ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

SUIT No. 635 of 2003

Venu G. Advani
through
his Legal Representatives

Vs.

M/s. Beach Developers & Others

For orders as to maintainability of the Suit in view of Court's order dated 14.09.2023.

Plaintiff	:	Through Mr. Shahrukh Brohi, Advocate.
Defendnat Nos.1,2&3	:	Through Mr. Abid Feroze, Advocate.
Date of hearing	:	28 September 2023 & 2 March 2024

MOHAMMAD ABDUR RAHMAN, J. By this Order I will be addressing an issue as to the Maintainability of this Suit that was raised by this Court on 27 March 2018 but which has been incorrectly stated in the Order Sheet as having been raised on 14 September 2023 and by which order aquestion was framed as under:

"Whether the Suit is time barred"

2. The Plaintiff contends that he was a Partner, holding a 14% share in a Partnership known as "Beach Developers." It is maintained by the Plaintiff, that the Defendant No. 2 and the Defendant No. 3 represented that they wished to acquire the Plaintiff share in that Partnership from him against a consideration of Rs. 47,500,000 (Rupees Forty Seven Million Five Hundred Thousand). It is contended by the Plaintiff that while he had given his consent to such a transaction, he was confronted by the Defendant No. 2 and the Defendant No. 3 with an agreement and receipt each dated 15 July 1996 and which he executed without actually receiving the consideration of Rs. 47,500,000 (Rupees Forty Seven Million Five Hundred Thousand) against an understanding that the amount indicated therein would be paid to him on the next day i.e. on 16 July 1996. The amount having not been paid the Plaintiff contends that each of those documents were procured from him fraudulently and for which he has maintained this *lis* inter alia seeking their cancelation.

3. The Defendants have raised a preliminary objection that the Suit having been presented on 29 May 2003 is well beyond the period of limitation prescribed in Article 91 of the First Schedule of the Limitation Act, 1908 for cancellation and which is consequentially barred under Section 3 of the Limitation Act, 1908. At the instigation of the Defendants an issue on this basis was raised by the Court on 27 March 2018 and which is being pressed by the Advocate for the Defendant.

4. Mr. Shahrukh Brohi, who addressed arguments on behalf of the Plaintiff has contended that the question of limitation in this Suit was a mixed question of fact and law and hence could not be determined at this stage. In this regard he relied on a decision of the Supreme Court of Pakistan reported as ***Dr. Muhammad Javaid Shafi vs. Syed Rashid Asad***[1] wherein a suit was maintained sixteen years after a Power of Attorney had been fraudulently registered and in which it was held that the law of limitation would not be used to permit a fraud to being perpetuated. He concluded by relying on another decision of the Supreme Court of Pakistan reported as ***Haji Abdul Sattar vs. Farooq Inayat***[2] wherein it was held that a determination of the period of limitation under Article 120 of the First Schedule of the Limitation Act, 1908 was a mixed question of fact and law.

5. Mr. Abid Feroze entered appearance on behalf of the Defendant and referred to the Sale Agreement dated 1 July 1995 whereby the Plaintiff had first acquired a 14% share in a Partnership known as “Beach Developers”. He next contended that the Plaintiff had agreed to dissociate with the Partnership and on account of which the Agreement dated 5 July 1996 that is sought to be cancelled has been instituted on 29 May 2003 nearly seven years after the Agreement was executed and hence the Suit was clearly barred under Article 91 of the First Schedule read with Section 3 of the Limitation Act, 1908.

6. I have heard the Mr. Shahrukh Brohi and Mr. Abid Feroze and have perused the record.

7. The power vested in a Court to reject a plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908 has been examined by the Honourable Supreme Court of Pakistan in the decision reported as ***Haji***

[1] PLD 2015 SC 212
[2] 2013 SCMR 1493

Abdul Karim vs. Messrs Florida Builders (Private) Limited [3] and wherein it was held that:

> " … *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.*

In summary when examining a Plaint under Order 7 Rule 11 the Court is bound to "appraise" the Plaint but while carrying out such an appraisal is not to consider the terms of the Plaint to be the gospel truth. Rather, while carrying out such an appraisal, a Court is bound to apply its mind to consider the statements made in Plaint and to consider whether the same are true when compared as against both admitted documents and documents appended to the Plaint. The Court is however not to consider the contents of the Written Statement and which should be left to be considered at the time of the determination of the issues in the *lis.*

