IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

C.P. No. D-246 of 2014

Present:
Mr. Justice Mehmood Ahmed Khan
Mr. Justice Khadim Hussain Tunio-JJ.

Petitioner: Saindino, through Mr. Talib Hussain Bhatti

Respondents: 1. Muhammad Uris, through Mr. Jagdish R. Mullani, Advocate.

2. Mukhtiarkar (Revenue) Daur

3. Sub-Registrar, Nawabshah

4. Province of Sindh

5. Learned District Court, Shaheed Benazirabad through Mr. Alalh Bachayo Soomro, A.A.G.

Date of hearing: 21.02.2018.

Date of decision: 21.02.2018.

JUDGMENT.

KHADIM HUSSAIN TUNIO, J:- Through captioned constitution petition, the petitioner has challenged the impugned judgment dated 31.01.2014 passed by learned District Judge, Shaheed Benazirabad in Civil Revision Application No.33 of 2013 whereby while setting aside the order dated 30.09.2013 passed by the learned 1st Senior Civil Judge, Nawabshah rejected the plaint of petitioner under Order 7 Rule 11 CPC.

2. Brief facts of the instant petition are that the petitioner paid an earnest money to the Respondent No. 1 in the sum of Rs. 3,50,000/- from a total of Rs. 4,75,000/- for the purchase of the suit land, however when the petitioner approached him, the Respondent ignored it and failed to complete his part of the deal. Hence, the petitioner filed a suit for Specific performance and injunction against the Respondent No. 1. The respondent No.1 filed counter affidavit on application u/o 39 Rule 1 & 2 C.P.C in the Court of 1st Senior Civil Judge, who after hearing the parties, dismissed the application of the respondent No.1 vide order dated 30.09.2013. Being dissatisfied with the aforesaid order, he filed a Civil Revision before the Court of learned District and Sessions Judge, who after hearing the parties,

set-aside the impugned order passed by learned trial Court. Against that order, the petitioner preferred instant Petition.

3. Learned counsel for petitioner submits that the impugned order passed by the Appellate Court is bad in law, facts, equity and principles of justice; that the suit is not barred under Article 113 of the Limitations Act; that the learned Appellate Court failed to consider the material aspect of the case while passing the impugned order; that the purpose of rejection of the plaint, maintainability of the suit is no ground and besides maintainability of the suit is a mixed question of law and facts, which can only be adjudicated upon after recording the evidence and framing of appropriate issues; that it is settled law that for deciding application u/o VII Rule 11 C.P.C, Court has to look into the averments of the plaint and for all intends and purposes same to be treated as correct; that the provisions of Order VII Rule 11 C.P.C is not exhaustive in every situation and application of the Respondent No.1 was not attracted to the suit of the petitioner. He prays that the impugned judgment be set aside.

4. Learned counsel for Respondent No. 1 has supported the impugned judgment while arguing that the Appellate Court has rightly dealt with the Revision application, as the same has been passed, per law, by considering the merits of the case.

5. Learned A.A.G for the respondents No.2 to 4 has argued that Article 113 of Limitation Act provides the period of three years, would run for filing a suit for Specific performance. The actual date of the Calendar Month for performance of the promise was not mentioned. However, when an agreement specifies the person to perform his part of the agreement, it can be performed on any day of the month. According to the agreement dated 05.04.2006, it is mentioned that the petitioner has filed a suit on 26.11.2012, therefore, the suit is hopelessly time barred. He further argued that as per the contents of agreement no possession was delivered to the petitioner and the Respondent No. 1 handed over vacant possession of the suit land through a receipt of land Revenue which shows that he is in possession, paying land rent, notice and revives the cause of action afresh from the date of legal notice, served subsequently.

6. We have heard the arguments advanced by the either parties and learned A.A.G and have perused the record prudently.

7. At the outset, we would say that since the provision of Order VII R 11 of the Code has an effect of non-suiting the plaintiff without trial (in other words *fair-trial)* which *otherwise* is guaranteed right of every party to a *lis.* This seems to be reason that *normally* such exercise is confined to averments of the plaint only which too by considering as *true* (for provision of Order VII rule 11 only). However, since this *criterion* was / is likely to give a license to plaintiff to plead even by concealing material facts and documents therefore, an exception has been provided to said criterion whereby the **'admitted facts & documents',** even if coming on surface through defence, may well be considered to examine maintainability of suit or *otherwise.* Reference may well be made to the case of ***Noor din & another v. ADJ, Lahore & Ors*** **2014 SCMR 513**, wherein it is held as:

