

## IN THE HIGH COURT OF SINDH KARACHI

Suit No. 1254 of 2015

[Mrs. Naveen Irfan Puri v. Mst. Shama Parveen and 3 others]

Dates of hearing : 24.04.2018, 02.05.2018, 10.05.2018,  
21.05.2018 and 25.05.2018.

Date of Decision : 03.09.2018

Plaintiff : Mrs. Naveen Irfan Puri through  
M/s. Dr. Muhammad Farogh Naseem and  
Ms. Pooja Kalpana, Advocates.

Defendant No. 1 : Mst. Shama Parveen through  
Mr. Mehfooz Yar Khan, Advocate.

Defendant No. 2 : Shamim Ahmed through M/s. Mushtaq  
A. Memon and Asif A. Memon, Advocates.

Defendant No. 3 : Nemo.

Defendant No. 4 : Sindh Building Control Authority (SBCA)  
through Mr. Aamir Ali, Advocate.

### JUDGMENT / ORDER

#### ADNAN IQBAL CHAUDHRY J. -

1. The suit properties are two adjoining plots, Survey No.20 and Survey No.52, Sheet No.C-F-1-5, Clifton Quarters, Karachi, admeasuring 2400 sq. yds. and 2600 sq. yds respectively. Both these plots are situated adjacent to the Mohatta Palace. At the relevant time, both the suit plots were jointly owned by the defendants 1 and 2 such that the defendant No.1 (Shama Parveen) was owner of 62.50% of both plots, while the defendant No.2 (Shamim Ahmed) was owner of 37.50 % of both plots.

#### Case of the plaintiff:

The case of the plaintiff as set-out in the plaint refers to three (3) sets of contracts which are discussed as follows.

Sale Agreement dated 19-12-1996:

2. By Sale Agreement dated 19-12-1996 both the defendants 1 and 2 agreed to sell both the suit plots to the plaintiff. From the side of the owners/sellers, this Sale Agreement was executed by the defendant No.2 (Shamim Ahmed) for himself and as Attorney of the co-owner/ defendant No.1 (Shama Parveen). The sale consideration agreed under this Sale Agreement for both the suit plots was Rs.60,000,000 (Rupees Sixty Million) only, out of which Rs.10,000,000 was paid on or before the Sale Agreement, Rs.20,000,000 was agreed to be paid on or before 19<sup>th</sup> January, 1997, while the balance sale consideration of Rs.30,000,000 (Rupees Thirty Million only) was agreed to be paid "on or before 19<sup>th</sup> July/August, 1997". The execution of this Sale Agreement dated 19-12-1996 is not disputed by any of the parties.

3. It is the case of the plaintiff that right after the Sale Agreement dated 19-12-1996 she learnt from news reports that to preserve the Mohatta Palace that was adjacent to the suit plots, the Government had restrained the defendants 1 and 2 from constructing on the suit plots; that the Government had decided to convert the suit plots into a public park and as compensation, the defendants 1 and 2 had been offered alternative plots; that when the plaintiff confronted the defendant No.2 with the news reports, he assured her that he would sort out the matter with the authorities, and that if he failed, he would give the plaintiff alternative plots, and until then the plaintiff would not be required to pay the balance sale consideration of Rs. 50 million; but despite that, the defendants 1 and 2 sent a legal notice dated 08-04-1997 to the plaintiff threatening forfeiture of the part payment and cancellation of the Sale Agreement dated 19-12-1996 unless the balance sale consideration was paid; that thereafter the defendant No.2 duped the plaintiff's husband into making further payments to the defendant No.2 in cash and to his brother, and in this manner, by 12-04-1997 a sum of Rs.43,000,000 had been paid by

and on behalf of the plaintiff towards the sale consideration agreed under the Sale Agreement dated 19-12-1996.

Sale Agreements dated 02-10-1997:

4. The Sale Agreements dated 02-10-1997 were between the plaintiff and the defendant No.1 only, not the defendant No.2. It is the plaintiff's case that when the defendant No.1 returned to Pakistan (whose Attorney was the defendant No.2), the plaintiff and the defendant No.1 entered into two Sale Agreements dated 02-10-1997, one each for the two suit plots, whereby the defendant No.1 (Shama Parveen) agreed to sell half of her share in the suit plots, i.e. 31.25 % in each of the suit plots, to the plaintiff for a total sale consideration of Rs.3,906,250; that on the same date i.e. 02-10-1997 the defendant No.1 also executed two General Power of Attorneys, duly registered, one for each of the two plots, in favour of the plaintiff's brother, authorizing him to transfer the suit plots; that on the same date i.e. on 02-10-1997 the defendant No.1 also delivered possession of 31.25% of each of the suit plots to the plaintiff; that subsequently, the plaintiff's brother, exercising mandate under the General Power of Attorneys dated 02-10-1997, executing two registered Conveyance Deeds dated 03-03-1998, one each for the two suit plots, for transferring title of 31.25% of both the suit plots to the plaintiff. Consequently, the plaintiff became co-owner of both the suit plots which came to be owned 31.25% by the plaintiff, 31.25% by the defendant No.1 and 37.50% by the defendant No.2.

