

**JUDGEMENT SHEET.**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
**JUDICIAL DEPARTMENT.**

**Regular Second Appeal No.09/2015**  
**Mst.Syeda Dabeer Fatima etc Vs Mst.Bilqees Akhtar etc**

**Appellant by:** **Mr.Muhammad Munir Paracha &  
Mr.Nauman Munir Paracha,  
Advocates.**

**Respondents:** **Mr.Muhammad Ilyas Sheikh &  
Mr.Hafeez ur Rehman, Advocates.**

**Date of hearing:** **6.1.2016.**

**AAMER FAROOQ, J.-** Through the instant appeal, the appellants have impugned the judgement and decree dated 14.2.2015 whereby the suit for Specific Performance filed by the appellants was dismissed.

2. The facts, in brief, are that respondents No.1 & 2 being owners of Property measuring 1500 sq.ft (western side) located on the roof of shop No.4 to 7, first floor, Commercial building constructed on plot No.13-R, Markaz F-7, Islamabad (the property), allegedly entered in an agreement to sell with appellant No.1. In the agreement appellant No.2 was made the nominee of appellant No.1 and respondents No.1 & 2 executed a general power of attorney in his favour which was registered in accordance with law. The alleged agreement to sell was executed on 14.3.2000. The appellants filed a suit for Specific Performance of the referred agreement on the ground that respondents No.1 & 2 are refusing to adhere to the terms of the same and transfer the property in favour of appellant No.1. It was also alleged in the plaint that the total consideration for the sale of above mentioned property was settled as Rs.1,400,000/- and out of the

same the entire consideration except Rs.32000/-, was paid. Respondents No.1 & 2 denied the agreement to sell and claim of the appellants. The suit filed by the appellants was dismissed by the learned trial court vide judgement and decree dated 3.1.2013 and the appeal filed by them was also dismissed vide judgement dated 14.2.2015.

3. Learned counsel for the appellants , interalia, submitted that the appeal filed by the appellants was dismissed on the issue of limitation and no findings have been rendered with respect to other issues; that under second part of Article 113 of first schedule to Limitation Act, 1908 the period of limitation is three years from the date of knowledge of refusal on part of the vendors to transfer the property. It was further contended that respondents No.1 & 2 did not specifically refused to transfer the property till filing of the suit, therefore, limitation period shall be taken from the referred date; that suit filed by the appellants was within the period of limitation, therefore, the appellate judgement should be set-aside and matter be remanded to the appellate court for findings on other issues.

4. Learned counsel for respondents No.1 & 2, interalia, submitted under the second part of Article 113 of the Schedule to Limitation Act, 1908 the refusal to transfer does not have to be specific and the limitation runs when the vendee has noted that the vendor is not transferring the property. Learned counsel pointed out that in the instant case by virtue of alleged agreement to sell the rights in the property were transferred to the appellants, however, subsequently, respondents No.1 & 2 continued to deal with the property as their own by receiving the rent; filing of eviction application as well as execution petition against tenants and had the property transferred in their favour in CDA record which was sufficient to apprise the appellants

regarding the state of affairs. In support of his contention learned counsel placed reliance on case titled Haji Abdul Karim Vs Florida Builders Private Limited (PLD 2012 SC 247), Muhammad Ashraf Vs Mst.Rashida Bibi (2006 YLR 1626) and Pakcom Limited Vs F.O.P etc (PLD 2011 SC 44). Learned counsel also pleaded that no ground was taken before the first appellate court regarding the finding of the trial court on issue of limitation, therefore, they have no right to agitate the same before this court.

5. The appellants filed a suit for Specific Performance of agreement to sell dated 14.3.2000 on 17.12.2005. Respondents No.1 & 2 resisted the claim of the appellant and denied entering into the referred agreement. Out of the divergent pleadings of the parties following issues were framed:-