> *"5. …The object of the powers conferred upon the trial court under Order VII, Rule 11 CPC is that the Court must put an end to the litigation at the very initial stage when on account of some legal impediments full-fledged trial will be a futile exercise.*
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> *"6. It is settled principle of law that while deciding an application under Order VII R 11 CPC, the Court is legally required to confine itself to averments of the plaint only and the same are to be taken as true. The Court can take into consideration even defence or document (s), brought onto record by defence side, but this exception is subject to the limitation that such defence or document should be irrefutable rather admitted. The reference, if any, can well be made to case laws "S.M. Shafi Zaidi through LRs v. Malik Hasan Ali Khan (Moin) through Legal heirs (2002 SCMR 38) wherein it is held"-*
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> *"14. Besides, averments made in the plaint other material available on record which on its own strength is legally sufficient to completely refute the claims of the plaintiff can also be looked into for the purpose of rejection of the plaint. It does not necessarily mean that the other material shall be taken as conclusive proof of the facts stated therein but it actually moderates that other material on its own intrinsic value be considered along with the averments made in plaint".*

8. The *legal* position, being so, is sufficient to reject the plea of the counsel for the defendant that *'if* the false statements, given in the plaint, are excluded, the suit as a whole does not disclose any cause of action in

favour of the plaintiff. The exercise of jurisdiction within meaning of Order VII R 11 of the Code does not permit the Courts to declare a *claim* or *document* as a false unless the same are **'undisputed rather admitted'.** Such could only be after proper adjudication of involved questions (issues).

9. We would also add that we are quite conscious of the legal position that *normally* where things are not *prima facie* making a lis falling within meaning of clauses 11(a), (b) and (d) of Order VII of the Code the non-suiting of parties (rejection of plaint) be avoided. In the case of ***MANAGING DIRECTOR SUI SOUTHERN GAS COMPANY*** **Ltd. Karachi *V. GHULA MABBAS*** **and others (PLD 2003 Supreme Court 724)** the Hon'ble Apex Court has been pleased to observe that:--

> ***(k) Limitation -- Administration of Justice -- Decision of the cases on merits always to be encouraged instead of non-suiting the litigants for technical reasons including on limitation (p.769).***

10. Now, while taking the *plea* of suit, being barred by limitation, we would not hesitate for a moment to hold that law of limitation is not a mere matter of technicality but is a foundation of the "LAW" hence if the facts and circumstances particularly of the *plaint,* on perusal, bring no other conclusion but that of suit being barred by law of limitation then the same has to be rejected. Reference may well be made to the case of ***Hakim Muhammad Buta & another Vs Habib Ahmed & Ors*** **(PLD 1985 SC 153)** wherein it is held as:-

> *"4. … If from the statement in the plaint the suit appears to be barred by limitation, the plaint shall have to be rejected also under Order VII, rule 11 C.P.C. The law therefore, does not leave the matter or limitation to the pleadings of the parties. It imposes a duty in this regard upon the Court itself…*

11. To succeed in getting a plaint rejected on account of limitation, the party, so claiming, will have to establish that on *bare* reading of the plaint the suit is *patently* barred by limitation but where there are circumstances, situations or happening of *claimed* facts leave a room open for determination then it would never be advisable to reject the plaint rather it would be better to treat the same as **'mixed question of law and facts'** to be answered after trial. We are guided in such conclusion with the case of ***Mushtaque Ali Shah v. Bibi Gul Jan*** **2016 SCMR 910** wherein it is held as:-

> *"22. As regards Mr. Awan's contention that the question of limitation being a mixed question of law and facts ought to have been decided after recording evidence, we may observe that* ***it is only in cases where determination as to when the cause of action for the suit arose, is dependent upon a certain factor, situation, happening or occurrence, existence, extent and the nature whereof could only be ascertained after recorded evidence, that the question of imitation needs to be determined after such evidence****. However, where on the plain reading of the plaint, as in the present case, it can be clearly seen that the suit is patently barred by limitation, no evidence is required. In fact to plead that a plaint cannot be rejected, for the suit being barred by limitation / law, without recording evidence is to plead against the mandate of law as contained in Order VII, Rule 11 of the Code of Civil Procedure, which essentially requires the Court to reject the plaint which appears from its contents to be barred by limitation."*

12. Having said so, we would proceed further to see whether the case of plaintiff falls within first category, what we find from perusal of the record that per averments, made in plaint, petitioner/plaintiff claims accrual of cause of action i.e. when the Respondent No.1/Defendant No.1 avoided to obtain *fardi* and *intekhab* and execute final sale deed in favour of Petitioner/Plaintiff and he was compelled to serve the respondent No.1/ Defendant No.1 with notice through his advocate and finally one day before filing of the suit (day before yesterday), when the Respondent No.1/Defendant No.1 turned dishonest and for the first time found negotiating the sale of the suit plaint with others and threatened to over-throw the petitioner/plaintiff from the suit land by shear force and refused to come to any terms and declined to obtain *fardi* and *intekhab* regarding the suit land for executing final sale deed in favor of petitioner/plaintiff.

