

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE EJAZ AFZAL KHAN
MR. JUSTICE MAQBOOL BAQAR
MR. JUSTICE FAISAL ARAB

CIVIL PETITION NO. 1598 OF 2016

(On appeal against the judgment dated 01.04.2016
passed by the Lahore High Court, Lahore in RSA No.
15/2009)

Major (R) Pervaiz Iqbal

... Petitioner

VERSUS

Munir Ahmad & others

... Respondents

For the Petitioner: Mr. Shahzada Mazhar, ASC
Ch. Akhtar Ali, AOR

For Respondents (1(b,c): Mr. Mehmood Ahmed Bhatti, ASC
Syed Rifaqat Hussain Shah, AOR

Date of Hearing: 15.01.2018

JUDGMENT

FAISAL ARAB, J.- Bungalow No. 73 measuring 4.29 acres located on Quaid-e-Azam Road, Sialkot Cantt, became evacuee property upon partition of India. It was allotted to one migrant from India Syed Chiragh Ali Shah. Out of the total area of the bungalow, twelve *Kanals* of land were subsequently resumed by the Government and the bungalow with the remaining land was handed over to the allottee.

2. On 15.05.1984, the successors-in-interest of Syed Chiragh Ali Shah entered into an agreement with the petitioner to sell the said bungalow. While the transaction under this agreement was yet to be completed, the petitioner on 10.07.1986 entered into

an agreement with respondents No. 1 & 33 (hereafter referred to as the buyers) to sell a portion of land of the said bungalow measuring seven *Kanals* for a total sale consideration of Rs.500,000/-. At the time of execution of this agreement, the buyers paid Rs.55,000/- as earnest money and the remaining amount of Rs.445,000/- was to be paid on 13.07.1986. This period was later extended upto 16.09.1986 by which time it was expected that the property under the earlier agreement would stand transferred in the name of the petitioner. However, as the successor-in-interests of Syed Chiragh Ali Shah did not transfer the bungalow to the petitioner on the basis of agreement with him, the petitioner in turn could not transfer seven *Kanals* to the buyers. It is the agreement dated 10.07.1986 which is subject matter of the present proceedings.

3. On 01.03.1987, the petitioner filed a suit for specific performance of the contract executed on 15.05.1984 with the successor-in-interests of Syed Chiragh Ali Shah. The buyers of the agreement dated 10.07.1986 were also arrayed as plaintiffs in the suit, however, during the pendency of the suit, on the application of the petitioner, the buyers were deleted from the array of the plaintiffs vide order dated 29.01.1991 who were directed to secure their rights under their agreement with the petitioner by filing a separate suit.

4. In 1994, the earlier suit filed by the petitioner against the successor-in-interests of Syed Chiragh Ali Shah was compromised in terms of a settlement agreement reached on

28.11.1994 and pursuant thereto a compromise decree was passed in favour of the petitioner on 21.12.1994. While execution of the compromise decree was yet to be carried out, the buyers filed a suit on 27.10.1996 seeking specific performance of the contract dated 10.07.1986. Along with the petitioner, all the successors-in-interest of the late Syed Chiragh Ali Shah were also made party to the suit.

5. The petitioner on the basis of compromise decree passed in his suit eventually got the bungalow transferred in his name on 02.03.2000. The suit filed by the buyers against the petitioner continued and was finally decreed on 17.04.2006. The petitioner challenged the decree in appeal before the District Court on the ground that the suit was barred by time. His appeal failed. He preferred second appeal in the High Court which was dismissed. Aggrieved by such decision, the petitioner has preferred the present petition seeking leave to appeal.

6. Learned counsel for the petitioner argued that under the agreement with the buyers, the transaction was to be completed by 16.09.1986 whereas suit was filed on 27.10.1996 and in terms of Article 113 of the Limitation Act, the suit for specific performance of the contract is to be filed within three years, it was clearly barred by time. He further contended that even if the commencement of the limitation is to be reckoned from the date when the order dated 29.01.1991 in his suit was passed whereby the Court deleted the names of the buyers from the array of the plaintiffs by giving them the opportunity to seek remedy by

bringing their own suit on the basis of their agreement with the petitioner, such suit ought to have been filed by the buyers within the next three years i.e. on or before 28.01.1994 however as the suit was filed as late as 27.10.1996 the same was hopelessly barred by time. In support of his argument learned counsel relied upon cases reported as Haji Abdul Karim etc. Vs. M/s Flordia Builders (Pvt) Ltd (PLD 2012 SC 247), Muhammad Bashir Vs. Hakim Ali (2000 YLR 368), Muhammad Ramzan Vs. Muhammad Qasim (2011 SCMR 249) & Overseas Pakistanis Foundation etc. Vs. Sqn. Ldr (R) Syed Mukhtar Ali Shah (2007 SCMR 569). Lakshminarayana Vs. Singaravelu (AIR 1963 Madras 24).