Oral contract dated 30-05-1998:

5. The plaint further states that subsequent to the aforesaid written contracts, the plaintiff also entered into an oral contract dated 30-05-1998 with the defendant No.1 (not the defendant No.2). This oral contract is alleged to be for purchasing the remaining 31.25% share of the defendant No.1 in each of the suit plots for a sale

consideration of Rs.23,100,000/-, which, per the plaintiff, was paid to the defendant No.1 in cash.

6. Per para 18 of the plaint, it is the plaintiff's case *"That since the execution of the sale agreement (dated 19-12-1996) the Plaintiff has been requesting and reminding the Defendants Nos.1 and 2 to complete the sale/commitment for the remaining property, but they have failed to fulfil their promise. They have misled and deceived the Plaintiff. Though till date the Defendants nos.1 and 2 have never refused to complete the sale agreements whether written or oral."* Per the plaint, the suit was filed in July 2015 when the defendant No.2 attempted to dispossess the plaintiff from the suit plots by use of force.

The plaint prays for a decree against the defendants jointly and severally for the following:

- "a) order specific performance of Agreement of sale dated 16-12-1996 (sic – should be 19-12-1996) and the oral agreement dated 30-05-1998 against the Defendants nos. 1 and 2, jointly and severally;*
- b) direct the Defendants nos. 1 and 2 to complete sale of this suit property by executing the sale deed jointly and severally for the remaining 68.5% share in favour of the Plaintiff;*
- c) in default of prayer (b) the Nazir may be directed to execute the sale deed for the remaining 68.5% share in the suit property in favour of the Plaintiff;*
- d) permanently and pending disposal of the main suit restrain the Defendants 1 and 2, their officers, agents and privies from dispossessing the Plaintiff, raising any construction over the suit property or creating any third party rights in relation to the said suit property or encumbering the suit property in any manner whatsoever, including acceptance and taking over of alternate plots;*
- e) direct the Nazir of this Hon'ble Court to conduct inspection of the suit property, so as to ascertain (by taking photographs) who is in possession of the same;*
- f) direct the Defendants nos. 1 and 2 to refund Rs.1 crore, jointly and severally, in the ratio commensurate with their referred*

*shares alongwith markup at bank rate and order indexation from the date of payment by the Plaintiff till the date of refund.*

*g) grant costs;*

*h) grant any other adequate relief deemed fit in the circumstances."*

Case of defendant No.2 (Shamim Ahmed):

7. The case of the defendant No.2, as borne from his pleadings, is that prior to the Sale Agreement dated 19-12-1996, the defendant No.1 had divested herself of her entire 62.50% share in both the suit plots by way of executing a sale agreement in favor of the defendant No.2 along with registered and irrevocable Power of Attorneys; that the plaintiff had satisfied herself of this fact and that is why in entering into the Sale Agreement dated 19-12-1996 she dealt only with the defendant No.2; that after the initial payment of Rs.10 million, the plaintiff never made any further payment under the Sale Agreement dated 19-12-1996, and thus vide legal notice dated 08-04-1997, the Sale Agreement dated 19-12-1996 was terminated; that since the defendant No.1 had already sold her share in the suit plots to the defendant No.2 (by sale agreement and registered Power of Attorneys as aforesaid), she could not have entered into the subsequent Sale Agreements dated 02-10-1997 with the plaintiff. It is further the case of the defendant No.2 that he was in exclusive physical possession of both the suit plots all along, and that such physical possession had been taken by the plaintiff unlawfully by use of force just before filing the instant suit.

8. Mr. Mushtaq A. Memon, learned counsel for the defendant No.2, informed that the defendant No.2 had filed suit to challenge the transaction between the plaintiff and the defendant No.1, which had allegedly been done behind the back of the defendant No.2. Regards the physical possession of the suits plots allegedly taken over by the plaintiff unlawfully, the defendant No.2 has filed Suit

No.2449/2015 under Section 9 of the Specific Relief Act, 1877. By a consent order dated 15-05-2018 passed in Suit No.2449/2015, pending the recording of evidence in that suit, the defendant of that suit who is the plaintiff herein, was restrained from creating any third party interest in the suit plots, and the suit plots were brought under the supervision of the Nazir of this Court, but without prejudice to the case of the plaintiff in this suit.

Case of the defendant No.1 (Shama Parveen):

9. Per her written statement, the defendant No.1 does not deny that the Sale Agreement dated 19-12-1996 had been executed by the defendant No.2 also as her Attorney. She states that in May 1997 she had been informed by the defendant No.2 that he had terminated the Sale Agreement dated 19-12-1996 for failure of the plaintiff to pay the balance sale consideration. The defendant No.1 denies having entered into the oral contract dated 30-05-1998 with the plaintiff. It is the case of the defendant No.1 that on receiving sale consideration of her share in the suit plots respectively from the defendant No.2 and the plaintiff, she (the defendant No.1) sold 31.25% of her share in both the suit plots to the defendant No.2, and the remaining 31.25% share in both the suit plots to the plaintiff by way of sale agreements coupled with registered Power of Attorneys. Therefore the defendant No.1 claims no further interest in the suit plots.

