

THE HIGH COURT OF SINDH, AT KARACHI

High Court Appeal No.75 of 2012

Present:

Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Abdul Mobeen Lakho

Date of hearing: 31.03.2022

Date of decision: 31.03.2022

Appellant: Shaikh Muhammad Sabir through Mr. Saad Fayyaz advocate

Respondents: M/s K.K. Builders (Pvt) Limited and others through Mr. Muniruddin Ahmed advocate

J U D G M E N T

ABDUL MOBEEN LAKHO J.- This High Court Appeal is directed against the order dated 30.04.2012, passed by learned Single Judge of this Court on CMA No. 5553/2011 moved by the defendants No.1 and 2 (respondents No.1 and 2 herein) under Order VII Rule 11 CPC, in Civil Suit No.507/2011, whereby the plaint of the suit was rejected.

2. Pithily the relevant facts of the case as detailed in the Appeal are that respondent No.1 through registered Conveyance Deed dated 25.04.1991 became owner of Plot No. Na-Class 118/6, situated in Deh Okewari, Sector-18, Gulistan-e-Jauhar, Scheme No.36, Karachi (hereinafter referred to as subject property). The respondent No.2 was appointed as Attorney of respondent No.1 in respect of subject property through registered Irrevocable Power of Attorney. A project under the name of Munir Bridge View was to be constructed on the subject property with collaboration between respondents No.1 to 7, who were partners of M/s Bloom Builders. Such project could not be completed hence respondents No.1 to 7 being partners of M/s Bloom Builders entered into Agreement dated 13.09.2002 for sale cum transfer of partially completed building project with the appellant and three other persons. The appellant paid entire sale consideration of Rs.1,15,00,000/- to the respondents. The respondent No.1

executed Special Power of Attorney in favour of nominee of appellant and only execution of Sale Deed/Conveyance Deed was to be undertaken. The appellant completed the project with huge investment and through his nominee executed lease deeds of the units of the building project in favour of different persons. It is further averred that on 01.03.2007, the appellant suffered brain hemorrhage and remained under treatment for about 2½ years, taking advantage of appellant's illness, the attorney of respondents took over all record on or about 10.04.2007 and control of the building in violation of the Agreement. Appellant partially recovered in June, 2009, who inquired the respondent No.2 about dispossession his staff, the respondent No.2 did not deny the same and assured him that he would render all accounts to appellant after his complete recovery. In the meantime, the respondent No.1 through respondent No.2 filed Suit No. 1179 of 2010 against appellant for declaration/cancellation/possession and recovery of damages. The appellant contested the said suit by filing his written statement, whereas, appellant also instituted a Suit No.507/2011 against the respondents for specific performance, possession, accounts and permanent injunction. In the said suit, the respondents filed an application under Order 7 Rule 11 CPC for rejection of plaint on various grounds, however, at the time of hearing of said application, learned counsel for the respondents only pressed the ground that the suit filed by the appellant was barred by limitation. The learned Single Judge after hearing the learned counsel for the parties, vide impugned order dated 30.04.2012 has been pleased to allow the application filed by the respondents under Order VII Rule 11 CPC and resultantly, rejected the plaint. The appellant being aggrieved by such order has preferred instant High Court Appeal with a prayer to set-aside the impugned order.

3. Learned counsel for the appellant argued that the impugned order is contrary to the settled law as laid down by Hon'ble Supreme Court as well as by this Court relating to scope of the provision of Order VII Rule 11 CPC, and also based on incorrect assumption of facts relating to cause of action. According to learned counsel, firstly, the cause of action for specific performance accrued on 10.04.2007, and subsequently, in the month of June, 2009, therefore, the finding as recorded in the impugned order to this affect is based on misreading of facts. Per learned counsel, in Suit No.1179/2010 filed by the respondents No.1 and 2 against appellant, they have stated that

they took possession of the subject property and building project in the year 2008, therefore, the suit filed in the year 2011 was not time barred. He further submitted that limitation is a mix question of facts and law, therefore, it could not be decided without framing of issues and taking evidence, therefore, the plaint could not be rejected under Order VII Rule 11 CPC. It has been prayed that impugned order may be set-aside and the Suit may be restored to be decided on merits.

4. Conversely, learned counsel for the respondents has vehemently opposed the contention of learned counsel for the appellant and argued that instant appeal is not maintainable as the appellant has no concern with the subject property, as admittedly, the appellant has already sold out the said property and handed over its possession as per agreement available at page 279 of instant appeal. It has been further argued that the Suit filed by the appellant is otherwise hopelessly time barred, as the cause of action according to the pleadings accrued on 10.04.2007, when the possession of subject project along with all the accounts and record was allegedly taken over from the appellant. According to learned counsel, from bare reading of para 12 of the plaint of Suit No.507/2011 it has come on record that appellant was allegedly dispossessed on 10.4.2007 and such alleged dispossession is presumed to be denial of the performance of the agreement, as such filing of suit for specific performance of agreement starts from the date of the alleged dispossession i.e. 10.04.2007. Learned counsel argued that the appellant has not prayed for condonation of delay in filing the Suit on the ground of his alleged illness, whereas, the Suit of the appellant has been filed as a counterblast of Suit No.1179/2010 filed by the respondents. According to learned counsel, since the suit of the appellant seeking specific performance was barred by law (Limitation) on the face of record and as per pleadings, therefore, the learned Single Judge has rightly rejected the plaint, hence he prayed for dismissal of instant appeal.

