IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 685 of 2006

Dawood Ahmed Salar **….** **Plaintiff**

Versus

Saud Ahmed Salar & another **….** **Defendants**

Chaudhry Muhammad Iqbal Advocate for Plaintiff

Mr. Muhammad Mushtaq Qadri Advocate for Defendant Nos. 1 and 2

Date of hearing : 07 August 2024

Date of judgment : 27 September, 2024

JUDGMENT

OMAR SIAL, J.: This case is essentially a family saga of two brothers spanning two decades of grievances that somehow ended up in the court docket. The elder brother i.e. the Plaintiff claims, in a lot many words than mentioned here, that he moulded his entire life and used his earnings to ease the life of his younger brother i.e. Defendant No.1. He has sued the brother for the return of those earnings/alleged loans/damages in the amount of Rs. 60,000,000. His nephew, the son of Defendant No.1 has also been impleaded even though no particular role has been ascribed to him in the pleadings. Regardless, the elder brother avers in the plaint that since around 1986, he has been financially supporting his younger brother in one way or the other at the cost of his future and that of his children. On 13.05.2003, an agreement of loan was executed between the two brothers whereby the younger brother agreed to pay a sum of 32,371 Saudi Riyals (roughly Rs.517,936 in the year 2006) in payment to the elder brother on account of a loan that he had received from him in 1991. ("**Loan**

Agreement"). It was on 18.05.2006 that this suit was filed to recover the money.

2. Conversely, the younger brother denies all the claims made by the elder brother and pleads that he was instrumental in providing financial aid to the elder brother on repeated occasions. However, instead of any payback and/or gratitude, the younger brother fraudulently usurped certain sums of money and has now embroiled the Defendant in this litigation. The following issues, as proposed by the defendants, were adopted by this Court with the consent of the plaintiff's counsel.

1. Whether the Suit is maintainable in the eyes of the law?
2. Whether the suit is barred by Limitation Act?
3. Whether the Suit is barred by the provisions of Section 42 of the Specific Relief Act?
4. Whether any cause of action ever arose for the plaintiff against the defendants?
5. Whether the plaintiff had made a loan agreement with defendant No. 1 in the year 2003 with malafide intention if so what is its effect?
6. Whether there was any business affiliation or terms between the plaintiff and the defendant no.1 if so what is its effect?
7. Whether the plaintiff have any right to claim the alleged amount of Rs.60,000,000/- (Rupees Sixty Million Only) from the defendants jointly or severally?
8. What should the decree be?

The above issues, with the powers vested in me under Order XIV Rule 5 of the CPC, 1908 are recast as follows for reasons of precision and clarity.

1. Whether the suit is maintainable under the law?
2. Whether the suit is time-barred?
3. Whether any cause of action accrued to the Plaintiff against the Defendants?
4. Whether a valid subsisting contract executed between Plaintiff and Defendant No.1?
5. Whether the Plaintiff is entitled to the relief as claimed?
6. What should the decree be?

Issue No. 1

3. The first legal issue pertains to the maintainability of the instant lis. I note that the instant suit pertains to a claim in the sum of Rs. 60,000,000/- which is way below the current pecuniary jurisdiction of this Court.[1] At the time of the institution of the suit i.e. in 2006, the pecuniary jurisdiction of this Court was for a claim of over and above Rs. 30,000,000/-.[2] Subsequently, the same was raised to fifteen million.[3] However, the amended proviso of section 7 of the 1962 Ordinance provided that all suits instituted before the passage of the said amendment shall continue to be tried and decided by the High Court. Accordingly, this Court has the pecuniary jurisdiction to adjudicate the instant suit.

Issue No. 3 (For the sake of free flow of the opinion, Issue 2 is addressed subsequently)

4. At the outset, I note that the entire premise of this case has been established on the Loan Agreement. However, the said document has not been exhibited during the trial but has been marked

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[1] Section 7, Sindh Civil Courts Ordinance, 1962 as amended via Sindh Civil Courts (Amendment) Act, 2021

[2] Section 7, WP Ordinance No.II of 1962 as amended via Sindh Civil Courts (Amendment) Ordinance, 2002

[3] Section 7, WP Ordinance No.II of 1962 as amended via Sindh Civil Courts (Amendment) Ordinance, 2002

as A/19. Hence, the very veracity of this document is in doubt and does not meet the tenets of the law of evidence which mandates that primary evidence be put forth.[4] Moreover, Defendant No.1 in his testimony has maintained that his signature on the said agreement was obtained via coercion and intimidation. To rebut such assertion, the Plaintiff failed to bring forth the two witnesses to the agreement i.e. Mahmood Munir and Mohammad Riaz Khan as required under Article 79 of the Qanun-e-Shahadat Order, 1981.[5] Hence, in the absence of the proof of the loan agreement, the Plaintiff has failed to establish that any cause of action accrued to him. Black's Law Dictionary defines cause of action as, *"...a primary right of the plaintiff violated by the defendant…"* The Plaintiff has failed to establish any right for there to have been a violation. There are other loan agreements executed between Defendant No.1 and other individuals, marked as A/18, A/20, A/21 and A/21-I.[6] However, the same are not

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[4] 2017 SCMR 172, Province of the Punjab v. Ghazanfar Ali Shah, "The argument that where a party did not raise objection as to the admission of a document and its exhibition, it cannot subsequently complain about its mode of proof has not impressed us as the provisions governing the mode of proof cannot be compounded or dispensed with, nor can the Court which has to pronounce judgement, as to the proof or otherwise of the document be precluded to see whether the document has been prroved in accordance with law and can as such, form basis of a judgement."