CMA No.11934/2015 under Order VII Rule 11 CPC and the legal objection on maintainability of the suit

CMA No.11934/2015 under Order VII Rule 11 CPC by the defendant No.2, and CMA No.10616/2015 under Order XXXIX Rules 1 & 2 CPC by the plaintiff had been heard together. But given its consequences if granted, I proceed to deal first with CMA No.11934/2015.

10. The grounds taken in CMA No.11934/2015 for rejection of the plaint are also amongst the grounds taken by the defendant No.2 in his written statement for dismissal of the suit. As elucidated by the Supreme Court of Pakistan in the case of *Haji Abdul Karim v. Florida Builders* (PLD 2012 SC 247), hereinafter '*Florida Builders*', though 'rejection of plaint' and 'dismissal of suit' are distinct concepts with different consequences, but while examining the plaint for the former, the Court retains its inherent power for the latter. That import from *Florida Builders* is in the following paras of the said judgment:

"12. After considering the ratio decidendi in the above cases, and bearing in mind the importance of Order VII Rule 11, we think it may be helpful to formulate the guidelines for the interpretation thereof so as to facilitate the task of courts in construing the same.

Firstly, there can be little doubt that primacy, (but not necessarily exclusivity) is to be given to the contents of the plaint. However, this does not mean that the court is obligated to accept each and every averment contained therein as being true. Indeed, the language of Order VII Rule 11 contains no such provision that the plaint must be deemed to contain the whole truth and nothing but the truth. On the contrary, it leaves the power of the court, which is inherent in every court of justice and equity to decide whether or not a suit is barred by any law for the time being in force completely intact. The only requirement is that the court must examine the statements in the plaint prior to taking a decision.

.....

Thirdly, and it is important to stress this point, in carrying out an analysis of the averments contained in the plaint the court is not denuded of its normal judicial power. It is not obligated to accept as correct any manifestly self-contradictory or wholly absurd statements. The court has been given wide powers under the relevant provisions of the Qanun-e-Shahadat. It has a judicial discretion and it is also entitled to make the presumptions set out, for example in Article 129 which enable it to presume the existence of certain facts. It follows from the above, therefore, that if an averment contained in the plaint is to be rejected, perhaps on the basis of the documents appended to the plaint, or the admitted documents, or the position which is beyond any doubt, this

exercise has to be carried out not on the basis of the denials contained in the written statement which are not relevant, but in exercise of the judicial power of appraisal of the plaint.”

Therefore, while examining the plaint of this suit for rejection or otherwise, I am guided by the above guidelines laid down in by the Supreme Court of Pakistan in *Florida Builders*.

11. The application for rejection of the plaint is premised on two grounds. First, that the suit is barred by limitation; and second, that the plaint is verified by an unauthorized person. A discussion of the submissions made by learned counsels on the ground of limitation is as follows.

Submissions on behalf of the defendant No.2:

12. Mr. Mushtaq A. Memon, learned counsel for the defendant No.2, submitted that the date for performance of the Sale Agreement dated 19-12-1996 was fixed as “19<sup>th</sup> July/August, 1997”, which would mean that the same had to be performed latest by 31<sup>st</sup> August, 1997; that such being a “date fixed”, it was the first part of Article 113 Limitation Act, 1908 that was attracted; that consequently limitation for the relief of specific performance of the Sale Agreement dated 19-12-1996 expired on 31-08-2000 and this suit filed on 23-07-2015 is hopelessly time-barred. To attack the suit on limitation, Mr. Mushtaq A. Memon primarily relied on the case of *Haji Abdul Karim v. Florida Builders* (PLD 2012 SC 247), hereinafter ‘*Florida Builders*’, which case in addition to Order VII Rule 11 CPC, is also a discourse on Article 113 Limitation Act, 1908.

Regards the oral contract dated 30-05-1998 that is alleged by the plaintiff between herself and the defendant No.1, Mr. Mushtaq A. Memon submitted that though the said oral contract was denied by the defendant No.1, but in any case, in view of Article 103 Qanoon-e-Shahadat Order, 1984, the alleged oral contract cannot be relied upon to contradict the written Sale Agreements.



Submissions on behalf of the plaintiff:

13. Though the counter-affidavit on behalf of the plaintiff to CMA No.11934/2015 contended that the mention of "19<sup>th</sup> July/August, 1997" in the Sale Agreement dated 19-12-1996 was not a date specific, and hence not a "date fixed" within the meaning of the first part of Article 113 Limitation Act, 1908, Mr. Farogh Naseem, learned counsel for the plaintiff did not press such point and conceded that the date so mentioned was a date fixed. That being so, he was confronted with the case of *Florida Builders* (PLD 2012 SC 247) wherein it has been held by the Supreme Court of Pakistan that where the sale agreement contains a date fixed, a suit for its specific performance attracts the first part of Article 113 Limitation Act, 1908 and "...the limitation shall commence forthwith from the date fixed by the parties, notwithstanding the alleged failure, inabilities of the respondent to perform its part of the obligations, the alleged interaction between the parties, their conduct, which shall have no relevance in the context of the limitation of those suits covered by the first part of the Article."