5. Heard the learned counsel for the parties and perused the record and the impugned order with their assistance. It appears that in the Suit No.507/2011 filed by the appellant seeking specific performance, respondents No. 1 and 2 had moved an application under Order VII Rule 11 CPC for rejection of plaint for being time barred under sub Rule (d) of Order VII Rule 11 CPC, which reads as under:-

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Order – VII

11. Rejection of Plaint:- The plaint shall be rejected in the following cases:-

- (a) Where it does not disclose a cause of action.
- (b) Where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) Where the relief claimed is properly valued, but the plaintiff is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- (d) Where the suit appears from the statement in the plaint to be barred by any law.

Learned Single Judge besides hearing the learned counsel for the parties, also provided opportunity to the counsel for the parties to file brief synopsis of their arguments together with the case law on the subject, however, learned counsel for the respondents Nos.1 and 2 filed such synopsis and case law, but the learned counsel for the appellant did not avail such opportunity. However, the learned Single Judge, after hearing the learned counsel for the parties and after perusal of record specially the averments made in the plaint by the appellant allowed the application filed by the respondents No.1 and 2 under Order VII Rule 11 CPC, and resultantly rejected the plaint mainly for the following reasons:

“5. Prima facie, there is force in what learned counsel for the Defendants has contended namely that on a bare reading of the plaint itself, the suit is barred by limitation. To this contention, no plausible answer by way of rebuttal was given by learned counsel for the Plaintiff nor as noted, was any synopsis filed by him. The law is of course well settled that once time began to run it does not stop running and the Plaintiff himself has taken the position that the cause of action accrued on 10.04.2007. On this basis, the suit appears to be hopelessly barred by limitation. Accordingly, the present application is allowed and the plaint is hereby rejected.”

6. We have gone through the contents of the plaint of the suit filed by the appellant for specific performance of an Agreement dated 13.09.2002, executed between the parties in respect of the subject building project for sale-cum-transfer of partially completed project, and a total sum of Rs.1,15,00,000/- was paid by the appellant and his partners to the Attorney

of the respondents. The appellant has averred in the plaint that on 01.03.2007, he suffered brain hemorrhage and remained in hospital and was under treatment for a period of about 2½ years, however, it appears that nothing was produced or attached with the plaint to support such fact. According to appellant, on or about 10.04.2007, respondent No.2 with the help of his persons removed the staff of the appellant from the premises and illegally took over all record and account books and controlled possession of the project. However, when the respondents failed to perform their part of the contract to handover the possession of the subject property, the appellant filed “the” subject suit i.e. Suit No.507/2011 seeking specific performance. Admittedly, a suit for specific performance of contract is governed by Article 113 of the Limitation Act, 1908, which is reproduced hereunder:

113	For specific performance of a contract	Three years	The date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused.
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7. Bare perusal of aforesaid Article of Limitation Act, and for the purposes the period of limitation it caters two situations (i) when time of performance is fixed in the agreement and (ii) where time is not fixed in the agreement. In the first part starting point of limitation is three years from the date fixed for performance, whereas, in the second part, time runs from the date when the performance is refused by either party. In view of averments made in para-19 of the plaint, which reads as under:-

“19. That the cause of action for filing the suit firstly accrued 10-04-07 and subsequently when on or about June, 2009 when the plaintiff after recovery of his illness approached the defendant No.2. Attorney of the defendants for restorations of the possession of the project at Karachi within the jurisdiction of this Hon’ble Court.”

It was claimed by the appellant that cause of action first accrued on 10.04.2007 when the respondents allegedly dispossessed the appellant from the subject property, and for all practical purposes refused performance of

the agreement between the parties as referred to hereinabove. As such, it can safely be concluded that the performance of contract was refused on 10.04.2007, thus time began to run from that date under Article 113 of Limitation Act. However, admittedly the appellant did not file the Suit for specific performance within the period of limitation as provided under law i.e. three years, nor took any steps or even took a plea that appellant was prevented by sufficient cause to file the Suit within the period of limitation, whereas, no application seeking condonation of delay has been filed. In a case, where it is evident from the averments of the plaint that the suit was filed beyond the period of limitation prescribed under Article 113 of the Limitation Act, the trial Court is not required to frame issue and record evidence. Reliance is placed upon the case reported as **Muhammad Khan vs. Muhammad Amin through LRs and others (2008 SCMR 913)**, wherein the Honourable Supreme Court held as under:

"On perusal of paragraph 18 of the plaint it appears that the petitioner in the plaint averred that the cause of action accrued to the plaintiff in the month of January, 2000 when the petitioners approached the defendants, to sale the suit property after issuance of T.O. Form. The plaint in the suits were admittedly filed on 5-1-2004. Evidently the suit was filed beyond the period of limitation prescribed under Article 113 of the Limitation Act it must be stated that the fact of limitation is evident from the averments made in the plaint itself. In such circumstances, the trial Court was not required to frame issue and record evidence."

