

FORM No. HCJD/C-121

ORDER SHEET

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

C.R. No.20075 of 2023

Mazhar Hussain and others Versus Mst. Jantan Bibi and others

Sr. No. of order/ proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties of counsel, where necessary
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27.3.2023 Mian Tariq Ahmad, Advocate for petitioners.

Through the instant revision petition judgments and decree dated 13.4.2022 and 04.3.2023 of the courts below have been called into question whereby the suit of the petitioners was dismissed by the trial court and appeal thereagainst was also dismissed.

2. Petitioner No.1 and predecessors-in-interest of petitioner Nos. 2 to 9 and 10 to 15 instituted a suit for declaration against the respondents alleging that the predecessor-in-interest of the respondents, namely, Sadiq son of Saeed had executed a sale agreement dated 15.7.2002 in their favour with respect to suit property measuring 31 acres, 7 kanals and 16 marlas in khewat No.201/190 situated at Estate Qazian, Tehsil and District Chiniot for consideration of Rs.7,10,000/- out of which Rs.6,60,000/- was received at the time of execution of the agreement and that it was stipulated that the remaining sale consideration of Rs.50,000/- shall be paid at the time of attestation of mutation or execution of registered sale deed. Case built up was that the predecessor-in-interest of the respondents during his lifetime had transferred possession to them and neither denied the agreement nor refused to perform under it but kept on postponing to receive the balance sale consideration of Rs.50,000/- from them or executing the sale deed in their favour until his death and that after his death when the legal heirs were

approached they initially did not refuse to perform the agreement either but thereafter they declined to do so and mutation of inheritance was entered in their name and that in such circumstances the said vendees were compelled to file the suit. Declaration was claimed from the court to the effect that the petitioners were owners-in-possession of the suit property under the agreement dated 15.7.2002 and decree was liable to be accordingly passed in their favour and against the respondents or in the alternate a decree for specific enforcement of contract dated 15.7.2002 may be passed by the court and further that the respondents may be permanently restrained from forcibly dispossessing them or alienating the suit property to any third party. In their written statement the respondents denied the existence of the agreement which was claimed to be a product of fraud, forgery and fabrication. Issues were framed, evidence was led by both sides whereafter the suit of the petitioners was dismissed by the learned Civil Judge vide judgment dated 13.4.2022. The petitioners filed an appeal thereagainst which too was dismissed vide judgment dated 04.3.2023 by the learned Addl. District Judge, Chiniot. Through the instant revision petition these decisions of the courts below have been called into question.

3. Learned counsel for the petitioners inter alia contended that the findings of the courts below were untenable, that suit was within time from the date of actual refusal to perform the contract, that execution of the agreement was proved and that evidence was not properly considered and construed.

4. Submissions made in support of the instant petition have been given due consideration in the light of the oral and documentary evidence on record as also the reasoning

as prevailed upon the courts below for dismissing the suit and also the appeal of the petitioners. Perusal of the available documents shows that the suit for declaration or in the alternative for possession through specific performance was instituted on 30.7.2008 to enforce an agreement dated 15.7.2002. In terms of the purported sale agreement, plea taken in the suit was that the respondents' predecessor-in-interest agreed to sell the suit land in consideration of Rs. 7,10,000/- and allegedly received earnest money of Rs. 6,60,000/- and that the possession was also transferred to petitioner No.1 and the predecessors of the rest of the petitioners who were alleged intending buyers. Execution of sale agreement was denied by the respondents who took the stance that no such transaction was ever entered into nor any payment was ever remitted by late Sadiq, their predecessor, nor the possession of land was transferred and that the suit was otherwise barred by time having been filed after more than six years from the date for completion of sale under alleged agreement. Main reason which prevailed with the courts below was that a specific date for the completion of the deal was mentioned in the disputed agreement; therefore, the suit would fall in the first part of Article 113 of Limitation Act, 1908 which provides a period of three years from the date mentioned in the agreement for the completion of the transaction and that in terms of the document Exh.P-1 claimed by the petitioner, the transaction was to conclude by 15.10.2002 while the suit was filed on 30.7.2008 after six years and as such it was barred by time.

5. Perusal of the alleged agreement dated 15.7.2002 Exh.P-1 reveals that in terms thereof, the vendor had allegedly agreed to receive the balance sale consideration

and transfer the suit land in favour of the petitioners' predecessor through sale deed or mutation till 15.10.2002 and in case the vendor fails to complete the transaction by the stipulated date, the purported vendee will be entitled to enforce the same through suit for specific performance and that in the event the purchaser failed to get the land transferred, the earnest money will stand forfeited. Perusal of the document provides in clear terms the cut-off date for the completion of transaction as 15.10.2002. Time was essence of the contract as the document indicates that the default would result in forfeiture of earnest money as per Exh.P-1, the transfer was to take effect either through attestation of mutation or sale deed on payment of balance consideration.

