

Stereo.HCJDA-38
JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

C.R. No.75693 of 2022

Robina Kausar
v.
Umar Majeeb Shami

J U D G M E N T

Dates of hearing	22.11.2023
Petitioners by	Mr. Mahmood Tahir Ch., Advocate.
Respondent by	Muhammad Irfan Malik, Advocate

Rasaal Hasan Syed, J. This judgment will dispose of the above titled civil revision as well as C.R. No.75701 of 2022 titled Robina Kausar v. Umar Majeeb Shami as both arise from a consolidated judgment of the trial court as well as the appellate court in two cross appeals.

2. Petitioner/plaintiff filed a suit for specific performance to enforce an agreement of sale dated 17.3.2004 against the respondent/defendant which was contested by the respondent. The relief of specific performance was declined by learned Civil Judge on the ground of limitation while the earnest money was directed to be returned. In cross appeals filed by the petitioner and respondent, the judgment of the trial court to the extent of refusal of grant of specific performance was affirmed while the decree for the return of earnest money was set aside. In the two revision petitions petitioner/plaintiff has assailed judgments/decrees of the courts below.

3. Learned counsel for the petitioner submits that the agreement of sale was admitted; that the suit filed by the petitioner for specific performance of agreement was wrongly dismissed on the ground of limitation and it was not appreciated that suit was within time from the date of notice of refusal to perform the contract and that for limitation purposes second part of Article 113 of Limitation Act, 1908 (the “**Act**”) was applicable and further that the view taken by the courts below that the limitation was to be regulated by the first part of Article 113 of the Act was against the law and that the respondent having taken the plea of return of earnest money but failed to prove the same, the petitioner was entitled to the grant of relief of specific performance of agreement or in the alternative for the return of earnest money with profit. It was further submitted that the courts below illegally dismissed the suit for specific performance on the plea of limitation and that the learned Addl. District Judge erred in law in modifying the decree by declining even the return of earnest money. It is added that the evidence of P.W.1 was not properly construed, nor were the documents produced in evidence correctly interpreted or analyzed by the appellate court and that the findings rested on misreading and non-reading of record.

4. Learned counsel for the respondent contended that specific date was fixed in the agreement for the performance of recorded obligation; that limitation for the purposes of suing

was regulated by the first part of Article 113 of the Act which was correctly applied by the courts below; that the suit having been filed beyond the period of limitation was rightly dismissed on the ground of limitation and that the alternative relief for return of money being barred by time suit having been filed after three years the appellate court justifiably interfered in the judgment of the trial court and, by rectifying the error, duly modified the decree and ordered dismissal of suit as a whole on the basis of limitation and that the suit having been filed beyond limitation no question of allowing relief of specific performance arose. With such arguments it was submitted that the claim was rightly declined by the courts below.

5. Points raised pro and contra have been carefully examined in the light of the evidence. Facts, as will be relevant for disposal of the case, are that on 23.4.2016 the petitioner brought a suit for specific performance titled Mst. Rubina Kausar v. Umer Mujeeb Shami claiming that on 17.3.2004 the respondent executed an agreement of sale in respect of suit property in favour of the petitioner. It was averred that sale price was fixed at Rs.30,000,000/- out of which Rs.15,000,000/- was paid as earnest money. Assertedly the sale deed could not be executed due to respondent's failure to fulfill the obligation within the agreed time and that extensions in time for completion of transaction were made due to this. It

was disclosed that the petitioner instituted a suit for specific performance on 27.6.2014, however, the respondent on coming to know of the civil suit contacted the petitioner through some respectables and requested her to abstain from pursuing the path of litigation and that he will do his best to complete the execution of sale deed without seeking any further extension. The petitioner could not convey the instructions to her counsel in this regard and in view thereof suit was dismissed for non-prosecution on 10.3.2015. Afterwards the respondent did not perform his part, instead the petitioner statedly learnt that the property was being sold elsewhere, which prompted the present/second suit for enforcement of the sale agreement.

6. Respondent/defendant contested the suit both on legal as well as factual premises, challenged its tenability on account of limitation and also asserted that he always remained ready and willing to perform his part, but the agreement could not be completed because of non-performance on part of petitioner/plaintiff which, in consequence, stood rescinded. It was claimed that the amount of Rs.15,000,000/- had already been returned and that the belated suit was brought to blackmail the respondent after a decade. Issues were framed and parties were asked to produce their evidence. Petitioner appeared as P.W.1 and produced documents Ex.P1 to Ex.P18 in support of her claim while the respondent could not produce any evidence as his right of defense was struck off vide order

dated 24.1.2020 due to non-compliance of order of the court on miscellaneous application for producing of documents.

