IN THE HIGH COURT OF SINDH, KARACHI

Suit No.101 of 1984

[**Karachi Properties Investment Company (Private) Limited v. Karachi Properties Investment Company and others**]

Dates of hearing : **19.05.2017**

Date of Decision : **12.06.2017**

Plaintiff : **Karachi Properties Investment Company (Private) Limited, through Mr. Shahanshah Hussain, Advocate.**

Defendant No.1 : **Karachi Properties Investment Company (1974) (Private) Limited.**

Defendant No.2 : **The Custodian, M. R. Khan, Karachi, through Mr. Amel Khan Kansi, Advocate.**

Defendant No.3 : **The Federation of Pakistan, through Mr. Masood Hussain Khan, Assistant Attorney General.**

Law under discussion:

(i) Civil Procedure Code, 1908.

(ii) The Martial Law Order No.105, dated 21.03.1985 (**"MLO"**), reported in P L D 1985 (Central Statute) page-647.

Other material relied upon by the Counsel for the Plaintiff

1. Black's Law Dictionary, Eighth Edition.
   [***Bryan A. Garner, Editor in Chief***]

2. Ballentine's Law Dictionary, Third Edition
   [***James A. Ballentine***]

J U D G M E N T

***Muhammad Faisal Kamal Alam, J*:** This action at law has been brought by plaintiff against defendants, primarily for recovery of the amounts, the plaintiff claimed to have paid to the defendants for issuance of ordinary Shares (fully paid-up) by defendant No.1 [Karachi Properties Investment Company (1974) (Private) Limited] to the plaintiff. Following relief is sought:

"***PRAYER***

i) Judgment and decree for Rs.1,79,17,353/44 together with interest at 14% till realization of the amount.

ii) Cost of the suit.

iii) ***Any other relief which this Hon'ble Court may deem fit.***"

2. On service of notice, Written Statements were filed on behalf of defendants No.1 and 2. From the pleadings of the parties, following issues were framed.

"***1. Is the Suit barred by limitation?***

2. Is the Suit barred by the provisions of the companies Ordinance 1984?

3. Whether the affairs of defendant No.1 were in effect managed and controlled by shareholders / Directors of the plaintiff?

4. In what circumstances and for what purpose was a sum of Rs.93,00,000/- paid to defendant No.1?

5. Are the letters annexed to the plaint all forged and fabricated?

6. Whether defendant No.1 could agree to treat the sum of Rs.93,00,000/- as refundable deposit, as alleged?

7. Is the Suit collusive and fraudulent?

8. Is the plaintiff entitled to claim interest?

9. What should the decree be?"

3. In the earlier round of litigation, Judgment dated 01.02.2003, was delivered against the plaintiff and the suit was dismissed on the point of limitation. Later the present plaintiff, preferred an Appeal against the

decision being High Court Appeal No.139 of 2013, which was eventually decided on 05.12.2014 and the earlier Judgment was set aside and the learned Division Bench came to the conclusion that present Suit is not time barred and, therefore, it has to be decided afresh by this Court.

4. Learned counsel for both the parties have ably assisted the Court and the record of the case has been examined.

5. The Issue-wise finding is mentioned herein under:

Issue No.1	_____	In Negative.
Issue No.2	_____	As under.
Issue No.3	_____	In Negative.
Issue No.4	_____	Accordingly.
Issue No.5	_____	As under.
Issue No.6	_____	As under.
Issue No.7	_____	In Negative.
Issue No.8	_____	Affirmative.
Issue No.9	_____	Suit decreed.

Discussion / Reasons of the Issues;

Issues No.1 and 2.

6. Since with regard to Issue No.1, learned Division Bench has already given its findings, therefore, this issue is answered in **Negative** and in favour of plaintiff, that instant Suit is not a time barred claim. At the same time, it would be advantageous to reproduce below the relevant portion of the Judgment of H.C.A.No.139 of 2013 relating to this Issue of Limitation_

> **"***Admittedly, even from the contents of written statement it is obvious that the money was not advanced as a loan to respondent No.1, and no material available on record suggests that respondent No.1 at any point of time before filing the Suit refused to pay back the said amount or showed its inability, conveying its failure, to refund the same so as to attract vires of Article 97 of the Limitation Act, 1908, which prescribes a period of*