Mr. Farogh Naseem candidly accepted that for the relief of specific performance to survive, the case of the plaintiff would need to 'come out' of *Florida Builders*. In order to do that, he pointed to page 257 of the judgment in *Florida Builders* where it has been recognized that the date fixed in the sale agreement may be extended or dispensed with by the parties by an express agreement, and he submitted that in the facts of the instant suit the date fixed in the Sale Agreement dated 19-12-1996 had in fact been extended by an express agreement which were the subsequent Sale Agreements dated 02-10-1997 between with the plaintiff and the defendant No.1. He submitted that the effect of the subsequent Sale Agreements dated 02-10-1997 was that while the other clauses of the Sale Agreement dated 19-12-1996 continued to subsist, the clause fixing the date of performance stood dispensed-with and novated within the meaning of Section 62 Contract Act 1872, and consequently it

was the second part of Article 113 Limitation Act, 1908 that was attracted where limitation runs from the date of notice of refusal, which notice, per learned counsel, was acquired by the plaintiff in July 2015 when the defendant No.2 attempted to wrest away physical possession of the suit plots from the plaintiff. Per learned counsel, in these circumstances, the suit was not time-barred and not hit by *Florida Builders*. In support of his submissions, Mr. Farogh Naseem relied on the cases of *Siraj Din v. Khurshid Begum* (2007 SCMR 1792); *Ghulam Nabi v. Muhammad Yaqub* (PLD 1983 SC 344); *Inam Naqshband v. Haji Shaikh Ijaz Ahmed* (PLD 1995 SC 314); and *Mussarat Shaukat Ali v. Safia Khatoon* (1994 SCMR 2189). He submitted that Section 62 Contract Act, 1872 also envisages partial novation of a contract and it is not that a complete substitution of the contract has to be shown to attract Section 62 Contract Act. As regards the fact that the subsequent Sale Agreements dated 02-10-1997 were executed by the defendant No.1 alone and not the defendant No.2, Mr. Farogh Naseem submitted that since the suit plots were joint property and sale consideration was paid for both of the suit plots, it did not matter that the subsequent Sale Agreements dated 02-10-1997 were not signed by the defendant No.2.

14. Mr. Farough Naseem, learned counsel for the plaintiff further submitted that the oral contract dated 30-05-1998 between the plaintiff and the defendant No.1 was a second novation of the date fixed under the original Sale Agreement dated 19-12-1996, and that in view of Proviso (2) to Article 103 Qanoon-e-Shahadat Order, 1984, such oral contract can be relied upon against the written contracts. However, he submitted that for the present purposes, even if the oral contract dated 30-05-1998 was ignored, the written Sale Agreements dated 02-10-1997 were sufficient to show that the date fixed under the original Sale Agreement dated 19-12-1996 had been dispensed with.

Rebuttal on behalf of the defendant No.2:

15. In rebuttal, Mr. Mushtaq A. Memon, learned counsel for the defendant No.2 submitted that under Section 62 Contract Act, 1872, novation takes place only if all parties to the original contract agree to substitute it; but here, admittedly, the defendant No.2 who was party to the original Sale Agreement dated 19-12-1996, was not party to the alleged novation, and thus the question of novation of the original Sale Agreement dated 19-12-1996 does not arise at all. To support his submission Mr. Mushtaq Memon relied on the cases of *Hawabai v. Sharif* (PLD 1961 (W.P.) Kar 412) and *Mussarat Shaukat Ali v. Safia Khatoon* (1994 SCMR 2189). He further submitted that novation is a substitution of the original contract, and not a mere variation of its terms as held in the cases of *Mohammad Nazir v. The District Judge, Gujranwala* (1988 CLC 2469) and *Dr. Khalid Kamal Khan v. Dr. Arshad Kamal Khan* (1992 CLC 1887); and that since the plaintiff has specifically prayed for specific performance also of the original contract (Sale Agreement dated 19-12-1996), the plea of novation was misconceived. Lastly, Mr. Mushtaq Memon submitted that since the plea of novation has not been expressly pleaded in the plaint, it cannot be considered at all as laid down in the case of *Fazal-ur-Rehman v. Sughra Haq* (2007 SCMR 564).

Discussion and finding:

16. In *Florida Builders* (PLD 2012 SC 247), while discussing the two parts of Article 113 Limitation Act, 1908, and in addition to the extract in para 13 above, it has also been held by the Supreme Court of Pakistan as follows:

“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."

It was acknowledged by Mr. Farogh Naseem, learned counsel for the plaintiff, that the date of "19<sup>th</sup> July/August, 1997" mentioned in the Sale Agreement dated 19-12-1996 was a "date fixed", and thus it had to be performed by 31<sup>st</sup> August, 1997. It is not the case of the plaintiff that any of the exceptions or excluding provisions of the Limitation Act, 1908 are attracted. Therefore, but for Mr. Farogh Naseem's argument that the date fixed in the Sale Agreement dated 19-12-1996 had been dispensed with (which argument is examined *infra*), the plaintiff cannot 'come out' of the case *Florida Builders*, making the relief for specific performance of the Sale Agreement dated 19-12-1996 time-barred after 31-08-2000.

