

Order Sheet
IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 262/2018

Deedar Ali Issran Vs. Abdul Wahid and others

| Date | Order with signature of Judge |
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1. FOR HEARING OF CMA NO.6795/2018
2. FOR HEARING OF CMA NO.6601/2021

Date of Hearing:

22.02.2022

Mr. Ghulam Muhammad Dars, Advocate for the Plaintiff along with Mr. Muhammad Yasir Advocate.

Mr. Neel Keshave, Advocate for Defendants 2 to 5 along with M/s. Anwar Ali Tunio & Abdul Jabbar Khatti Advocates.

ARSHAD HUSSAIN KHAN, J:- Through this application [CMA 6795/2018] under Order VII Rule 11 CPC read with Section of 151 CPC., Defendants No. 2 to 5, seek rejection of the Plaintiff of instant suit.

2. Relevant facts for deciding the aforementioned application are that the Plaintiffs filed the present suit for Declaration, Cancellation, Directions, Damages and Permanent Injunction with the following prayers:-

- I) Declare that all the documents mentioned in para-4 of the Plaintiff are forged, fabricated and self-prepared by the help and in collusion with official respondents as same have neither been executed by the deceased Plaintiff nor his any of the legal heirs.
- II) Judgment and Decree whereby cancel all the documents mentioned in para-5 being forged and fabricated.
- III) Direct the Defendants to handover the possession of property in question to the Plaintiff forthwith.
- IV) Grant damages for Rs.5/- billion as mentioned in the Memo of Plaintiff for damages, expenses and losses.
- V) Grant permanent injunction against the defendants restraining them, their agents, successors, attorneys, employees or any other person (s) from selling, creating third party interest, transferring, disposing the property in question bearing No.ZC-1, ZC-2 and ZC-3, measuring 300 Sq. Yards each situated in Block No.5, Gulshan-e-Iqbal, KDA, Scheme No.24, Karachi, on the basis of the said forged and fabricated documents, till final disposal of this suit.
- VI) Consequential relief(s) which this Honourable Court deems fit and proper under the circumstances of the case may kindly be passed.
- VII) Costs of the suit.

3. This suit has been filed by the legal heirs of Deedar Ali Issran. The case of the Plaintiffs in nutshell is that their father Deedar Ali Issran, who expired on 14.01.1998, was the owner of the property bearing Nos. ZC-1, ZC-2 and ZC-3, measuring 300 sq. yards, each situated in Block No.5, Gulshan-e-Iqbal, KDA, Scheme No.24, Karachi [suit property]. The plaintiffs came to know about certain documents, details whereof are mentioned in para-5 of the plaint of this suit, [subject documents] from the civil suit bearing No.1482/1998, filed by Defendant No.1, inter alia, against the present plaintiffs before this Court for Specific Performance of Contract, Permanent Injunction and Cancellation of Documents. It is stated that the subject documents are forged, fabricated and have been prepared in collusion with the official defendants. It is further stated that the deceased father of the Plaintiffs or his legal heirs at no point in time ever executed General Power of Attorney in favour of any one, as such the question of any deal in respect of the deceased's property does not arise. It is also stated that the amount of damages, claimed in the suit by the Plaintiffs, against the Defendants for their preparing forged and fabricated documents, are liable to be paid by the Defendants in order to compensate the loss and harm and other disadvantages suffered by the Plaintiffs consequent upon the actionable wrong of the Defendants. Hence, the suit with the above mentioned prayers.

4. The Defendants No.2 to 5 have filed instant application under Order VII Rule 11 CPC for rejection of the Plaint on the grounds that (i) the Suit is not maintainable being time barred, (ii) the Suit is hit by the doctrine of *res judicata* as in the judgment and decree, passed in the earlier suit i.e. 1482/1998, all the issues, raised in the present suit, have substantially been decided, therefore, the very same issues cannot be raised again in the present/subsequent suit. Hence, the Plaint of the present suit is liable to be rejected on such count alone.

5. The Plaintiffs filed their counter affidavits wherein they have denied the allegations levelled in the application as well as affidavit in support thereof. It has been stated that application under order VII Rule 11 CPC is misconceived; that the bar of limitation is not applicable to the instant suit; that doctrine of *res judicata* will not apply to this case as the documents, sought to be cancelled in the present case

are different from the documents of the earlier suit; hence, the application merits dismissal with costs.