- i) Whether defendants No.1 & 2 in pursuance of settlement decree dated 1.6.1999 entered into agreement to sell dated 14.3.2000 with plaintiff No.1 regarding suit house in consideration of Rs.1400000/- OPP
- ii) Whether defendants No.1 & 2 have executed general power of attorney No.693 dated 14.3.2000 regarding the suit property in the name of plaintiff No.2 on the nomination of plaintiff No.1 after receiving the sale consideration? OPP
- iii) Whether plaintiffs are entitled to decree for specific performance as prayed for? OPP
- iv) Whether defendant No.2 was minor on 14.3.2000 and the defendant No.1 was appointed as guardian of the defendant No.2 by the guardian vide order of guardian judge dated 6.3.1993 and there was no permission to sell the minor's property if so its effect? OPD 1 & 2.
- v) Whether agreement to sell dated 4.3.2000 and general power of same date are void abinitio, result of fraud, misrepresentation, fabrication and under influence and is under illegal disability? OPD 1 & 2.
- vi) Whether the agreement dated 14.3.2000 is illegal against the terms of conditions of lease against CDA ordinance and rules made their especially when lease deed was executed but 21.1.2003, hence the suit is barred by law? OPD 1 & 2.
- vii) Whether the plaintiff have no cause and locus standi to file the instant suit? OPD

- viii) Whether the plaintiffs have not come to the court with clean hands? OPD
- ix) Whether the suit of the plaintiff is not maintainable in its present form? OPD
- x) Whether the suit of the plaintiff is time barred? OPD
- xi) Whether the plaintiffs have concealed material facts from the court and suit being false and frivolous is liable to be dismissed with special cost under section 35-A CPC? OPD
- xii) Relief.

6. Learned trial court dismissed the suit of the appellants on merits as well as the issue of limitation and appellate court dismissed the appeal filed by the appellants while confining itself on issue No.10 i.e the issue of limitation. The sole controversy before this court in the instant appeal is that whether the suit filed by the appellants against respondents No.1 & 2 was barred by limitation. Admittedly in the alleged agreement to sell no date was prescribed for transfer of the property. Under Article 113 of the Schedule of Limitation Act, 1908 the limitation period for suit for specific performance of a contract is three years from the date fixed for the performance or if no such date is fixed when the plaintiff has notice that performance is refused as mentioned above. As date for performance of the agreement has been given in the agreement between the parties in the present case, therefore, the period of limitation is to be computed from notice to the appellants regarding refusal of performance of the agreement. The Honourable Supreme Court of Pakistan in case titled Haji Abdul Karim Vs Florida Builders Private Limited (PLD 2012 SC 247) held that limitation was a command of law prescribing statutory period within which a right is to be exercised or enforced. It was also observed as follows:-

*In the context of interpreting Article 113 of the Act, the provisions for the facility of reference are reproduced below:--*

<i>Description of suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
<i>1</i>	<i>2</i>	<i>3</i>
<i>113. For specific performance of a contract.</i>	<i>Three years</i>	<i>The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.</i>

*And for the purpose of the above, it seems expedient to touch upon the legislative history of the Article. The prior Limitation Acts of 1871 and 1877, had in each of them the corresponding provision as in Article 113. However, the words in 1871 Act, were "when the plaintiff has notice that his right is denied", postulating that the second part of Article 113 was the only provision then regulating the limitation for the suits for specific performance and the commencement of three years period was dependent on the proof of the fact of notice of denial and the question of limitation was accordingly to be decided, having no nexus with the date even if fixed by the parties for the performance of the contract. The said provision however was expanded and these words were substituted in the subsequent Act of 1877, as are also found in the third column of the present Act. The change brought by the Legislature in 1877 Act was retained in Article 113 of the Act, by including the first part that the time would run from the '**date fixed**' for the performance is thus purposive and salutary in nature, which contemplates and reflects the clear intention of the legislature to prescribe the same (three years) period of limitation, however, providing that the parties who otherwise have a right to fix a date of their own choice in the agreement for the performance thereof, such date in consequence of law shall also govern the period of limitation as well for the suits falling in this category. Thus now the three years period mentioned in Column No. 3 of the Article runs in two parts:--*

