

## ORDER SHEET

**IN THE HIGH COURT OF SINDH AT KARACHI**  
**Suit No.1413 of 2016**

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DATE	ORDER WITH SIGNATURE OF JUDGE
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**Plaintiff No.2:** Adnan Masood Khan Through Mr. Rehman Aziz Malik, Advocate.

**Plaintiffs No.3 to 5.** Through Muhammad Ali Lakhani, Advocate.

**Defendant No.1:** Through Mr. Abdur Rehman, Advocate.

**Defendant No.2:** DHA Through Mr. Shahid Hussain, Advocate.

*For hearing of CMA No.17358/16.*

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**Date of Hearing:** 27.02.2018

**Date of Order:** 06.03.2018

**ORDER**

**Muhammad Junaid Ghaffar, J.** This is an application under Order VII Rule 11 CPC seeking rejection of the Plaint on the ground that instant Suit is barred in law including but not limited to under Section 11 CPC and order 2 Rule 2 CPC.

2. Learned Counsel for Defendant No.1 submits that the Plaintiff No.1 & 2 had earlier filed a Suit before this Court bearing Suit No.608/2002, which was then transferred to the 2<sup>nd</sup> Senior Civil Judge (South), Karachi, and assigned a new number bearing No.1796/2002 and same stands dismissed vide Judgment dated 25.01.2010 against which no appeal was preferred, and therefore, the principal of Res judicata would apply in terms of Section 11 CPC. He further submits that the claim as setup by the Plaintiffs is purportedly based on an Agreement dated 15.07.1976 and a Power of Attorney of the same date which is not registered and such

agreement was allegedly entered into by the father of the Plaintiffs and through this Suit they seek specific performance, whereas, very existence of the agreement is denied. Learned Counsel has referred to the observations of the Senior Civil Judge regarding the genuineness of the said agreement and Power of Attorney and submits that there remains no cause of action, whereas, even under Order 2 Rule 2 CPC when Suit was filed, the Plaintiffs ought to have taken such plea, which has now been prayed in this Suit. He further submits that this is an open plot, whereas, no possession was ever given to them, hence, any protection under Section 53-A of the Transfer of Property Act, 1882, is not available. He has relied upon **PLD 2005 SC 605** (*Fecto Belarus Tractor Ltd. v. Government of Pakistan through Finance Economic Affairs and others*) and **PLD 1970 SC 63** (*Abdul Hakim and 2 others v. Saadullah Khan and 2 others*).

3. Learned Counsel for the Plaintiffs No.1 & 2 submits that earlier the Suit was in respect of different cause of action inasmuch as the same was filed against Defence Housing Authority, Karachi, ("DHA") primarily for the reasons that they had refused to record mutation on the basis of a Gift executed by their father in favour of Plaintiffs No.1 & 2 and had demanded personal attendance of (Defendant No.1 in this Suit) after change in their rules. According to the learned Counsel when the Suit plot was purchased there was no such requirement in DHA for personal presence of the Seller, and therefore, the dismissal of the earlier Suit has no bar on this case and Res Judicata will not apply. According to learned Counsel the Power of Attorney in question is a registered document creating substantial right in favour of the Plaintiffs' father, and therefore, Defendant No.1

cannot resile from such instrument. Insofar as the observation in the Judgment of the Senior Civil Judge regarding agreement and Power of Attorney are concerned, the learned Counsel submits that since the originals of the same were not in possession of Plaintiffs No.1 & 2, the same could not be proved and such observations are immaterial as to the present proceedings and can only be decided after evidence is led by the Plaintiffs. Per learned Counsel the entire sale consideration was paid in full, whereas, the possession was also handed over, and therefore, the protection under Section 53-A of the Transfer of Property Act is available to the Plaintiffs and in support he has relied upon **2010 CLC 407** (*Muhammad Nawaz Magsi v. Haji Illahi Bux and others*), **2017 SCMR 316** (*Syed Hakeem Shah (Deceased) through LRs and others v. Muhammad Idrees and others*). Per learned Counsel without prejudice, the Plaintiffs No.1 & 2 being legal heirs of deceased father in any case would be entitled to their respective shares as per Shariah, and therefore, the bar contained in Section 11 and order 2 Rule 2 CPC would not come in the way of the Plaintiffs to that extent. In support he has further relied upon **1994 SCMR 826** (*Jewan and 7 others v. Federation of Pakistan through Secretary, Revenue, Islamabad and 2 others*), **2003 SCMR 1284** (*Punjab Board of Revenue, Employees Cooperative Housing Society Limited v. Additional District Judge, Lahore and others*), **1984 CLC 1280** (*Dr. Syed Haider Bokhary v. North-West Frontier Province and 5 others*), **2001 YLR 980** (*Ramchand and another v. III Additional District and Sessions Judge, Larkana and 2 others*), **PLD 1975 Karachi 26** (*Messrs Jamia Industries Ltd. Karachi v. Karachi Municipal Corporation through its Chairman*), **1985 CLC 810** (*Mst. Gul Farosha v. Umar Gul and 11 others*), **PLD 1968 Karachi 723** (*Hoshang and others v. Dr. Eddie P. Bharucha and others*).

