

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No.920 of 2017

Date	Order with Signature of Judge
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Present: **Mr. Justice Nazar Akbar**

Plaintiff : Mst. Hajani Sherbano
Through Mr. Mushtaq A. Memon, Advocate

Defendant No.1 : Qazi Muhammad Fareed
Through Mr. Yawar Farooqi, Advocate.

Defendant No.2 : Sindh Building Control Authority through
(i) Director General
(ii) Deputy Director

Defendant No.3 : S.B.C.A through the Director,
Through Mr. Ghulam Akbar Lashari,
Advocate.

Defendant No.4 : Karachi Memon Co-operative Housing
Society Limited. (None present).

Defendant No.5 : Al-Riaz Co-operative Housing Society Ltd.
(None present).

Defendant No.6 : Karachi Cooperative Housing Societies
Union Limited. (None present).

Defendant No.7 : Federation of Pakistan. (None present).

Date of hearing : 07.09.2017

Date of Decision : 24.10.2017

JUDGMENT

NAZAR AKBAR, J:- By this order I intend to dispose of an application U/O VII Rule 11 CPC [CMA No.10916/2017] filed by defendant No.1. The only ground taken by the learned counsel for the defendant in the application is that the suit is time barred.

2. Learned counsel for the defendant has contended that through this suit, the plaintiff has sought recovery of possession of plot of land bearing No.136 situated in Block 7 & 8, Karachi Memon Cooperative Housing Society Limited, Usman Essa Bhai Road, Karachi measuring 1181 sq. yds, (the suit property) which is owned and possessed by defendant No.1 since 2007 as absolute

owner by virtue of a registered lease deed executed by defendant No.5 in the office of the competent sub Registrar Properties on **28.4.2007** (Annexure D/3 to the counter affidavit to application under Order 39 Rules 1 and 2 CPC). The plaintiff has claimed that she has acquired the suit property by virtue of mutation dated **02.5.2009** and transfer issued by defendant No.4 Karachi Memon Cooperative Housing Society Limited (Annexure 'C' at page-219 of the plaint). To assert her claim on the basis of mutation and transfer order the plaintiff alleged that on **12.5.2009** she was dispossessed when defendant No.1 by use of force illegally removed her watchman and, therefore, she had filed Criminal Complaint under Illegal Dispossession Act, 2005 for recovery of possession of suit property from defendant No.1. The said complaint No.105/2009 was ultimately dismissed and therefore, from her own showing in the plaint, the cause of action for recovery of possession of suit property has accrued to the plaintiff on **12.5.2009** and this suit has been filed on **29.3.2017**.

3. Mr. Yawar Farooqi, advocate for defendant No.1 has further contended that during the proceedings under Illegal Dispossession Act, 2005, defendant No.1 has filed and relied on a registered lease deed in her favour as defense. He has drawn my attention to the evidence of plaintiff's son in the criminal compliant No.105/2009 and the relevant portion is available at page No.345 of the plaint wherein the plaintiff through her attorney has admitted that:

"It is correct that I have not filed any lease deed and sale deed in respect of plot. It is correct that respondent has filed lease deed in the case. It is correct that lease deed filed by the respondent has not been challenged in any court. It is correct that suit No.763/2009 was filed for permanent injunction against me and other. It is correct that in my statement that above noted suit was decreed.

By referring to para-7 of the plaint, learned counsel contended that Defendant No.1 had also filed suit **No.763/2009** for Declaration and Permanent Injunction that she should not be dispossessed from the suit property without due course of law. The plaintiff's son, who was attorney in criminal complaint and has also filed present suit on her belief was a party as defendant No.1. However, she did not prefer any suit for cancellation of the registered document during the last 8 years and therefore, her prayer for cancellation of a registered document is also hopelessly time barred. Learned counsel for defendant No.1 has further contended that the title and possession of defendant No.1 is otherwise perfect since defendant No.5 in 2011 has also filed a **suit No.85/2011** challenging the title and possession of defendant No.1 was dismissed and it has attained finality since no appeal was filed against the dismissal of the said suit. In suit No.85/2011 the plaintiff herself was directly a party as defendant No.3 and even she has not preferred any appeal or otherwise shown any grievance against the dismissal of suit about title of defendant No.1 in respect of the suit property. The possession of the plaintiff is continuous since 2007 and attempts of the plaintiff herself and at her behest by defendant No.5 challenging the title of the plaintiff and his possession has already been rejected by this Court. Therefore, this Court has no jurisdiction to entertain the suit being time barred as the jurisdiction of the Court is subject to limitation.