7. Learned Civil Judge after considering the entire evidence, oral as well as documentary, dismissed the suit to the extent of relief of specific performance as being time-barred but at the same time directed the respondent to return Rs.15,000,000/- to the petitioner without recording any reasons therefor. Both the parties preferred appeal against this decision. Petitioner filed civil appeal No.12/2022 titled Rubina Kausar v. Umer Majeeb Shami to challenge the decree to the extent of refusal to grant relief of specific performance of the agreement while the respondent filed civil appeal No. 6560 of 2021 titled Umer Majeeb Shami v. Rubina Kausar impugning the judgment to the extent of the direction for return of earnest money. The appeal of the petitioner was dismissed. That of the respondent was allowed.

8. Decree of the trial court resultantly to the extent of declining relief of specific performance was affirmed and the judgment of the trial court to the extent of direction for return of earnest money was set aside. As such, the suit for specific performance was dismissed in toto. Aggrieved of decision in the two appeals the petitioner has brought the present revision petitions.

9. Questions presented for consideration of this Court are as to whether the suit was barred by time and was rightly

dismissed by the court below; whether in view of dismissal of suit on account of limitation the order of return of earnest money amounted to an untenable contradiction in terms; and as to whether the petitioner was entitled, in obtaining facts, to the grant of decree of specific performance.

10. Agreement to sell dated 17.3.2004 Ex.P1 provided for six months to complete the transaction. Ex.P2 dated 03.9.2005 extended the period till 30.3.2005. Time was further extended for completion of sale vide extension document dated 22.3.2005 Ex.P3 till 30.9.2005. Further extension was allowed vide Ex.P4 dated 23.8.2005 till 31.3.2006 which was followed by extension document dated 04.3.2006 Ex.P5 taking this period to 31.3.2007. Afterwards, by Ex.P6 it was extended to 31.3.2008 and finally vide extension Ex.P7 dated 31.8.2008 the period was extended for completion of the transaction till 31.3.2009. Petitioner asserted that all these extensions were made because of the respondent but the documents referred supra do not support such depiction. Scrutiny of the documents rather reflects that the extensions were made with the “consent of parties”. Chapter VI of Qanun-e-Shahadat Order, 1984 relates to exclusion of oral by documentary evidence. Article 102 provides that where the terms of a contract, or a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no

evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, *except the document itself*, or secondary evidence of its contents in cases in which secondary evidence, upon satisfaction of conditions prescribed, is admissible. Likewise, Article 103 provides that where the terms of a contract are in writing and proved according to the mode provided no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives-in-interest, for the purposes of contradicting, varying, adding to, or subtracting from, its terms.

11. Perusal of the documents shows that consistent conduct of the parties was that the extensions, whenever made, were in writing. Ex.P2 to Ex.P7 belie the stance of the petitioner that the agreement was extended from time to time because of the fault of the respondent. Rather the documents show that every extension was with mutual consent and no specific burden was attributed to either party. In the given circumstances it was a case where the agreement provided for a specific date, month and year for the completion of the deal under the agreement with the last extension of 31.3.2009 serving as final cut-off date.

12. Article 113 of the Act provides that for the purposes of specific performance of a contract limitation shall commence *where the date is fixed for the performance from that date, or,*

if no such date is fixed, when the plaintiff has notice that performance is refused. Bare reading of the documents Ex.P2 to Ex.P7 which are being enforced in the suit reveals that a specific date for the performance of contract was given and the last being Ex.P7 provided for the performance till 31.3.2009 which obviously would fall in the first part of Article 113 of the Act providing for three years of limitation to sue for specific performance from the date fixed in the agreement. In the instant case the suit was instituted on 23.4.2016 i.e. over seven years from the date fixed in the last-mentioned document Ex.P7.

13. Another aspect of the case is that the petitioner earlier filed civil suit No. 22682/C dated 27.6.2014 for specific performance of the agreement of sale Ex.P1 which was dismissed for non-prosecution on 22.7.2014. No effort was claimed to have been made for its restoration. In the plaint of the said suit Ex.D1 it is stated in paragraph 14 that *“now in June 2014 the plaintiff came back to Pakistan and on 20.6.2014 the plaintiff alongwith respectable (1) Muhammad Khaliq son of Asghar Ali and (2) Ubaid-ur-Rehman son of Rauf Qadeer approached the defendant and requested him to transfer the suit property in favour of the plaintiff firstly the defendant delayed the matter on lame excuses then he flatly refused to transfer the suit property in favour of the plaintiff and extended threats that if the plaintiff again contacted him he*