17. Adverting now to the argument of Mr. Farogh Naseem that the date fixed in the Sale Agreement dated 19-12-1996 was dispensed with by the parties, he had submitted that that was done under the subsequent Sale Agreements dated 02-10-1997 which had the effect of novating the 'date fixed' in the Sale Agreement dated 19-12-1996, as opposed to novating the entire Sale Agreement dated 19-12-1996. Indeed, the argument was made with the purpose of keeping alive the other clauses of the original Sale Agreement dated 19-12-1996 failing which, the prayer for its specific performance does not lie. Before examining the merits of that argument, I observe here

that the plea that the date fixed under the Sale Agreement dated 19-12-1996 had been dispensed with or novated, has not been taken in the plaint at all. It has been held in *Florida Builders* (PLD 2012 SC 247) and *Fazal-ur-Rehman v. Sughra Haq* (2007 SCMR 564) that the failure to categorically plead novation in terms of Order VII Rule 6 C.P.C. is fatal to such plea, and that much would have sufficed to reject such plea outright. But nevertheless, to answer the point of law raised, I agree with Mr. Farogh Naseem that novation under Section 62 Contract Act, 1872 can be said to be of a part of a contract, however not in the sense expounded by him, but I say that in the sense that there can be a contract that can be divided into severable and distinct obligations (as opposed to being an 'entire contract'), or there can be an independent contract within the main contract, such as an arbitration clause. In such situations, the word 'contract' in Section 62 Contract Act, 1872 where it refers to the original contract, refers to a severable or independent contract. It is also to be kept in mind that since a contract can also be an oral one, the word "contract" also appearing in Section 62 Contract Act does not necessarily mean the deed/instrument that embodies the contract, but the agreement between the parties, which agreement and parties may be multiple under one deed. However, whether the novation is of the severable contract or the independent contract within the contract, or whether it is of the entire contract embodied in the deed, it is settled law that the effect of Section 62 Contract Act, 1872 is that the original contract cannot be enforced. [See the cases of *Haji Baz Muhammad Khan v. Noor Ali* (2018 SCMR 1586), and *Banque Indosuez v. Banking Tribunal for Sindh & Baluchistan* (1994 CLC 2272)]. However, in order to see whether the subsequent Sale Agreements dated 02-10-1997 had dispensed with the date fixed in the original Sale Agreement dated 19-12-1996, I proceed to examine both the said Sale Agreements. The law as it stands today is that for the purposes of Order VII Rule 11 CPC, the Court can, in addition to the plaint, also look at other material on the record. [See the case of *S.M. Shafi Ahmed Zaidi v. Malik Hassan Ali Khan* (2002 SCMR 338)]. These Sale

Agreements have been filed with the plaint, were relied upon by the plaintiff, and were referred to by both learned counsels while making submissions.

18. The Sale Agreement dated 19-12-1996 can be said to have embodied the following four (4) distinct obligations: (i) the contract to sell the share of defendant No.1 in Survey No.20; (ii) the contract to sell the share of the defendant No.1 in Survey No.52; (iii) the contract to sell the share of defendant No.2 in Survey No.20; (iv) the contract to sell the share of the defendant No.2 in Survey No.52. The percentage of land holding of each seller was specified, so also the price per square yard. In the circumstances, any of the said four (4) contracts could have been performed independently or jointly with one or more of the other contracts embodied in the Sale Agreement dated 19-12-1996, that was actually done under the subsequent Sale Agreements dated 02-10-1997 as discussed *infra*.

As against the Sale Agreement dated 19-12-1996 where the defendant No.1 had agreed to sell to the plaintiff her entire share of 62.50 % in both the suit plots, under the subsequent Sale Agreements dated 02-10-1997 the defendant No.1 agreed to sell to the plaintiff only half of the defendant No.1's share in both the suit plots, i.e. 31.25 % in each of the suit plots, while retaining the other half (31.25%) with herself. The price per square yard that works out under subsequent Sale Agreements also varies from the price per square yard agreed under the original Sale Agreement. The subsequent Sale Agreements dated 02-10-1997 do not to keep alive the original Sale Agreement dated 19-12-1996 as between the plaintiff and the defendant No.1. Therefore, it is not that the subsequent Sale Agreements dated 02-10-1997 dispensed with the date fixed under the original Sale Agreement dated 19-12-1996, but that the contract as between the plaintiff and the defendant No.1 embodied in the Sale Agreement dated 19-12-1996 stood substituted and novated within the meaning of Section 62 Contract Act, 1872. In other words, after the Sale Agreements dated 02-10-1997, the

original Sale Agreement dated 19-12-1996 only embodied the contract between the plaintiff and the defendant No.2 who was not party to the novation.