7. Learned counsel for the buyers, on the other hand, argued that the limitation for filing of the suit could only have started from 02.03.2000 when the successors-in-interest of Syed Chiragh Ali Shah conveyed the bungalow in favour of the petitioner. According to the learned counsel, it was this date when the cause of action accrued to the buyers and the suit filed by them in 1996 was premature, therefore, the question of it being barred by time did not arise. Learned counsel for the buyers also argued that it was also the petitioner's case in his written statement that the claim raised by the buyers in their suit was premature, hence the plea that suit was barred by time cuts across the argument of the petitioner's counsel. He maintained that all the three Courts below rightly decreed the suit on the basis of the evidence that came on the record and rightly did not treat the suit to be barred by time. In support of his argument learned counsel relied upon the case from Indian jurisdiction reported as

Lakshminarayana Vs. Singaravelu (AIR 1963 Madras 24) and on the case of Inam Naqshaband vs. Haji Shaikh Ijaz Ahmed (PLD 1995 SC 314).

8. Under the agreement dated 10.7.1986, the petitioner agreed to sell seven *Kanals* which were part of the property that at that time had not yet been transferred in his name by the successors-in-interest of Syed Chiragh Ali Shah, therefore, unless such transfer takes place, there was no occasion for the buyers to seek transfer of seven *Kanals* of land in their names. This uncertainty continued until a compromise was reached in the suit filed by the petitioner and the property in question was eventually conveyed in the name of the petitioner on 02.03.2000. It was from this date onwards that the petitioner was legally competent to honour his commitment under the agreement entered into with the buyers.

9. The parties to the agreement dated 10.07.1986 very well knew from the very inception that unless the successors-in-interest of Syed Chiragh Ali Shah convey the property in question in the name of the petitioner the transaction could not be completed. In these circumstances, the fixation of the time under the agreement was subject to such conveyance. The real intention of the parties to an agreement has to be gathered from what they intended at the time of the execution of the agreement which in this case was that upon transfer of the property by the successors-in-interest of Syed Chiragh Ali Shah in the name of the petitioner, the petitioner would then transfer seven *Kanals* of land to the

buyers. This intention has to be imputed to the parties to the agreement dated 10.07.1986. In the case of Lakshminarayana Vs. Singaravelu (AIR 1963 Madras 24) cited by learned counsel of the buyers, it was held in paragraph 6 as under:-

"the doctrine of imputing intention to the parties to a contract which may at times be at variance with the terms of a contract reduced to writing is a doctrine which has found acceptance of late with courts. This doctrine really rests upon the principle of construing an agreement with reference to the real situation or context in which it was entered into and not relying upon the mere wording of the contract as fixing the real intention of the parties".

10. In the above referred case, it has also been held as under:-

"13. In the first case relied upon by the learned counsel for the appellant, Mallikarjuna v. Parthasarathi, ILR (1944) Mad 742 : MANU/TN/0201/1943 : AIR 1944 Mad 218, the court had to consider whether the period indicated in a contract for sale of immovable property as the time for performance was a definite period from which limitation could start. In that case the contract was entered into on 18-7-1934 and the promise contained in the contract was to execute the sale deed when both the brothers of the obligor returned to the village for the next summer vacation, that is, May-June 1935. The question was whether limitation began to run from May-June 1935. The Bench observed thus:

"This is much too indefinite to be regarded as fixing a 'date' for the performance of the contract and we agree with the lower court that the period of limitation must be computed from the date of refusal to perform....."

What, according to us, underlies this decision is that the words of the third column in Article 113 of the First Schedule to the Indian Limitation Act should not be literally construed but liberally construed having regard to the facts of each individual case. "The date fixed for the performance", which is the phrase occurring in the third column of Article 113, must therefore be not only a date which can be identified without any doubt as a particular point of time, but it should also be a date which the parties intended should be the date when the contract could be performed. This principle, though not explicitly stated in the decision cited, above, is in our opinion the rationale behind the ruling of the decision."

