

IN THE HIGH COURT OF SINDH AT KARACHI

H.C.A. No. 337 of 2023

[Nasir Ali V. Syed Qamar Hussain & others]

Present:
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Muhammad Osman Ali Hadi

Date of hearing : 09.04.2025
Date of decision : 09.04.2025
Appellant : Through Mr. Waqar Muhammad Khan Lodhi,
Advocate
Respondent No.1 : Through Mr. Munawar Ali Memon, Advocate.

JUDGMENT

Muhammad Osman Ali Hadi, J: The instant Appeal arises from Impugned Judgment dated 26.08.2023 and Decree dated 07.09.2023 (collectively referred to as “**the Impugned Judgment**”) in which Suit No. 1040 / 2009 of the Appellant (Plaintiff in the Suit) was dismissed by the learned Single Judge, in the Original Civil Jurisdiction of the High Court of Sindh at Karachi.

2. The succinct facts of the matter are that the Appellant claims to have entered into an agreement for purchase of property being Plot NOS No.724, 725 Sector 1-A, KDA Scheme No.35 Lines Area, Gulshan-e-Zahoor, Karachi measuring (approx.) 90 sq. yards, along with a constructed small building (“**the Property**”).

3. The Appellant states he paid the Respondent an advance sum of Rs.11,50,000/- (One Million One Hundred and Fifty Thousand Only), on 24.05.2005, and through pay orders dated 23.06.2005 drawn on Bank Al Habib Ltd., against an alleged total sale consideration of Rs.21,50,000/- (Rs. Two Million One Hundred and Fifty Thousand Only).

4. Against the said payment, it was submitted that the Respondent handed over first floor of the Property to the Appellant, who then resided on the same.

5. As per the facts available, the Appellant first paid a token advance payment of Rs.100,000/- against the total payment of Rs.2,150,000/-, and a sale receipt was

issued showing the same. This amount of Rs.100,000/- was described as non-refundable.

6. The Appellant was understood to pay the Respondent the balance sale consideration of Rs.2,050,000/- within a period of two months, and the Respondent was to then hand over the possession of the Property. In case the Respondent did not hand over the Property to the Appellant within two months and post-receiving complete payment, the Respondent would refund double the amount of total money paid to the Appellant.

7. Subsequently, the Parties entered into a Sale Agreement dated 15.06.2005 in respect of the Property, which highlighted certain basic terms.¹

8. The relevant consideration in the Sale Agreement was that if the Respondents fails to pay balance amount due (at this point Rs.10,00,000/-) within the stipulated period, the token advance money of Rs.100,000/- would be forfeited.²

9. For instant purposes, without getting into unnecessary complications, the Appellant did not fulfil their payment obligations under the Sale Agreement, and (belatedly) filed Suit No.1040 of 2009 (from which this Impugned Judgment / Decree stem) on 22.07.2009, seeking specific performance of the Sale Agreement dated 15.06.2005.³

10. Six issues were framed on 13.12.2010 which were:

- i. Whether the Plaintiff is entitled to a specific performance of the agreement?
- ii. Whether the Defendant at the time of entering into sale agreement assured that the suit property is free from all claims, lien, charge and encumbrances, if so, what its effect?
- iii. Whether the Defendant at the time of entering into sale transaction disclosed that the suit property is mortgaged with the bank and the Plaintiff was agreed to pay of such liabilities, if so, what its effect?
- iv. Whether the Plaintiff is entitled for the decree as prayed?
- v. Whether the Plaintiff is entitled for Damages?

11. Evidence was recorded and final arguments were heard, after which the learned Single Judge passed the Impugned Judgment dismissing the Appellant's Suit, and holding that their claim for specific performance was barred under the

¹ Available at Page 121 of the File.

² Clause 7

³ Available at Page 161 of the File.

laws of limitation. It is against the Impugned Judgement from which the Appellant has preferred this Appeal.

12. Counsel for the Appellant commenced arguments by stating that the Impugned Judgment has erred by dismissing the Suit, as he submits the matter was not barred by limitation. As per learned Counsel for the Appellant, he states that only when he approached the Union Council 9, Jamshed Town to try and ascertain the status of the Property, he was informed that the said Property was already previously mortgaged with Habib Bank Ltd., which was around November 2006. He states that keeping this date in mind, the Suit was within the prescribed limitation period.

13. Learned Counsel next contended that as per the terms of the Sale Agreement, it was incumbent upon the Respondent to ensure that a proper sale deed was executed between the Parties.

14. Counsel for the Appellant mainly contended that under Article 113 of the Limitation Act, 1908, the date of limitation would run from the date of refusal to perform obligation under the sale agreement, which as per the learned Counsel (in addition to his earlier stance of November 2006) would actually commence from May, 2009 (as stated in para 15 of his plaint), on which date he submits the Respondent refused performance.⁴

15. In justification of his contentions, the Appellant stated that he was renegotiating the purchase price with the Respondent, which was the reason he did not pay the initial amount for purchase of the Property within the stipulated time period.

16. He then referred to section 62 of the Contract Act 1872, in which he states that the initial sale agreement was novated by a new agreement he claims to have entered into with the Respondent. In support of his contentions, learned Counsel for the Appellant relied upon several case laws.⁵

17. Learned Counsel for the Respondent⁶ conversely opposes the assertions put forth by the Appellant, and states that the Suit was rightly rejected as being barred by limitation. Learned Counsel for the Respondent further stated that the

⁴ Available at Page 173 of the File.

