

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT No.76 of 2010

JUDGEMENT

Plaintiff No.1	:	Anjum Rehmat through Mr. Khalid Latif, Advocate.
Plaintiff No.2	:	Nadeem Rehmat through Mr. Khalid Latif, Advocate.
Defendant No.1	:	Squadron Leader (Retd) Shaikh (Ex-parte)
Defendant No.2	:	Riaz (Ex-parte)
Defendant No.3	:	A. Rehman Dadabhoy (Exparte)
Defendant No.4	:	Shoaib Zafar Niwani through Mr. Ghulam Shabbir Baloch, Advocate. (Absent)
Defendant No.5	:	Shaikh Muhammad Rafiq Akhter Through Khawaja Naveed Ahmed, Advocate. (Absent)
		Mr. Mansoor-ul-Arfin, Advocate for Official Assignee.
DATE OF HEARING	:	14.03.2014

NAZAR AKBAR, J. The Plaintiffs' counsel by order dated 04.11.2013 was directed to satisfy the Court on the question of maintainability of the suit. The relevant portion from the said order is reproduced below:-

“I have heard learned counsel for the plaintiffs regarding maintainability of the suit and also that under what circumstances the plaintiffs, who are already in Court since 1979, have filed suit in 2010, after almost thirty (30) years in respect of the same property. To this point, learned counsel for plaintiffs submit that Suit No.76/2010 is on different cause of action. On the face of it, if it is correct then obviously Suit No.879/1979 shall have no nexus with this suit. At the same time, learned counsel for plaintiffs submits that this suit came-up with Suit No.879/1979 on the orders passed by Hon'ble Supreme Court in the year 1993 and such order have bearing on this suit as well. I am afraid that when learned counsel for plaintiffs himself admits that cause of action of the

earlier suit i.e. Suit No.879/1979 is different than the cause of action of instant suit, then how he can interpret any orders passed in 1993 would have bearing on a case about which he was not having a cause of action then. Therefore, it is hereby ordered that Suit No.76/2010 is separated from all other bunch of cases. Office to fix this suit separately with direction to place it in Court on the next date for the purpose of determining its maintainability”.

2. Mr. Khalid Latif learned counsel for the Plaintiff on 25.11.2013, 24.12.2013, 17.2.2014 and on 24.3.2014 addressed the Court on the question of maintainability of this suit. Mr. Mansoor-ul-Arfin, advocate for the Official Assignee with the consent of Mr. Khalid Latif was also allowed to assist the Court and by consent of both the counsel on 17.2.2014 it was also ordered that file of another suit No.1329/2005 filed by the Defendant No.4 be placed in Court alongwith this suit before final hearing on the question of maintainability of this suit. The Plaintiffs claim that “cause of action” for the present suit No.76/2010 had accrued to them on receiving the plaint of Suit No.1329/2005, therefore, these two cases were tagged together. However, on 14.3.2014, the suit No.1329/2005, in presence of the counsel of the Plaintiff of the said suit, was dismissed for non-prosecution. Two orders dated 24.2.2014 and 14.3.2014 from suit No.1329/2005 are relevant for appreciating the circumstance in which the said suit was dismissed and effect of its dismissal on this suit No.76/2010. The orders from suit No.1329/2010 are:-

1. For orders on Official Assignee Report dated 23.6.2008
2. For hearing of CMA No.253/2011.

24.02.2014.

Mr. Rana Azeem, advocate for the Plaintiff.
 Mr. Mansoorul Arfin, advocate for the O.A.
 Mr. Khalid Lateef, advocate for the Defendants
 No.4&5.
 Mr. Ziauddin Junejo, AAG.
 Ms. Memoona, advocate holding brief for Mr. Sohail
 Muzaffar, advocate for Defendant No.7.

1. In view of the order passed in the main Suit bearing No.879/1979, the Official Assignee’s Report dated 23.06.2008 has no consequence and become infructuous.

2. Mr. Rana Azeem, learned counsel seeks withdrawal of his Vakalatnama on behalf of the Plaintiff in this case, as he has already sent notice through TCS to the Plaintiff as well as his Attorney, but they are not in contact with him. He has further stated that he has checked from the Tracking Record that said notices were duly received at the address given in the Plaint.