19. Having seen as discussed in the para above that the Sale Agreements dated 02-10-1997 had substituted the Sale Agreement dated 19-12-1996 to the extent it was between the plaintiff and defendant No.1, and the Sale Agreements dated 02-10-1997 having been duly performed vide Conveyance Deeds dated 03-03-1998, the question of specific performance of the contract between the plaintiff and the defendant No.1 under the Sale Agreement dated 19-12-1996 does not arise. As regards the contract between the plaintiff and the defendant No.2 that continued under the Sale Agreement 19-12-1996, the relief for specific performance of that contract is time barred by nearly 15 years. Even if I were to hold that Sale Agreements dated 2-10-1997 and/or the oral contract dated 30-05-1998 between the plaintiff and the defendant No.1 had somehow dispensed with the date fixed under the original Sale Agreement dated 19-12-1996, Mr. Farogh Naseem was not able to convince this Court as to how that could dispense with the date fixed in the contract between the plaintiff and the defendant No.2 when the defendant No.2 was not party either to the subsequent Sale Agreements dated 02-10-1997 or the alleged oral contract.

20. There is yet another aspect of the matter. Even if I accept the contention of Mr. Farogh Naseem that the Sale Agreement dated 19-12-1996 subsisted as partially novated by the Sale Agreements dated 02-10-1997 and the oral contract dated 30-05-1998, that the date fixed therein had been dispensed with, that it was the second part of Article 113 Limitation Act, 1908 that was applicable, and that limitation of three years would run from the date when the plaintiff acquired notice that performance is refused, the plaint manifests as discussed *infra*, that the plaintiff had in fact acquired

notice/knowledge of refusal of performance of the Sale Agreement dated 19-12-1996 and the alleged oral contract dated 30-05-1998.

It is the plaintiff's case (in para 14 of the plaint) that the entire sale consideration agreed under the oral contract dated 30-05-1998 had been paid by her husband to the defendant No.1 on the date of the oral agreement. Thereafter, in para 15 of the plaint, she states that :

*"That thereafter the Plaintiff through her husband kept on reminding the Defendants Nos. 1 and 2 to complete the sale. Both the Defendants Nos. 1 and 2 never refused but kept on delaying the matter with false promises. A request was also made by the Plaintiff that since she had already paid Rs. One Crore in excess the same may be refunded jointly and severally by the Defendants Nos. 1 and 2 commensurate with their share holding in the suit property"*

In para 17 of the plaint, the plaintiff states that:

*"That the Plaintiff came to knowledge through private sources that the Defendants were entering into negotiation with the Government in relation to allotment of alternative plots; despite having paid Rs. 70 million and acquiring ownership right of 31.5% share in the suit property the Plaintiff was not even informed by the said Defendants about the same. This proved the malafides on the part of the Defendants. The Plaintiff left with no option through her counsel issued letters dated 13.2.2001 and 27.11.2001 informing the relevant authorities about the Plaintiff's right and status and also that she should be made party to agreement/deal, if any, in relation to the suit property. Copies of letters are enclosed and marked as Annex K and K-1."*

Further, in para 19 of the plaint, the plaintiff states:

*"The Plaintiff sometime on 15.1.2012 learnt from reliable sources that the Defendants Nos. 1 and 2 had again started construction of town houses over the suit property and that too without even informing the Plaintiff. Thereafter, the Plaintiff through her counsel notified through public notice dated 23.2.2012 in daily Dawn not to enter into any transaction/agreement with regard to the suit property; copy of the public notice is attached herewith as Annex L. in response the said Defendants stopped construction. Whenever the Plaintiff had made a request to the Defendants Nos. 1 and 2, they made promises to complete the sale."*



A bare reading of the paras 15 and 17 of the plaint reproduced above (underlining supplied for emphasis) shows that even after the legal notice dated 08-04-1997 the plaintiff acquired notice/knowledge of refusal of performance right after the said oral contract dated 30-05-1998; then on 13-02-2001, and again on 27-11-2001 when the plaintiff came to know that the defendants were negotiating with the Government for alternative plots in lieu of the suit plots and raised that issue with the relevant authorities. If that is not enough, then para 19 of the plaint also shows that the plaintiff acquired notice/knowledge of refusal again on 15-01-2012 when she learnt that the defendants 1 and 2 had started construction on the suit plots and when she made a public notice on 23-02-2012 warning the public not to enter into any transaction with regards to the suit plots. If limitation is computed from any of the aforesaid dates under the second part of Article 113 of the Limitation Act, 1908, then this suit filed on 23-07-2015 for the relief of specific performance of the Sale Agreement dated 19-12-1996 and the alleged oral contract dated 30-05-1998 is still time-barred.

In the case of *Bomanshaw Burjorji Gazdar v. Mumtaz Begum* (1985 SCMR 554), which was a case where no date for performance of the sale agreement had been fixed, it was held that limitation will run from date when plaintiff had notice of refusal to perform, and such notice/ knowledge was acquired when plaintiff's legal notice remained unacknowledged. Similarly, in the case of *Zafar Iqbal v. Sher Muhammad* (2003 YLR 673), where plaintiff admitted in his pleadings that he was persisting with the other party every two months to perform the sale agreement and such persistence continued for 2 years ("kept on false hopes"), then plaintiff had notice of defendant's refusal, and time had to be reckoned from such notice.