⁵ 1994 CLC 1576, PLD 1966 SC 505, PLD 1995 SC 314, 2018 SCMR 1586, 1994 CLC 2272

⁶ As initial Respondent is deceased, the matter is contested by his legal heirs who are all available on record.

Appellant had moved in on first floor of the Property as a tenant⁷, but has not paid any rent for the several years and has further illegally usurped the second floor of the Property as well, which the Appellant has further sub-let. Counsel for the Respondent next contended that the Appellant had two months to make the payment, calculated from 24.05.2005, the date an initial sale transaction was effected between the Parties, but had failed to do so. Counsel next contended that as per the subsequent Sale Agreement dated 15.06.2005, a time period of two (2) months was specifically stipulated (at clause 7). Counsel concluded by stating the Appellant's claim of novation of contract is devoid of merit, and that the Appellant did not take this plea in the initial Suit and as such cannot be permitted to raise the same at this stage.

18. After hearing the detailed arguments and going through the Impugned Judgment, we have failed to find any irregularity with the same. The Impugned Judgment has meticulously gone through all the facts, documents and arguments put forth by the Parties (through their Counsels), and have (correctly in our opinion) reached the conclusion that the suit for specific performance by the Appellant, who was seeking enforcement of a Sale Agreement dated 15.06.2005, was time barred.

19. The Impugned Judgment has accurately held that as per clauses contained in the Sale Agreement and the initial advance payment receipt, the time of two months was the period in which the Appellant was to ensure execution of the sale agreement. In fact, clause 10 of the Sale Agreement⁸ specifies time being of the essence of the Agreement.

20. In the Impugned Judgment, the learned Single Judge has referred to several judgments and precedents, which have deeply deliberated and explained the application of Article 113 of Limitation Act, 1908. The first part of Article 113 provides that where there is a time stipulation in the agreement, that would be the opening point from which limitation would run.

21. The second part of Article 113 provides that if no specific period for limitation has been stated in an agreement, then specific performance would be calculated from the date of refusal. This was greatly elaborated in the leading case of *Florida Builders Pvt. Ltd.*⁹ which has also been discussed in the Impugned Judgement.

⁷ Tenancy Agreement available at Page 133 of the File.

⁸ At Page 125 of the File

⁹ PLD 2012 SC 247 cited in Para 20 of the Impugned Judgment.

22. It is clearly observed by us that the Appellant has not provided any substantial evidence of a date of refusal furnished by the Respondent, but in Para 15 of their Plaint¹⁰ they have merely stated the Respondent refused to perform the agreement in May, 2009.

23. It is pertinent to note the Appellant did not provide any documentation or other evidence to corroborate his assertion, but has written a single line simply stating there was refusal in May, 2009. We find this statement of the Appellant to be without any merit, and it appears quite blatant that the same has been done in an attempt to try and overcome laws of limitation. We cannot condone such behaviour, as it is trite law that limitation is not mere technicality, but a substantial part of the legal process which cannot be taken lightly.

24. Even in certain matters where there is no stipulation of time, nor any known date of refusal, it is incumbent upon the claimant party seeking specific performance to file a suit within a reasonable time. In such situations, even the date of execution of the agreement can be considered a starting point for purposes of calculating limitation. This has also been opined by the Supreme Court in the case of *Abdul Ghani V. M. Shafi*¹¹, also discussed in the Impugned Judgement.¹²

25. Even in the Appellant's own cross examination,¹³ he has admitted that the time period fixed for execution of the agreement was two months, from 24.05.2005 to 24.07.2005.

26. The essence of filing a successful appeal is to show some material irregularity in law, fact or evidence was committed by the court below. In the instant matter, the Appellant has failed to show us any such irregularity. It appears they are attempting to gain a second chance to regurgitate their earlier case (which was dismissed in the Impugned Judgement), with the additional argument of novation of contract under section 62 of the Contract Act 1872.

27. The Appellant has been enjoying possession of the two floors above the ground-floor (referred to as the 1st & 2nd floors) of the Property, without payment of rent. It also appears the Appellant is taking undue advantage of the fact that the original Respondent (since deceased) Syed Qamar Hussain, left behind only female legal heirs, i.e. a widow and 3 daughters (current Respondents). The Appellant

¹⁰ At Page 173 of the File.

¹¹ 2007 SCMR 1186

¹² At Para 22 of the Impugned Judgement

¹³ At Page 215 of the File

appears to be using coercive and bullying tactics to deny the Respondents their inherited legal rights on the Property.

28. For reasons aforementioned, we do not find any reason to interfere with Impugned Judgement & Decree. This Appeal is accordingly dismissed and the Appellant is directed to immediately handover possession of the Property (i.e. 2nd & 3rd floors, and any other part of the Property in which he or any person through him is in possession of) to the Respondents, as expressly directed in Para 44 of the Impugned Judgement, failing which the Respondents may approach the local police station and the S.H.O. to ensure compliance of this Order. The Parties shall also ensure compliance for requisite disbursements / payments to which they may be entitled, as per directions stated in the Impugned Judgement / Decree.

29. The Parties are left to bear their own costs.

Appeal dismissed.

The above are the reasons of our short order dated 09.04.2025.

JUDGE

JUDGE

M. Khan