6. Learned counsel for the Defendants, during his arguments, while reiterating the contents of the application and the affidavit has contended that the Plaint of the present suit is liable to be rejected on the grounds of limitation and res judicata. The documents, sought to be cancelled, were executed between the period from 1996 to 2011, hence the prayer for cancellation of the said documents is beyond the period of limitation i.e. three years as provided under Articles 91 and 92 of the Limitation Act, 1908, therefore, it cannot be enforced at this belated stage. He has denied that the Plaintiffs are owner of the suit property bearing No. ZC-1, ZC-2 and ZC-3. In fact, the suit property was owned by [late] Deedar Ali Issran, the father of the Plaintiffs, who, in his life time, in lieu of consideration, had executed General Power of Attorney on 26.05.1996 in favour of Syed Akhlaque Ali son of Sayed Ashfaq Ali [Defendant No.2], which was duly registered with the Sub-Registrar T-Division, vide registration No.1332 [at pages 94 to 96] of Book No.IV ADDL. Volume No.256 dated 22.05.1996, and subsequently on the basis of said power of attorney the property was transferred in favour of Defendants 3, 4 and 5, through registered sale deeds and since then they are owners of the suit property in their own rights. It has been argued that the documents, sought to be cancelled, are registered documents and presumption of truth is attached to them under registration Act and Qanoon-e-Shahadat Order. It is also argued that authenticity or credibility of a registered documents cannot be called in question if it is not challenged within the time prescribed under the law. It is further argued that the subject documents are neither forged nor fabricated as alleged. All the documents, referred to in para-5 of the Plaint, were never challenged since 1998 till filing of the present suit rather having been admitted by all the legal heirs of the [late] Deedar Ali Issran including Plaintiffs in earlier round of litigation, which has finally been decided by this Court, vide judgment and decree dated 29.12.2017 and 12.01.2018, respectively. It is also urged that challenging the documents after almost 20 years is nothing but an attempt to blackmail the defendants with mala fide intention to extort more money as earlier they had also demanded money and

executed the said power of attorney in favour of their brother who ultimately signed a document to accept the sale in favour of the defendants. It is further urged that the subject documents have already been held valid in the earlier judicial pronouncement in suit No.1482 of 1998, hence the plaintiffs have no rights under the law and the facts to seek cancellation of the same in this subsequent suit. In the last, it has been argued that the malafide and ulterior motives of the plaintiffs are apparent from filing of the present misconceived and time barred suit, hence the Plaint of the present suit is liable to be rejected. In support of his contention, he has relied upon the cases of *Zaidi through Legal Heirs v. Malik Hassan Ali Khan (Moin) through Legal Heirs* [2002 SCMR 338], *Rashid Ahmed v. Federation Of Pakistan through Secretary, Ministry of Communication (Communication Division), Islamabad and another* [1998 SCMR 405], *Noor Din and another v. Additional District Judge, Lahore and others* [2014 SCMR 513], *Aziz-ur-Rehman Hamid v. Crescent Commercial Bank* [2008 SCMR 54], *Muhammad Azhar Khan and another v. Assistant Commissioner/Collector, Toba Tek Singh and others* [2006 SCMR 778], *Abdul Majid and others v. Mst. Zubeda Begum and other* [2007 SCMR 866] and *Ilyas Ahmed v. Muhammad Munir and 10 others* [2012 PLD 92 Sindh].

7. On the other hand, learned counsel for the Plaintiffs while reiterating the contents of the Plaint as well as counter affidavit to the application has argued that instant application is misconceived; that through instant suit declaration of the documents, mentioned in para-5 of the Plaint, as forged and fabricated, has been sought, which fact can be adjudicated only after recording of evidence. He has argued that reliance upon Articles 91 and 92 of the Limitation Act, 1908, is misconceived since the Plaintiffs have never accepted / admitted the authenticity of the documents challenged through instant suit and further the plaintiffs came to know about the documents only in the year 2015 as such the present suit, even otherwise, is within time. It has been argued that three Sale Deeds dated 20.08.1998, purportedly executed by Defendant No.2, mentioned in para 5(i) of the Plaint, through which Defendants 3 to 5 claim their title are forged and illegal documents. That Defendant No.2 executed the sale deeds in favour of

