

**ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI  
Suit No.1602 of 2012**

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Date                      Order with Signature of Judge

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**For order as to maintainability of this Suit**

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15.02.2017.

Mr. Muhammad Anwar Tariq, Advocate for the Plaintiff.  
Mr. Khawaja Shamsul Islam, Advocate for Defendant No.1.

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**Muhammad Junaid Ghaffar J.**                      Office has placed this matter before me for orders as to maintainability of this Suit pursuant to directions given by a learned Division Bench of this Court through order dated 3.2.2017 in HCA No.154/2015. It appears that vide Order dated 28.4.2015 a learned Single Judge of this Court while hearing the injunction application was pleased to reject the plaint in this matter against which the aforesaid HCA was filed and with the consent of the parties and without touching merits of the case, the said order was set-aside by directing this Court to hear the parties afresh on maintainability of this Suit.

2.     Learned Counsel for the plaintiff submits that this a Suit for Specific Performance of 50 commercial plots bearing No.SR-1 to SR-50 of 100 Sq. Yds. each situated in Sector 13-A, Hawks Bay Scheme No.42, Karachi, pursuant to a Letter dated 15.11.2011 duly signed by the plaintiff and defendant No.1. He submits that payment of Rs.10,000,000/- (Rs. 10 Million) was made through five (5) different cheques, which were en-cashed on the same date, and thereafter allocation receipts were issued by defendant No.1 dated 15.11.2011 and on the same date acknowledgement of possession was issued by the plaintiff, however, vide Letter dated 03.11.2012, the defendant No.1 refused to lease the subject plots, hence instant Suit.

3. Per learned Counsel the objections regarding maintainability of this Suit by relying upon the provisions of Section 25 to 28 of the Contract Act is not justifiable and so also the provisions of Sections 54 and 56 of Specific Relief Act are not attracted as they relate to injunctions, therefore, instant Suit is competent before this Court. Learned Counsel has also referred to Section 12 of the Specific Relief Act and has contended that this is a Suit for Specific Performance and plaintiff is entitled to lead evidence in support of its claim. He submits that the allegation of fraud and forgery as alleged cannot be adjudicated at this stage of the proceedings against the plaintiff. Per learned Counsel the plaintiff may have a weak case on merits but this does not mean that a plaint can be rejected summarily without affording any opportunity to the plaintiff to lead evidence. In support of his contention he has relied upon the cases reported as **2014 CLC 669** (*First Women Bank Ltd. through Authorized Representative/Attorney v. Major (R) Shamshed Ali Khan and 3 others*), **1993 SCMR 183** (*Bashir Ahmad v. Muhammad Yousaf through Legal Heir*), **2017 CLC 40** (*Ahmed Nawaz Jagirani v. Sindh Industrial Trading Estate Ltd. through Managing Director*), **PLD 1984 Karachi 233** (*Messrs Karachi Gas Company Ltd. v. Messrs Fancy Foundation*), **AIR 1998 Rajistan 103** (*Sukhpal Singh v. State of Rajasthan and others*), **PLD 2015 Sindh 142** (*Pakarab Fertilizers Limited v. Dawood Hercules Corporation Limited through Secretary and 8 others*), **PLD 1977 Karachi 377** (*Custodian of Enemy Property, Islamabad v. Hoshang M. Dastur and 6 others*) and **PLD 2007 Karachi 224** (*Umeed Ali and 12 others v. Government of Sindh and others*).

4. On the other hand, learned Counsel for Defendant No.1 submits that the Specific Performance which is being sought by the

plaintiff is against A.A. Construction Company, which is a registered Partnership Firm, however, the said Company is not a defendant before this Court, as defendant No.1 in fact are partners of the Firm and they have been sued individually in their names, hence no Specific Performance of the alleged so called agreement can be sought. Learned Counsel has read out Para No.3 & 8 of the Plaint and submits that on the one hand the plaintiff claims that on payment of full and final settlement, the possession was handed over, and on the other they are claiming possession as well execution of all development works through this Suit as well. He further submits that instant Suit has been filed by one Adnan Abid through an Attorney namely Fawad Hussain, whereas, there is no agreement between the parties nor any receipt and it is only a Letter dated 15.11.2011 issued by the plaintiff himself of which the Specific Performance is being sought. Learned Counsel has also referred to the signatures of the plaintiff on various letters and the Power of Attorney given to Mr. Fawad Hussain and submits that there is a vast and marked difference in the signatures, hence instant Suit has been filed incompetently. Per learned Counsel the cheques being relied upon were not in the name of defendant No.1 but were cash cheques which were encashed by Muhammad Zahid, who is the Manager of the plaintiff, and therefore, no payment as alleged was ever made to defendant No.1. Learned Counsel submits that neither any privity of contract exists between the parties, nor any cause of action accrues insofar as defendant No.1 is concerned. Learned Counsel has also referred to rejoinder filed on behalf of the plaintiff to one application, and submits that through rejoinder an altogether new stance has been taken by the plaintiff so as to cure legal objections raised on behalf of defendant No.1 regarding privity of contract, and therefore,

