

SIN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE QAZI FAEZ ISA
MR. JUSTICE YAHYA AFRIDI

Civil Petition No. 1831 of 2017

*(Against the judgment dated 12.04.2017
passed by Lahore High Court, Lahore in CR
No.1209/2010)*

Syed Athar Hussain Shah.

... Petitioner

Versus

Haji Muhammad Riaz and another.

... Respondents

For the Petitioner:

Mr. Azmat Ullah Chaudhry, ASC.
Ch. Akhtar Ali, AOR.

For the Respondents:

Mr. Aftab Alam Yasir, ASC.
Mrs. Kausar Iqbal Bhatti, ASC/AOR.

Date of Hearing:

24.11.2021

ORDER

Qazi Faez Isa, J. The petitioner through this petition has sought to set aside three concurrent judgments. The case of the petitioner is that he purchased 10 *marlas* and 4 *sarsai* from the respondent No.2's undivided share in a larger piece of land through an agreement dated 27 September 1997 (Exhibit P-2) (respectively '**the land**' and '**the agreement**') for a sale consideration of thirty five thousand rupees, which he paid and took possession of the land.

2. On 15 June 1998 the petitioner filed a suit seeking specific performance of the agreement ('**the first suit**') but the plaint was rejected on 15 January 1999 under Order VII Rule 11 of the Code of Civil Procedure, 1908 ('**the Code**') as the requisite court fee, despite granting repeated opportunities to the petitioner (plaintiff in the suit), was not paid. The following day, on 16 January 1999, the respondent No. 2 conveyed the land through a registered sale deed ('**the sale deed**') to

respondent No. 1. The petitioner filed another suit on 31 May 1999 ('**the second suit**') in which he sought the cancellation of the sale deed and a declaration with regard to his ownership of the land by relying on section 53-A of the Transfer of Property Act, 1882, and he also sought specific performance of the agreement. However, he withdrew the second suit on 12 April 2004. The petitioner then filed another suit on 13 April 2004 ('**the third suit**'). It is the dismissal of this third suit concurrently by three courts, which has been assailed herein.

3. The learned Mr. Azmat Ullah Chaudhry, representing the petitioner, submits that the respondent No. 2 could not have executed the sale deed in favour of the respondent No. 1 because the respondent No. 2 had entered into the agreement with the petitioner. He submits that all three courts decided against the petitioner on untenable grounds. Firstly, by holding that the attesting witnesses of the agreement were not produced, which, he submits, was not required as the agreement was admitted by the respondents, in their jointly filed written statement. Secondly, the learned Judge of the High Court incorrectly assumed that the respondent No. 1 was a *bona fide* purchaser for value without notice even though this plea was not taken. Thirdly, on the ground of the belated filing of the third suit, which, the learned counsel submits, was also not correct since the suit had also sought to declare that the petitioner was the owner of the land, contending that, Article 120 of the First Schedule to the Limitation Act, 1908 provides that a '*Suit for which no period of limitation is provided elsewhere in this schedule*' can be filed within *six years*. Learned counsel also relied upon section 53-A of the Transfer of Property Act, 1882 to contend that since possession of the land was with the petitioner his rights could not be defeated by the sale deed and relied upon the case of *Taj Muhammad v Yar Muhammad Khan*¹ and *Hikmat Khan v Shamsur Rehman*². Reliance was also placed on a judgment of this Court in the case of *Fazla v Mehr Din*³ which stipulates that section 50(1) of the Registration Act, 1908 protects the person who is in possession and has an agreement in his favour. Concluding his

¹ 1992 SCMR 1265

² 1993 SCMR 428

³ 1997 SCMR 837

submissions, he states that declaration was the main *cause of action* and also the main prayer in the suit and declaration would govern the period of limitation.

4. Learned counsel had sought to augment their submissions by filing written arguments and they were permitted to do so by 17 January 2022. The petitioner's counsel has filed written arguments (CMA No. 172/2022) which we have also considered.

5. Learned Mr. Aftab Alam Yasir represents the respondent No. 1 and learned Mrs. Kousar Iqbal Bhatti represents the respondent No. 2. They submit that the third suit was hopelessly time barred as it was filed five years and three months after the agreement. They referred to and relied upon Order XXIII Rule 2 of the Code and section 9 of the Limitation Act, 1908 and state these provisions stipulate that once time with regard to limitation starts to run it cannot be stopped, and that the third suit had sought specific performance of the agreement and the cancellation of the sale deed for which the prescribed period of limitation was three years, respectively under Article 113 and Article 91 to the First Schedule of the Limitation Act, 1908. Therefore, the third suit was time-barred both with regard to seeking the specific performance of the agreement and for cancellation of the sale deed. They submit that the prescribed period of limitation could not be extended by adding a declaratory relief because the purported declaration was not the primary relief. Section 53-A of the Transfer of Property Act, 1882 will also not come to the aid of the petitioner since it can only be used as a shield and not be made the basis of an attack for seeking a declaration. Reference was also made to Order II Rule 2 of the Code. On merits they submitted that there was not an unqualified admission of the agreement, it was not proved, and the payment of sale consideration was also not admitted by the witnesses produced by the petitioner.