6. The provision of Article 113 of the Limitation Act, 1908 mandates that in the cases where date is fixed for the performance of the contract in the agreement itself then three years period will commence from the date so mentioned therein and if no such date is fixed then from the date the buyer had noticed that the performance was refused. There was no issue of title, the seller was considered to be owner of the property and competent to sell the same and as per terms the transaction was to be completed through mutation or sale deed till 15.10.2002. Being so the case would fall in the first part of Article 113 of the Limitation Act, 1908 in terms thereof suit could be filed till 14.10.2005 which was filed on 30.7.2008. The arguments that the case would fall in the second part of the Article is devoid of any legal reason.

7. As observed supra, the terms of the alleged agreement Exh.P-1 clearly provides for the performance of the contract till 15.10.2002 and any breach thereof, could entail the consequences of either rescission of contract,

forfeiture of the money or in the alternative, in the event of default on vendor's part a right to seek specific performance to enforce the agreement before the court of law. Provision on the face of it being specific and provided for time limit and cut-off date for the completion of the deal, the plea of the petitioner that their case would fall in second category of the cases covered by Article 113 of the Limitation Act, 1908 is devoid of substance. Petitioner's plea that the possession of the property was delivered in pursuance of the agreement and as such section 53-A of Transfer of Property Act, 1882 was attracted, is untenable in view of the evidence on record. While considering the plea of delivery of possession under the sale agreement, it was observed by the court of first instance that the petitioner produced khasra girdawari Exh.P-6 since 2009 wherein their names were mentioned as tenants and not as owners and that the khasra girdawari from July 2002 till 2009 were not produced which was material in this regard and was relevant to verify if transfer of possession had ever taken place under any alleged agreement to sell on 15.7.2002.

8. In any case the petitioner was not mentioned in the column of possession in khasra girdawari for the year 2009-10 Exh.P-6 as in possession under the sale rather they were described as tenants which obviously belies the stance of the petitioners as to the alleged delivery of possession under the sale agreement. In the course of hearing learned counsel could not point out any misreading in the entries of revenue record nor could show from the record any entry of possession "under the sale" i.e. "ba-tasawar bae". The petitioner was also required to produce khasra girdawari from 15.10.2002 till 2008 to support his plea that the possession under sale was

transferred but no such document was produced which obviously raised adverse inference against the petitioner. The courts below, therefore, rightly observed that the petitioner had failed to prove not only the agreement of sale but also transfer of possession under any alleged agreement and that the suit could be filed within three years from the date mentioned in the disputed agreement to sell which having not been filed, it was hopelessly barred by time. Learned counsel's reliance on the case of "Syed Hakeem Shah (deceased) through L.Rs. and others v. Muhammad Idrees and others" (2017 SCMR 316) is not helpful in supporting the petitioner's plea inasmuch as in the said case it was observed that where the sale consideration was totally paid, possession was delivered to transferee and only on account of ban on the registration of lease their transfer document was not executed the transferee was well within his right to seek execution of sub-lease in his favour when the ban got lifted.

9. The rule in this case does not apply to the petitioner's suit as there was no ban on transfer of land in the case of the petitioner nor was there any legal or factual impediment in the transfer of the property by the predecessor of the respondents. As per petitioner's own evidence the alleged vendor remained alive for six years who allegedly entered the agreement with full title, the only thing which was to be done was to transfer the ownership right by mutation or sale deed on receiving balance sale consideration till 15.10.2002. This being so, the suit ought to have been filed within three years from the date claimed in Exh.P-1 for the completion of transaction as there was no such restriction to the alienation of the property. In "Syed Athar Hussain Shah v. Haji Muhammad Riaz and another" (2022 SCMR 778) it

was observed to the effect that suit for specific performance of an agreement could be filed within three years as provided by Article 113 of the Limitation Act, 1908 and that the alleged agreement of sale even if proved could not give any title in favour of the intending buyer as under:

“11... The first suit had sought the specific performance of the agreement and the second suit also the cancellation of the sale deed. For both these causes of action the prescribed period of limitation is three years as respectively provided under Article 113 and Article 91 of the First Schedule of the Limitation Act, 1908. The petitioner's third suit had sought the specific performance of the agreement, the cancellation of the sale deed, which was executed when there was no suit pending, and a declaration with regard to the ownership of the land. The third suit was filed after three years and was time barred with regard to seeking the specific performance of the agreement and for the cancellation of the sale deed. We are now left to consider whether the third suit was saved because it had also sought a declaration of ownership of the land as submitted by the petitioner's learned counsel for which Article 120 prescribes six years period of limitation... An examination of the petitioner's plaint makes it clear that the petitioner had primarily sought the specific performance of the agreement, then the cancellation of the sale deed and had added the declaratory relief to primarily save the third suit from the consequence of having been filed, beyond the period of limitation.

12. The petitioner's reliance on section 53-A of the Transfer of Property Act would also not save him from the vicissitude of the period of limitation. Section 53-A does not confer or creates a right, and its use is defensive as has been continuously held by this Court ... The linking or combining of section 53-A of the Transfer of Property Act with the petitioner's suit will not benefit him by extending the period of limitation and save the third suit.”