21. That brings us to the fall-back argument of Mr. Farogh Naseem that even if relief for specific performance was assumed to be time-barred, the plaint could still not be rejected as the plaintiff

had prayed for the reliefs of injunction and refund in prayer clauses (d) and (f) reproduced in para 6 above.

Regards prayer clause (f), which is for refund of the amount said to be over-paid to the defendants 1 and 2, that relief being one for recovery of amount last paid on 30-05-1998, is also time-barred.

However, prayer clause (d) presents another matter. It is for an injunction restraining the defendants 1 and 2 (the other co-owners) from dispossessing the plaintiff from the suit plots and from raising construction on and creating rights in the suit plots. The plaintiff has pleaded that she was in possession of the suit plots (the extent of which is discussed *infra*), and that the defendants 1 and 2 attempted to dispossess her by force in July 2005. Hence, for the relief of injunction in prayer clause (d), the suit is not time-barred.

22. From the plaint it appears that the cause of action for the relief of injunction is independent of the cause of action for the relief of specific performance, and the relief for injunction can be sustained independent of the relief for specific performance. There is no bar to joining different causes of action in one suit. In the circumstances, the question that now arises is of the way forward when the Court concludes that the suit is barred by law for some of the reliefs but not for other relief inasmuch as, it is settled that the plaint cannot be rejected in piecemeal. The answer to that question also lies in the case of *Florida Builders* (refer to para 10 above) which postulates that while examining the plaint for rejection, the Court is not denuded of its inherent power of otherwise dismissing the suit if found to be barred by law. To explain that concept further, in case of rejection of plaint, Order VII Rule 13 CPC allows a plaintiff to present a fresh plaint in respect of the same cause of action where the ground for rejection of the plaint can be addressed and remedied. But where the ground for rejection of the plaint is such that it cannot be remedied at all, then the Court can dismiss the suit instead of rejecting the plaint. A suit barred by limitation is exactly such a case where

Section 3 of the Limitation Act, 1908 states that “.....every suit instituted after the period of limitation ..... shall be dismissed .....”.

23. In my view, dismissal of a suit can be dismissal of a part of the suit where the suit joins separate causes of action, and does this suit, and thus where a relief based on one cause of action is barred by law, the suit to the extent for that relief can be dismissed while allowing the suit to continue for other reliefs. That much is manifest in the definition of “decree” in Section 2(2) CPC which reads as follows:

“(2) “decree” means the formal expression of an adjudication which so far as regards the Court expressing it, conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint [the determination of any question within Section 144 and an order under Rules 60, 98, 99, 101 or 103 of Order XXI]. But shall not include -

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.

*Explanation.* A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.”

Reliance can also be placed on the case of *Bai Chanchal v. Syed Jalaluddin* decided by the Supreme Court of India (AIR 1971 SC 1081) wherein, while noticing the provisions of Order XXIII Rule 3 C.P.C. and Order XII Rule 6 C.P.C. it was held that, “Thus, it is clear that in the same suit, there can be more than one decree passed at different stages.”

24. Consequent to the above, I dismiss this suit as barred by limitation for the reliefs in prayer clauses (a), (b), (c) and (f) of the plaint. A decree be made accordingly. The suit shall continue for the relief for injunction and consequential reliefs in prayer clauses (d), (g) and (h) of the plaint. Having found as above, I need not discuss

the other ground taken by the defendant No.2 for rejection of the plaint. CMA No. 11934/2015 is disposed off accordingly.

CMA No.10616/2015 under Order XXXIX Rules 1 & 2 CPC

25. By this application the plaintiff has prayed for a temporary injunction in terms of prayer clause (d) of the plaint (reproduced in para 6 above) which is to preserve her physical possession of the suit plots and to stay third-party interest in, and construction on the suit plots.

Submissions:

26. As regards possession of the suit plots, Mr. Farogh Naseem, learned counsel for the plaintiff submitted that the plaintiff has been in exclusive physical possession of the suit plots. He submitted that part possession of the suit plots had been delivered by the defendant No.1 to the plaintiff under the Sale Agreements dated 02-10-1997 whereby the defendant No.1 had sold 31.25% of both the suit plots to the plaintiff. As regards possession of the other part of the suit plots, Mr. Farogh Naseem submitted that that had been delivered to the plaintiff by both defendant No.1 and defendant No.2 subsequent to the Sale Agreement dated 19-12-1996 and in part performance thereof, and that is how the plaintiff came into exclusive possession of both suit plots. For the protection of the plaintiff's possession of the suit plots, Mr. Farogh Naseem had relied upon the cases of *Hakeem Shah v. Muhammad Idrees* (2017 SCMR 316) and *Inayat Ullah v. Shah Muhammad* (PLD 1961 Lah 371), both of which are in respect of Section 53-A of the Transfer of Property Act, 1882.

