

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE AMIR HANI MUSLIM
MR. JUSTICE FAISAL ARAB

CIVIL PETITION NO. 160-K OF 2016

(On appeal against the judgment dated 26.11.2015
passed by the High Court of Sindh, Karachi in R.A.
No. 98/2007)

Syed Hakeem Shah (dece) through LRs and others

... Petitioners

VERSUS

Muhammad Idrees and others

... Respondents

For the Petitioners: Mr. Jamil Ahmed Virk, ASC

For CBA: Mrs. Abida Parveen Channar, ASC
Mr. Ghulam Qadir Jatoi, AOR

Date of Hearing: 21.12.2016

ORDER

FAISAL ARAB, J.- Respondent No. 1 filed a suit for specific performance in 1993 against respondent No. 2 claiming that an area of 2250 square feet in the basement of Nairang Shopping Centre, Nairang Complex, Karachi was sold and possession delivered to him in the year 1980 for a total sale consideration of Rs.200,000/- but the sublease could not be registered in his name as there was a ban on such transfer. The suit was resisted by the petitioner on the ground that respondent No. 2 has sold the property to respondent No. 3, who then gifted the same to respondent No. 4 and then the respondent No. 4 sold the suit property to the petitioner and he is a *bona fide* purchaser. The learned Trial Court vide judgment dated 29.05.2003 dismissed the suit. Feeling aggrieved, respondent No. 1 filed appeal before the Appellate Court, which was accepted and the suit of the respondent No. 1 was decreed. The petitioner then filed Civil Revision before the High Court, which was dismissed vide impugned judgment. Hence, this petition.

2. Insofar as the merits of the case are concerned, the learned counsel for the petitioners did not point out any misreading or non-reading of evidence. The only points that were pressed before this Court were that the suit was barred by time as the same was filed in 1993 for a transaction that took place in 1980. The other point was that the suit was undervalued.

3. Insofar as the plea of limitation is concerned, the factual position is that the claim of the respondent No. 1 was that he paid the entire sale consideration and was also handed over possession of the suit property and only the sublease was not being executed by the seller. In this background, when the sale consideration is totally paid and possession was also delivered to respondent No. 1 and only on account of the ban on the registration of leases that transfer document was not executed, the respondent No. 1 was well within his right to seek execution of the sublease in his favour when the ban was lifted and when respondent No. 2 unlawfully entered into sale transaction with the respondent No. 3. In this background, it cannot be said that suit was barred by time. In the case of Muhammad Nawaz Magsi Vs. Illahi Bux (2010 CLC 407), the High Court of Sindh in similar circumstances dealt with the issue of limitation as under:-

"14. Section 53-A of Transfer of Property Act in itself creates a right in favour of a transferee to retain possession. Such right comes into existence when transferor puts the transferee in possession in part performance of the contract. The right created by section 53-A in favour of the transferee in possession could be termed as an equitable title which he holds in the property. Hence where a transferee is enjoying possession of a property pursuant to an agreement to sell and such right is threatened by the transferor or a person claiming under him or even by a stranger then the transferee becomes entitled to defend his existing right in a Court of law. While defending so it matters not whether he goes to the Court as a plaintiff or is sued as a defendant. Normally suit is filed against the transferee in possession either by the transferor or a person claiming under him which threatens the transferee his enjoyment of possession. Faced with such a situation, the transferee in possession defends his possession by virtue of section 53-A of the