8. The prayer clause as maintained by the Plaintiff in this Suit is for convenience reproduced hereinunder:

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[3] PLD 2012 SC 247

" … *A). to hold that the Agreement and Receipt dated 15.07.1996 (Annexures 'C' & 'D') are wrong, bogus, fabricated, baseless, illegal and have no value before the eyes of law as well as cancel the same,*

B). to hold that the Plaintiff is still Partner of Defendant No.1 and is competent to deal / control / supervise / inquire / obtain/check / verify the accounts as well as deals the affairs of Beach Developers in all regards as Partner,

C). to direct Defendants not to restrain / refrain the Plaintiff or his Representative to deal / perform functions as Partner of Beach Developers and also provide / grant / pay the benefits / privileges / interest over the affairs / business of Beach Developers as per his shares continuously including future interest / rights/ privileges as Partner;

D). to appoint Receiver / Commissioner with powers to take over the business of Beach Developers and also appoint Auditors for the purpose of checking/ verification and deal the affairs connected with Beach Developers with power to deal with the business in all regards of Beach Developers and its projects and pay the amount of interest with mesne profit as per schedule rate of banks,

E). or may pass any order(s) in favour of the Plaintiff against the Defendants which may deems fit and proper under the circumstances of this suit."

9. I have examined the Plaint and in which the Plaintiff has admitted that he had maintained Suit No. 925 of 2000 on the same cause of action that existed in this Suit but the Plaint of which was struck off on 8 March 2001 under Rule 128 of the Sindh Chief Court Rules. The Provisions of Rule 128, 129 and 130 of the Sindh Chief Court Rules which regulate such conduct and rights of a Plaintiff are for reproduced hereinunder:

" … *128. Time for payment of process fee and consequence of non-payment.*

Process fees for the issue of summons, notice or other process and costs of advertisements shall be paid to the Nazir within seven days from the order directing such summons, notice, process or advertisement to issue or within such further time as may be allowed by an order in writing of the Registrar, (O.S.). In default of such payment, the plaint or application shall be struck off by the Registrar, (O.S.), who shall make an endorsement to that effect on the plaint or application and sign it. The plaintiff or applicant or his advocate presenting the plaint or application is expected to ascertain and shall be presumed to know the date of the order directing the issue of the process or advertisement.

129. Restoration.

A plaint or miscellaneous application struck off the file under the last preceding rule, may be restored to the file, as of the date on which it was originally filed, on the application of the plaintiff or applicant and on sufficient grounds being shown to the satisfaction of the Registrar (O.S.).

130. Fresh plaint.

When a plaint or miscellaneous application, is so struck off the file, the plaintiff or the applicant shall be at liberty subject to the law of limitation to present a fresh plaint or miscellaneous application for the same matter."

As is apparent where a Plaint is struck off under Rule 128 of the Sindh Chief Court Rules a Plaintiff has two options. He can either apply under Rule 129 of the Sindh Chief Court Rules to restore the Plaint or he can under Rule 130 of the of the Sindh Chief Court Rules refile a new plaint on the same matter and which will be entertained subject only to the issue of limitation.

10. I have examined the file of Suit No. 925 of 2000 and note that after the Plaint was struck of an application for restoration under Rule 129 of the Sindh Chief Court Rules was maintained and which was also dismissed as having not been pressed by the Plaintiff. As the suit has not be restored and as the Plaintiff is, under Rule 130 of the Sindh Chief Court Rules notwithstanding the provisions of Order II Rule 2 of the Code of Civil Procedure,1908, fully entitled to maintain the same cause in a new Plaint, the only question that remains to be asked is as to whether this Suit has been filed within the time period indicated in the provisions of the Limitation Act, 1908.

