

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
SUIT N. 207 / 2009

DATE ORDER WITH SIGNATURE OF JUDGE

Plaintiff: M/s Democrat Construction Company Pvt. Ltd through Mr. Muhammad Yaseen Azad Advocate.

Defendant: Abdul Rashid through Mr. Mansoor Ahmed Shaikh Advocate.

- 1) For hearing of CMA No. 1478/2009.
- 2) For hearing of CMA No. 12105/2010.
- 3) For examination of parties and settlement of issues.

Date of hearing: 16.03.2018.

Date of order: 16.03.2018.

ORDER

Muhammad Junaid Ghaffar, J. This is an application (CMA No. 12105/2010) under Order VII Rule 11 CPC filed on behalf of the Defendant primarily on the ground of Limitation.

2. Learned Counsel for the Defendant submits that the Plaintiff in this Suit seeks a relief in respect of Settlement Agreement dated 15.6.1992 and an affidavit dated 19.10.1998 whereas, this Suit has been filed in 2009 i.e. after expiry of limitation period. He further submits that in fact the Suit ought to have been filed for Specific Performance of the Agreement, but instead; a Suit for Declaration has been filed for implementation of the Agreement which in pith and substance can only be termed as a Suit for Specific Performance. Per learned Counsel under Article 113 of the Limitation Act, 1908, the Suit is hopelessly time barred, whereas, reliance of the Plaintiff on some

receipts of the year 2007 is not relevant as the same does not disclose as to in what respect they were issued and therefore, the plaint is liable to be rejected.

3. On the other hand, learned Counsel for the Plaintiff submits that the Agreement in question was entered into by the predecessor in interest of the Plaintiff company as now the same is being managed by new owners and it subsequently came into their knowledge that some Agreement was entered into and thereafter, on 15.5.2007 and 18.6.2007 an amount of Rs. 30,000/- and Rs. 50,000/- respectively was paid to the Defendant; hence, the limitation would start running from such date and the Suit is within time. In support he has relied upon ***Ghulam Ali V. Asmatullah and another (1990 SCMR 1630), Fatima Moeen V. Additional District Judge, Sheikhpura and 22 others (1992 SCMR 1199), Jewan and 7 others V. Federation of Pakistan and 2 others (1994 SCMR 826) and Manzur Ahmed and 7 others V. Abdul Khaliq and 2 others (1990 SCMR 1677).***

4. I have heard both the learned Counsel and perused the record. It would be advantageous to refer to the prayer clause of the Suit which reads as under:-

- “1) To declare that the Agreement of Settlement dated 15.6.1992 as well as affidavit dated 19th October, 1998 are the valid documents and on the basis of these two documents the Plaintiffs are owner of the land and Defendant is not competent to claim the ownership of the property.
- 2) To cancel the Lease due to subsequent Agreement of Settlement dated 12.02.1992 and 19.10.1998.
- 3) Restraining the Defendants, his agents, representatives, employees or servants from dispossessing the Plaintiff from the land in question or to create any third party interest.
- 4) Any other relief which this Hon’ble Court deem fit and proper under the circumstances, of the case.”

5. Perusal of the aforesaid clause reflects that the Plaintiff seeks a Declaration that Agreement of Settlement dated 15.2.1992 (wrongly mentioned as 15.6.1992) as well as affidavit dated 19.10.1998 are valid documents entitling the Plaintiff to claim a lawful ownership of the Suit property. The other prayer is for cancellation of the lease of the Defendant. The case as set up by the Plaintiff is to the effect that the Agreement in question was entered into by the predecessor in interest of the Plaintiff Company's management and it was not in their knowledge until 2007 and thereafter, they immediately approached the Defendant and paid certain amounts. Therefore, according to the Plaintiff, the limitation would start from 2007. However, I am not in agreement with such line of argument. Firstly for the reason that Plaintiff is a private limited company and cannot take a plea that due to change in management the present owners were not aware of any such Agreement. The Agreement was with the company and not with the management. All acts done by the company are the acts of the company and it is the company itself which is to be held responsible for consequences if any. Therefore, this line of argument that due to change in management they were not aware cannot be entertained. Secondly, the plea that since some payments were made in 2007 is also not tenable for the reason that perusal of the receipts reflects that they are cash receipts. Further such receipts do not disclose that they are in continuation of the Settlement Agreement or have any nexus with the terms and conditions of the Settlement Agreement as claimed. Even the amounts mentioned on the receipt do not corroborate with the terms and conditions of the Settlement Agreement and the amounts mentioned therein. Notwithstanding this, it is settled proposition of law

that any enlargement in limitation if made after the expiry of the statutory period is meaningless. It is only relevant when it has been made within the limitation period and with express terms. Reliance on the receipts of 2007 are of no help to the cause of the Plaintiff insofar as limitation is concerned. These payments if any ought to have made before the expiry of the limitation period and from that perhaps, the limitation could have been acknowledged. However, admittedly, the Agreement is of 1992 whereas, the receipts placed on record are of the year 2007 when such limitation had already expired long ago.

6. As to the case that this is a Suit for Declaration and not for Specific Performance, I may observe that this argument is also misconceived inasmuch as the entire gist of the case is in respect of an Agreement on the basis of which the Plaintiff claims ownership of the land, therefore, mere title of declaration will not make this case as a Suit for Declaration. It will remain a Suit for Specific Performance as the Plaintiff has come before the Court claiming that such Agreement is a valid agreement and the Plaintiff is willing to pay the entire sale consideration. In Para 9 of the plaint it has been stated that *“they are ready to pay the balance amount as per Agreement of Settlement dated 15th February, 1992 as well as affidavit dated 19th October, 1998. The new management of the plaintiff further prepared to fulfill the terms and conditions of the Agreement of Settlement and already to pay the balance amount as per said documents without committing any default”*. This clearly is a Suit for Specific Performance and Article 113 covers the limitation period in respect of Suit for Specific Performance and without any further discussion as already observed such limitation period stands expired.