Transfer of Property Act. However, there can be a situation, where instead of transferor or a person claiming under him files a suit against the transferee in possession, the transferor or a person claiming under him creates such a situation which threatens the transferee his possession and compels him to seek protection of the Court. In such a situation, the transferee brings his own suit against the transferor or the person claiming under the transferor in order to defend his right to retain his possession. Even as a plaintiff, the relief that is sought by a transferee in possession from the Court under section 53-A of the Transfer of Property Act is perseverance of his possession of the property. Thus in both the positions i.e. plaintiff or defendant, the transferee in possession is defending his equitable title that he has already acquired in the property under his possession by virtue of section 53-A of Transfer of Property Act. Why a transferee in possession should wait for an action to be brought against him by the transferor or any person claiming under the transferor or a stranger to exercise his right to retain possession under section 53-A of Transfer of Property Act. Why not the transferee in possession when threatened should himself establish in a Court of law the legality of his possession by filing his own suit. If the right to seek protection under section 53-A of the Transfer of Property Act is construed to be only available to a transferee if he is sued as a defendant in a suit then it would create an anomalous situation. It would then mean that it is the capacity in which a transferee in possession finds himself in a suit i.e. as a plaintiff or a defendant, which would determine whether the protection under section 53-A of the Transfer of Property Act is to be extended to him. This does not appeal to reason. The right conferred upon a transferee in possession under section 53-A should not depend upon how he is described in a suit i.e. plaintiff or a defendant. This cannot be the object of the lawmakers. Statutory protection granted under section 53-A of the Transfer of Property Act is available to a transferee in possession and it matters not whether he is a plaintiff or a defendant in a suit. His status as a plaintiff or defendant in a suit will be of no legal consequence while deciding his entitlement under section 53-A of Transfer of Property Act. In any of the two capacities, the transferee in possession is defending his right to retain possession, which he is already enjoying. When the transferee files his suit, he is doing nothing but defending his existing right of possession, which he is already enjoying by virtue of section 53-A of the Transfer of Property Act. The right of a

transferee in possession granted under section 53-A of Transfer of Property Act can be availed by him whether he files his own suit or is sued as defendant. Therefore, a transferee in possession can always file suit of his own seeking the relief of permanent injunction in order to preserve his equitable title i.e. the right to enjoy possession of the property in the wake of any threat either from the transferor or any person claiming under him or even a stranger. Reliance is placed on the case of Ahmed Mujtaba Khan versus Iqbal Shah reported in 1990 CLC 1381 and a Division Bench case of Inayat Ullah v. Shah Muhammad reported in PLD 1961 Lah. 372 where it has been held that a transferee of immovable property can defend his right guaranteed to him under Section 53-A of Transfer of Property Act, whether he defends this right in his capacity as a plaintiff or a defendant.

15. *It may also be mentioned here that though for filing a suit for specific performance of a contract, the prescribed period of limitation is three years but as the applicant has filed his suit on the basis of agreement to sell which is coupled with transfer of possession and has also sought the relief of, permanent injunction, the statute of limitation would not come in his way. Where a plaintiff continue to enjoy a right then the statute of limitation cannot take away such a right as the law of limitation is not meant to take away an existing right. It only bars remedy to gain one's lost right. The right created under section 53-A of Transfer of Property Act is an existing right and is not extinguished by any length of time. There cannot be any expiry date for enjoyment of a right conferred upon a transferee in possession under section 53-A of the Transfer of Property Act. Therefore, the law of limitation does not come in the way of a transferee in possession when he as a plaintiff, files his own suit to preserve his right to retain possession that is granted to him under Section 53-A of the Transfer of Property Act.*

16. *It may also be added here that while granting the relief of permanent injunction to transferee in possession under Section 53-A of the Transfer of Property Act, the Court may also direct the parties to complete the transaction under the agreement to sell. This would certainly close doors to future litigation and would also perfect the equitable title of the transferee in possession. There is no reason to deny this to the transferee in possession when it was the transferor who in the first place failed to discharge his obligation under the contract."*

4. In view of the reasoning of the above quoted judgment, the question of respondent No.1's suit being barred by time does not arise at all. So far as the issue of undervaluation is concerned, an issue was though framed but the petitioner failed to establish the same. The Appellate and Revisional Courts rightly dealt with the controversy and their findings are unexceptionable.

5. For what has been discussed above, we do not find any merit in this petition, which is dismissed and leave is refused.

JUDGE

JUDGE

Karachi, the
21st of December, 2016
Approved For Reporting
Khurram