*(i) from the date fixed for the performance; or*

*(ii) where no such date is fixed when the plaintiff has notice that*

*performance is refused.*

*The reason for the said change as stated above is obvious. In the first part, the date is certain, it is fixed by the parties, being conscious and aware of the mandate of law i.e. Article 113, with the intention that the time for the specific performance suit should run therefrom. And so the time shall run forthwith from that date, irrespective and notwithstanding there being a default, lapse or inability on part of either party to the contract to perform his/its obligation in relation thereto. The object and rationale of enforcing the first part is to exclude and eliminate the element of resolving the factual controversy which may arise in a case pertaining to the proof or otherwise of the notice of denial and the time thereof. In the second part, the date is not certain and so the date of refusal of the performance is the only basis for computation of time. These two parts of Article 113 are altogether independent and segregated in nature and are meant to cater two different sorts of specific performance claims, in relation to the limitation attracted to those. A case squarely falling within the ambit of the first part cannot be adjudged or considered on the touchstone of the second part, notwithstanding any set of facts mentioned in the plaint to bring the case within the purview of the later part.*

7. In the plaint the appellants have claimed that cause of action accrued in their favour when respondents No.1 & 2 expressed their intention regarding cancellation of their irrecoverable general power of attorney a month ago and finally on 16.12.2005 when the referred respondents approached respondent No.3 for the same. The agreement to sell dated 14.3.2000 was tendered in evidence as Ex.P1 and the salient terms of the same are as follows:-

- 5) *That the first party has delivered the vacant possession to the second party who is in now possession of the same.*
- 6) *That the first party has created an agency coupled with interest of this agreement by executing a*

*general power of attorney in the name of Mr.Mohammad Asif Mehboob son of late Dr.Mehboob Elahi, as nominated by the second party.*

7. *That the first party has left no interest with the said portion of the property which is subject matter of this agreement and hereby agrees to transfer all those rights in the said portion of the property which has been acquired by the first party through the above said decree dated 1.6.1999.*
8. *That hereinafter the second party is entitled to lease out the above said property to receive rent, to get vacate and enjoy all the incidents, privileges and rights as an owner. All the fittings and fixtures in the above said portion is also included in this transaction.*

8. The bare reading of the above terms show that the agreement created an agency and in this behalf a power of attorney was executed in favour of appellant No.2. It was also agreed that the first party shall have no interest in the property and the appellants had the right to lease out the property in question; receive rent; to get the property vacated and enjoy the benefits and rights as an owner. However, despite the referred terms, the property subsequent to the alleged agreement, was got transferred by respondents No.1 & 2 in their favour independently from appellant No.2 who is the son of respondent No.2. In this behalf vide EX.P32 i.e letter dated 3.4.2000 addressed to Deputy Director Estate Management CDA, Islamabad, the co-owners of the entire property made an application for transfer the same in their names and a Specific request was made for the transfer separately. In this behalf respondent No.1 executed the letter

in her personal capacity whereas appellant No.2 being son of respondent No.1 executed the letter as one of the legal heirs of deceased Dr.Mehboob Elahi and attorney of Shafqat Yasin. Similarly, the execution application to get the property vacated from the tenant was filed by respondents No.1 & 2 and the possession was taken by them and likewise rent is being received by them. In this behalf execution application for vacation of rented property was filed by respondent No.1 (Ex.D4). The settlement between the respondent No.1 and tenant was executed by her (Ex.D5) and the application for receiving rent was also filed by respondent No.1. These actions on part of respondent No.1 were subsequent to alleged agreement to sell and in negation of the terms of the same.

9. Though Article 113 *ibid* does not specifically provide the form of the notice of refusal, however, the notice may be explicit or implied. In this behalf reliance is placed on case titled *Meran Vs Ghulam Hussain* (PLD 1985 Karachi 674). **In Muhammad Ashiq etc Vs Tauqir Shahid etc (PLD 1998 Lahore 444) it was held as follows:-**

*Under Article 113 of Limitation Act, if date for performance of agreement is given in the agreement, then a suit for specific performance can be filed within three years from the date recorded in the agreement. If no date is provided, the suit can be filed within three years from the date when the purchaser had notice of refusal.*

**In Janardhanam Prasad Vs Ramdas (Appeal Civil 6141/2000), the Supreme Court of India held as follows:-**



*"For specific performance of a contract Three years the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused"*