his three brothers / defendants 3 to 5 on the basis of forged Irrevocable Power of Attorney dated 22.05.1996, purportedly executed by the Plaintiff / deceased Deedar Ali Isran. That the Sale Deeds dated 20.08.1998, executed by Defendant No.2, on the basis of lapsed irrevocable power of attorney dated 22.05.1996 in favour of Defendant Nos. 3 to 5 are apparently illegal, forged and fabricated documents having been executed after the demise of the Plaintiff / deceased Deedar Ali Isran and in this regard reliance is placed upon Section 201 of the Contract Act, 1872. It has been argued that registration of the documents cannot be given any efficacy to the fraudulent and collusive documents and such documents warrant adjudication by a competent court of law. Learned counsel further argued that the earlier suit No.1482/1998 was filed by some other party namely; Abdul Wahid mainly against the Defendants in this suit for Specific Performance of Contract, Permanent Injunction and Cancellation of Documents. In the earlier suit only the cancellation of three sale deeds dated 20.08.1998 [Annexure A/8, A/9 and A/10 [pages 141, 155 and 167] was sought by the Plaintiff Abdul Wahid and the issue was also framed in respect of the said three sale deeds and not other 10 documents, which are subject matter of instant suit. It has been argued that in the present suit the Plaintiffs have sought cancellation primarily of GPOA dated 08.06.1998 while alleging fraud in its execution and have also sought cancellation of 09 other documents, as mentioned in para-5 of the Plaint, which were never adjudicated in the earlier suit, hence the Plaint cannot be rejected in piecemeal merely on the basis that the sale deeds were adjudicated in the earlier suit. It has been further argued that the findings in respect of the three sale deeds dated 20.08.1998 and the observations regarding GPOA dated 08.06.1998 in the judgment dated 29.12.2017 in earlier Suit No.1482/1998 were impugned by the Plaintiffs in HCA No.13 of 2018 praying setting aside of the judgment dated 29.12.2017 only to the extent of validation of three sale deeds, wherein the Hon'ble Court was pleased to clarify that while deciding the instant suit it would not be prejudiced with the findings recorded in the impugned judgment dated 29.12.2017. That the Plaintiffs are seeking their shares of inheritance from the property of their deceased father as have been defrauded by the defendants hence, on equitable grounds, need an opportunity to fairly contest the matter on merits. It is

also urged that for the purpose of deciding application under Order VII, Rule 11, C.P.C., the Court has only to consider the averments made in the plaint and has to presume that every fact pleaded in the plaint is true and correct. It is further urged that the limitation is a mix question of facts and law, as such cannot be decided without recording evidence. Lastly, he has argued that the Defendants have failed to make out a case for rejection of the Plaint, therefore, instant application merits dismissal with costs. In support of his contention learned counsel has relied upon the case of *Muhammad Altaf and others v. Abdur Rehman Khan and others* [2001 SCMR 953].

8. I have heard the arguments of learned counsel for the parties and considered the material available on the record.

Perusal of the instant application transpires that defendants No. 2 to 5 seek rejection of the plaint on the two points viz. (i) Limitation and (ii) Res judicata.

POINT NO.1

The contention of learned counsel for the defendants in respect of limitation is that the documents, which are sought to be cancelled in the present proceedings were executed during the period from 1996-2011 and those were very much in the knowledge of present plaintiffs as the said documents were subject matter of the earlier proceeding viz. Suit No.1482 of 1998 wherein present plaintiffs were parties being defendants, hence the prayer is beyond the period of limitation i.e. three years as provided under Articles 91 and 92 of the Limitation Act, 1908, therefore, it cannot be enforced at this belated stage.

9. There is no cavil with the proposition of law that while considering application under Order VII, Rule 11, C.P.C., the contents of the Plaint have to be considered with the presumption that whatever is stated therein is correct. However, it is also well settled principle of law that where the plaintiff had concealed the material facts and important documents in the plaint, in that event, the material produced by the Defendant along with written statement or application under Order VII, Rule 11, C.P.C. could also be taken into consideration more particularly judicial record and admitted documents for rejecting the Plaint. Reliance in this regard can be placed on the cases of *Nazeer*

Ahmed and others v. Ghulam Mehdi and others [1988 SCMR 824], *Muhammad Zaman v. Tariq Mahmood and 28 others* [1994 MLD 207], *Maj. (Rtd.) Hamid Ali Khan v. Mian Muhammad Anwar* [2000 CLC 1633], *S.M. Sham Ahmad Zaidi through Legal Heirs v. Malik Hassan Ali Khan (Moin) through Legal Heirs* [2002 SCMR 338] and *Ilyas Ahmed v. Muhammad Munir and 10 others* [PLD 2012 Sindh 92].