> *three years for filing the Suit after such failure to pay back the money. In the absence of such material, in our estimation, the transaction between the parties is controlled by residuary Article 120 of the Limitation Act, 1908, which lays down a limitation of six years for filing the Suit from the date of accrual of cause of action. The money was paid by the appellant on 23.04.1978 for purchasing shares of the respondent-company and if any cause of action is to be deemed to have accrued to the appellant to file the Suit for its recovery, it would be considered from such date. The Suit for its recovery was filed on 31.12.1983 that is within six years of its advancement, which, therefore, was not barred by time.*"
>
> [**Underlying to add emphasis**]

7. With regard to Issue No.2, the rival pleadings of the parties are examined together with the evidence that has come on record, which do not persuade this Court to give an Affirmative finding on this Issue, therefore, I hold that present Suit is not barred by any of the provisions of Companies Ordinance, 1984.

Issues No.3 and 4.

8. It is an undisputed fact, which can be deduced from the pleadings of the parties that defendant No.1-Company was incorporated with a particular object of promoting the project of 'Hayat Regency Hotel' in Karachi. The defendant No.1-Company came into existence in effect as a joint venture vehicle by the Directors of plaintiffs and group of Directors of another entity, viz. Hyesons Group of Industries.

Mr. Shahanshah Hussain, learned counsel for the plaintiff argued that though defendant No.1 filed its Written Statement, but they never entered the witness box to lead evidence, therefore, their stance is of no value. It has been further contended by the counsel representing the plaintiff, that defendant No.1 pleaded the reason for not issuing Shares in lieu of the amount of Rs.9.3 Million received by defendant No.1, as, from

the then competent Authority; Controller of Capital Shares, requisite permission was not obtained and it was a breach of commitment on the part of defendant No.1.

Plaintiff's side argued that though defendant No.1 constructed civil structure of above Hotel project but due to certain factors, project itself could not be completed. To address and resolve this situation, the Federal Government-defendant No.3 promulgated Martial Law Order No.105, dated 21.03.1985 (**"MLO"**), which has been gazetted on April 2, 1985, a copy whereof has been placed on record by the plaintiff's side. The present defendant No.2 has been mentioned as Custodian in the said MLO with the powers and authority to determine and compensate the parties / entities mentioned in subsection (2) of Section 4 of this MLO. The defendant No.1 (Karachi Properties Investment Company 1974 Limited) is mentioned in the last against serial (d) of the subsection. However, the stance of plaintiff's side is that the present plaintiff falls in the category of unsecured creditors, which have been mentioned at serial (c) of the above section. To a query about their status as creditors, Mr. Shahanshah Hussain has referred to the legal definition of the 'creditor' and 'debtor' as mentioned in Black's Law Dictionary, Eighth Edition and Ballntine's Law Dictionary, Third Edition. It would be advantageous to reproduce the meanings of 'creditor' as contained in these dictionaries, herein under:

Black's Law Dictionary:

> ***Creditor. 1.*** *One to whom a debt is owed; one who gives credit for money or goods. – also termed debtee.* ***2.*** *A person or entity with a definite claim against another, esp. a claim that is capable of adjustment of liquidation.* ***3.*** *Bankruptcy. A person or entity having a claim against the debtor predating the order for relief concerning the debtor. [Cases: Bankruptcy – 2822. C.J.S. Bankruptcy 239, 241.].* ***4.*** *Roman law. One to*

whom any obligation is owed, whether contractual or otherwise. Cf. DEBTOR.

Debtor. 1. *One who owes an obligation to another, esp. an obligation t pay money. 2. Bankruptcy. A person who files a voluntary petition or against whom an involuntary petition is filed – Also termed bankrupt. [Cases: Bankruptcy 2221. C.J.S. Bankruptcy 45.]*

Unsecured creditor. *See Creditor.-->* **Black's Law Dictionary** *[Ninth Edition]*

Ballentine's Law Dictionary:

Creditor. *An oblige, a person, natural or artificial, public or private, in whose favour an obligation exists by reasons of which he is or may become entitled to the payment of money, at least if the obligation is one on a liquidated demand based upon an agreement. Henley v Myers, 76 Kan 723, 93 P 168; Lindstrom v Spicher, 53 ND 195, 205, NW 231, 41 ALR 968, 971. A general creditor, a secured creditor, a lien creditor, and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity, and an executor or administrator of an insolvent debtor's or assignor's estate. 15 Am J2d Com C 7. As the term appears in an assignment for the benefit of creditors, "creditor" means one who has a definite demand against the assignor, or a cause of action capable of adjustment and liquidation at trial. 6 Am J2d Assign for Crs 109. As the term appears in the Bankruptcy Act, unless inconsistent with the context, "creditor" includes anyone who owns a debt, demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy. 9 Am J2d Bankr 389. Under the Uniform Fraudulent Conveyance Act, a creditor is a person having any claim, whether matured or unmatured, liquidated or unliquated, absolute, fixed, or contingent. Uniform Fraudulent Conveyance Act 1, applied in*

American Surety Co. v. Conner, 251 NY 1, 166 NE 783, 65 ALR 244.

debt. *A common-law action for the recovery of a fixed and definite sum of money or for a sum of money which can be ascertained from fixed data by computation or is capable of being readily reduced to certainty. 1 Am J2d Actions § 20; that which is owing to a person under any form of obligation or promise, including obligations arising under contract, obligations imposed by law without contract, even judgments. Anno: 12 ALR2d 799. In the broad sense of the term, "debt" includes a claim for unliquidated damages. Anno: 69 L Ed 380.*

In the ordinary sense, "debt" is not merely a promise to pay money but is an unconditional and legally enforceable obligation for the payment of money; it involves the relationship of debtor and creditor, or of borrower and lender. Evans v Kroh (Ky) 284 SW2d 329, 58 ALR2d 1446. In a narrower sense, a "debt" is an obligation arising out of contract, express or implied, which entitles the creditor unconditionally to receive from the debtor a sum of money which the debtor is under legal, equitable, or moral obligation to pay without regard to any future contingency. Evans v Kroh (Ky) 284 SW2d 329, 58 ALR2d 1446.

An action is one for a "debt," sufficient for the issuance of a writ of garnishment, where it is based on rescission of a contract because of fraud of the seller, and seeks recovery back of a specified sum paid under the contract, even though actual rescission of the contract before institution of the suit was prevented by absence of the defendant, and recovery of damages for fraud and deceit is requested in the alternative. Cleveland v San Antonio Bldg. & L. Asso. 148 Tex 211, 223 SW2d 226, 12 ALR2d 781.

The word "debt," appearing in a constitution or statute fixing a debt limit for municipalities, does not have a fixed legal signification but is used in different statutes and constitutions in senses varying from a very restricted to a

> *very general signification. Its meaning, therefore, in any particular statute or constitution is to be determined by construction. 38 Am J1st Mun Corp § 410. Unless absolutely required, the words "debt" or "liability" in debt limitation provisions should not be so interpreted as to paralyze the legal functioning of municipal corporations which have reached or exceeded their existing debt limits. Moores v Springfield, 144 Me 54, 64 A2d 569, 16 ALR2d 502.*
>
> *A sum of money which is payable is a debt, without regard to whether it be payable presently or at a future time. Hence, a debt may be a debt due or a debt not due. State ex rel. Rice v Wilkinson, 82 Mont 15, 264 P 679, 683.*
>
> ***[Underlying for emphasis]***

9. Main theme of submissions of plaintiff's counsel is about the admission made by witness of defendant No.2 (Custodian) in his cross-examination as well as in the pleadings about receipt of Rs.9.3 Million by defendant No.1. He argued that firstly the management of defendant No.1 was not in the hands of plaintiff's Board of Directors as admittedly defendant No.1 was incorporated by the two groups of Board of Directors of two different Companies, which have already been mentioned in the preceding paragraphs. The learned counsel for plaintiff has also referred and read out the **correspondences;** Exhibit No.5/1 to 5/7 (pages-3 to 15 of the Evidence File) exchanged between plaintiff and defendant No.1, in support of another plea that present Defendant No.1 acknowledged its indebtedness to the Plaintiff.