6. The learned counsel representing the respondents also availed the opportunity to file written arguments. On behalf of respondent No. 1 written arguments (CMA No. 171/2022) are filed praying for the dismissal of the petition. The counsel for respondent No. 2 has filed

separate written arguments (CMA No. 170/2022), which, surprisingly, are contrary to the position she took when we heard her in Court and are contrary to the respondent No. 2's position before the Trial Court. The respondent (through her counsel) in CMA No. 170/2022 now supports the petitioner and prays that his suit be decreed. Such conduct has undermined counsel's credibility and Mrs. Kousar Bhatti, ASC/AOR, is well advised to be careful in future to avoid being reported for disciplinary action.

7. That the merits of the petitioner's case need only be considered provided the third suit was filed within time, because if it wasn't, the petitioner's third suit would fail on the ground that it was filed beyond the stipulated period of limitation.

8. The learned Mr. Chaudhry most ably represented the petitioner to save him from the limitation pitfall by articulating that the third suit was in substance a declaratory suit, for which no specific period of limitation was prescribed and thus it would come under the residuary Article 120 of the First Schedule to the Limitation Act, 1908, which prescribes a period of limitation of six years, and that the third suit was filed within six years. He submits that since the possession of the land was with the petitioner pursuant to the agreement, section 53-A of the Transfer of Property Act, 1882 would be applicable. Learned counsel also relied upon the decisions in three cases decided by this Court. Therefore, it would be appropriate to examine these judgments.

9. In the case of *Taj Muhammad v Yar Muhammad Khan*⁴ the facts were quite unusual. A declaratory suit was filed by the appellant on the ground that he was a mortgagee in possession and he had inherited the property from his father and that the gift mutations got made by his step-brothers in their favour were illegal and void. The parties resolved their dispute by entering into an agreement, possession was handed over to the appellant, and reliance was placed on section 53-A of the Transfer of Property Act, 1882. There was no question of the belated filing of the

⁴ 1992 SCMR 1265

suit in this case. Limitation was also not an issue in the cases of *Hikmat Khan v Shamsur Rehman*⁵ and in *Fazla v Mehr Din*.⁶

10. The petitioner's conduct in filing the first suit, not paying requisite court fee, which resulted in the rejection of the plaint, filing the second suit, withdrawing it, and then filing the third suit is inexplicable. However, what requires determination is whether the third suit was filed within the prescribed period of limitation. It needs consideration whether once the period of limitation commences it can be stopped or be avoided by introducing another cause of action or relief in the suit or by reformulating them. The answer is provided by section 9 of the Limitation Act, 1908, reproduced hereunder:

'9. Continuous running of time: Where once time has begun to run, no subsequent disability or inability to sue stops it.'

The rejection of plaint in the first suit and the withdrawal of the second suit would not help avoid the period of limitation as is made clear from Rule (2) of Order XXIII of the Code, reproduced here:

'2. Limitation law not affected by first suit.
In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.'

11. We now proceed to consider the applicable period of limitation. 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.

⁵ 1993 SCMR 425

⁶ 1997 SCMR 837

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. The Privy Council in the case of *Janki Kunwar v Ajit Singh*⁷ held that the substance of the relief has to be seen, and if a relief is added for which there is a longer period of limitation it would not save the suit. That was a case in which the plaintiff had added the relief of possession of immovable property, which had 12 year's limitation, to the relief of setting aside a deed of sale, for which the period of limitation was three years under Article 91. In *Muhammad Javaid v Rashid Arshad*⁸ this Court held that, '*If the main relief is time barred and the bar is not surmounted by the respondent, the incidental and consequential relief has to go away along with it and the suit is liable to be dismissed on account of being time barred*'⁹. 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 create a right, and its use is defensive as has been continuously held by this Court, including in the in cases of *Shamim Akhtar v Muhammad Rasheed*¹⁰, *Muhammad Yousaf v Munawar Hussain*¹¹ and in *Amirzada Khan v Ahmad Noor*¹² where this Court held, '*it is well-settled principle of law that possession of property obtained in part performance of a contract can only be used by a defendant as a shield in defence of his right and not as a weapon of offence as intended in the present case*'¹³. The cases cited by the learned Mr. Chaudhry state as much. In *Taj Muhammad v Yar Muhammad*

⁷ 15 Cal. 58

⁸ PLD 2012 Supreme Court 212, para 5, p.230G

⁹ Ibid, paragraph 5, page 230G

¹⁰ PLD 1989 Supreme Court 575

¹¹ 2000 SCMR 204

¹² PLD 2003 Supreme Court 410

¹³ Ibid, paragraph 12, page 14L

*Khan*¹⁴ it was held, that 'It is true that section 53-A does not confer or create any right but it provides a defence to a transferee to protect his possession.' And, in *Hikmat Khan v Shamsur Rehman*,¹⁵ 'It is true that section 53-A of the Transfer of Property Act cannot be utilized by a person in possession of immovable property under an unregistered document which is compulsorily registrable under the Registration Act, as a weapon of offence to assert his title over the property...'. 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.

13. That having concluded that the third suit filed by the petitioner was belatedly filed there is no need to consider the arguments on the merits of the case as the third suit would have to be dismissed on the ground of having been filed beyond the prescribed period of limitation. Therefore, leave to appeal is declined and consequently this petition is dismissed, but there shall be no order as to costs.

Judge

Judge

Announced in open Court on 2 March 2022 at Islamabad

Judge

Approved for Reporting
(M. Tauseef)

¹⁴ 1992 SCMR 428, para 11, p.432B.

¹⁵ 1993 SCMR 428, para 11, p.432B