10. From the record, it appears that present defendant No.1 had filed a civil suit bearing No.1482 of 1998 before this Court on 24.11.1998, inter alia, against the present plaintiffs for Specific Performance of Contract, Permanent Injunction and Cancellation of documents. Pursuant to the notice and summons, the present plaintiffs, being defendants in the said suit, filed their respective written statements and subsequently after full-dressed trial the suit was dismissed by this Court on 29.12.2017 through a very exhaustive judgment. Against the said dismissal though two appeals were filed; (i) HCA No.30 of 2018 by present defendant No.1, which was dismissed for non-prosecution and (ii) HCA No. 13 of 2018 filed by present plaintiffs, which was subsequently withdrawn. Consequently, the judgment dated 29.12.2017, passed in the suit No.1482 of 1998 has attained finality. Record also shows that the documents, which are sought to be cancelled in the present proceedings, were not only the part of the court record but were also exhibited during evidence and have been considered in judgment dated 29.12.2017. For the sake of ready reference, subject documents as mentioned in para-5 of the plaint of the present suit along with exhibit numbers assigned in earlier suit are mentioned hereunder:

- a. Irrevocable General Power of Attorney given by Deedar Ali Isran son of Hassan Ali in favour of Syed Akhlaq Ali son of Syed Ashfaq Ali dated 22.02.1996. **(Exhibit No. D/1).**
- b. Irrevocable General Power of Attorney given by legal heirs of Deedar Ali Isran in favour of his son of Hassan Ali dated 08.06.1998. **(Exhibit No. D/2).**
- c. Sub-Irrevocable General Power of Attorney given by Hassan Ali son of late Deedar Ali Isran in favour of Syed Akhlaq Ali son of Syed Ashfaq Ali dated 15.06.1998. **(Exhibit No. D/3).**
- d. General Power of Attorney given by legal heirs of Syed Akhlaq Ali in favour of Syed Iqbal Ali dated 21.10.2011. **(Exhibit No. D/4).**

- e. General Power of Attorney given by defendant Nos.4 & 5 in favour of Syed Iqbal Ali dated 21.10.2011. **(Exhibit No.D/5)**.
- f. Application written by Deedar Ali Isran addressed to the then Director General KDA dated 12.03.1986. **(Exhibit No.X/1)**.
- g. Agreement cum Surrender Deed executed by Muhammad Rafiq dated 19.08.1986 **(Exhibit No. D/7)** and Deed of Cancellation of General Power of Attorney, vide Registration dated 13.05.1987. **(Exhibit No. D/8)**.
- h. Sale Receipt dated 26.07.1995 by deceased plaintiff. **(Exhibit P/1)**.
- i. Addendum Receipt dated 26.08.1995 by deceased plaintiff. **(Exhibit P/2)**.
- j. Copies of three Sale Deeds dated 20.08.1998. **(Exhibits P/7 to P/9)**.
- k. Deed of Cancellation dated 13.05.1987. **(Exhibit D/8)**.

11. The stance of the plaintiffs in respect of limitation for seeking cancellation of the documents is that they acquired the knowledge about the subject documents in the year 2015 that too through proceedings of suit No. 1482 of 1998. Whereas the record of the suit 1998 reflects that initially in the year 1999 a written statement was filed on behalf of Defendants No. 1(a) to (f) and 2 to 5 and 6. However, the legal heirs of defendant No.1 (present plaintiffs) engaged another counsel who filed application (CMA 699 of 2008) for permission of filing a separate written statement on behalf of defendants No. 1 (a) to (f). The said application was allowed on 10.05.2010 and subsequently on 15.03.2012 defendants No. 1 (a) to (f) filed written statements through their respective signatures. Record also shows that present plaintiffs No. 1(c) and (d) though were initially not party in the suit No.1998, however, upon their application (CMA No.2073 of 2007) they were subsequently allowed to join the proceedings and were impleaded as defendants No. 9 and 10. Upon joining the proceedings, the said defendants filed two written statements first one on 07.01.2012 and the second one on 09.01.2013. The above documents clearly reflect that the present plaintiffs, being defendants No.1 (c), (f) and 9 and 10 in suit 1998, were in the knowledge of the stance and the documents of the parties viz. present defendant No.1 and defendants No.2 to 5 in the said suit and if not in the year 1999, when first written statement was filed then definitely in the year 2012, when the written statement was

filed on behalf of defendants No.9 and 10. Whereas the present suit was filed on 20.04.2017 approximately after about 05 years, which is beyond the period prescribed for seeking cancellation of instrument under Article 91 and 92 of limitation Act. For ease of reference the said Articles are reproduced below:

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| "91. | To cancel or set aside an instrument not otherwise provided for. | Three years | When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him. |
| 92. | To declare the forgery of an instrument issued or registered. | Three years | When the issue or registration becomes known to the plaintiff. |

12. The Honourable Supreme Court of Pakistan in the case of *Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad and others* [PLD 2015 SC 212] [per majority decision], while dilating upon the scope and object of the law of limitation, inter alia, has as held under:

“.....It has also eluded the attention of the learned High Court that basically the suit filed by the respondent was for cancellation of the documents on the allegations of fraud, forgery and misrepresentation, which (suit) shall squarely fall within the purview of section 39 of the Specific Relief Act and per Article 91 of the Act, the prescribed period of limitation shall be three years. Anyhow before proceeding further qua this proposition, we find it expedient to briefly touch upon the nature, the object and the significance of the law of limitation. From the various dicta/pronouncements of the superior court, it can be deduced without any fear of contradiction that such law is founded upon public policy and State interest. This law is vital for an orderly and organized society and the people at large, who believe in being governed by systemized law. The obvious object of the law is that if no time constraints and limits are prescribed for pursuing a cause of action and for seeking reliefs/remedies relating to such cause of action, and a person is allowed to sue for the redressal of his grievance within an infinite and unlimited time period, it shall adversely affect the disciplined and structured judicial process and mechanism of the State, which is sine qua non for any State to perform its functions within the parameters of the Constitution and the rule of law. The object of the law of limitation and the law itself, prescribing time constraints for each cause or case or for seeking any relief or remedy has been examined by the courts in many a cases, and it has been held to be a valid piece of legislation, and law of the land. It is "THE LAW" which should be strictly construed and applied in its letter and spirit; and by no stretch of legal interpretation it can be held that such law (i.e. limitation law) is merely a technicality and that too of procedural in nature. Rather from the mandate of section 3 of the Limitation Act, it is obligatory upon the court to dismiss a cause/lis which is barred by time even though limitation has not been

set out as a defence. And this shows the imperative adherence to and the mandatory application of such law by the courts. The said law is considered prescriptive and preventive in nature and is held to mean and serve as a major deterrent against the factors and the elements which would affect peace, tranquility and due order of the State and society. The law of limitation requires that a person must approach the Court and take recourse to legal remedies with due diligence, without dilatoriness and negligence and within the time provided by the law; as against choosing his own time for the purpose of bringing forth a legal action at his own whim and desire. Because if that is so permitted to happen, it shall not only result in the misuse of the judicial process of the State, but shall also cause exploitation of the legal system and the society as a whole. This is not permissible in a State which is governed by law and Constitution. And it may be relevant to mention here that the law providing for limitation for various causes/reliefs is not a matter of mere technicality but foundationally of the "LAW" itself. In the above context, a judgment of this Court reported as Atta Muhammad v. Maula Bakhsh and others (2007 SCMR 1446) has thrown considerable light on the subject and has provided guidance, in the following words:-

"We may add that public interest require that there should be an end to litigation. The law of limitation provides an element of certainty in the conduct of human affair. Statutes of limitation and prescription are, thus, statues of peace and repose. In order to avoid the difficulty and errors that necessarily result from lapse of time, the presumption of coincidence of fact and right is rightly accepted as final after a certain number of years. Whoever wishes to dispute this presumption must do so, within that period; otherwise his rights if any, will be forfeited as a penalty for his neglect. In other words the law of limitation is a law which is designed to impose quietus on legal dissensions and conflicts. It requires that persons must come to Court and take recourse to legal remedies with due diligence."

The question which further arises for determination in this case on the point of limitation is whether in all those cases, like the one in hand, where a plaintiff has joined several causes of action and has sought multiple remedies, the cause of action/remedy entailing the maximum period of limitation should necessarily and mandatorily be resorted to and should cover the question of limitation for the purposes of the whole suit, regardless of whether the suit is barred by time for other cause(s) of action or relief. Suffice it to say that this is not the absolute rule of law, rather legal aspect should be examined by taking into consideration the facts of each case and particularly the frame and object of the suit, taking inter alia further into account the contents of the plaint itself. And thus it should be determined what main relief is being sought by the plaintiff and whether the other remedies asked for (may be carrying larger period of limitation) are ancillary, dependent and consequential to the main relief. The ratio of catena of judgments of the superior courts are to the effect, that in order to ascertain the application of correct Article of limitation to a particular suit, the frame of the suit should be considered, adverted and adhered to (as mentioned above). The true test for determining the period of limitation is to see the true effect of the suit and not its formal or verbal description⁽¹⁾. The Privy Council in a matter reported as Janki Kunwar v. Ajit Singh (15 Cal. 58), in which the basic and frontal attack was to the validity of certain documents, but the relief

of possession was also claimed by the plaintiff, while resolving the question of limitation, opined as follows:-

"Then the Judicial Commissioner deals with the case in a different way. He says the suit is essentially a suit for the possession of immovable property, and as such falls within the 12 years' limitation. Now he is clearly wrong there. It was not a suit for the possession of immovable property in the sense to which this limitation of 12 years is applicable. The immovable property could not have been recovered until the deed of sale had been set aside, and it was necessary to bring a suit to set aside the deed upon payment of what had been advanced, namely, the Rs.1,25000. Therefore there has been on the part of the lower Courts a misapprehension of the law of limitation in this case. Their Lordships are clearly of opinion that the suit falls within Article 91 of the Act XV of 1877, and is therefore barred".

