

IN THE HIGH COURT OF SINDH, KARACHI

1. Suit No.940 of 1996
Muhammad Sher Khan
Versus
M/s. Long Life Builders

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2. Suit No. 646 of 1999
Khan Jamal
Versus
M/s. Long Life Builders and others

Mr. Muhammad Jamil, Advocate for Defendant No.2-Khan Jamal
in Suit No.940 of 1996 and representing same person as Plaintiff
in Suit No.646 of 1999.

Nemo for Defendants as well as Plaintiff in Suit No.940 of 1996

Date of hearing : 22.09.2016

Date of Judgment : 03.10.2016

JUDGMENT

Muhammad Faisal Kamal Alam, J: By this common Judgment both the titled suits are decided as they were consolidated by the order dated 25.08.2003. Subject matter of both the suits is a Plot bearing No.A-186, admeasuring 240 square yards together with the construction thereupon, situated in Block No.17, Scheme No.36, Gulistan-e-Jauhar, Karachi-*the Suit Property*. For the purposes of reference and identification of parties, the Plaintiff (Muhammad Sher Khan) of Suit No.940 of 1996, who is also Defendant No.3 in a subsequent Suit No.646 of 1999 will be referred as "***Claimant***", whereas, Defendant No.2 in Suit No.940 of 1996 and the Plaintiff of subsequent No.646 of 1999 will be referred as "***subsequent Plaintiff***" (Khan Jamal). Similarly,

Suit No.940 of 1996 is referred to as earlier suit and Suit No.646 of 1999 can be termed as subsequent suit.

2. Defendant No.1 (Long Life Builders) was an association of persons and was engaged in the development of real estate and had announced a residential Scheme by the name Long Life Houses, in Block No.17, KDA, Scheme No.36, Gulistan-e-Johar, Karachi. As per the contents of the pleadings of Suit No.940 of 1996 (earlier suit) the duration of completion of the said Scheme / project was 24 to 30 months.

3. According to Claimant (Plaintiff in Suit No.940 of 1996), he in response to the advertisement of Defendant No.1 (Long Life Builders), had made booking way back in January 1986 of a house to be constructed on the aforementioned Plot.

4. Grievance of above Claimant as mentioned in the Plaint is, inter alia, that even after making timely payments to the Defendant No.1/Builders, the latter had not delivered the possession of the aforementioned house/bungalow [suit property], as it was not completed within time, but due to which the Claimant suffered losses in the shape of repayment of loan obtained from House Building Finance Corporation (HBFC) and rentals, as at that relevant time he had no property of his own to live in. It is further averred in the earlier Suit that although a registered lease deed dated 20.02.1990 in respect of the suit property was executed between Claimant and Defendant No.1-the Builders, but without handing over the possession of the suit property to the Claimant (Muhammad Sher Khan), even after passage of considerable time. The imminent reason for filing the earlier suit (Suit No.940 of 1996) was allegedly an agreement dated 17.01.1996 filed as Annexure "G" by the Claimant (Mohammad Sher Khan) and available on Page-85 of the Court File, whereunder the transaction between the said Claimant and Builders

(Defendant No.1) in respect of the suit property was rescinded in consideration of monetary compensation though amount whereof is not mentioned in the said Agreement.

5. When all efforts of Plaintiff failed, including sending of a legal notice dated 07.02.1996, demanding handing over the vacant and peaceful possession of the suit property, he filed the present proceeding with the following prayer:-

“It is, therefore, prayed that this Hon’ble Court may be pleased to pass Judgment and Decree in favour of the Plaintiff and against the Defendant as follows: -

- a). ***That by virtue of lease deed executed by the Defendant in favour of the Plaintiff on 20th February, 1990, the Plaintiff being bonafide, legal and rightful owner of the property bearing Bungalow No.A-186, Scheme No.36, Gulistan-e-Jauhar, Karachi and the physical, actual and constructive possession may please be given and handed over to the Plaintiff.***
- b). ***That the rent for 85 months at the market rental value be ordered to be paid to the Plaintiff by the Defendants and onward till the disposal of this suit.***
- c). ***Mesne profit Rs.863,728/-.***
- d). ***That the Defendant his legal heirs, attorney servants, any person or persons working under him***

or claiming through him may please be to restrain not to sale, dispose of and mortgage Bungalow No.A-186, situated at Scheme No.36, Gulistan-e-Jauhar, Karachi.
- e). ***Costs of the Suit may be granted.***
- f). ***Any other / further relief or reliefs, which this Hon’ble Court may deem fit and proper in the circumstances of the case may also be granted.”***