7. It may further be observed that on this the law is very clear and settled in terms of Article 113 of the Limitation Act that a Suit for Specific Performance can be filed within three years from the date fixed for performance of the Agreement or if no such date is fixed, then from the date when such performance is refused by a party. Admittedly in the agreement the date for performance / payment of balance sale consideration (last installment date) is fixed as 20.6.1993 and that is not disputed. From such date the Suit is admittedly time barred. Even otherwise, for the sake of arguments, if the limitation is to be counted from the date of Affidavit i.e. 19.10.1998, again it is time barred. There is nothing on record in writing, which could suggest that before the expiry of the limitation period of three years any acknowledgement was made by the Defendant for extension of the time. There is no enlargement of time within the limitation period. The law is clear and settled in this account that a Suit for Specific Performance is to be filed within three years as discussed hereinabove. The Hon'ble Supreme Court in the case of **Haji Abdul Karim v Florida Builders (Pvt) Limited (PLD 2012 SC 247)** has been pleased to uphold rejection of plaint in an identical situation wherein a Suit for specific performance was apparently time barred. The relevant finding is as under;

5.And for the purpose of the above, it seems expedient to touch upon the legislative history of the Article. The prior Limitation Acts of 1871 and 1877, had in each of them the corresponding provision as in Article 113. However, the words in 1871 Act, were "when the plaintiff has notice that his right is denied", postulating that the second part of Article 113 was the only provision then regulating the limitation for the suits for specific performance and the commencement of three years period was dependent on the proof of the fact of notice of denial and the question of limitation was accordingly to be decided, having no nexus with the date even if fixed by the parties for the performance of the contract. The said provision however was expanded and these words were substituted in the subsequent Act of 1877, as are also found in the third column of the present Act. The change brought by the Legislature in 1877 Act was retained in Article 113 of the Act, by including the first part that the time would run from the '**date fixed**' for the performance is thus purposive and salutary in nature, which contemplates and reflects the clear intention of the legislature to prescribe the same (three years) period of limitation, however,

providing that the parties who otherwise have a right to fix a date of their own choice in the agreement for the performance thereof, such date in consequence of law shall also govern the period of limitation as well for the suits falling in this category. Thus now the three years period mentioned in Column No. 3 of the Article runs in two parts:--

(i) from the date fixed for the performance; or

(ii) where no such date is fixed when the plaintiff has notice that performance is refused.

The reason for the said change as stated above is obvious. In the first part, the date is certain, it is fixed by the parties, being conscious and aware of the mandate of law i.e. Article 113, with the intention that the time for the specific performance suit should run therefrom. And so the time shall run forthwith from that date, irrespective and notwithstanding there being a default, lapse or inability on part of either party to the contract to perform his/its obligation in relation thereto. The object and rationale of enforcing the first part is to exclude and eliminate the element of resolving the factual controversy which may arise in a case pertaining to the proof or otherwise of the notice of denial and the time thereof. In the second part, the date is not certain and so the date of refusal of the performance is the only basis for computation of time. These two parts of Article 113 are altogether independent and segregated in nature and are meant to cater two different sorts of specific performance claims, in relation to the limitation attracted to those. A case squarely falling within the ambit of the first part cannot be adjudged or considered on the touchstone of the second part, notwithstanding any set of facts mentioned in the plaint to bring the case within the purview of the later part. In other words, as has been held in the judgments reported as *Siraj Din and others v. Mst. Khurshid Begum, and others* (2007 SCMR 1792) and *Ghulam Nabi and others v. Seth Muhammad Yaqub and others* (PLD 1983 SC 344) "when the case falls within first clause the second clause is not to be resorted to". However, the exemption, the exclusion and the enlargement from/of the period of limitation in the cases of first part is permissible, but it is restricted only if there is a change in the date fixed by the parties or such date is dispensed with by them, but through an express agreement; by resorting to the novation of the agreement or through an acknowledgment within the purview of section 19 of the Act. And/or if the exemption etc. is provided and available under any other provision of the Act however, to claim such an exemption etc. grounds have to be clearly set out in the plaint in terms of Order VII Rule 6, C.P.C. We have examined the present case on the criteria laid down above, and find that according to the admitted agreement between the parties, 31-12-1997 was/is the 'date fixed' between them for the performance of the agreement, which has not been shown or even averred in the plaint to have been changed or dispensed with by the parties vide any subsequent express agreement. In this behalf, it may be pertinent to mention here that during the course of hearing Mr. Abdul Hafeez Pirzada, on a court query, has stated that there is no agreement in writing between the parties which would extend/dispense the date fixed and that he also is not pressing into service the rule of novation of the contract. We have also noticed that the petitioners have neither alleged any acknowledgment in terms of Article 19 of the Act, which should necessarily be in writing, and made within the original period of limitation nor any such acknowledgment has been pleaded in the plaint or placed on the record. Besides, no case for the exemption etc. has been set-forth in the plaint and the requisite grounds are conspicuously missing in this behalf as is mandated by Order VII, Rule 6, C.P.C.

8. Needless to observe, without prejudice, even if it is a Suit for Declaration as contended, again on that account as well it is hopelessly time barred. Accordingly for the aforesaid discussion, I am of the view that instant Suit is hopelessly time barred as per the provisions of Article 113 of the Limitation Act, and therefore is barred in law. Accordingly, **CMA 12105 of 2010** is allowed and the Plaint is hereby rejected under Order VII rule 11 CPC.

J U D G E

ARSHAD/