It may be observed from the rule *supra* that petitioners' reliance on the provisions of section 53-A of Transfer of Property Act, 1882 would not render any assistance for enlarging the period of limitation so as to allow the petitioner to file the suit after the alleged refusal. The facts

of the petitioners' case are clearly distinguishable as in the petitioners' case, they could not prove transfer of possession under the sale and entries in the revenue record reflect their status as tenant and not as intending buyer and, being so, the provisions of section 53-A, Transfer Of Property Act, 1882 would otherwise not lend any support for helping hand to the petitioner to save them from the rigour of limitation. The findings of courts below on the question of limitation could not be shown to be either perverse or based on any misreading of the evidence nor any ground could be made out for interference therein. Suit being barred by time was liable to be dismissed and was rightly dismissed as such.

10. Another important aspect of the matter is that in the instant case the execution of Exh.P-1 and existence of any intending sale transaction was disputed by the respondents who had categorically stated that neither any agreement was made nor any payment was received nor the possession was ever transferred in favour of the petitioner. The findings recorded by the court of first instance were that the pleadings of the petitioner did not show any negotiation of oral sale if made prior to the written agreement to sell dated 15.7.2002 Exh.P-1 but all the PWs attempted to take different stands by claiming different dates of negotiation of sale prior to the sale agreement. The oral assertion being not founded in the pleadings, the evidence in this regard was rightly overlooked. It is also observed that from the evidence it was discernible that the deceased Sadiq predecessor of the respondents was 90 years old when he died. The agreement Exh.P-1 was not claimed to have been made or executed in the presence of any of the male member of the family though he was stated to have an elder son. It is also observed that from

15.7.2002 till the filing of the suit on 30.7.2008 the petitioner did not claim to have ever issued notice to the deceased Sadiq though he remained alive for six years. It is in the evidence that Sadiq died on 20.7.2008 i.e., after more than seven years from the date of alleged sale agreement dated 15.7.2002 but no evidence was produced to show that any notice whatsoever was given to him for transfer of property nor any suit was filed despite the expiry of limitation. The inaction on the part of the petitioner was quite conspicuous and raised serious suspicious as to the execution of document. The entire oral evidence was minutely scrutinized by the courts below whereafter the findings were recorded to the effect that execution of Exh.P-1 could not be proved nor any payment of alleged earnest money through Exh.P-2 could be established . No misreading or non-reading of any material part of evidence could be referred or shown in the course of hearing nor any error of law could be pointed out so as to warrant interference.

11. An argument was raised by the learned counsel that the appellate court could have exercised the powers under Order XLI, Rule 27, C.P.C. to seek additional evidence by way of referring the matter to expert for forensic examination and report as to the genuineness of thumb-impression of Sadiq and that in not doing so an error of law was committed. The argument is misconceived. It is discernible from the file that the suit was instituted on 30.7.2008, it was dismissed on 13.4.2022 during this period no application was filed for any comparison of thumb impression through the expert on the part of the petitioner. Under Rule 27 of Order XLI, C.P.C. the appellate court had jurisdiction to consider the permission for additional evidence provided the evidence

was refused by the court below illegally or the appellate court while considering the evidence on record reaches the conclusion that additional evidence is necessary for the correct determination of the case or that the existing evidence is not sufficient to reach the conclusion one way or the other. None of these circumstances existed as the petitioner had never applied for additional evidence before the trial court nor it was a case of refusal to grant permission of additional evidence; nor the court ever observed that the evidence was not sufficient to decide the case rather the circumstances noted in the reasoning of the court of first instance shows beyond doubt that number of reasons were given to disbelieve the plea of the petitioner as to the execution of document. Even otherwise the evidence on record was sufficient to conclude that the petitioner had failed to prove the existence of sale transaction with the deceased Muhammad Sadiq nor the agreement could prove the purported agreement by any credible evidence. No misreading or non-reading of evidence could be shown in the findings of the trial court and as such same were rightly not interfered with in appeal by the learned Addl. District Judge.

12. As to the argument that issue-wise findings were not recorded, the same is also untenable. Order XX, Rule 5, C.P.C. applies to the suit and to the judgment of the trial court, the trial court decided the case issue-wise and recorded independent findings for rendering decision on all the issues. In appeal under Rule 31 of Order XLI, C.P.C. the court was required to consider the points raised in appeal at the time of hearing, the reasons recorded by the trial court and to decide the same by recording the reasons thereof. Appellate court is not required to decide the appeal by recording issue-wise findings but only the

points raised at the time of hearing were to be looked into. Reference can be made to the case of “Kareem Bux v. P.O. Sindh and others” (1998 CLC 27). In the instant case the learned Addl. District Judge took note of the entire evidence, the reasoning recorded by the court below and after considering the same on the touchstone of law recorded findings to the effect that the suit was barred by time; which as also findings of the court on other points did not suffer from any misreading of record nor any error of law could be pointed out as to warrant interference. For the reasons above there is no substance in this revision petition which is accordingly **dismissed**.

(RASAAL HASAN SYED)
JUDGE

APPROVED FOR REPORTING

JUDGE