8. It is also evident from record that the appellant has not referred any ground for exemption or seeking condonation of delay in terms of Order VII, Rule 6, C.P.C. whereby, it is the duty of the plaintiff/appellant to state reasons of filing of the suit after expiry of the period of limitation, whereas, all those grounds are required to be stated in the body of the plaint, however, in the instant case, no such plea has been raised by the appellant. The provision of Order VII, Rule 6, C.P.C. read as follows:-

"Grounds of exemption from limitation law.--- Where the suit is instituted after the expiration of the period prescribed by the law of

limitation, the plaintiff shall show the ground upon which exemption from such law is claimed."

9. From perusal of plaintiff's suit filed by the appellant seeking specific performance, it appears that appellant has not claimed any exemption or condonation of delay, nor mentioned any ground in terms of Order VII, Rule 6, C.P.C. whereas appellant was under obligation to state the grounds if the suit has been filed beyond the period of limitation. In the case of **Haji Abdul Karim and others v. Florida Builders (Pvt.) Ltd. (PLD 2012 SC 247)**, the Honourable Supreme Court has formulated the guidelines for the interpretation of Order VII Rule 11 CPC, which reads as under:

"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 plaintiff's statement. 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 plaintiff's statement 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 plaintiff's statement prior to taking a decision.

Secondly, it is also equally clear, by necessary inference, that the contents of the written statement are not to be examined and put in juxtaposition with the plaintiff's statement in order to determine whether the averments of the plaintiff are correct or incorrect. In other words the court is not to decide whether the plaintiff is right or the written statement is right. That is an exercise which can only be carried out if a suit is to proceed in the normal course and after the recording of evidence. In Order VII, Rule 11 cases the question is not the credibility of the plaintiff versus the defendant. It is something completely different, namely, does the plaintiff's statement appear to be barred by law.

Thirdly, and it is important to stress this point, in carrying out an analysis of the averments contained in the plaintiff's statement 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 enables 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.

We have examined the plaint on the touchstone of the above criteria and find that from the admittedly executed agreement between the parties, which is the document sued upon and the entire case of the petitioners is structured thereupon, it postulates a 'date fixed' for the performance thereof and no case for the exemption, the enlargement and the exclusion of period of limitation has been set out, in the plaint as per Order VII, Rule 6, C.P.C. therefore, the suit undoubtedly appeared from the statement in the plaint to be barred by the limitation and has been rightly rejected by the Court."

10. While examining the plaint, particularly, para 12, wherein, the appellant himself has disclosed the cause of action and the date of dispossession of the appellant from subject project, which as per pleadings was violation of the Contract, and keeping in view the guidelines mentioned in the above cited judgment of Hon'ble Supreme Court, it reveals that in the suit the appellant has himself admitted to the fact that cause of action was accrued on 10.04.2007, but the suit was filed beyond the period of limitation i.e. three years, when the appellant/plaintiff noticed that specific performance was refused. Accordingly, it has emerged that the suit was hopelessly time-barred. Even otherwise while deciding the application under Order VII, Rule 11, C.P.C. Court has to look into the contents of the plaint, particularly, when such relevant facts or averments in the plaint have not been disputed.

11. It is also pertinent to observe that the appellant kept mum did not take any step nor filed suit, till the time when the respondents filed Suit No.1179/2010 against the appellant and after filing of such suit, the appellant filed instant Suit against the respondents, therefore, the argument of the learned counsel for the respondents that it was counterblast of Suit filed by the respondents appears to be tenable. In any event, structure of law is founded upon legal maxim delay defeats equity, time and tide wait for none. Law helps the vigilant and not the indolent. Whereas, it is also settled legal position that limitation creates a substantial right in favour of succeeding party and against the defaulting party, which cannot be taken away casually

on inconsistent pleas or lame excuses. Plea of the appellant that law of limitation is a mixed question of law and fact; therefore, when there are allegations in the plaint, it required an enquiry and recording of evidence, is misconceived under the facts and circumstances of instant case, for the reason that the question of limitation is floating on the record based on the averments in plaint, whereas, there is no dispute relating to date of refusal i.e. 10.04.2007. It may be observed that law of limitation is not merely a matter of technicality, but is a foundation of 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 Court has no option but to reject the plaint under Order VII Rule 11 (d) CPC for being barred by law. Reference can be made to the case of **Hakim Muhammad Buta and another Vs Habib Ahmed and others (PLD 1985 SC 153)** wherein it is held as under:-

“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...”

12. In view of hereinabove facts and circumstances of instant case and the ratio of the above cited judgments of the Hon’ble Superior Courts, we have come to the conclusion that the learned Single Judge has rightly concluded that the suit is barred by limitation and consequently, rejected the plaint of Suit No.507/2011, whereas, no substantial grounds have been raised by the appellant warranting any interference in the impugned order. Resultantly, instant High Court Appeal was dismissed along with listed applications vide our short order dated 31.03.2022, and these are the reasons for such short order.

JUDGE

JUDGE

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