In another case reported as Bashir Ahmad v. Partab (1989 MLD 4314) it was held:-

"The next question which falls for consideration is whether suit filed by the appellant was barred by time. In the suit the appellant challenged the validity of sale-deed allegedly executed by Arjan deceased in favour of respondent on the ground of fraud and misrepresentation. Article 144 of the Limitation Act was not attracted to the suit merely because a prayer for possession of land was made. Since the appellant could not be granted relief regarding possession of land unless he had crossed the hurdle of sale-deed in favour of respondent therefore the provision of Limitation Act prescribing limitation for getting a document on the basis of fraud declared as void would be applicable. In the facts and circumstances as pleaded in the plaint the suit is mainly for a declaration that the said sale-deed was void having been procured through fraud and relief of possession is in the nature of consequential relief therefore Article 91 of the Limitation Act is applicable. This Article prescribed a period of three years from the date when the alleged fraud came to the knowledge of the plaintiff".

[Emphasis supplied]

The Honourable Supreme Court further held in the case as under:

“According to Article 114 of the Qanun-e-Shahadat, 1984 which reads as

"114. Estoppel: When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing", a person is estopped by his own conduct, if he though was aware of certain fact(s), which is likely to cause harm to his rights and adversely affect him and is prejudicial against him, avowedly or through some conspicuous act or by omission, intentionally permits and allows another person to believe a thing to be true and act on such belief without taking any steps to controvert or nullify such adverse fact and instead he sleeps over the matter. In other words, where a person who is aggrieved of a fact, he has a right, rather a duty to object thereto for the safeguard of his right, and if such a person does not object, he shall be held to have waived his right to object and

subsequently shall be estopped from raising such objection at a later stage. Such waiver or estoppel may arise from mere silence or inaction or even inconsistent conduct of a person...”

[Emphasis is supplied]

13. In view of the above, I am of the considered opinion that the relief claimed in the present suit for cancellation of the documents absolutely comes within the ambit and scope of Article 91 and 92 of the Limitation Act, hence the present suit is time barred under Article 91 and 92 of the Limitation Act.

POINT NO.2

14. Insofar as this point is concerned that the present suit is also hit by principle of *res judicata* as the issues involved in the present suit have already been adjudicated upon and determined finally by this Court in Suit No.1482 of 1998 through the judgment dated 29.12.2017.

Before dilating upon the Pleas taken in the arguments by learned counsel for the parties in respect of this point, it would be expedient to refer to Section 11 of CPC, which reads as under:

“11. Res judicata— No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.—The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.—Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

15. It is now well settled that in respect of doctrine of *res judicata*, no exhaustive test can be laid down for determining the matters, which

are directly and substantially in issue in every case, rather it depends on the facts and circumstances of each case. The most important condition that needs to be satisfied is that the matter in issue in the subsequent suit was in issue, directly and substantially, in a former suit. The general and ordinary meaning of 'suit' is a proceeding, which is commenced by presentation of a plaint. Ordinarily, and in more specific terms, a 'suit' is a civil proceeding that is instituted by presentation of a plaint. The expression 'former suit' denotes a suit that has been decided earlier in time than the suit in question, that is, the subsequent suit, regardless of whether such a suit, which was decided earlier was instituted subsequently to the suit in question or not. If two suits are instituted one after the other, and both relate to the same question in controversy, the bar of *res judicata* will apply even in cases where the subsequently instituted suit is decided first.

Furthermore, a 'party' is a person whose name appears on the record at the time of the decision. A party may be the plaintiff or defendant. The condition recognizes the general principle of law that judgments and decrees bind the parties. Once the matter is heard and decided in one suit, the same cannot be agitated again by the same parties, their legal representatives or successors-in-interest. Rule of *res judicata* applies to and binds in a subsequent suit, the same parties to the former suit, and their legal representatives or anyone claiming through such parties. Further, even if a subsequent suit is instituted in a different form or under a different guise, but seeking to agitate the same matter that was decided in the former suit, it will be hit by the rule of *res judicata*. For applying *res judicata*, it is necessary that the matter should have been heard and finally decided in the former suit.