10. As against that, Mr. Amel Khan Kansi, the learned counsel for defendant No.2 has laid much emphasis on the element of collusiveness between plaintiff and defendant No.1. He has specifically referred to the cross-examination of P.W.-1, namely, Feroze Jamal, who in his cross-

examination has acknowledged that when the correspondences, Exhibit No.5/1 to 5/7, were exchanged between plaintiff and defendant No.1, **Darayas Minwala**, was the joint Managing Director at that relevant time of both the corporate entities, viz. plaintiff and defendant No.1. However, when confronted with the admission made by defendants' witness in his cross-examination about receipt of Rs.9.3 Million by defendant No.1 from plaintiff against issuance of shares, the learned counsel for defendant No.1 did not deny this aspect of the case, but drew the attention of this Court to the evidence of his witness about the above referred correspondences to prove that even the witness [DW-1] has clearly deposed that these Exhibits 5/1 to 5/7 were the fabricated documents.

The Defendant counsel seriously disputed the Claim amount of Rs.1,79,17,353/44, by referring to Plaintiff's evidence and stating that latter has failed to justify and prove any losses which can be made basis for claiming this inflated amount.

11. Mr. Masood Hussain Khan, Assistant Attorney General has adopted the arguments of learned counsel for defendant No.2.

12. Appraisal of testimony of each witness from plaintiff and defendants brings forth the following:

(i) It has been specifically pleaded in the plaint as well as deposed in the examination-in-chief that an amount of Rs.93,00,000.00/- (Rs. 9.3 Million) was paid to the defendant No.1 through Cheque No.AKF-021073, dated 23.05.1978 drawn on Habib Bank Limited (Club Road Branch, Karachi), as a sale consideration for issuance of fully paid ordinary shares of defendant No.1 to plaintiff. On this material aspect of the case, the plaintiff's witness (Feroze Jamal) could not be disproved, rather

the said P.W.-1 was never cross-examined on the factum of payment of Rs.9.3 Million through above cheque.

(ii) The defendants' witness (A. R. Khan) in his cross-examination has admitted that the above sum of Rs.9.3 Million was received by defendant No.1 from plaintiff towards their share price and the '***Shares were not issued against the money received***'.

13. The above leads to the conclusion that an amount of Rs.9.3 Million was in fact paid to defendant No.1 in consideration for the issuance of fully paid up Shares, which was never issued nor the amount was refunded to plaintiff, which is still now lying with defendant No.2 as Custodian; as admittedly under the said MLO, present Defendant No.2 has taken over the subject Hotel Project as its owner and administrator; that includes, taking over the affairs of Defendant No.1. The Custodian [Defendant No.2], *inter alia*, has the power and authority to sale, transfer and distribute the sale proceeds as compensation to the entities and persons mentioned in the said MLO. In addition to the above, it is also an undeniable fact, in the light of deposition of Defendant's witness, that Defendant No,2/Custodian took over the affairs of Defendant No.1 (Company).

14. That though Managing Director of plaintiff and defendant No.1 at that relevant time from 1978 to 1985, was the same person, that is, Darayas Minwala, but Directors of Hyesons Group of Industries were also there for managing the affairs of defendant No.1 and, therefore, defendant No.1 being a distinct juristic / corporate entity, cannot be said to have been managed by plaintiff's Board of Directors. Accordingly, I answer this issue in **Negative** and in favour of plaintiff.

15. Therefore Issue No.4 is answered accordingly that the amount of Rs.9.3 Million (rupees ninety three lakhs) was paid to Defendant No.1 for the issuance of its ordinary fully paid up shares to plaintiff.

Issues No.5, 6 and 7.

16. From the above discussion and appraisal of evidence, this finding cannot be given that the letters were forged and fabricated, for the reason that even the D.W.-1 in his deposition showed ignorance about the record of defendant No.1 when he took over as its Custodian under the aforereferred MLO. However, since at that relevant time Managing Director of both corporate entities; plaintiff and defendant No.1, was the same person, therefore, these Exhibits 5/1 to 5/7 (the Correspondences) exchanged between plaintiff and defendant No.1, *inter alia*, confirming the indebtedness of defendant No.1 to plaintiff, can neither be given due weightage nor be taken as a conclusive evidence.