11. As has now been settled by the Supreme Court of Pakistan in the decision reported as ***Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad***[4] where a Plaintiff maintains a plaint with several causes of action the Court should consider the main relief claimed by the Plaintiff while determining a question of limitation it being held that:

> *" … The question which further arises for determination in the 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 restored to and should cover the question of limitation for the purpose 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 aspects 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 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 the determining the period of limitation is to see the true effect of the suit and not its form or verbal description****."*

I am clear that the main relief that is being sought by the Plaintiff in this Suit is one for cancelation of the Agreement and Receipt each dated 15 July 1996 as having been executed fraudulently and which would ***generally***

[4] PLD 2015 SC 212

have to be instituted within the time prescribed in Article 91 of the First Schedule of the Limitation Act, 1908 and which reads as under:

Description of suit.	**Period of limitation.**	**Time from which period beings to**
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.

As the criteria for determining the time period is to commence from the date *"When the facts entitling the plaintiff to have the instrument cancelled or set aside bec[a]me known to him,"* it is therefore incumbent on this Court to look at the Plaint and to see what the Plaintiff has contended is the time from when he claims to have knowledge of the 'facts entitling" him to have the instrument cancelled or set aside. Regarding such knowledge the Plaintiff in the plaint of this Suit has stated that:

> *" …* *19. That the Receipt dated 15.07.1986 is bogus / wrong as the same was not complied in this sense that in presence of the witnesses, Defendant No. 2 obtained signatures of the Plaintiff* ***with the promise that the amount through a Bank Draft be paid to the Plaintiff on the next day*** *but till to date they have not complied / honoured their commitments.*
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> *20. That the Agreement dated 15.7.1996 and Receipt dated 15.7.1996 are incorrect, wrong and fictitious as the same were not complied* ***although signed by the Plaintiff in good faith*** *and by consideration of long acquisition / friendship as well as family / business relationship with Defendant Nos. 2 & 3 and their family and now under the direct and absolute control of Defendant No. 1.*
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> *21. That the Agreement and Receipt dated 15.7.1996 are false, baseless and have no value before the eyes of lay as Defendant Nos. 2 & 3* ***prepared and executed the same with dishonesty, fraud with malafide intention as well as by giving wrong and baseless impression to the Plaintiff for payment of the amount on the next day****, obtained signatures of the Plaintiff and* ***unless the Defendants complied / fulfilled, the obligations enumerated / mentioned therein the same cannot be said to be just, proper, valid and genuine documents at all and the same are liable to be cancelled****. …*
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> *24. That the Plaintiff previously filed Suit No. 925 of 2000 for the same request which is the subject matter of Present Suit and the same was Dismissed for Non-Prosecution and thereafter on 05 August, 2002 due to efforts made by the Plaintiff for redressal of his grievance Defendant No. 2 on the voice of his conscious accepted the claim of the Plaintiff and also made a statement in writing whereby certified that he had not made/paid the payment to the Plaintiff which was the subject matter of Suit 925/2000 and 1124 /97 and also the subject matter of the Present Suit in the changed circumstances."*

The above quoted paragraphs of the Plaint confirm that according to the Plaintiff:

(i) both the Agreement and Receipt each dated 15 July 1996 were admittedly signed by the Plaintiff on 15 July 1996;

(ii) that payment of the amount indicated in the Agreement and Receipt each dated 15 July 1996 were to be made on the next date i.e. 16 July 1996; and

(iii) that by a letter dated 5 August 2002, the Defendant No. 2 ,who is one of the partners of the registered partnership "Beach Developers," has accepted that no payment was ever made by the Partnership under the Agreement dated 15 July 1996 nor were any monies received by him under the Receipt dated 15 July 1996.

12. On the basis of the pleadings in the Plaint there can be no doubt that the Plaintiff has admitted that he was aware of the execution of the Agreement and the Receipt on 15 July 1996. The basis of the fraud i.e. that he was not paid the sum of Rs. 47,500,000 (Rupees Forty Seven Million Five Hundred Thousand) on 16 July 1996 to my mind would be the date on which the Plaintiff was fully aware that the Agreement and the Receipt each dated 15 July 1996 had been obtained from him by fraud and which would therefore be the date from which the time period of limitation should be calculated. That being the case, this Suit having been presented on 29 May 2003 would prima facie have been filed after the period prescribed in Article 91 of the First Schedule of the Limitation Act, 1908.