instant Suit is not maintainable. Learned Counsel has also referred to Sections 21 (b) & (c) of the Specific Relief Act, 1877 and Sections 2(e) & (h) and Section 29 of the Contract Act, 1872 and submits that there is no agreement between the parties, of which the Specific Performance can be sought. In support of his contention he has relied upon the cases reported as **2007 SCMR 1692** ( *Sqn. Ldr (R) Umeed Ali Khan v. Dr. (Mrs.) Sultana Ibrahim and others*), **2006 CLC 893** (*Ahmed Bakhsh alias Ahmad v. Salabat Khan and another*), **2010 MLD 82** (*Tahira Begum v. Syeda Saira Awais*), **2010 MLD 123** (*Saeed Naseem Cheema v. Mrs. Rukhsana Khan*), **PLD 2003 Karachi 691** (*Jehan Khan v. Province of Sindh and others*), **2007 SCMR 741** (*Raja Ali Shan v. Messrs Essem Hotel Limited and others*), **1988 SCMR 824** (*Nazir Ahmed & others v. Ghulam Mehdi & others*), **PLD 2012 SC 247** (*Haji Abdul Karim and others v. Messrs. Florida Builders (Pvt) Limited*) and **PLD 2013 Lahore 716** (*Gulistan Textile Mills Ltd. v. Askari Bank Ltd. and others*)

5. I have heard both the learned Counsel and perused the record. Though there is no objection by the Office as to maintainability of this Suit, nor any application has been filed under Order VII Rule 11 CPC on behalf of defendant, however, since earlier the plaint was rejected while deciding an injunction application and in appeal the plaintiff had raised an objection to the effect that he was never put to notice in this regard, therefore, the matter has been taken up as to maintainability of Suit pursuant to the orders passed by the learned Division Bench on 03.02.2017 in HCA No.154/2015. The relevant portion of the order reads as under:-

“The proposition appears to be well founded and not controverted. Consequently, without touching the merits of the impugned order only for the aforesaid reason by consent of the parties the impugned order is set aside with a rider that the maintainability of the Suit would be argued before the learned J-3 (O.S) on 15.02.2017 at 11.00 a.m. It is also agreed that in case

Plaintiff seeks an adjournment the interim order in his favour would automatically stand vacated. This High Court Appeal stands disposed of alongwith listed application in above terms.”

6. There appears to be certain objections raised in the counter affidavit by the learned Counsel for Defendant No.1 inasmuch as reliance has been placed on Sections 25 to 28 of the Contract Act, and so also Sections 54 and 56 of the Specific Relief Act. Though no formal Application under Order VII Rule 11 CPC has been filed to that effect, however, the question of maintainability of Suit can be raised and examined by the Court at any stage of the proceedings, even without any such Application under Order VII Rule 11 CPC. However, while doing so the Court has to keep in mind the parameters as laid down in law specially Order VII Rule 11 CPC, which provides that the Plaint **shall** be rejected where it does not disclose a cause of action, or where the relief claimed is undervalued or where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped and finally where the Suit appears from the statement of the plaint to be barred by any law. 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. Nonetheless in this case specifically, I have only taken into consideration the averments in the plaint and other material admittedly placed on record and relied upon by the plaintiff. 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 from 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".

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.

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.

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.

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)

7. Insofar as defendant No.1's case is concerned they have placed reliance on various documents to contend that there is no agreement between the parties, whereas, fraud and forgery has been committed by the plaintiff in filing of instant Suit. It is their case that no relief can be granted to the plaintiff on the basis of such documents as no cause of action accrues. Learned Counsel contends that since there is no agreement, therefore, question of any Specific Performance does not arise. On an overall examination of the Plaint and so also the documents attached with the Plaint, it appears that the plaintiff claims to have paid defendant No.1 an amount of Rs.10,000,000/- (Rs. 10.0 M) through certain cheques for purchase of the Suit Property. The plaintiff has himself annexed the copies of the said cheques which clearly reflect that they are not cheques of any **payee's account** or **to order** of any party, or for that matter **cross** cheques, but are **Cash** cheques. This distinction is necessary to understand that Cash cheques can be en-cashed by the bearer,