11. In the case of Inam Naqshaband vs. Haji Shaikh Ijaz Ahmed (PLD 1995 SC 314) it was held as under:-

"6. Adverting to the point at No.(iii) raised by the learned counsel for the petitioner we find that question of limitation is not a pure question of fact. It is a mixed question of law and fact. So, the High Court was quite competent to reverse the concurrent findings of the two Courts below on this issue. In the peculiar circumstances of the case, that the property was sold for Rs.5,000 and the respondent/vendee paid Rs.4,500/- as earnest money and only nominal amount of Rs.500/- was to be paid by him within a week of the agreement; that the sale deed was actually drawn up on 25.7.1963 and signed by the parties but before it could be presented before the Registrar for registration, the petitioner/plaintiff slipped away; that before expiry of the one week's time for the performance of the contract, the father of the petitioner/defendant filed suit for declaration that he was the owner in possession of the suit property, we are of the view that the cause of action to file a suit for specific performance of agreement to sell relatable to the property which was subject matter of the suit between the father and

the son/petitioner, the cause of action remains suspended till the decision of the suit against the father of the petitioner on 28.9.1966. We are convinced that it was on 28.9.1966 that the title of the petitioner over the suit property became clear. It is by now well settled that the cause of action to sue for the specific performance of the contract arises only when the vendee is in a position to perform his part of contract effectively and till such date no cause of action arises for the other party to compel him to perform his part of the contract. In the instant case, a week after the agreement, the father of the petitioner filed a suit against petitioner seeking declaration to the effect that he was owner in possession of the suit property. He also obtained a stay order. So it can safely be held that the cause of action was inchoate and incomplete and became complete on 28.9.1966 when the suit of the father was dismissed, or on 22.12.1967 when the appeal filed by the father of the petitioner against the judgment and decree dated 28.9.1966 was dismissed by the appellate Court. Before a defendant can successfully invoke the bar of limitation under second clause of third column of Article 113 of the Limitation Act, he has to prove affirmatively that more than three years before the filing of the suit he had unequivocally, unconditionally and clearly refused to perform his part of the contract. In the instant case he had not stated so."

12. When the order of the Court dated 29.01.1991 is analyzed whereby the buyers of the agreement dated 10.07.1986 were deleted as party and set at liberty to bring their own suit against the petitioner for enforcement of their right, it becomes evident that the earlier suit was only for the enforcement of the transaction entered into between the petitioner and the successors-in-interest of Syed Chiragh Ali Shah and the buyers of the agreement dated 10.07.1986 had nothing to do with that suit except that they were dependent upon the petitioner's success in

that suit. The order of the Court dated 29.01.1991 only acknowledged the right of the buyers to file their own suit to seek specific performance of the agreement. Even when the buyers filed their suit in 1996, the petitioner had not gained the title to the property in question hence their claim was still premature. The cause of action could have only arisen to the buyers when the petitioner had come in the position to complete the transaction with them and that accrued on 02.03.2000 when the property in question was conveyed in the name of the petitioner therefore no decree prior to this date could have been passed in favour of the buyers compelling the petitioner to convey seven *Kanals* of land out of the property in question. The fact that the suit filed in 1996 was premature was acknowledged by the petitioner in his written statement. When the petitioner himself took this plea then taking the plea of limitation would in fact amount to taking mutually destructive pleas because if the suit is considered to be premature, it cannot be said to be barred by time and if the suit was barred by time then it cannot be said to be premature. Undoubtedly, the cause of action accrued to the petitioner on 02.03.2000 when the title of the property in question was transferred in his favour and at that time suit for specific performance of contract dated 10.07.1986 was already pending, therefore, question that it was barred by time did not arise at all.

13. We are, therefore, of the view that the trial court has rightly decreed the suit for specific performance of the contract in terms of the agreement dated 10.07.1986, which was upheld in appeals both by the District Court and the High Court. However,

we are of the view that pursuant to the agreement, possession was handed over to the buyers whereas they retained the balance sale consideration of Rs.445,000/- with them till the same was deposited with the *Nazir* under the orders of the Trial Court. In the circumstances, the petitioner shall be entitled to a sum of Rs.3,000,000/- as equalizer over and above the balance sale consideration, which shall be deposited with the Nazir of the Trial Court within a period of two months.

14. The above are the detailed reasons of our short order dated 15.01.2018 when we converted this petition into appeal and partly allowed it in the following terms:-

"For the reasons to be recorded later, this petition is converted into appeal and partly allowed. Decree for specific performance of contract is maintained with the modification that the respondent will deposit an amount of Rs.30,00000/- over and above the amount already deposited with the trial court within a period of two months."

JUDGE

JUDGE

JUDGE

Islamabad, the
15th of January, 2018
Approved For Reporting
Khurram