However, since this matter is being adjourned to be fixed alongwith Suit No.76/2010, in which the Plaintiff is already impleaded as one of the Defendants, therefore, Mr. Rana Azeem, learned counsel is requested that one more notice may be issued to the Plaintiff intimating withdrawal of his Vakalatnama and informing the Plaintiff through notice that in case of non-appearance of the Plaintiff before him or before this Court on the next date of hearing i.e. 05.03.2014, this matter will be dismissed for non-prosecution, as the Plaintiff and his Attorney is not in contract with him.

Mr. Rana Azeem, learned counsel is directed to file not only a copy of TCS Receipt, but also Delivery Report through TCS before this Court alongwith his statement on the next date of hearing.

14.03.2014.

Rana Azeem, advocate for the Plaintiff.
Mr. Mansoor-ul-Arfin, advocate for the Official Assignee.
Mr. Khalid Latif, Advocate for the Defendants No.4&5.

Learned counsel for the Plaintiff has already filed an application for withdrawal of his power and he has fully complied with the requirement of law in terms of Rule 50 of the SCCR. However, on 24.2.2014 Court had requested him to again send notice to the Plaintiff, that request has already been complied with and fresh notices were also sent by the counsel for 14.3.2014. Nobody is present on behalf of the Plaintiff, suit is dismissed for non-prosecution.

3. It is pertinent to mention here that in Plaintiffs' earlier suit No.879/1979 which is still pending and in their present suit No.76/2010 as well as in Suit No.1329/2005 filed by the defendant No.4 the subject matter is ***Plot No.150-J, Block No.2, PECHS measuring 1000 sq.yds*** (hereinafter the suit plot). In their two suits bearing suit No.879/1979 and suit No.76/2010, the plaintiffs have approached this Court on the basis of sale agreement dated **22.5.1979** in respect of the suit plot and in suit No.1329/2005 the plaintiff (defendant No.4 herein) has approached this court on the basis of an agreement of sale dated **14.5.1988**. The Plaintiffs are already in Court since **17.10.1979** as their first suit No.879/1979 for specific performance of contract dated **22.5.1979** is still pending and on **20.1.2010**, they have filed another suit No.76/2010 with the following prayers:-

- a. Declaration that annexures “AA”, “BB”, “DD”, and “EE” to the plaint are not binding on the Plaintiffs, being coram non judice, of no legal effect and have to be ignored as being void ab-initio.
- b. Adjudge annexures “AA”, “BB”, “DD”, and “EE” to the plaint and void against the plaintiffs.
- c. Order annexures “AA”, “BB”, “DD”, and “EE” to the plaint to be delivered up and cancelled.
- d. Send copy of the decree to the sub-Registrar ‘T’ Div-XI, Karachi for necessary action under the law.
- e. Grant costs of this suit.
- f. Grant any other relief deemed fit and proper in the circumstances of the case.

4. These prayers are tricky. These are more complexed questions of mathematics or algebra than legal questions explicitly reflecting the actual grievances of the Plaintiffs. We have first to discover the hidden meaning of “AA”, “BB”, “DD” and “EE” before proceedings further. And before discovering the real meaning of annexures AA, BB etc let us see the cause of action that prompted the plaintiffs to file the instant suit pending their 30 years old suit No.879/1979. The plaintiffs have shown cause of action in para 58 of the plaint which is reproduced below:-

“58. That the cause of action accrued to the Plaintiffs in or about the last week of May 2008 when they came to know of the filing and pendency of suit No.1329 of 2005, on 28.5.2008 when their advocate filed his power on their behalf in Suit No.1329 of 2005 and obtained copies of the plaint and its annexures and soon thereafter when they came to know of the annexures “AA”, “BB”, “DD”, and “EE” and the contents thereof and on 17.7.2008 when they filed their written statement in Suit No.1329 of 2005 in this Hon’ble Court, at Karachi and hence within the territorial jurisdiction of this Hon’ble Court. the Defendants reside and / or work for gain at Karachi and are hence susceptible to the jurisdiction of this Hon’ble Court.”

The plaintiffs by referring to AA, BB, DD and EE in their claim of cause of action and the prayer mean the following documents:-

Annexure “AA” is sale deed executed on 27.1.1987 between Ldr. (Retd.) Shaikh Ghulam Sadiq S/o Shaikh Mohamod (defendant No.1) and Riaz Ahmed S/o Abdul Karim (defendant No.2) in respect of Plot No.150-J Block II PECH Karachi.