*The Court in applying the period of limitation, would first inquire as to whether any time was fixed for performance of agreement of sale. If it is so fixed, the suit must be filed within the period of three years, failing which the same would be barred by limitation. Here, however, no time for performance was fixed. It was for the Courts to find out the date on which the plaintiff had notice that the performance was refused and on arriving at a finding in that behalf, to see whether the suit was filed within three years thereafter. The question was considered in R.Kparvatharaj Gupta Vs K.C.Jayadeva Reddy [(2006) 2 SCC 428], which in turn was noticed and applied in Gunwantbhai Mulchand shah & Ors. V. Anton Elis Farel & Ors. [(2006) 3 SCC 634]. {See also Pukhraj D.Jain & Ors. V. G.Gopalakrishna [(2004) 7 SCC 251]} The first Defendant was a friend of the 2<sup>nd</sup> Defendant. Admittedly, the usual stipulations were knowingly not made in the agreement of sale dated 11.4.83. The 1st Defendant may or may not be aware about the agreement entered by and between the respondent herein. But he cannot raise a plea of absence of notice of the deed of sale dated 4.9.1985, which was a registered document. Possession of the suit land by the appellant also stands admitted. Registration of a document as well as possession would constitute notice, as is evidence from Section 3 of the Transfer of Property Act, 1882, which is in the following terms:*

*"...."a person is said to have notice" of a fact when he actually knows that fact, or when, but for willful abstention from an enquiry or search which he sought to have made, or gross negligence, he would have known it.*

**Similarly, Panchaman Dhara etc Vs Monmatha Nath Maity (Appeal Civil 5187 of 2001),** the Supreme Court of India held as follows:-

*It is not in dispute that the suit for specific performance of contract would be governed by Article 54 of the Limitation Act, 1964. While determining the applicability of the first or*

*the second part of the said provision, the court will firstly see as to whether any time was fixed for performance of the agreement of sale and if it was fixed, whether the suit was filed beyond the prescribed period unless any case of extension of time for performance was pleaded and established. When, however, no time is fixed for performance of contract, the court may determine the date on which the plaintiff had notice of refusal on the part of the defendant to perform the contract and in that event the suit is required to be filed within a period of three years wherefrom*

10. In the instant case since certain rights were specifically granted to appellants vide the above mentioned agreement to sell, therefore, any action on part of respondents No.1 & 2 which was adverse to those rights shall tantamount to notice with respect to refusal to transfer and the period of limitation shall start therefrom. In this behalf the application to CDA EX.P32 was made on 4.3.2000 to which appellant No.2 as nominee of appellant No.1 and Attorney of respondents No.1 & 2 was also signatory had knowledge and notice that respondent No.1 is executing the letter in violation of terms of agreement to sell. Similarly the filing of execution application; taking of the possession of the property in question from the tenant and receipt of rent are the actions on part of respondent No.1 were acts adverse to the rights granted to the appellants under the alleged agreement to sell. In this behalf reliance is placed on case titled **Muhammad Ashraf Vs Mst.Rashida Bibi (2006 YLR 1626)** wherein the Honourable Lahore High Court held as follows:-

*Since the question of limitation in the above circumstances, was a mixed question of law and fact, it*

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*was incumbent upon the respondent/plaintiff to state, firstly as to when she became aware of the dismissal of C.R.1788/86 and, secondly, as to when she first sought and was refused execution of a sale deed pursuant to the agreement EX.P2. At this juncture, it is relevant to note that the onus of proving that the suit was within time, was rightly placed on the respondent/plaintiff and it was for her to lead affirmative evidence of all relevant facts to show that the suit had been filed within the period prescribed under Article 113 of the Schedule to the Limitation Act. Since she failed to do so, the suit was liable to be dismissed as being time barred.*

The appellants did not plead specifically the knowledge about the acts adverse to their rights and vaguely asserted that they came to know about the refusal when the general power of attorney was sought to be cancelled. There is no explanation in the evidence by the appellants regarding the acts by respondents No.1 & 2 which are adverse to the rights of the appellants. In light of the referred facts and circumstances there is no misreading or non reading of evidence by the courts below or otherwise any legal infirmity in the impugned judgement calling for interference in the instant second appeal.

11. For the foregoing reasons, the instant appeal is without merit and is therefore, dismissed.

(AAMER FAROOQ)  
JUDGE

Announced in open court this 1st day of April, 2016.

JUDGE

**M.S.Zaki.**

*Approved For Reporting*