will murdered (sic) the plaintiff... ”. In paragraph 17 of Ex.D1 it was asserted that “the cause of action arose to the plaintiff and against the defendant on 17.3.2004 when the agreement between the plaintiff and defendant was executed. The cause of action further arose at every occasion when the agreement of sale was extended and lastly on 20.6.2014 when the defendant flatly refused to transfer the property in favour of the plaintiff and extended threats of dire consequences and the cause of action is still occurring... ”. Instead of seeking restoration of the suit the petitioner waited for two years and brought the second and present suit on 23.4.2016 out of which instant revisions stem. The fate of the suit ended in dismissal for non-prosecution vide order dated 10.3.2015. However, no evidence was produced in support of assertion of alleged oral extension in time, except the petitioner’s own statement. The statement of the petitioner in this regard is also contradictory and otherwise not supported by record as the order of the learned Civil Judge, dismissing the suit for non-prosecution, simply shows that no one appeared from the side of the petitioner to pursue the case resulting in its dismissal for non-prosecution.

14. Neither did the petitioner produce any evidence of oral understanding to withdraw the suit nor did the counsel file affidavit in support thereof. Obviously, the story being contradictory to the order-sheet, was inadmissible. Petitioner attempted to claim that after the withdrawal of the suit, she

observed that the property was being alienated by the respondent. This alarmed her and that she filed a suit on the assumption that it was notice to refuse performance of the contract, therefore, according to petitioner the suit was within time. The plea raised was totally misconceived, against the terms of the agreement and otherwise not proved by any corroborative evidence. Rather the agreement Ex.P1 and supplementary extension Ex.P2 to Ex.P7 clearly mentioned a fixed date for the performance of agreement and there were no ifs and buts in this regard. The date was not subjected to clearance of any bar of title of the respondent nor was there any injunctive order against completion of the deal. The petitioner sought enforcement of the agreement with the stance that respondent was owner of the property and could transfer the same. In the given circumstances the suit was to be regulated by the first part of Article 113 of the Act for limitation purposes.

15. In Muhammad Sadiq and others v. Muhammad Mansha and others (PLD 2018 SC 692) it was observed to the effect that existence of a mortgage qua the property subject-matter of sale has no bearing on the question of limitation for specific performance of agreement to sell which proceed independently and on its own footing, therefore, limitation in suchlike cases would begin to run from the date recorded in the agreement as prescribed by the first limb of Article 113 of the Act.

Reference can also be made to the case of Haji Abdul Karim and others v. Messrs Florida Builders (Pvt) Limited (PLD 2012 SC 247) where it was observed to the effect that cases falling in the ambit of first part of Article 113 of the Act could not be considered on the touchstone of the second part for both being independent were meant to cater for two different type of suits for specific performance in relation to limitation and that limitation is a command of law prescribing statutory period within which the right is to be exercised and enforced as such the courts would have no lawful authority to ignore the date/period stipulated in contract which as a legal consequence is meant to regulate the period of limitation in terms of first part of Article 113 of the Act and that no exemption qua the period of limitation could be claimed in law by a party on account of pending litigation simpliciter in the absence of an order of competent court preventing such party from suing.

16. In view of the rule *supra*, the limitation in the instant case was to be regulated by the first part of Article 113 of the Act which provides for a period of three years from the date fixed in the agreement for performance of the obligation. As per Ex.P7 the last extension was till 31.3.2009. The suit having been filed on 23.4.2016 was on the face of it barred by limitation as having been filed after more than three years. So much so that the previous suit Ex.D1 which was dismissed for non-prosecution and was never restored, was also barred by

limitation, as it was filed on 27.6.2014 after more than three years. The findings of the courts below on the question of limitation being in accordance with law, are affirmed. As to the claim of the petitioner for specific performance of agreement, it was rightly declined as the suit was barred by time. The courts below were obligated to dismiss the same as barred by limitation and were not required to discuss the issue as to specific performance on merits. The concurrent findings in this regard do not call for interference.

17. In so far as the argument that the respondent having not proved the return of earnest money petitioner should have been allowed the return of the earnest money, suffice it to observe that the main relief of enforcement of agreement having been declined, because of bar of limitation with respect to the suit for specific performance or alternatively for the return of earnest money, the same could have been instituted within three years from the fixed date. This not having been done, both reliefs could not be allowed and were rightly so declined. The argument that the court in equitable jurisdiction could order the return of earnest money is without substance. Of course, the court could have allowed the return of money provided the suit itself was not barred by time and having recorded the findings concurrently that the suit was not within time and was filed after more than three years after the expiry of limitation, the petitioner was not entitled to any such relief.

View taken by the courts below, being in accordance with law,
does not call for interference.

18. For the reasons supra, there is no merit in these revision
petitions, which are **dismissed**.

(RASAAL HASAN SYED)
JUDGE

ANNOUNCED IN OPEN COURT ON **05.12.2023**.

JUDGE

APPROVED FOR REPORTING

JUDGE

Rabbani