (Deceased)

⁵ 2021 PLD 538 SC, Sheikh Muhammad Muneer v. Mst Feezan

⁶ Article 81, QSO, 1984

79, QSO, 1984. This legal requirement was not discharged by the Plaintiffs. Neither is any explanation offered for the absence of the testimonies of the attesting witnesses. Therefore, the sale agreement does not qualify as valid evidence and any and everything stated therein is meaningless including facts such as sale consideration and/or its alleged possession.

6. I am cognizant that as per Article 100, QSO, 1984 a presumption of correctness attaches to a document that is more than 30 years old. However, this is a rebuttable presumption and is to be availed with, "*great care and caution.*"⁷ The Supreme Court in the case reported at 2017 SCMR 1934, Nazir Ahmed v. Karim Baksh (Late) has held that the presumption under Article 100 would only apply, "*if there is no doubt about the valid execution of the same.*" In the absence of subscribing witnesses as required under Article 17(2) and 79 of the QSO, 1984 the validity of the sale agreement is in doubt.

7. Khan also did not tender any explanation as to why the formal transfer and mutation of the property was never effected in the intervening four decades and why no such request was made by Malik Mir Hazar Khan to Noor Jehan and others.

8. Much reliance has been placed by the counsel for the plaintiffs on section 53-A of the Transfer of Property Act, 1882. For a case under the said section to be made the following prerequisites have to be met in toto; "(i) the contract should have been in writing signed by or on behalf of the transferor; (ii) the transferee should have got possession of the immoveable property covered by the contract; (iii) the transferee should have done some act in furtherance of the contract and (iv) the transferee has either performed his part of the contract or is willing to perform his part of the contract."⁸

⁷ 2014 PLD 794 SC, Mst. Hajyani Bar Bibi v. Mrs. Rehana Afzal Ali Khan

⁸ 2012 SCMR 1246, Nanjegowda & another v. Gangamma & another

9. There is a plethora of case law of the Supreme Court that stands for the proposition that refuge under section 53-A can be taken as a defence and not as a weapon of offence.⁹ Be that as it may, the judgement reported at 2017 SCMR 316, Syed Hakeem Shah (Deceased) v. Muhammad Idrees stands for the proposition that section 53-A can be employed both ways i.e. as a weapon of defence as well as an offence. Operating on the dicta laid down by the said judgement, I now proceed to examine the merits of the plaintiff's case on the touchstone of section 53-A. The first part of its test requires that there should be a contract in writing. The sale agreement is very much there on the record. However, as discussed above, the same has not been proved against the tenets of the QSO, 1984. Hence, the Plaintiff has failed to meet the very first prong. In a case reported at 2010 SCMR 1116, Muhammad Ashraf Khan v. Khan Siddique & others, the Supreme Court held that where the sale agreement was disputed, section 53-A could not fill up the lacuna and it went on to hold that the same was even otherwise only enforceable as a defence on the part of the alleged buyer. As all the four prongs are required to be met for section 53-A to apply, I can stop at this juncture for the first prong stands unfulfilled. However, for a wholesome discussion, I now proceed to the second prong of the test which is possession and which has been framed as Issue No.3.

ISSUE NO.3

10. The plaintiffs have not been able to establish possession of the Suit Property. The same as per the Mukhtiarkar Report, Taluka Shah Mureed, District Malir, Karachi dated 22.10.2009 is an open tract of land lying vacant. Even though there are statements of two persons of the locality that are attached with the report and who say that the possession of the Disputed Property is with the Plaintiff. However, the same have no legal sanctity as these persons have not entered

⁹ 2022 SCMR 778, Syed Athar Hussain Shah v. Haji Muhammad Riaz; 2010 SCMR 1116, Muhammad Ashraf Khan v. Khan Siddique & others; 2003 PLD 410 SC, Amirzada Khan v. Ahmad Noor

the witness box before this Court and deposed in favour of the plaintiffs. Hence, the second prong is also unmet. The third prong requires of the plaintiffs to have acted in furtherance of the contract. Even though the plaintiffs claim that work has been undertaken on the Disputed Property, there is no comment on the nature of work undertaken neither has any pictorial evidence been led to demonstrate the same. Hence, there is nothing on the record to establish the proof of the third prong. Fourthly, the Plaintiffs had to demonstrate that they had performed their part of the contract. Even though the sale agreement holds that their part of the contract so far as the payment of the sale consideration was concerned had been fully discharged. However, the same does not lend any support to the Plaintiffs' case as the said agreement cannot be treated as evidence for lack of fulfilling the evidentiary requirements.