16. Keeping the above test in mind, it is imperative to examine the record of earlier civil suit bearing No. 1482 of 1998. From perusal of record of the said suit, annexed by the defendants along with the application, which have not been disputed by plaintiffs, it transpires that Suit No.1482 of 1998, [hereinafter refer to as the '*earlier suit*'] was filed by Abdul Wahid (present defendant No.1), before this Court, for Specific Performance of Contract, Permanent Injunction and Cancellation of documents *against* (1) Deedar Ali Issran since deceased through his legal heirs (a) Hassan Ali, (b) Shahid Hussain, (c) **Kausar**

Parveen [*present plaintiff No. 1(a)*], (d) Sarvat Bano, (e) Tasawar, (f) **Aarfa** [*present plaintiff No.1 (b)*], (g) Mst. Qamar Jehan, (2) **Syed Akhlaque Ali** [*present defendant No.2*], (3) **Syed Iqbal Ali** [*present defendant No.3*], (4) **Syed Altaf Ali** [*present defendant No.4*], (5) **Syed Jibran Ali** [*present defendant No.5*], (6) **Karachi Development Authority** [*present defendant No.6*], (7) Karachi Building Control Authority [*present Sindh Building Control Authority*] , (8) the Sub-Registrar T. Div. [*present Sub Registrar-I*] (9) **Abrar Ali** [*present plaintiff No. 1(c)*] and (10) **Mst. Mumtaz Sultana** [*present plaintiff No.1 (d)*] with the following prayers:

“1). of Specific Performance of Contract, against Defendants No.1 (a) to (g) in terms of Sale receipt dated 26.07.1995 and addendum to receipt dated 26.08.1995 or in the alternative, Nazir of this Hon“ble Court be appointed as Commissioner with powers to take over the custody of the suit properties and get Sale Deed registered in favour of Plaintiff on behalf of legal heirs of Defendant No.1 and hand over the possession of the same to the Plaintiff.

2). To adjudge the Sale Deeds dated 20.08.1998 under Registration Nos.4275, 4277 and 4279 registered by Sub-Registrar T-Division-IV, Karachi as void;

3). To declare that Power of Attorney dated 22.05.1996 is invalid / void after the death of Defendant No.1 on January, 1998;

4). To declare that building plan approved by K.B.C.A., Defendant No.7 in respect of suit properties on the basis of illegal / void Sale Deeds as null and void;

5). To grant permanent injunctions restraining Defendants No.3, 4 and 5 and their representative, assigns, contractors, etc., from selling, transferring or disposing of the suit properties in any manner to any person/persons;

6). To grant permanent injunction restraining Defendants No.3, 4 and 5 from raising any construction over the suit properties;

7). To grant permanent injunction restraining Defendant No.8 from registering any document in respect of the suit properties during pendency of the suit; and

8). Any other relief / reliefs as this Hon“ble Court may deem fit and proper under the circumstances of the case; and

9). Cost of the suit be awarded.”

Upon notice and summons, defendants No.1 (a) to (f), 2 to 5, 6, 9 and 10 have filed their respective written statements. Subsequently, out of the pleadings following issues were framed by this Court;

“1. Whether the suit is not maintainable in law?

2. Whether the Plaintiff has no cause of action?
3. Whether suit against KDA is not maintainable for want of statutory notice under Article 131 of KDA Order 5/1957?
4. Whether the Defendant No.1 during his life time agreed to sell the suit Plots to the Plaintiff?
5. Whether the contract between Plaintiff and Defendant No.1 was in the nature of "Contingent Contract" executable after dismissal of earlier Suit No.209 of 1989?
6. Whether the contract between Plaintiff and Defendant No.1 is enforceable against the legal heirs of Defendant No.1?
7. Whether Sale Deed dated 20.08.1998 registered in favour of Defendants Nos.2, 3 and 4 is binding on the Plaintiff or liable to be cancelled being subsequent to the agreement executed between Plaintiff and Defendant No.1?
8. Whether the agreement between Defendants No.3, 4 and 5 and Syed Akhlaque Ali entered into after dismissal of Suit No.409 of 1989?
9. Whether Syed Akhlaque Ali was competent to sell suit Plots after the death of Defendant No.1?
10. Whether in the event of failure to get the reliefs of Specific Performance of Contract, the Plaintiff is entitled to the amount, received by the Defendant No.1 with interest /compensation from the legal heirs of Defendant No.1?
11. What reliefs the Plaintiff is entitled to?
12. What should the decree be?"