6. Notices were issued but Defendant-builder did not contest the earlier suit. However, an Application under Order I Rule 10 of CPC (CMA No.644 of 1998), was filed by above Khan Jamal (Plaintiff of subsequent suit), who laid his claim on the above mentioned suit property and pleaded that a single story structure of the Bungalow was purchased by him from one Choudary Mohammad Pervaiz son of Muhammad Shafiq under a Sale Agreement dated 17.10.1997 (**Subject Sale Agreement**) for a total sale consideration of Rs.14,50,000/- (Rupees Fourteen Lac and Fifty Thousand Only).

7. In his application, the said Jamal Khan, who was later impleaded as Defendant No.2 by the order dated 14.01.1999, had leveled serious allegations against the Claimant, inter alia, that the latter (Muhammad Sher Khan) was never a genuine allottee of the suit property and his claim is false.

8. In the intervening period, the above named Khan Jamal also instituted a Suit No.646 of 1999 (subsequent suit) in order to safeguard his interest in respect of the suit property, wherein he impleaded Long Life Builders, as Defendant No.1, (which is also the Defendant No.1 in the earlier suit), Muhammad Pervaiz son of Muhammad Sahfiq, as Defendant No.2, from whom the said Khan Jamal (Plaintiff) is claiming to have purchased the said property, Muhammad Sher Khan (Claimant/Plaintiff of earlier Suit No.940 of 1996), Ch. Fiaz Muhammad and Zulfiqar Ali, who according to Plaintiff of subsequent suit were involved in the transaction in question and from whom his predecessor-in-interest, namely, Muhammad Pervaiz had purchased the suit property and these persons were actually the builders/representatives of Defendant No.1 (Long Life Builders). Since in the earlier Suit, Muhammad Sher Khan (Claimant) has sought, inter alia, specific

performance of the contract on the basis of a lease deed dated 20.02.1990, which purportedly was executed by the Defendant No.1 (Long Life Builders) in favour of said Mohammad Sher Khan, therefore, in the subsequent suit its Plaintiff has made a prayer for cancellation of this lease deed. It would be advantage to reproduce prayer clause of subsequent suit (**Suit No.646/1999**), which reads as under:-

“It is, therefore, prayed that this Hon’ble Court be pleased to pass Judgment and Decree in favour of the Plaintiff and against the Defendants as under: -

- a). *To declare that the Plaintiff is entitled to claim specific performance of the Agreement of sale dated 01.11.1997 having paid total sale consideration of the suit property to Defendant No.2 and is also entitled to remain in peaceful and undisturbed possession of the house situated on Plot No.A-186, measuring 240 Sq. Yards in the Project known as Long Life Bungalows situated on Survey Nos.186, 210 and 211, Block No.17, Deh Okewari KDA, Scheme No.36, Gulistan-e-Jauhar Karachi;*
- b). *Direct the Defendant No.2 or any person claiming through or under him to execute the transfer documents viz. lease deed, conveyance or any other document to complete the title of the Plaintiff in respect of suit property. In case the Defendant No.2, fails to do so; then the Nazir of this Hon’ble Court may be appointed / directed to execute the said documents.*
- c). *To declare the lease-deed purported to be executed by Defendant No.5 in favour of Defendant No.3 is illegal, void and liable to be adjudged void and cancelled.*
- d). *This Hon’ble Court may further be pleased to direct the Defendant No.3, to delivered the lease deed purported to be dated 20.02.1990 to this Hon’ble Court for cancellation;*

- e). *Restrain Defendants and all persons claiming through or under them from doing or causing to be done anything by which possession of the Plaintiff over the suit property is disturbed in any manner whatsoever.*
- f). *Costs of the suit.*
- g). *Any other / further and better relief which this Hon'ble Court may deem fit and proper under the circumstances of the case."*

9. Notices were issued to all the Defendants of the subsequent suit. Except for Plaintiff-Khan Jamal [of subsequent suit], no other Defendants including Muhammad Sher Khan, who has filed the above earlier suit, contested the claim of Khan Jamal.