On the other hand, Mr. Mushtaq A. Memon learned counsel for the defendant No.2 submitted that physical possession of the suit plots had not been delivered to the plaintiff under any of the contracts pleaded, but it had been taken over by the plaintiff from the defendant No.2 unlawfully by use of force in July 2015 just

before filing suit; that in any case, since the suits plots are joint property, in view of Section 44 of the Transfer of Property Act, 1882, and the case of *Faiz Ahmed v. Muhammad Sharif* (2005 MLD 298), the defendant No.1 could not have transferred possession of any part of the joint property (suit plots) to the plaintiff; that Section 53-A of the Transfer of Property Act, 1882 was not attracted as the conditions of the said Section were not met, nor does the plaintiff plead protection of Section 53-A of the Transfer of Property Act.

In rebuttal, Mr. Farogh Naseem relied on the case of *Muhammad Muzaffar Khan v. Muhammad Yousuf Khan* (PLD 1959 SC 9) and *Niaz Ali v. Muhammad Sadiq* (PLD 1995 Lah 617) to submit that Section 44 of the Transfer of Property Act, 1882 was no bar on the transferor to give such possession that the transferor enjoyed as co-owner.

Discussion/finding:

27. In para 13 of the plaintiff it is stated by the plaintiff that it was under the Sale Agreements dated 02-10-1997 that the defendant No.1 (only) delivered to the plaintiff possession of 31.25% (only) of both the suit plots. This possession is recited in the Sale Agreements dated 02-10-1997 and in possession letters filed with the plaintiff. It may be recalled that the said Sale Agreements dated 02-10-1997 were duly performed when those culminated in Conveyance Deeds and the plaintiff became co-owner of 31.25% share in both the suit plots. However, the plaintiff is completely silent on how the plaintiff came to be in exclusive possession of the suit plots, nor has the plaintiff pleaded that she is was delivered possession of the suit plots (partial or complete) in part performance of the Sale Agreement dated 19-12-1996. True that Section 53-A of the Transfer of Property Act, 1882 can be used as a sword and not only as a shield, but the plaintiff has not sued under Section 53-A of the Transfer of Property Act. Therefore, no injunction in this suit can

follow on that basis. However, this is not to prejudice the case of the plaintiff in Suit No.2449/2015 where she is the defendant.

28. Mr. Farogh Naseem had cited the case of *Hakeem Shah v. Muhammad Idrees* (2017 SCMR 316) to suggest that in cases of where possession has been delivered in part performance of a sale agreement, then a suit for specific performance is not time-barred by any length of time. But the case of *Hakeem Shah* shows that the said observation was made for such cases where the suit is actually brought by the transferee under Section 53-A of the Transfer of Property Act, 1882, which is not the case in the instant suit. Also, that observation was made in the facts where the obligations under the sale agreement had been fulfilled, but the transfer could not be effected due to a ban on such transfers. Therefore, the case of *Hakeem Shah* is distinguishable. In any case, *Florida Builders* is by a larger Bench.

29. Since the Sale Agreements dated 02-10-1997 and possession letters of same date do recite that possession of 31.25% of both suit plots was delivered by the defendant No.1 to the plaintiff, the plaintiff has a *prima facie* case at least for protection of that possession. The questions whether such physical possession of joint property was ever held by the defendant No.1, and if so, was it ever delivered to the plaintiff, and if so, was such delivery barred under Section 44 of the Transfer of Property Act, 1882, are questions that require evidence. As regards the prayer in the CMA to stay third-party interest in, and construction on the suit plots, since the plaintiff is presently co-owner (31.25%) of both the suit plots, she has a *prima facie* case for such injunction. However, for the present I find that the interest of the plaintiff is adequately safeguarded by the order dated 15-05-2018 passed in Suit No.2449/2015. Therefore till final adjudication in this suit, this CMA 10616/2015 is allowed in the following terms:

- (a) the defendants 1 and 2 are restrained from creating any third party interest in the suit plots and from raising any construction on the suit plots;
- (b) until further orders are passed in this suit or in Suit No.2449/2015, the following arrangement made for the protection of the suit plots vide order dated 15-05-2018 in Suit No.2449/2015 shall be the order of the Court for the purposes of this suit as well:

*“In order to preserve the suit properties, the following order is passed to signify that the suit properties are under supervision of this Court.*

*(i) The Nazir to deploy at least two security guards at the suit properties round-the-clock with instructions to report to the Nazir immediately of any activity out of the ordinary at the suit properties. If both parties consent the Nazir may deploy a third security guard as it is said that the boundary wall has three entrances. This be done without removing the security guards of the plaintiff;*

*(ii) The Nazir to affix a sign-board at the suit properties to inform the public that the suit properties are under supervision of the Nazir of this Court;*

*(iii) If the parties consent, the Nazir may install CCTV cameras at the suit properties with arrangements to secure the footage of such cameras;*

*(iv) The cost for (i) to (iii) above shall be shared equally by the parties and shall be paid in advance, so also the Nazir’s fee of Rs.40,000.”*

Nothing herein shall be construed to prejudice any action brought by the defendant No.2 to challenge the transaction between the plaintiff and the defendant No.1.

JUDGE