[5] Proof of execution of document required by law to be attested.— If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of given evidence:
Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.
Sheikh Muhammad Muneer v. Mst Feezan PLD 2021 SC 538 *"The command of the Article 79 is vividly discernible which elucidates that in order to prove an instrument which by law is required to be attested it has to be proved by two attesting witness if they are alive and otherwise are not incapacitated and are subject to the process of the Court and capable of giving evidence. The powerful expression "shall not be used as evidence" until the requisite number of attesting witnesses have been examined to prove its execution is couched in the negative which depicts the clear and unquestionable intention of the legislature barring and placing a complete prohibition for using in evidence any such document which is either not attested as mandated by the law and/or if the required number of attesting witnesses are not produced to prove it. As the consequence of the failure in this behalf are provided by the Article itself therefore it is mandatory provision of law and should be given due effect by the Courts in letter and spirit. The provisions of this Article are most uncompromising so long as there is an attesting witness alive capable of giving evidence and subject to the process of the Court no document which is required by law to be attested can be used in evidence until such witness has been called the omission to call the requisite number of attesting witnesses is fatal to the admissibility of the document…And for the purpose of proof of such a document the attesting witnesses have to be compulsorily examined as per the requirement of Article 79 otherwise it shall not be considered and taken as proved and used in evidence…"*

[6] A/18 - between Nazima Begum and Defendant No.1. A-20 between Aftab Ahmed Siddiqui and Defendant No. A-21, Mazaharuddin and Defendant No.1 (all dated 13.05.2003) and A-21-I between Mirza Waheed Baig and Defendant No.1 date 21.04.2003

discussed as those individuals are not privy to the instant lis. Plaintiff avers that he paid the said individuals on behalf of Defendant No.1. However, it is unclear as to why he continued making payments on behalf of Defendant No.1 to other individuals, despite Defendant No.1's alleged willful default spanning over two decades. Hence, the third issue is answered in the negative.

Issue No. 2

5. Even otherwise, the suit is barred by limitation. This is the second legal objection raised by the Counsel for the Defendants and a plethora of case law has been cited at the bar to substantiate the said argument.[7] I note that as per Article 57 of the Limitation Act, 1908 the period for suing for return of money owed is three years from the date the loan is made. Clause 2 of the Loan Agreement stipulates, "*That the Second Party had promised with the First Party that he will return the loan in a short time but twelve years have passed the second party has failed to fulfill his obligation for repayment of loan.*" The Plaintiff's document states that the loan was tendered in 1991 and had to be returned in a short time but that a period of twelve years has passed. The execution of the Loan Agreement, however, revived the cause of action in 2003 on the tenets of section 25(3) of the Contract Act, 1872 which provides that, *"An agreement made without consideration is void 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 authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law of the limitation of suits."* In the case of 1997 SCMR 536, Behlol v. Quetta Municipal Corporation, the Supreme Court held that section 25(3) of the Contract Act, 1872 would provide a fresh cause of action to a time-barred claim and section 19 of the Limitation Act, 1908 would not be

[7] 2018 SCMR 1131, 2016 SCMR 910, PLD 2022 SC 716, PLD 2012 Sindh 92, 2022 MLD 174, 2009 YLR 451, 2021 CLC 151, 2001 MLD 907 and 2008 CLC 418

applicable, as long as the said three conditions are met. A relevant extract of the judgement cited and confirmed in the said case is reproduced as follows; *"There is no basic difference between section 25(3) of the Contract Act and section 19 of the Limitation Act. Under the former, there should be a promise in writing to pay a time barred debt. But under section 19 a mere acknowledgement in writing within the period of limitation extend the time. Promise as contemplated by section 25(3) gives a fresh cause of action. It applies when the debt is barred by time."*

6. In the instant case, the promise is made in writing i.e. the Loan Agreement dated 13.05.2003, it is signed by the person charged with the loan i.e. Defendant No.1 and the payment of that loan but for the said promise would be time-barred. The Loan Agreement refers to a loan rendered in 1991. The period of limitation thus began in 1991 and lapsed in 1993 resulting in the claim being time-barred. Accordingly, the three conditions of section 25(3) of the Contract Act, of 1872 stand met. The cause of action thus revived, by Article 57, the suit had to be filed within three years from the date of agreement i.e. 13.05.2003. However, it was filed on 18.05.2006 and is time-barred by a period of six days. No explanation for the delay of these six days has been put forth in the pleadings as mandated under Order VII, Rule 6. [8] Hence, the second issue is answered in the affirmative.

Issue No. 4

7. The fourth issue pertains to whether the agreement under consideration stands the test of being a contract. Agreement, as defined in section 10 of the Act, is, "*made by the free consent of parties to contract…*" Free consent is defined in section 14 as one that is not induced by, amongst others, *"coercion as defined in section 15"*[9] and

[8] 2012 PLD 247 SC, Haji Abdul Karim v. Florida Builders Private Limited

[9] Coercion" is the committing, or threatening to commit, any act forbidden by the Pakistan Penal Code (XLV of 1860) or the unlawful detaining, or threatening to detain, any property, to the

that but for the coercion, the consent would not have been given. The Defendants in their pleadings aver and maintain that the contract was executed by Defendant No.1 under coercion. Defendant No.1 has pled that he was called over to the Plaintiff's house, where other people had also assembled and then illegally detained and coerced into signing the documents. He substantiates this with a complaint filed on 14.05.2003 with the SHO of Shah Faisal Colony which has been exhibited as D/5. Accordingly, I hold that the suit is not only time-barred but that the loan agreement does not meet the legal requisites of a lawfully binding contract. Accordingly, the fourth issue is answered in the negative.

8. Given the foregoing, the suit of Plaintiff is dismissed with a cost of Rs. 500,000 to be paid by Defendant to Plaintiff within thirty days from the date of this judgment.

JUDGE

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prejudice of any person whatever, with the intention of causing any person to enter into an agreement.