Thereafter the evidence was recoded and subsequently this Court after hearing counsel for the parties passed the judgment dated 29.12.2017. Relevant portions of the judgment for ease of reference are reproduced as under:

"5. The afore-mentioned Issues can be categorized into four broad categories; in Category "A" falls the Issues relating to the maintainability of the present suit. Category "B" covers the Issues No.4, 5, and 6, pertaining to the validity of sale transaction of the subject properties between the Plaintiff and Defendant No.1, who died even before filing of the present suit and subsequently his legal heirs were impleaded, as apparent from the current title of the Plaintiff. Category "C" covers the Issues 7, 8 and 9 about the sale transaction of the subject properties in favour of present Defendants No.2, 3, 4 and 5. Finally, Category-D is for the Issues 10, 11 and 12, about the entitlement of Plaintiff to receive the compensation from the Defendant No.1(a) to (g)-legal heirs of Defendant No.1 (Deedar Ali Issran) and general relief that can be awarded to Plaintiff."

"19. In view of the above, findings for the Issues falling in Category "C" is that the Sale Deeds dated 20.08.1998 registered in

favour of above named Defendants are valid documents and have been entered into by Syed Akhlaque Ali, Defendant No.2, being duly authorized by a registered instrument, viz. Sub-Irrevocable General Power of Attorney dated 15.06.1998, which is in pursuance of earlier registered Irrevocable General Power of Attorney given by the legal heirs to one of legal heirs, namely, Hassan Ali. Undisputedly after withdrawal of the earlier lis the present Sale Deeds (afore referred) were executed in order to avoid any objections about operation of stay in the earlier lis. Even the second set of legal heirs have compromised their dispute with Defendants No.3, 4 and 5, hence I do not find any illegality in the subject registered Sale Deeds, all of 20.08.1998-Exh P/7, P/8 and P/9 respectively. Issue No.7 is accordingly answered that these registered Sale Deeds are binding on the Plaintiff and are not liable to be cancelled, in view of the discussion contained in the preceding Paragraphs and after finding handed down for Issues falling in Category "B", similarly Issues No.8 and 9 are answered accordingly and in favour of Defendants No.2 to 5.

20. Since the sale transaction between Plaintiff and Defendant No.1 has not been proved by Plaintiff, therefore, he is not entitled to receive any amount towards compensation nor any other relief. Accordingly, the present suit is dismissed, with no order as to costs."

17. From perusal of the pleadings of the present case and the judgment passed in earlier Suit No. 1482 of 1998, it clearly transpires that the parties and the subject matter of earlier suit and the present lis are the same. The documents of the present lis were not only part of the earlier suit but the same were exhibited and duly considered by learned judge while passing judgment dated 29.12.2017 wherein the main documents viz. sale deed dated 20.08.1998 in favour of the defendants No.3 to 5 have been declared as valid. The said judgment though appealed against, however, upon withdrawal of the said appeal the judgment dated 29.12.2017 has attained finality for every practical purposes and cannot be interfered with directly or indirectly in a collateral proceeding, that is, through present proceedings. Principle of collateral proceeding is a settled rule, under which, a final decision by a court of competent jurisdiction cannot be upset or interfered with in some parallel or collateral proceeding, as the plaintiff has attempted to do through present suit. In the circumstances, the plaintiffs are estopped to question the legality of the documents, forming a part of the conclusive judgment and decree; any determination thereof would be barred in terms of principle of res judicata. I am fortified in my view by the following two reported Judgments: -

- i) *Sajjad Ahmed v. Habib Bank Limited and others*
[2019 CLD 824]

- ii) 2018 MLD 1009 [*Muhamad Ibrahim through attorney v. Province of Sindh through Chief Secretary, Government of Sindh, Sindh Secretariat, Karachi and 6 others*]

In the circumstances, I am of the considered view that the Judgment dated 29.12.2017, passed in the earlier Suit No 1482 of 1998, operates res-judicata and hence instant suit is also barred by the doctrine of res-judicata.

18. It is well settled that an incompetent suit should be laid at rest at the earliest moment so that no further time is wasted over what is bound to collapse not being permitted by law. It may be observed that in the trial of judicial issues i.e. suit which is on the face of it incompetent not because of any formal, technical or curable defect but because of any express or implied embargo imposed upon it by or under law should not be allowed to further encumber legal proceedings. Reliance, in this regard is placed upon the case of *Ilyas Ahmed v. Muhammad Munir and 10 others* [PLD 2012 Sindh 92].

19. For the foregoing reasons, Civil Misc. Application No. 6795/2018, under Order VII Rule 11 CPC read with Section of 151 CPC is allowed and the Plaint is, therefore, rejected. Since the Plaint has been rejected, all other pending applications are also dismissed having become infructuous.

JUDGE