4. Learned Counsel for the Plaintiffs No.3 to 5 submits that insofar as these Plaintiffs are concerned, neither the bar contained in Section 11 CPC nor under Order 2 Rule 2 CPC would apply inasmuch as they were neither party to the Suit nor they were in fact privy of such agreement and therefore, subsequently they have already filed an Application under Section 12(2) CPC against such judgment, which is pending. Per learned Counsel in fact the Plaintiffs No.2 to 5 deny the very execution of Gift Deed as claimed by Plaintiffs No.1 & 2, whereas, they are in possession of the original Agreement, Power of Attorney as well as original Allotment issued in favour of Defendant No.1, and therefore, listed application is liable to be dismissed. According to the learned Counsel, it is settled law that the plaint cannot be rejected in piecemeal and even if the objection could be sustained against Plaintiffs No.1 & 2, it would definitely not apply to the Plaintiffs No.3 to 5. Learned Counsel further submits that the Plaintiffs are in constructive possession of the plot in question on the basis of payment of total sale consideration as well as original documents of the same. In support he has also relied upon some judgment cited by the Counsel for Plaintiffs No.1 & 2 reported as **2001 YLR 980** (supra) so also **PLD 1967 SC 559** (*Allah Rakha v. Siraj Din and others*)

5. Counsel for DHA supported the case of Defendant No.1 and submits that since earlier Suit was dismissed, no cause of action remains in field.

6. I have heard all the learned Counsel and perused the record. There are two grounds which have been raised by the learned

Counsel for the Defendant No.1 in support of his application. First, is reliance on Section 11 CPC as according to the learned Counsel after dismissal of the earlier Suit, the principle of *Res-Judicata* would be applicable. For that I may observe that it is not in dispute that at least Plaintiffs No.3 to 5 were not party to such proceedings, and therefore, even if a conclusion is drawn that the Suit is barred in law, (to which I am unable to agree for other reasons in this order), even then the Plaint ought not to have been rejected in piecemeal as the Suit would continue to the extent of Plaintiffs No.3 to 5. Therefore, I do not see any justifiable ground to reject the Plaint as being barred in law under Section 11 CPC.

As to applicability of Order 2 Rule 2 CPC, I may observe that this also does not seem to be a justifiable objection as earlier Suit was not for any declaration or injunction against the present Defendant No.1; but was filed only against DHA's inaction and/or impugned action for refusing mutation of the plot in the names of Plaintiffs No.1 & 2 on the basis of a purported Gift Deed. On perusal of the plaint in the earlier suit, it reflects that it was never filed for Specific Performance nor it could have been done so, as according to the Plaintiffs No.1 & 2 a registered Power of Attorney was already in favour of their father, who had then gifted the property to them on the basis of a registered Power of Attorney and their grievance was only to the extent that DHA was refusing mutation of the Gift Deed so executed by their father. But it was never their case nor could have been that the present Defendant No.1 was refusing to honour any agreement or for that matter refusing to appear before DHA. It was their precise case that change in the rules of DHA would only apply prospectively and not on the transactions, which has already been entered into.

Moreover, the present cause of action was never available as purportedly a registered Power of Attorney was available with them and it is only reluctance on the part of DHA to effect transfer which has given rise to the present cause of action. In view of such position, I am of the view that for the present purposes and in view of the peculiar facts of this case, it would not be appropriate to sustain the objections so raised in this application for rejection of the plaint.

7. Notwithstanding the above, there is also one issue of limitation, which has though not been raised in the application; but the Court while hearing the parties had confronted specially learned Counsel appearing for all plaintiffs to that effect. It is not in dispute that the agreement was entered into in the year 1976 and the Power of Attorney was also executed in the same year. Under Article 113 of the Limitation Act, a Suit for Specific Performance can be filed within three years from the date fixed for performance of the Agreement or if no such date is fixed then from date when such performance is refused by a party. In this matter, it appears that no specific date was fixed for performance of the agreement nor in fact it could have been as allegedly a registered Power of Attorney was executed in favor of the predecessor in interest of the Plaintiffs. Therefore, the limitation in this matter is to be counted from the date of refusal and for that it is not the case of Defendant No.1 that it was refused earlier and the limitation period stands expired as according to them such agreement itself is denied. The plaintiffs' case is that they approached Defendants No.1 & 2 after expiry of their father for effecting mutation, which was refused, and therefore, instant Suit is within time. Learned Counsel for Plaintiffs No.1 & 2 has relied upon the case of Syed

Hakeem Shah (Supra) passed by the Hon'ble Supreme Court, wherein, it has been observed that in cases where entire sale consideration has already been paid and possession has been handed over the rights of such purchaser are protected under Section 53-A of the Transfer of Property Act and therefore the limitation for filing a Suit for Specific Performance would not apply *stricto sensu*. The Hon'ble Supreme Court in this Judgment has cited with approval the case reported as Muhammad Nawaz Magsi (Supra). Therefore, for the present purposes, when the agreement itself is denied, whereas, according to the agreement the entire sale consideration has been paid, and Plaintiffs No. 3 to 5 claim to be in possession of original title documents, at least constructive possession appear to be with them (as this is an open plot), I am of the view that a plain reading and examination of the plaint and the documents so annexed, no conclusive finding can be given even in respect of the limitation period involved herein because of the peculiar facts and circumstances of this case. It is needless to observe that case law relied upon by the learned Counsel for Defendant No.1 is not relevant because of the peculiar facts as above. Accordingly, the objection of limitation, though raised by the Court, is also hereby overruled and it would be in the fitness of the case that parties shall lead their evidence and may raise such legal objections at the time of settlement of issues.

8. In the facts and circumstances as above the listed application under Order 7 Rule 11 CPC is hereby dismissed.

Dated: 06.03.2018

Judge