whereas, payees account or cross cheques can only be deposited in an account for transfer of funds. The Plaintiff to further support his contention has also annexed a Bank Statement to justify that such cheques were encashed from his account on 15.11.2011. Perusal of the Bank Statement reflects that all these cheques were en-cashed/ withdrawn by one Muhammad Zahid personally. There is no reference in the Plaint or material, which could reflect that the said payment was made to any of the partners i.e. Defendant No.1 (i) & (ii). It further appears that the cheques were issued from the account of one Ambreen Nouman, who has not been arrayed as a plaintiff in this matter nor any such disclosure has been made in the Plaint that as to why the plaintiff seeks Specific Performance of an agreement for which the payments were made from the account of stranger to these proceedings. It further appears that the plaintiff's entire case rests upon Letter dated 15.11.2011 through which the plaintiff wrote to Defendant No.1 (i) & (ii) regarding such payment. Though there is some signature appended on this Letter, allegedly acknowledging the payment of the aforesaid amount, however, neither it alleged nor it is the case of the plaintiff that these are signatures of any of the defendants No.1(i) or (ii). This is neither any agreement nor it can be treated as a Receipt showing full particulars of an understanding or agreement of which Specific Performance can be sought, at least to the extent of defendant No.1. Though it is settled law that Specific Performance can even be sought of an oral agreement, however, here it is not the plaintiff's case. The plaintiff has rested his case on this Letter dated 15.11.2011 and seeks Specific Performance of the same. It further appears that after filing of the counter affidavit and objections by the defendant No.1, the plaintiff has filed a rejoinder by way of an affidavit in this matter and since it is the stance of the



plaintiff in continuation of the Plaint, therefore, the same can be taken up by the Court for consideration while deciding the maintainability of the Suit. Through this affidavit-in-rejoinder, the plaintiff submits that though the cheques were encashed by his Manager Muhammad Zahid but on the telephonic request since they were presented for encashment by a person namely Mr. Ghulam Hussain, who claimed to be the nominee of defendant No.1 and wanted to transfer the cash funds online in his account and therefore, his Manager facilitated this online transfer. This altogether is a changed stance as compared to the Plaint itself and this being on factual plane, if true, then should have been so stated in the Plaint from the very beginning and not through affidavit-in-rejoinder after an objection was raised. It further appears that along with affidavit in rejoinder, the plaintiff has also annexed 5 deposit slips of HBL, which reflects that an amount of Rs. 2 Million each was deposited in the account of Ghulam Hussain on the same dated i.e.15.11.2011. However, when examined with the cheques attached with the plaint, it reflects that all five cheques as stated were not of Rs. 2 Million each, but for Rs. 2.3M, 1.8M, 2.0M, 2.2M, & 1.7M. This again is contradictory and does not support the plaintiff's case in any manner. It further appears that the plaintiff has filed at least two statements subsequently along with certain documents, (and without going into further deliberation that whether any such documents can be placed on record without leave of the Court in a Civil Suit), it is noticed that along with one statement now the plaintiff has annexed copy of a receipt dated 17.11.2011, which allegedly acknowledges payment of Rs. 10Million in the manner and mode on which now the plaintiff rests his case, that the same has been deposited and paid through Mr. Ghulam Hussain. I am afraid this again does not support the plaintiffs case in absence of any request to the Court to allow any amendment in the

pleadings. As observed, in a Civil Suit a party has to confine itself to the plaint and the list of documents filed along with the plaint, and for this reason no further documents can be placed on record through statements without leave of the Court. This practice needs to be deprecated.

8. Moreover, the plaintiff claims Specific Performance of the agreement against a Partnership Firm, which has not been arrayed as a defendant. Though the two Partners are defendants, but they have been sued individually in their own capacity through the Partnership Firm but for all legal and practical purposes, the Partnership Firm is not a defendant against whom the Specific Performance is being sought. The requirement of Order 30 Rule 1 CPC is not fulfilled, nor has any effort been made to array the Partnership Firm as a defendant in this matter. The plaintiff's entire case is based upon the alleged acknowledgment and allocation receipts, which have been issued by the Partnership Firm and not by the individual partners in their own capacity, therefore, there does not appear to be any privity of contract between the plaintiff and defendants No.1 (i) & (ii). In such circumstances it appears that there is no cause of action accrued to the plaintiff against defendant No.1(i) & (ii). Moreover, the plaintiff has though taken a divergent stance as against his own plaint, but till date has not filed any application to amend the pleadings to that effect, notwithstanding that whether such application is granted or not.

9. The Court while analyzing the plaint as a whole has to see that whether the relief being sought can be finally granted to the plaintiff on the basis of his averments and the cause of action so stated. Here in this matter, the contention of learned Counsel for the plaintiff may be correct that instant Suit is not otherwise barred in law and

therefore plaint cannot be rejected. However, at the same time the plaint can be rejected if the Court comes to the conclusion that there is no cause of action accrued to the plaintiff against the defendant. It is settled law that the totality of facts must co-exist and if anything was wanting the claim would be incompetent. It is again settled that not only the party seeking relief should have a cause of action when the transaction or alleged act was done but also at the time of institution of the claim and a suitor was required to show that not only a right had been infringed in a manner to entitle him to a relief but also that when he approached the Court the right to seek relief was in existence. (See ***Ahmed Nawaz Jafirani v. Sindh Industrial Trading Estate Limited-2017 CLC 40***).

10. In view of hereinabove facts and circumstances of this case I have come to the conclusion that insofar as plaintiffs case is concerned, there is no cause of action accrued to him, at least in respect of defendant No.1(i) & (ii), and therefore, exercising powers vested in this Court in terms of Order 7 Rule 11 CPC, the plaint is hereby rejected.

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Judge