13. However, I do not think that the matter ends there. On the issue of limitation, the Plaintiff also premises his claim on the basis of a letter dated 5 August 2002 wherein the Defendant No. 2, who is one of the partners of "Beach Developers" has accepted that no monies had been paid by "Beach Developers" to the Plaintiff pursuant to the Agreement dated 15 July 1996 and by the receipt dated 15 July 1996 both of which when read along with the letter dated 5 August 2002 would indicate that the Agreement dated 15 July 1996 would as such fail for a lack of consideration. Section 25 of the Contract Act, 1872 prescribes that:

> " … ***25. Agreement without consideration void, unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation law.-***
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> *An agreement made without consideration is void, unless:-*
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> *(1) it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other; or unless*

> *(2) it is a promise to compensate, wholly or in a part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do, or unless*
>
> *(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.*
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> *In any of these cases, such an agreement is a contract.*
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> *Explanation 1.- Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.*
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> *Explanation 2.- An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.*

Regarding the period for Limitation, it is noted that Sub-Section (1) of Section 29 of the Limitation Act, 1908 prescribes that:

> *"* … ***29. Savings.***
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> ***(****1) Nothing in this Act shall affect section 25 of the Contract Act, 1872 (IX of 1872)."*

A bare reading of these two provisions can only lead to the conclusion that where an agreement is found, in terms of Section 25 of the Contract Act, 1872, to be void for want of consideration a suit maintained on that cause of action cannot be found, inter alia, to be barred under Section 3 of the Limitation Act, 1908 and which would consequentially exclude the application of Article 91 of the First Schedule of the Limitation Act, 1908. I am however not inclined to accept such an argument. On the facts clearly, the Agreement dated 15 July 1996 envisages an obligation of the payment of consideration of a sum of Rs. 47,500,000 (Rupees Forty Seven Million Five Hundred Thousand) to the Plaintiff and hence it cannot be said that the Agreement is not supported by consideration so as to attract the provisions of Sub-Section (1) of Section 29 of the Limitation Act, 1908. What is in fact in dispute in this Suit is as to whether the amount mentioned in the Agreement dated 15 July 1996 has or has not been paid and if so, as to what are the consequences of that obligation having not been performed. It would seem that if the amounts have not been paid the Plaintiff could have alleged breach of the Agreement and sought specific performance for the performance of the obligation or in the alternative sought termination of the Agreement. The Plaintiff has elected for neither and has instead sought cancellation of the Agreement on the ground of a fraud having been perpetuated on him, as defined in Section 17 of the Contract Act, 1872 and for which, as held by the Honourable Supreme Court of Pakistan in the

decision reported as ***Dr. Muhammad Javaid Shafi vs. Syed Rashid Asad***[5] the period of limitation is to be determined in accordance with Article 91 of the First Schedule of the Limitation Act, 1908. In that Judgment it was held:

> " … *In our candid view if an instrument is alleged to have been obtained by fraud, undue influence, coercion or misrepresentation it is not a document which can be held to be void ab initio or on the face of it void, but it requires to be determined and adjudged by the court of law as voidable or void as the case may be and in such an eventuality, the matter shall squarely be covered by section 39 of the Specific Relief Act …"*

As stated above, the Plaintiff had knowledge of the fraud on 16 July 1996 when the amount that was purportedly payable to him by the Partnership was not paid. That being the case, the fact that such an admission was acknowledged in the letter dated 5 August 2002 to my mind would not allow the Plaintiff to allege that a fresh cause of action accrued in his favour to cancel the Agreement dated 15 July 1996. All that document does is acknowledge the old breach of the Agreement dated 15 July 1996 made by the Defendants and which, would not take anything away from the fact that the Plaintiff became aware of the facts on the basis of which he seeks cancellation of the documents on 16 July 1996. The Plaint is therefore barred under Article 91 of the First Schedule read with Section 3 of the Limitation Act, 1908.

14. For the foregoing reasons, I am of the opinion that this Suit as maintained is barred under Article 91 of the First Schedule read with Section 3 of the Limitation Act, 1908. The Plaint is therefore rejected under the provisions of Order VII Rule 11 of the Code of Civil Procedure, 1908 with no order as to costs.

JUDGE

Karachi dated 9 March 2024

[5] PLD 2015 SC 212