10. Consequently, by the order dated 21.12.1999 service was held good on all the Defendants and on 24.01.2000 Defendants were ordered to be proceeded exparte. This Court on 27.05.1998 dismissed the earlier suit for non-prosecution, while observing that even Affidavit-in-Evidence on that day was not filed by the Claimant despite an undertaking. However, subsequently, on the Application preferred by the Claimant, his earlier Suit was restored by the order dated 30.09.1998. It is noteworthy to mention that though the evidence was not led by Claimant (of earlier suit) but he through his counsel has filed written arguments on 14.10.2010, that is, almost after two and half years from the date of the order of 27.3.2007, requiring the parties to file written arguments. By the order dated 25.08.2003 both suits were consolidated and on 03.11.2003 consolidated issues were framed, which are reproduced herein below: -

- "1. Whether the suit is barred by law?**
- 2. Whether the handing over possession by Mohammad Pervaiz to Plaintiff Khan Jamal was legal?**

3. *Whether the Plaintiff Khan Jamal is entitled to mesne profits, if so, at what rate?*
4. *Whether Plaintiff Khan is entitled for any relief?*
5. *Whether Plaintiff Khan Jamal has invested huge amount to make the suit property inhabitable?*
6. *Whether Plaintiff Khan Jamal is entitled for the specific performance of the contract against Defendant Mohammad Pervaiz or any person claiming through him?*
7. *What should the decree be?"*

11. Only Plaintiff has led the evidence by examining himself and the two attesting witnesses of above mentioned subject sale agreement.

12. On account of persistent absence of other contesting parties, their side was closed by the order dated 10.01.2005. Subsequently, Claimant of Suit No.940 of 1996 (earlier suit) moved an application under Section 151 of CPC (CMA No.4274 of 2006), for reopening of the side, but the same was also dismissed by the order dated 26.09.2006.

13. Claimant in Suit No.940 of 1996 did not enter the witness box to prove his claim.

14. On the other hand, the Plaintiff of subsequent suit entered the witness-box and his examination-in-chief was conducted in support of his affidavit-in-evidence and the documents filed therewith. Exhibit 5/2 is the original Sale Agreement executed between Defendant No.1-Long Life Builders and Defendant No.2-the said Choundary Mohammad Pervaiz from whom the present Plaintiff has purchased the suit property. Exhibit-5/5 is the subject Sale Agreement relating to the transaction in question, that is, when the present Plaintiff of subsequent suit had

contracted to purchase the suit property from Defendant No.2 for a sale consideration of Rs.14,50,000/- (Rupees Fourteen Lac and Fifty Thousand Only). With regard to the subject Agreement, the present Plaintiff led the secondary evidence under Article-74 of the Qanoon-e-Shahadat Order, 1984, after seeking approval from the Court through order dated 03.04.2001. In order to lead secondary evidence, the present Plaintiff of subsequent Suit has produced Report No.30 dated 22.02.2001, lodged at Police Station New Town, Karachi and Notice published in Daily Jang of 26.02.2001 as Exhibits 5/3 and 5/4 respectively [both in original] about misplacing of original subject agreement. In addition to this, he has produced a receipt issued by said Defendant No.2 as Vendor, acknowledging the receipt of above mentioned amount towards sale consideration from the present Plaintiff. This receipt has been exhibited as Exhibit-5/6. Few original receipts issued by the Residents of Long Life Builders Welfare Association have also been referred to by the learned counsel to prove his stance that the Plaintiff of subsequent suit (Khan Jamal) is in the physical possession of the suit property. These payment receipts have been exhibited as 5/51 to 5/55.