Annexure **“BB”** is sale deed executed on 18.7.1987 between Riaz S/o Abdul Karim (defendant No.2) and A. Rehman Dadabhoy S/o A. Jabbar Dadabhoy (defendant No.3) in respect of Plot No.150-J, Block II, PECHS Limited Karachi.

Annexure **“DD”** is sale agreement executed on 14.5.1988 between A. Rehman Dadabhoy S/o A. Jabbar Dadabhoy (defendant No.3) and Shoaib Zafar Niwani S/o Zafar Uddin (defendant No.4) in respect of Plot No.150-J, Block-II, PECHS Limited Karachi.

Annexure **“EE”** is receipt dated 14.5.1988 issued by A. Rehman Dadabhoy in respect of Plot No.150-J, Block-II, PECHS Limited Karachi in favour of Shoaib Zafar Niwani.

5. Learned counsel for the plaintiffs has vehemently argued that this suit is maintainable as the plaintiffs have a cause of action and it is not barred by time as according to him limitation for filing the suit starts from the point of time when the plaintiffs come to know about the existence of annexures “AA”, “BB”, “DD” and “EE” through the plaint of the suit No.1329/2005. And the knowledge of these annexures to the plaintiffs, according to him is dated 17.7.2008 when the plaintiffs filed their written statement as defendants No.4 and 5 in Suit No.1329/2005.

6. The perusal of plaint of suit No.1329/2005 suggests that the defendant No.4 merely on the basis of sale agreement dated **14.5.1988** with defendant No.3 filed the said suit for cancellation of eleven years prior sale agreements dated **22.5.1979** between the defendant No.2 and the plaintiffs of suit No.76/2010. The office objection on maintainability of suit No.1329/2005 continued for nine years and even an application of defendants No.4 & 5 in suit No.1329/2005 (the Plaintiff herein) bearing CMA No.71/2009 for disposal of the said suit on issues of law filed on **22.12.2009** remained pending till dismissal of the suit for non-prosecution. In fact the suit No.1329/2005 lingered on simply for the reason that it was ordered to be tagged with 26 years old suit No.879/79, the original suit filed by these plaintiffs, merely at the request of the counsel. Probably pendency of suit No.1329/2005 was not hurting the present Plaintiffs since they are not keen to get their own earlier suit No. 879/1979 disposed of on merit. I have noticed that during the last several dates of hearing the counsel for plaintiffs has never shown his desire to take-up suit No.879/1979 before any other issue. Be that as it may, on 14.3.2014 suit No.1329/2005 was dismissed and therefore, if at all, any cause of action has accrued to the plaintiff on filing of the said suit by the Defendant No.4, it is no more an existing cause of action. Once “cause of action” for filing

of a suit dies/vanishes, the suit cannot survive. The plaintiff has claimed cause of action for present suit on the basis of suit No.1329/2005 and with the dismissal of Suit No.1329/2005, the suit No.76/2010 loses its basis. A continuing cause of action is necessary for filing and maintaining a suit for a judicial verdict on any dispute or for determination of any “right” from a court of law.

7. The instant suit is even otherwise time barred. It was the duty of the plaintiffs to elaborate the circumstances in which he claimed that only in the last week of May 2008, they learnt about suit No.1329/2005. They have not disclosed that whether they received a notice from the court in May 2008 or any other document suddenly revealed to them the pendency of suit No.1329/2005 to claim starting point of limitation for filing of the suit on **20.1.2010** for cancellation of sale deeds which were registered and executed as far back as on **27.1.1987** and **18.7.1987**, annexure “AA”, and “BB” etc to the plaint. The date of engaging a counsel is not a proof of knowledge of pendency of a suit. The knowledge of pendency of a suit to a party to the suit is to be inferred from the date of service on the party to the suit. When the Plaintiff assert a particular date in the plaint for the purpose of limitation to bring his cause of action within time, the plaintiff has to furnish facts and the circumstances in which he acquired such knowledge on a particular date and time otherwise the Court has to determine the date from the facts available on record to determine limitation for filing of the suit. In the case in hand, the Plaintiff has based his cause of action from the facts alleged in the plaint of suit No.1329/2005 which was filed by the defendant No.4 on **22.9.2005**. Therefore, record of Suit No.1329/2005 was relevant to ascertain a date to determine the question of limitation for filing of the instant suit. I have thoroughly examined the record of suit No.1329/2005 and diary of Additional Registrar (O.S) in suit No.1329/2005 clearly indicates that the defendants No.4 and 5 who have filed present suit No.76/2010 were duly served with notices / summons of suit No.1329/2005 on **13.4.2006**. The defendants No.4 and 5 (the Plaintiffs herein) have never disputed that they were not served through the bailiff or the diary of Additional Registrar was incorrect. Not only the diary of Additional Registrar, but the court order dated **17.10.2006** also clearly indicates that the defendants No.4 and 5 (the plaintiff in present suit No.76/2010) were served with the notice of suit No.1329/2005, therefore the date and time of service of suit No.1329/2005 is supposed to be the time of acquiring knowledge. The Plaintiffs have filed this suit on **20.1.2010** after more than three years from **13.4.2006**