Consequently, the Issue No.5 is answered that though the above letters / correspondences (Exhibit No.5/1 to 5/7) are not forged and fabricated, but at the same time cannot be made basis for conclusively deciding the present case for the reasons already mentioned in preceding paragraphs. In view of the discussion hereinabove, Issue No.6, in my view, can be answered in the term that once it has been acknowledged that defendant No.1 did receive a sum of Rs.9.3 Million from plaintiff and that too for a lawful consideration then, the former (defendant No.1) is liable to pay to the latter (plaintiff) the said amount. With regard to Issue No.7, relating to collusiveness of the Suit, the arguments of plaintiff's counsel has substance; that in view of the admissions made by defendants in their pleadings as well as in the evidence, the significance of alleged collusiveness has almost diminished. Secondly, defendant No.2, which has

a statutory status, was impleaded by this Court vide order dated 02.02.1986 and was given ample opportunity to contest the matter as is evident from the record as well as above referred High Court Appeal, but the said defendant No.2 / Custodian could not falsify the claim of the plaintiff to the extent of Rs.9.3 Million. Therefore, after impleadment of Custodian as defendant No.2, which for all intents and purposes was inducted in place of defendant No.1, ***as also observed in the above order of 02.02.1986***, therefore, the present suit / proceeding cannot be termed as collusive or fraudulent one and, therefore, I answer this Issue in **Negative**.

Issues No.8 and 9.

17. The plaintiff has claimed a total sum of Rs.1,79,17,353.44 (rupees eighteen million approximately), as according to Plaintiff, since the principal amount of Rs. 9.3 million has been utilized by the said Defendants to the detriment of plaintiff's interest.

18. Once it has been admitted by the defendants that a huge amount of Rs.9.3 Million was paid way back in 1978, which at that time was no doubt an enormous amount, then the onus is on defendants to prove that either they paid back this amount to plaintiff or kept this amount in a separate account and it was never utilized by them in their other transactions, but this onus the defendants have failed to discharge. Although the defendant No.2 (Custodian) in its Written Statement has taken up the defense that the amount of Rs.9.3 Million paid by plaintiff to defendant No.1 was kept in a Share Application Account in which no interest is accrued, but in their evidence, defendant No.2 and its witness did not produce any such document nor detail of such Accounts to corroborate his evidence; thus it is not proved by Defendants that no interest accrued on the above amount of

Rs. 9.3 million; rather in his cross-examination, to a specific question, the said Custodian's witness (D.W.-1) has showed his ignorance about the record available with him to support Defendant's above stance. To answer this issue, the provisions of the said MLO has also been taken into the account. One of the main objectives of the above enactment-MLO is, *inter alia*, to pay out the compensation to certain categories of persons and entities which have been mentioned under Section 4 thereof. In this regard, the counter argument of Mr. Amel Kansi [Defendant's counsel] is that the subject Project though has been sold, but the sale proceeds is to be distributed in accordance with the order of priority mentioned in the said Section 4 of MLO, wherein the present Plaintiff does not figure (appear) hence, present Defendant No.2-Custodian is not liable to pay out any amount to Plaintiff.

Undoubtedly no document has been produced by plaintiff in the evidence to prove the fact that plaintiff was in fact a 'secured creditor'. Secondly, Counsel of Defendant No.2-Custodian has rightly pointed out that Plaintiff has also failed to justify and prove its total claim of Rs. Rs.1,79,17,353.44/-[as mentioned in the Prayer clause]. But at the same time if the definition of 'creditor' or 'debtor' are carefully perused as mentioned in the above well-known Law Dictionaries, then in my considered opinion, the status of present plaintiff does fall within the ambit of an unsecured creditor as mentioned in subsection 2(c) of Section 4 of the above MLO, and, hence, is entitled to receive its admitted and determined amount of Rs.9.3 Million. Even otherwise, in view of the above discussion and particularly the undisputed factual aspect that has emerged after leading of evidence by the Parties; plaintiff and defendants, the latter [Defendants] are liable to pay the above amount of Rs. 9.3 million (rupees ninety three lacs) to Plaintiff.

In these circumstances, the Issue No.8 is answered in **Affirmative**. Thus, plaintiff is entitled to the markup as well, as the above admitted amount of Rs. 9.3 million {rupees ninety-three hundred thousand only} is lying with Defendant No.1 since 1978, which thereafter was transferred to Defendant No.2 in terms of said MLO. Consequently, I decree this Suit against all the Defendants jointly and severally, which are liable to pay the sum of Rs.9.3 Million {rupees ninety-three hundred thousand only} with 12% (Twelve percent) markup from the date of institution of this Suit till the realization of the amounts.

19. Parties are left to bear their own costs.

JUDGE

Dated: 12.06.2017.

Riaz Ahmed / P. S.*