He has relied on the following case laws:-

- i) S.M Shafi Ahmed Zaidi through Legal Heirs vs. Malik Hassan Ali Khan (Moin) through Legal Heirs **(2002 SCMR 338)**;
- ii) Dr. Muhammad Javaid Shafi vs. Syed Rashid Arshad and others **(PLD 2015 Supreme Court 212)**;

iii) Muhammad Iqbal through duly authorized Attorney vs. Muhammad Ahmed Ramzani and 2 others **(2014 CLC 1392)**.

4. Learned counsel for the plaintiff, at the very outset, has referred to judgment dated **07.3.2017** passed by Hon'ble Supreme Court in Civil Petition No.860-K/2006 dated 07.3.2017 (annexure H/3 to the plaint). According to him, the limitation for filing the instant suit starts from the date of the said judgment. He has emphasized on the observation that *"she (plaintiff herein) may seek the proper remedy before the appropriate Court of law which matter shall be decided by the Court being uninfluenced from the impugned consent order. In the light whereof, this petition is disposed of"*. He has further contended that right from 2009 when the plaintiff was forcibly dispossessed by defendant No.1, the plaintiff is vehemently pursuing her claim for possession of the suit property from defendant No.1 before different forums including lodging FIR as well as criminal complaint under Illegal Dispossession Act, 2005. He has also contended that **Section 14** of Limitation Act, 1908 is also attracted, since the plaintiff was bonafidely pursuing her claim in the Court of Law. On enquiry, the Court was informed that the plaintiff has filed an appeal against the acquittal of defendant No.1 on dismissal of her complaint under the Illegal Dispossession Act, 2005 by the District and Sessions Judge. He has vehemently claimed that through suit No.85/2011 the executant of lease of suit property namely Al-Riaz Cooperative Housing Society Limited (defendant No.5) has dis-owned the suit property allegedly transferred in favour of defendant No.1.

5. Heard learned counsel for the parties and perused the record.

6. The requirement of Order VII Rule 11 CPC, amongst other, is that *the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law*. In para-5 of the plaint the plaintiff herself has averred that on **12.5.2009** her chowkidar had unlawfully and through use of force been removed from the suit property. Therefore, irrespective of the title of the person who has dispossessed her and/or even her own title whether doubtful or not a right to sue has accrued to her on **12.5.2009** for recovery of possession of suit property under **Section 9** of the Specific Relief Act, 1877 against defendant No.1 for which limitation is only six months (Article 3 of Limitation Act, 1908). It is also borne from the plaint that the plaintiff has filed criminal complaint under **Section 3** and **4** of the Illegal Dispossession Act, 2005 with, amongst other, the following prayers:-

- a. *To restore the possession of the said property to the Complainant or her attorney on proper verification in presence of the Nazir of this Hon'ble Court, through the SHO/Respondent No.5.*
- b. *To take cognizance and pass the Order for registration of criminal Complaint against the Respondent No.1 & 3, his accomliees/ land grabbers illegally in occupation of the said property.*

She has herself opted for recovery of possession through the aforesaid proceedings and she has not filed a suit for recovery of possession. But on **29.11.2014** she lost when the learned IV-Additional District & Sessions Judge, East Karachi dismissed criminal complaint No.105/2009. Her criminal acquittal appeal No.328/2014 is pending before this Court.

7. It is also on the record that the plaintiff herself was defendant No.3 in **suit No.85/2011** filed by defendant No.5

against defendant No.1 herein for cancellation of sub-lease and recovery of possession of the suit property from defendant No.1. Interestingly in the suit filed by defendant No.5, one of the prayers was that after cancellation of lease in favour of defendant No.1 the suit property may be handed over by defendant No.1 to defendant No.3 (plaintiff herein). Here it is necessary to reproduce the prayer No.2 in suit No.85/2011.

(ii) *That the **defendant No.1** be ordered to **hand over peaceful possession of the said plot to the defendant No.3** with immediate effect.*

With dismissal of suit No.85/2011, this Court rejected the claim of defendant No.5 (plaintiff in suit No.85/2011) to hand over suit property to defendant No.3 (plaintiff herein) in her presence by order dated **18.1.2013**. However, she did not file suit for possession within three years even from **18.1.2013** nor preferred an appeal against the rejection of plaint of suit No.85/2011. Therefore, in the instant suit prayer **clause 'D'** that "*defendant No.1 has no right to retain physical possession thereof*" and "*that the defendant No.1 is liable to restore the physical possession to the plaintiff*" is hit by the principal of resjudicata and also barred by law of limitation.

