

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
II Appeal No.176 of 2019

Date Order with signature(s) of Judge(s)

1. For hearing of CMA No.5792/2019
2. For hearing of main case

13.04.2021

Mr. Mustafa Safvi, advocate for appellant
Mr. Afaq Yousuf, advocate for respondent

This is second round of litigation and perhaps the trial court in the second round at least has not passed order strictly as required under the law and in terms of the order passed by this Court on 27.02.2013 in II Appeal No.63 of 2006. The reproduction of the order of this Court in II Appeal No.63 of 2006 is very essential so that the proceedings of the two courts below be adjudged:

“Learned counsel for both the parties have pointed out that although in the pleadings before the trial Court the point of limitation was raised specifically, but the learned trial Court has failed to record its verdict on the point of limitation and decreed the suit. However, the appellate Court while passing the impugned judgment has taken the judicial notice of above legal point and observed that the trial Court has not appreciated the above legal aspect of the case nor recoded its verdict on the point of limitation accordingly. The appellate court set aside the judgment and decree and allowed the appeal. Learned counsel for both the parties request that it would be appropriate if both the judgments are set aside and case is remanded back to the trial Court for recording proper and specific verdict on the point of maintainability of the suit in view of limitation.”

By consent judgments of both the Courts below are set aside, matter is remanded back to the trial Court to pass the judgment afresh keeping in view the point of limitation and decide the case within 60 days on the basis of evidence already recorded, after an opportunity of hearing learned counsel for both the parties.

The II appeal is disposed of in the above terms.”

Appellant has already resumed the possession of premises in rent proceedings, however, present controversy is arising from suit proceedings filed by tenant for cancellation of registered lease.

Despite specific direction for a decision in accordance with law, including the issue of limitation, the trial court neither framed an issue nor gave specific findings with regard to limitation. After remand of the case in terms of the aforesaid order of this Court, the trial court decreed Suit No.433 of 2004 on 26.07.2013. Though the trial court mentioned it in the conclusion of issue No.5 that it received the direction of this Court on the point of limitation, yet in a very cursory manner while deciding the issue No.6, which is "What should the decree be", observed that the suit is not hit by limitation and that is it. There are no specific findings in this regard though it was inevitable in terms of the order of this Court.

In my view, after remand, the trial court should have framed an issue and to this extent respondent has conceded, however, he submitted that the defence of limitation was not available in terms of pleadings/written statement. This statement is contrary to earlier statement made before this Court as observed in the order reproduced above. This, even otherwise, could hardly be a ground to restrict the trial court to frame an issue and give specific findings as required by law and in terms of order. Even if the pleading does not provide plea of limitation it can always be looked into as being primary concern of trial Court.

Coming to the issue in hand, the lease of the subject premises claimed to have been executed in the year 1981. In my view, a specific issue ought to have been framed by the trial court for a decision as to whether plaint instituted in the month of April, 2004, in respect of the lease in question sought to be declared as without lawful authority and be declared as illegal and unlawful was within time or otherwise. The concerned article of limitation i.e. Article 91 required a probe as to whether when the facts entitling the plaintiff to have the instrument cancelled become known to him. This is the

only article where such language is used. The counsel for the parties have appreciated that though this Court could have decided this issue one way or the other but then the rights of either party to prefer appeal could be curtailed in this way. The appellate court observed in second last para of typed page 8 of judgment that though lease was registered in 1981 but it is not in the knowledge of plaintiff/respondent.

The finding should be in consonance with requirement of Article 91 of the Limitation Act as referred above. I, therefore, with consensus of counsels deem it appropriate to refer the matter back to the trial court after setting aside the judgments of the two courts below dated 16.07.2019, passed by Additional District Judge-XII, Model Civil Appellate Court, District South Karachi in Civil Appeal No.158 of 2013 and 26.07.2013, passed by III Senior Civil Judge, Karachi South in Civil Suit No.433 of 2004 to frame this specific issue of limitation and give findings as to when the facts entitling the plaintiff to have the instruments cancelled triggered. It is expected that if any application for recording additional evidence only for this issue is preferred, it may be considered in accordance with law as Mr. Afaq, learned counsel submitted that it is a mixed question of law and fact. No notice however is required to be issued to the counsel as well as parties as they may appear before the trial court on **25.05.2021**, after Ramzan as further agreed by counsel. It is expected that the trial court may pass judgment in accordance with law including the issue of limitation within a period of **three (3) months** with compliance report to this Court through MIT-II.

Appeal is disposed of in the above terms.

J U D G E

Gulsher/PS