**IN THE HIGH COURT OF SINDH AT KARACHI**

**Civil Suit No.1112 of 2008**

**Mst. Jummana Khurshid ---------- Plaintiff**

**Versus**

**Messrs Rufi Builders & others ---------- Defendants**

**Date of hearing:** **24.02.2016**

**Date of Order:** **24.02.2016**

**Plaintiff:** **Through Mr. Javed Raza, Advocate.**

**Defendant No.3:** **Through Mr. Ali Ahmed Tariq, Advocate.**

## ORDER ON CMA NO. 1449/2009.

***Muhammad Junaid Ghaffar, J.*** **-** Through this Application, the defendant No.3 has sought rejection of Plaint under Order VII Rule 11 CPC on various legal grounds, as stated in the Application.

2. Counsel for Defendant No.3 has contended that the Plaintiff is a tenant in property bearing Flat No.E-33, 4th Floor, Rufi Apartments, FL-1, Block-13-D/2, Gulshan-e-Iqbal, Karachi, ("**Property**") against whom a Rent Case was filed and the Rent Controller had passed Order dated 30.10.2003 under Section 16(1) and Order dated 24.12.2003 under Section 16(2) of the Sindh Rented Premises, 1979, which was upheld by the Additional District Judge, Karachi East, vide Order dated 03.12.2004, against which a petition bearing C.P. No. S-10/2005 was filed by the Plaintiff and vide Judgment dated 10.08.2006, the said findings were set-aside and the matter was remanded to the Rent Controller for deciding the issue that whether there exists any relationship of Landlord and Tenant between the Plaintiff and Defendant No.3. He further submits that such order was impugned before the Hon'ble Supreme Court, through CPLA No 515-K/2006, however, the Order passed by the High

Court was maintained and the parties were directed to proceed before the Rent Controller. However, per Counsel during pendency of such proceedings after remand, instant Suit has been filed with an altogether new plea by seeking specific performance of some Receipt issued in 1994, hence without prejudice, instant Suit is time barred. Learned Counsel has further contended that while filing its Written Statement in the Rent Case, the Plaintiff had admitted the ownership of the property in favor of Defendant No.3, whereas, the pleadings in the Suit are altogether against such admitted position. He has further contended that during pendency of this Suit, the Rent Controller as well as the Appellate Authority have affirmed that there exists a relationship of Landlord and Tenant between the parties against which a petition has been filed by the plaintiff before this Court, which is pending and therefore, the Plaintiff cannot claim any ownership in respect of property on the basis of such findings. Per Counsel instant Suit has filed beyond the period of Limitation, as prescribed under Article 113 of the Limitation Act, whereas, the Defendant No.1/Builder against whom the specific performance is being sought, has also supported the case of defendant No.3 in its Written Statement. In support of his contention he has relied upon the cases reported as **2005 CLC 1982 (Messrs. SIGN SOURCE Vs. Messrs ROAD TRIP ADVERTISERS and another).**

3. On the other hand, Counsel for the Plaintiff has contended that insofar as this Suit is concerned, it is independent in nature and while deciding the Application under Order VII Rule 11 CPC, the Court is not supposed to examine the pleadings of the parties in any other matter and therefore, whatever stance which has been taken in earlier proceedings specially, in a Rent Case, are not material for the time being. He has submitted that the Plaintiff booked the Suit Property through Defendant No.1 on 08.11.1994 by making payment of Rs.1,30,000/= in cash and was issued acknowledgement of possession on 31.01.1995 and thereafter the Defendant No.3 in collusion with defendant No.1 has played fraud with the Plaintiff and has managed to get the Receipt issued in his name from Defendant No.1 and so also the Sub-Lease of the property in question. He has further contended that insofar as Limitation is concerned, it was in the year 2006 for the first time that it came into plaintiff's knowledge about Sub-Lease of the property in favor of Defendant No.3, when such material was brought on record in C.P No.S-

10/2005 filed before this Court. Thereafter, per Counsel the Plaintiff approached defendant No.1 for specific performance of Receipt issued at the time of booking of the property and, therefore, the Limitation would start in terms of Article 113 of the Limitation Act once the specific performance was refused by defendant No.1. Counsel has further contended that insofar as the possession is concerned the same is with the Plaintiff, whereas, the utility bills are being issued in the name of the Plaintiff.