15. Another significant document is the original registered Irrevocable General Power of Attorney dated 6th November, 1997, which according to Mr. Muhammad Jamil, learned counsel representing Khan Jamal, was executed in favour of the present Plaintiff, enabling him to complete other formalities in respect of the suit property and to facilitate the present Plaintiff for perfecting his title in respect of the suit property. This Irrevocable General Power Attorney is available on record as Exhibit-5/7.

16. Mr. Muhammad Jamil, learned counsel has also referred to the pre-purchase public notice [Exhibited 5/8], possession order dated 17.12.1994, which has been produced as Exhibit-5/10 in favour of the above named Defendant No.2 and Possession Certificate as Exhibit-5/12, Site Plan of the suit property-Exhibit No.5/9 [all documents are in original] issued by Defendant No.1, in order to show that all the requisite formalities for purchasing a property as per law and the market practice was complied with. Beside this, few of utility bills in original have also been exhibited in the evidence by Khan Jamal-Plaintiff of subsequent suit to prove his claim that he purchased the suit property from its rightful owner who was in actual physical possession of the same. The two witnesses, namely, Abdul Majeed and Inamul Haq Choudhary, who have signed the subject agreement as attesting witnesses were also examined and their affidavit-in-evidence are available as Exhibit-6/1 and 7/1, respectively.

17. Both the above witnesses in their evidence have corroborated the plea of Plaintiff as well as the contents of subject sale agreement in respect of the suit property.

18. Findings on the issues are as follows:

ISSUE NO.1:	In Negative.
ISSUE NO.2:	In Affirmative.
ISSUE NO.3:	In Negative.
ISSUE NO.4:	In Affirmative.
ISSUE NO.5.	In Affirmative.
ISSUE NO.6.	In Affirmative.
ISSUE NO.7.	Suit No.940/1996 is dismissed and Suit No.646 of 1999 is decreed as prayed.

ISSUES NO.1, 2 AND 6.

19. Since the subsequent Suit is also for cancellation of the above mentioned registered lease deed dated 20.02.1990 in favour of Claimant Mohammad Sher Khan, therefore, at the very outset it is to be seen that whether the Plaintiff of subsequent suit (Khan Jamal) has brought his action in the shape of the Suit No.646 of 1999 within time. Undisputed facts are that the said Plaintiff (Khan Jamal) was impleaded as Defendant No.2 in the subsequent Suit by the order dated 17-12-1998, when his application under Order I Rule 10 of CPC being CMA No.6644 of 1998 was allowed, which was filed on 27.5.1998 and his subject agreement of sale is of 17.10.1997 (Exh 5/5). In his above application the Plaintiff had mentioned in detail about purchasing the suit property from Defendant No.2 of subsequent suit (Ch. Mohammad Pervaiz). The Plaintiff-Khan Jamal has specifically pleaded in paragraph-16 of his above mentioned application under Order I Rule 10 of CPC that he acquired knowledge about the earlier suit on 13.05.1998 when the Claimant and his representative approached the Plaintiff and informed him about the proceedings of earlier suit and demanded a heavy amount for withdrawing the same. Thus, in order to safeguard his interest in respect of the suit property, the Plaintiff has filed the subsequent Suit No.646 of 1999 on 12.05.1999, that is, within one year from acquiring knowledge about the pending proceedings of earlier suit and existence of the aforementioned registered lease deed in favour of Claimant-Sher Khan. Though the Claimant in his Counter-Affidavit to the above application of Plaintiff had disputed the claim generally but his (Plaintiff Khan Jamal) possession in respect of the suit property was not denied, though it was termed trespassing. No evidence to the contrary was led by Claimant and other Defendants to disprove that the Plaintiff (of subsequent Suit) had

the knowledge of existence of the registered lease deed in question at all material times. Therefore, there is no reason to disbelieve the version of Plaintiff (Khan Jamal) that he acquired knowledge about the impugned lease deed on 13.05.1998. The same fact the Plaintiff has pleaded in paragraph 11 of his plaint of his subsequent suit, which remained un-rebutted throughout. In terms of Article 91 of the Limitation Act [1908], the limitation period prescribed for cancellation of documents is three years. Accordingly, in the light of the above discussion the present subsequent suit filed by Plaintiff (Khan Jamal) in order to protect his right in respect of the suit property is within time.