13. Further, the perusal of written statement, filed by the Respondent No.1 himself, would show that he has specifically stated in his written statement that "*the plaintiff finding that the answering defendant is in possession of the suit land managed the things and he along with others on the night in between 20th and 21st, March 2013, at about 8:00 pm came on the suit land duly armed with deadly weapons and brought thrashers and tractors and started thrashing the wheat dera and thrashed wheat of an area of 4.00 acres weighing almost 200 maunds in the whole night and the Respondent No.1 on coming to know about the arrival of the plaintiff and others on the suit land and thrashing of wheat rushed to the suit land along with Ghulam Nabi and Allah Warayo and asked plaintiff and others that there is prohibitory status quo order of*

the land along with tractors and thrashers and as to why they were thrashing his wheat, but they did not listen and forcibly occupied the suit land in utter violation of the prohibitory status quo orders issued by the Hon'ble Court, on which the answering defendant filed Contempt Application against the plaintiff and his companions and also moved such application to SSP Nawabshah who endorsed the same to SHO P.S. Daur, but nothing has been done as the plaintiff is coming from the ruling party."

14. Further, it is also matter of record that the Respondent No.1 filed FC Suit No. 129 of 2013 Re. Muhammad Uris V. Sain Dino and others against the present petitioner/plaintiff for declaration, so also filed application u/o VI Rule 17 CPC for amendment of the pleadings and seeking relief of possession of the suit land, which was allowed by the Senior Civil Judge, Nawabshah and set aside by the District Court. Same has been assailed by the Respondent No.1 through C.P No. D-1499 of 2015.

15. Such inclusion followed by claimed refusal of Respondent to execute final sale deed, which has been pleaded as fresh, continuity of cause of action, prima facie, the petitioner/plaintiff in her plaint has pleaded number of circumstances, facts and manner of happening of incident lasting on a threat to surrender his rights which bring the question of limitation, nothing short of a mixed question of law, dependent upon proper determination which could only be done after completion of trial.

16. Be that as it may, it is also a matter of record that the plaintiff on the basis of averments, made in the plaint, has also included the delivery of possession. Needless to add that the plaint *legally* cannot be rejected in part; even if one of the prayers is maintainable then the plaint cannot be rejected. Reference may well be made to the case of ***Attaullah v Sanaullah*** **PLD 2009 Karachi 38)**. In another case of ***Pakistan Agricultural Storage & Ors Corporation Ltd V. Mian Abdul Latif & Ors*** **PLD 2008 SC 371** wherein it is held as:-

> *"6… and if the Court on the basis of averments made in the plaint and documents available comes to the precise conclusion that even if all the allegations made in the plaint are proved; the plaintiff would not be entitled to the relief claimed, then the Court would be justified to reject the plaint in exercise f powers available under Order VII, Rule 11 CPC."*

17. Per Article 142 of Limitation Act the period for such relief is **"twelve years"** commencing from date of ***'dispossession*** or ***discontinuance'.*** Since, the law itself provides *specific* period hence no reference is needed however reference may well be added to the case of ***Wazir Khan v. Qutab Din*** **PLD 2009 SC 95** wherein it is held as:-

> *"8.. We perused the contents of the plaint and found that though the suit is titled simply as one for possession, however, in the relief sought at the end of the plaint in addition to prayer for possession, declaration for setting aside the two mutation has also been sought. Having said that, this controversy, as will be seen, is not relevant for the purpose of determining the issue of limitation. We intend to examine the question on the premises that it was a suit for possession and, therefore, could have been brought within twelve years of the plaintiff's dispossession, which is also the case of the plaintiff / appellant."*
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> *9. The two relevant provisions in the Limitation Act for filing suit for possession are, Articles 142 and 144. The two relevant provisions in the Limitation Act for filing suit for possession are, Articles 142 and 144. The learned counsel for the appellant has pressed into service the latter. A suit for possession of immoveable property when the plaintiff has been dispossessed is covered by Article 142 and* ***the time is to be reckoned from the date of the plianitff's dispossession.…****..*

18. In view of foregoing reasons, the present Constitutional Petition was allowed and the impugned order dated 31.01.2014 passed by learned District Judge, Nawabshah was set aside and the order dated 30.09.2013 passed by learned Ist. Senior Civil Judge, Nawabshah was maintained, whereby he dismissed the application u/o VII Rule 11 CPC filed by the respondent No.1. These are the reasons of our short order dated 21.2.2018.

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