11. I further note that, as per the Mukhtiarkar report, the chain of title is as follows;

- a. 13.09.1984 – The title to the Disputed Property was recorded, by way of inheritance, in VF-VII in the names of (i) Umar S/o Rahmat Brohi, (ii) Khan Muhammad S/o Allah Dino Brohi, (iii) Mst. Haleeman D/o Mubarak Brohi, (iv) Mst. Jamal Khatoon D/o Jumo Brohi, (v) Mst. Baigo D/o Jumo Brohi, (vi) Mst. Murad Bibi D/o Noor Muhammad Brohi, (vii) Mst. Khan Bibi D/o Noor Muhammad Brohi and (viii) Mst. Noor Jehan D/o Noor Muhammad Brohi.
- b. 03.03.2008 – Upon the death of Umar at a(i) his legal heirs were recorded as having inherited his share vide entry no. 149 in VF-VII. Those legal heir are as follows; (i) Rasool Bux, (ii) Nabi Bux, (iii) Abdul Hameed, (iv) Moula Bux, (v) Abdul Aziz, (vi) Mst. Hameedan Bano, (vii) Mst. Hasna Bano, (viii) Mst. Gul Bano, and (ix) Mst. Haneefan.

- c. 03.03.2008 – Upon the death of Khan Muhammad at serial (a)(ii) his legal heirs were recorded as having inherited his share vide entry no. 150 in VF-VII. Those legal heirs are as follows; (i) Muhammad Ali, (ii) Nasir Ali, (iii) Mst. Kousar Perveen, (iv) Mst. Yasmeen, (v) Mst. Shabana Jamil and (vi) Murad Bibi.
- d. 22.08.2008 – 13-15 acres of Serial 15 of Disputed Property were sold by Mst. Jamal Khatoon at serial (a)(iv) and 19 others through a registered sale deed to the Society, which sale was recorded at entry no. 152 of VF-VIII
- e. 22.08.2008 – 03-18 acres of Serial 16 of Disputed Property were sold by Mst. Jamal Khatoon at serial (a)(iv) and 19 others through a registered sale deed to Asif Maqsood, son of Maqsood Khan, which sale was recorded at entry no. 153 of VF-VIII
- f. 03.01.2014, Asif Maqsood at (e) sold off his share through a registered sale deed to Waqas Rafat s/o Malik Rafat Hussain, which sale was recorded as Entry No. 03 of VF-VIII.

12. The sellers in paragraph 6(a) from whom the heirs of Malik Mir Hazar Khan claim to have bought the Disputed Property were not the owners at the time the alleged Sale Agreement was executed. In fact, the Disputed Property stood mutated in the name of the sellers after twelve years of the alleged Sale Agreement. Hence, even if one was to assume that the Sale Agreement was validly executed, the sellers (at paragraph 6(a)) at the time of the alleged Sale Agreement were not competent to transfer the Disputed Property as provided for in section 7 of the Transfer of Property Act, 1882. This stands confirmed from Annexure B to the plaint, i.e VF-VII which was produced as Annexure X/1 by Khan. I also note that heirs of Malik Mir Hazar Khan have been unable to produce a certified copy of the said VF-VII form

in evidence which demonstrates that even the title documents are not in their possession. I am cognizant of the fact that should Plaintiffs have succeeded on the basis of section 53-A of the said Act, the subsequent entries would not have been an obstacle in their claim.

13. Be that as it may, I am of the view that the evidence led by the heirs of Malik Mir Hazar Khan has been scant and does not meet the threshold of Articles 17(2), 79 and 117, QSO, 1984. Accordingly, the same does not merit the grant of the discretionary relief of specific performance.¹⁰ Hence, no case for grant of transfer and mutation of the Disputed Property is made.

ISSUE NO.6

14. The suit stands dismissed with no order as to costs.

JUDGE

¹⁰ 2012 SCMR 900, Muhammad Sharif v. Nabi Baksh