20. Similarly, it is also necessary to take into account the pleadings and record of earlier Suit No.940 of 1996. As per the claim of Claimant (Plaintiff in Suit No.940 of 1996) he filed the said earlier suit on 12.09.1996 against a cause of action that accrued on 31.01.1986, that is, after more than 10 years. The impugned lease deed in favour of the Claimant was executed by Defendant No.1 (Long Life Builders) on 20.02.1990, that is, more than six years before filing of the said earlier suit. According to Paragraph-14 of the Plaint (of earlier Suit No.940 of 1996), the Claimant himself has pleaded that by virtue of an alleged agreement dated 17.01.1996 (Annexure "G" to the Plaint), the Defendant No.1 (Long Life Builders) had agreed that transaction between them and Claimant should be rescinded in lieu of monetary compensation to be paid to Claimant (Mohammad Sher Khan). Though the above document has been questioned by the Claimant, but no relief is sought against this document [the above annexure G]. The Claimant has not annexed the relevant record relating to the loan given by HBFC (as averred) with the Plaint of the earlier suit. Limitation prescribed for seeking specific performance of a contract is three years under Article 113 of the

Limitation Act, 1908. The Plaintiff of subsequent suit (Khan Jamal) who is Defendant No.2 in the earlier suit has taken a specific preliminary objection in his Written Statement that the said earlier Suit No.940 of 1996 is barred by limitation. The onus was / is on Claimant (Sher Khan) to demonstrate that his earlier Suit No.940 of 1996 is within time, which onus he has failed to discharge. The significance of Limitation Act (1908), has been expounded by the Hon'ble Supreme Court in a decision reported in PLD 2015 Supreme Court Page-212. It has been held, inter alia, that law of limitation is a substantive law and not a procedural one, therefore, it is obligatory upon the Court to dismiss a cause / *lis*, which is barred by time even though limitation has not been set out as a defence. Additionally, the conduct of a party in a proceeding of the nature can also be one of the determining factors in reaching a decision about genuineness and truthfulness of latter's claim. Case record of both the subject suits is evident of the fact that Plaintiff [Sher Khan] conduct is dubious and uncalled for, which lends support to the stance of Plaintiff [Khan Jamal] which he has pleaded in plaint [of subsequent suit] and further substantiated on oath that the above Claimant was in league with Defendant No.4; one of the partners/representatives of Defendant No1-builders, in order to exact money from Plaintiff [Khan Jamal]. In view of the above discussion the Suit No.940 of 1996 (the earlier suit) filed by Claimant (Sher Khan) is barred by law of limitation.

21. Considering the facts mentioned in the preceding paragraph, I hold that the suit filed by Khan Jamal is not barred by law but he had / has a legal character in terms of Section 42 of the Specific Relief Act, 1877, for filing the present proceedings [Suit No. 646 of 1999], inter alia, to safeguard his interest in respect of the suit property. Similarly, Khan Jamal-Plaintiff of subsequent suit has successfully discharged his

onus about being in possession of the suit property in view of the above mentioned facts and documents placed on record, which were never challenged by any of the parties despite providing them ample opportunity to lead evidence. It is also noteworthy to mention that Plaintiff of subsequent suit has produced original sale agreement dated 23.04.1992 between Defendant No.1 (Builders) and Defendant No.2 (Muhammad Pervaiz), the predecessor-in-interest of Plaintiff (Khan Jamal) and this document has been Exhibited as 5/2 and contents whereof were never questioned in the evidence. In clause-6 of this agreement [Exh.5/2] it is mentioned that the suit property with an incomplete structure was handed over to Defendant No.2 for a sale consideration of Rs.7,75,000/- (Rupees Seven Lac Seventy Five Thousand Only). In addition to these material documentary evidence, the Plaintiff has also produced in original the site plan of the suit property and possession order issued by Defendant No.1-Builders in favour of Defendant No.2, from whom the Plaintiff has purchased the suit property. Taking into account the testimony and documentary evidence which were never challenged by the adversaries, it can be held that the sale transaction between Plaintiff of subsequent Suit and Defendant No.2 in respect of the suit property is a valid one, and therefore, the Defendant No.2 is liable to perfect the title of the Plaintiff in respect of the suit property, inter alia, as the latter (Plaintiff-Khan Jamal) is also in lawful possession of the same. Even otherwise, the evidence led, witnesses examined and documents produced / exhibited corroborate each other for deciding that the sale transaction entered into by Plaintiff (Khan Jamal) is also as per the prevailing market practice. Consequently, I hold that Plaintiff-Khan Jamal is entitled for the specific performance of contract against the Defendant No.2 (Mohammad Pervaiz) and any persons through or under him, including the present Defendants. Therefore, Issue