when the plaintiff came to know about the documents annexures AA, BB, DD and EE which they want to be declared as void and canceled through this suit No.76/2010 on the face of it was time barred.

8. Another aspect of this case is that the plaintiffs on 20.1.2010 had no cause of action to file a suit for cancellation of annexure “AA” and “BB”. These annexure “AA” and “BB” are two separate sale deeds which were respectively registered on 27.1.1987 and 18.7.1987 and the plaintiffs on 17.10.1998 almost 12 years prior to filing of suit No.76/2010 have already amended their pending suit No.879/79 to include the relief of cancellation of the same annexure “AA” and “BB”. It is regretted that the Plaintiffs in first 30 paragraphs of plaint have extensively referred to their earlier suit No.879/1979 and they have filed record of proceeding upto the orders of Supreme Court dated 02.02.1993 remanding their suit No.879/1979 back to High Court. They have filed original plaint of suit No.879/1979 and concealed the amended plaint dated 17.10.1998. In their amended plaint of suit No.879/79 the same plaintiffs have added the following paragraph No.16-A:-

“16-A The alleged Sale Deed dated 27.01.1987 (Annexure “AA” in present suit) of the suit property in favour of the Defendant No.3 and the alleged Sale Deed dated 18.7.1987 (Annexure “BB” in present suit) in favour of the Defendant No.4 are not legal and valid and are liable to be cancelled.”

The defendant No.3 and 4 in the amended plaint of Suit No.879/1979 are Mr. Riaz and Mr. A. Rehman Dadabhoy and they are defendants No.2 and 3 in present suit No.76/2010 and the prayer against them in the fresh suit is the same. Therefore the claim of the Plaintiffs in para 58 of the plaint that “they came to know of the annexures “AA” and “BB” on 17.7.2008 when they filed their written statement in Suit No.1329/2005” was a blatant misstatement.

9. Regarding maintainability of the suit for declaring annexures DD and EE i.e. sale agreement and receipt both dated 14.5.1988 between defendant No.3 (A. Rehman Dadabhoy) and defendant No. 4 (Shoaib Zafar Niwani), suffice is to say that neither of these documents are binding on the plaintiffs nor these documents have any legal effect adverse to the interest, if any, of the plaintiffs in respect of the suit property bearing Plot No.150-J, Block No.2, Pakistan Employees Co-operative Housing Society Limited, Karachi. Plaintiffs’ interest in the suit property is already subjudice in suit No.879/79. The plaintiffs’ apprehension about these documents have no basis since the plaintiff are not party to the said sale agreement

dated **14.5.1988**. Mr. Rehman Dadabhoy, the so-called executant of the annexure "DD" is already party in the suit filed by the Plaintiff in 1979. It goes without saying that an agreement to sell of an immovable property by itself does not create any interest in or charge on such property. Section 54 of the Transfer of Property Act, 1882 is complete answer to the uncalled for fears of plaintiffs with reference to the annexures DD and EE. The agreement annexure DD dated 14.5.1988 has not conferred any right, title or interest in suit property in favour of defendant No.4 adverse to the interest of the Plaintiffs herein and therefore a document which by itself has no legal consequence is neither required to be declared so nor is required to be cancelled. Thus the plaintiffs are neither aggrieved by these documents nor they have any cause of action for filing of the present suit to seek the relief of cancellation of the said annexure DD and EE.

10. In view of the above facts and circumstances, this suit is dismissed as not maintainable.

JUDGE

Karachi

*Dated:*_____

SM