8. Besides the above, it is obvious from the plaint itself that the plaintiff had acquired the knowledge of existence of registered instrument in respect of the suit property in favour of defendant No.1 sometime in 2010 or even before and yet she waited for almost seven years to file a suit on **29.3.2017** for seeking relief of cancellation of it. The plaintiff in paragraph No.8 of the plaint has referred to and filed copies of judgment and decree in suit No.85/2011 as annexure D/1 and D/2. Therefore, the existence of

registered lease deed of the suit property in favour of defendant No.1 had come to the notice/knowledge of the plaintiff in 2009 as well as in 2011 when the proceedings under Illegal Dispossession Act, 2005, and suit No.85/2011 were initiated against defendant No.1 by the plaintiff and defendant No.5 respectively. The suit No.85/2011 was filed on **30.12.2010** and it was dismissed by judgment dated **22.01.2013**. Therefore, in presence of the aforementioned decree, the prayer clause (g) regarding cancellation of lease deed in the instant suit also suffers from resjudicata since it is identical to payer clause (i) of suit No.85/2011. Prayer clause (g) in the instant suit and prayer clause (i) in suit No.85/2011 are reproduced as follows:-

Suit No.85/2011 prayer clause (i)	Suit No.920/2017 prayer clause (g)
<p><i>That the allotment letter dated 21.6.1982 (P-1) and sub license No.2 dated 3.6.2010 (P-2) in respect of Plot No.136, Block 7 & 8 situated at Usman Essa Bhai Road, near Hill Park, off Shaheed-e-Millat Road, Karachi issued by the plaintiff society in favour of defendant No.1 are void and of no legal effect and as such cancelled.</i></p>	<p><i>Mandatory injunction directing the defendant No.1 and/or his assign to deliver-up for cancellation the Allotment Letter No.180 dated 21.6.1982, Sub-license No.2 dated 3.6.2010 and/or any other document pertaining to the above referred plot as may be set-up to raise claim adverse to the title of plaintiff pertaining to the subject plot.</i></p>

The suit for relief of cancellation or setting aside an instrument is filed under **Section 39** of Specific Relief Act, 1877 for which **Article 91** of the Limitation Act, 1908 provides only three years as limitation when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him/her. The facts entitling the plaintiff to seek relief of cancellation of the registered sale deed in favour of defendant No.1 came to her knowledge in 2010 or even before and, therefore, irrespective of the fact that there is already a decree of dismissal of a suit for cancellation of the same instrument as well as judgment rejecting

the prayer for handing over possession of the suit property to the plaintiff, the instant suit is hopelessly time barred.

9. The contention of learned counsel for the plaintiff that limitation to file suit for recovery of possession begin on **7.3.2017** when plaintiff's CPLA No.864-K/2017 was dismissed by the Hon'ble Supreme Court is misconceived. Defendant No.1 has filed a C.P No.D-3164/2015 against KBCA and Master Plan Department, CDGK which was decided by consent order on **13.10.2016**. The plaintiff herein has challenged the said consent order before the Hon'ble Supreme Court, though she was not party in the said constitution petition before the High Court. The issue before Hon'ble Supreme Court was not about the ownership and title of the plaintiff. Therefore, Hon'ble Supreme Court has directed her to seek clearance and declaration of title from the appropriate Court of law and further clarified that the same shall be decided by the Court being **uninfluenced** from the impugned consent order. Such findings of the Hon'ble Supreme Court were not condonation of delay for seeking clearance and declaration of the title nor it can be considered as the beginning of time for seeking relief of declaration, possession and cancellation of registered instrument in respect of the suit property.

10. The other contention of the learned counsel that **Section 14** of the Limitation Act, 1908 may be attracted in this case is also misconceived. The provision of **Section 14** of the Limitation Act, 1908 are attracted only to exclude the time of proceedings bonafidely pursued in a Court without jurisdiction. In the case in hand the plaintiff has been pursuing Crl. Complaint in a Court having jurisdiction to entertain the said criminal complaint. Her **CrI. Acquittal Appeal No.328/2014** is still pending before this

Court against the dismissal of Crl. Complaint No.105/2009. However, the plaintiff has never approached any Court for seeking declaration of title of suit property (prayer clause 'A') though her title was under cloud since 2009 when defendant No.1 had allegedly dispossessed her and has set up his own title to defend possession and she was required to approach the Court to seek a declaration of title under **Section 42** of the Specific Relief Act, 1877. Her own proceedings under **Sections 3 and 4** of the Illegal Dispossession Act, 2005 were not in the nature of a remedy for declaration of ownership and cancellation of registered document. Strangely enough instead of plaintiff, defendant No.5 had filed suit No.85/2011 for cancellation of title document of defendant No.1 with an additional prayer that the possession of the suit property may be handed over to the plaintiff herein. But once the plaint of suit No.85/2011 was rejected, the plaintiff herein did not prefer any appeal nor the defendant No.5 and, therefore, it cannot be said that the plaintiff was prosecuting her right to seek cancellation of registered title document and possession before any Court of law which had no jurisdiction.

11. In view of the above facts and discussion, in my humble view the suit from the statements in the plaint appears to be hopelessly time barred, therefore, the plaint is rejected.

J U D G E

Karachi,
Dated: 24-10-2017

*Ayaz Gul/PA**