No.1 is answered in Negative and in favour of Plaintiff-Khan Jamal but this Issue No.1 is answered in Affirmative with regard to the earlier suit of 940 of 1996, which is barred by law of limitation, whereas, Issues No.2 and 6 are answered in Affirmative.

ISSUES NO.3, 4 AND 6.

22. Since Khan Jamal has not claimed mesne profit in his subsequent suit, therefore, he is not entitled to any mesne profit, however, his plea of making investment in the suit property for making it a habitable residential Unit has not been disproved by the Defendants, therefore, incurring expenses of Rs.5,00,000/- (Rupees Hundred Thousand Only) at that relevant time has been proved.

23. It has been specifically stated on oath by Plaintiff (Khan Jamal) that proceedings of earlier suit is collusive, in particular between Claimant (Muhammad Sher Khan) and Defendant-Builders. Since this statement on oath was never rebutted in the evidence by the Defendants, therefore, the present Plaintiff has proved that the earlier proceeding [earlier Suit No. 940 of 1996] is in fact was/is collusive. Finding on the issue of cancellation of the above mentioned impugned Lease Deed is also necessary. Admittedly, Claimant of earlier Suit No. 940 of 1996 has neither examined himself [in the evidence] nor the impugned Lease Deed [of 20-2-1990] was proved by him [Plaintiff-Sher Khan], hence, the said impugned Lease Deed loses its evidentiary value. Applying the Rule of preponderance, it can be held that Plaintiff-Khan Jamal has successfully proved his stance in respect of the impugned lease deed dated 20.2.1998. Notwithstanding the above finding on the impugned lease deed, if the same is left outstanding [even in the above form], yet it tends to produce adverse legal effects for Plaintiff (Khan Jamal). Even otherwise, the present controversy cannot be effectively adjudicated

upon, unless the impugned lease deed dated 20.2.1990 is adjudged as cancelled.

Consequently Issue No.3 with regard to mesne profit is answered in Negative, whereas, Issues No.4 and 5 are answered in Affirmative and in favour of Plaintiff-Khan Jamal.

ISSUE NO.7.

24. In view of the discussions contained in the preceding paragraphs, the arguments of learned counsel with regard to invoking Section 41 of the Transfer of Property Act, 1882, that his client / Khan Jamal-Plaintiff in subsequent Suit was a bonafide purchaser without notice as well as invoking Section 27(b) of the Specific Relief Act, 1877, has substance. Consequently, subsequent Suit No.646 of 1999 is decreed as prayed. Defendants are directed to execute a valid lease deed in favour of Plaintiff {Khan Jamal} in respect of the suit property in order to perfect his title. Accordingly, Defendant No.3-Mohammad Sher Khan or any person claiming through or under him, including present Defendants in whose possession the original lease deed dated 20.02.1990 (the impugned document) in respect of the suit property is, are directed to surrender the said document-registered lease deed in original before the Nazir of this Court, who shall cancel the same. Accordingly, earlier suit (Suit No.940 of 1996), filed by Plaintiff-Mohammad Sher Khan is dismissed, with no order as to costs.

25. It is further directed that copy of this Judgment should be sent to the concerned Registrar/Sub-Registrar who has earlier registered the above impugned lease deed dated 20.02.1990.

26. In view of the above peculiar facts the Plaintiff-Khan Jamal (of Suit No.646 of 1999) is entitled to his costs.

Dated:_____

JUDGE

M.Javid/P.A.