4. I have heard both the Learned Counsel and perused the record. Though there are certain legal grounds, raised in the Application under Order VII Rule 11 CPC, however, the first and foremost which I would like to deal with is the objection in respect of Limitation involved in the instant matter. This is a Suit for Specific Performance as well as for cancellation of the acknowledgment of possession issued in favor of Defendant No.3. However, the primary cause of action accrued to the Plaintiff is in respect of specific performance of the Receipt dated 08.11.1994 for Rs.1,30,000/- (claimed as an agreement by the plaintiff) which according to the Plaintiff is the part payment for the purchase of property in question. It is the case of the Plaintiff that this payment was made by her, though no receipt has been annexed with Plaint as the Plaintiff is not in possession of any such Receipt. However, the plaintiff relies upon acknowledgement of possession, issued by Defendant No.1 on 31. 01.1995. The precise case of the Plaintiff is on the premise that payment made to defendant No.1, and the acknowledgement of possession is an Agreement of which the Specific Performance could be sought. Though the Plaintiff has not annexed the Receipt of Rs.1,30,000/=, however, the same has come on record through written Statement of defendant No.1, which was initially issued in the name of plaintiff, but, subsequently was amended in the name of Defendant No.3. The reason for such amendment given by Defendant No.1 in its written statement is that it was mutually requested by the Plaintiff and Defendant No.3, and all further payments were also made by Defendant No.3. Therefore, without prejudice, if the Receipt of Rs.1,30,000/-, as claimed by the Plaintiff is treated as an Agreement between the Plaintiff and Defendant No.1, even then the Plaintiff was required to file Suit for specific performance within 3 years in terms of Article 113 of the Limitation Act, 1908 either from the date fixed for performance of the

Agreement and if not, then when the Plaintiff has notice that specific performance has been refused. Admittedly, there is no agreement on record from which it could be ascertained that any date for such performance was fixed, even the terms and conditions settled between Plaintiff and defendant No.1 have not been placed on record. Therefore, the limitation period would start running from the date when it came to the knowledge of plaintiff that performance has been refused by defendant No.1. Though it has been stated in the plaint that it only came into their knowledge somewhere in 2006, that the property has been subleased in favor of Defendant No.3, and thereafter the Plaintiff approached Defendant No.1, however, nothing specifically has been stated in the Plaint nor any supporting document has been filed, whereby, it could discerned that the Plaintiff had in the first instance approached Defendant No.1 for specific performance which was refused. In fact it is the case of the Plaintiff that it only came to their knowledge somewhere in 2006 when documents of sublease were filed by defendant No.3 in Rent Petition, however, such fact is belied by their own written statement filed in rent proceedings on or about 11.8.2003 which reads as under:-

> "The husband of the opponent requested the applicant to spare the money as friendly loan to him for payment of the balance consideration of flat to the builder. Because there was a notice for cancellation of the booking. The opponent agreed to favor the opponent's husband and he arranged for payment to the builder. But in order to secure his money and for his safe side, he directly paid the said amount to the builder and by mutual understanding, it was arranged to get the sub-lease registered in the name of applicant. But the opponent remained in occupation of the flat as its owner. The opponent's husband has paid a sum of Rs.60,000/- to the applicant in installments, but later on the opponent changed his mind and stopped receiving the installments of loan. He has filed the above case on false and concocted story."

5. It is a settled proposition of law that the Court is duty bound to see that whether the Suit which has been filed before it, is barred by any law or not. If a specific objection is taken through an application under Order VII Rule 11 CPC, or otherwise, the Court is bound to examine the plaint and reject it forthwith, if it appears from the statement made therein, to be barred by any law. The Court is duty bound by the use of the mandatory word "Shall" under Order VII Rule 11 CPC, to reject the plaint if it "appears" from the statement in the plaint to be barred by any law. Though the Counsel for the Plaintiff may be justified in arguing that

while deciding an application, the Court has to see and examine the contents of the plaint and not beyond that, whereas, the contents of the written statement are not to be examined and put in juxtaposition with the plaint. However, such rule is not absolute and there are always exceptions to it. The Court while examining the averments in the plaint is not obligated to accept as correct, any manifestly self-contradictory or wholly absurd statement of the plaintiff. The Hon'ble Supreme Court in the case of ***Haji Abdul Karim Versus Messers Florida Builders (Pvt) Limited (PLD 2012 SC 247)***, has upheld the order of rejection of plaint under Order VII Rule 11 CPC passed by the Trial Court in a case of specific performance of an agreement and has laid down certain guidelines to be followed while examining the contents of plaint and its rejection under Order VII Rule 11 CPC and has held as under:

> 9. We have already noticed that the court is bound by the use of the mandatory word "shall" to reject a plaint if it "appears" from the statements in the plaint to be barred by any law. What is the significance of the word "appears"? It may be noted that the legislative draftsman has gone out of his way not to use the more common phraseology. For example, in the normal course, one would have expected that the language used would have been "where it is established from the statements in the plaint that the suit is barred by any law" or, alternatively, "where it is proved form the statement in the plaint that the suit is barred by any law". Neither of these alternatives was selected by the legislative draftsman and it must be assumed that this was a deliberate and conscious decision. An important inference can therefore be drawn from the fact that the word used is "appears". This word, of course, imports a certain degree of uncertainty and judicial discretion in contradistinction to the more precise words "proved" or "established". In other words the legislative intent seems to have been that if prima facie the court considered that it "appears" from the statements in the plaint that the suit was barred then it should be terminated forthwith. This great advantage of this would be twofold".
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> 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.
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> 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.
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> 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 plaint in order to determine whether the averments

> of the plaint are correct or incorrect. In other words the court is not to decide whether the plaint 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 plaint appear to be barred by law.
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> 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. ***(Emphasis added)***

6. In the instant matter, the written statement (of rent proceedings) has been filed with the Plaint by the Plaintiff and therefore, the Court can examine such document. Moreover, this being a factual assertion could always to be examined as multiple litigations are going on between the parties in respect of the property in question. If the case, as stated in the plaint, is correct then it is difficult to believe that some other stance taken in the rent proceedings was either not correct or cannot be relied upon by the Court. If such stance in the plaint is true, then it should have also been reflected in the rent proceedings. This appears to be a change of stance taken by the Plaintiff and to deny the relationship of Landlord and Tenant between the parties.

7. Be that as it may, since the question of limitation is to be taken up by the Court at the very first instance and on perusal of the plaint in question it appears that the Suit is beyond the limitation period as prescribed under Article 113 of the Limitation Act, even if the Receipt in question for the sake of arguments is treated as an Agreement between the parties. It was the Plaintiff, who, under the law was obligated to approach Defendant No.1 for specific performance within three years of the issuance of Receipt and once the specific performance was refused within the limitation period then the limitation would have start running from the date of refusal in the instant matter. It cannot be accepted that a party to the agreement is well within its right not to approach the other

party for performance of the agreement for an unlimited or unspecified period of time, so as to enlarge the period of limitation. This in turn would be against the spirit of law, including the Limitation Act. To seek protection under the 2nd part of Article 113 of the Limitation Act, that is the notice of refusal for performance, the party must have approached for such performance of the agreement within a reasonable time. In the instant matter the plaintiff despite having knowledge, neither approached defendant No.1 for performance of the agreement nor initiated any other proceedings in time before any Court, except instant Suit. The said refusal was already in notice when the plaintiff had filed its written statement and had said that "***he (defendant No.3) directly paid the said amount to the builder and by mutual understanding, it was arranged to get the sub-lease registered in the name of applicant (defendant No3)***". After having examined such assertion of the plaintiff, it leaves no doubt in my mind that it was in the knowledge of the plaintiff that a sub-lease has been registered in favor of defendant No.3 by defendant No.1, hence, performance of the alleged agreement refused insofar as plaintiff is concerned. There cannot be any other meaning or exception to this. Moreover, the plaintiff has otherwise not been able to show nor has brought on record that as to when the Plaintiff approached Defendant No.1 and when such specific performance was specifically refused.

6. In the circumstances and the facts discussed hereinabove, I am of the view that the Suit of the Plaintiff is hopelessly time barred in terms of Article 113 of the Limitation Act, and therefore, the Plaint must be rejected. Accordingly being convinced on 24.02.2016 by means of a short Order, I had allowed the listed Application by rejecting the Plaint under Order VII Rule 11 C.P.C and these are the reasons thereof.

Judge

Ayaz