

ORDER SHEET  
**IN THE HIGH COURT OF SINDH AT KARACHI**  
Suit No.1245 of 2009

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DATE	ORDER WITH SIGNATURE OF JUDGE
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1. For orders on maintainability of Suit.
2. For hearing of CMA Nos.10322/10.
3. For hearing of CMA No.8249/09.

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**19.12.2017**

Mr. Zulfiqar Haider Shah, Advocate for the Plaintiffs.  
Mr. Zahid Marghoob, Advocate for Defendants.

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On 31.05.2010 as well as on 13.11.2017 objections regarding maintainability of this Suit were raised in respect of the same being time barred. Today, both the learned Counsel have been heard on maintainability of this Suit.

Learned Counsel for the Plaintiffs submits that this is a Suit for Specific Performance, Compensatory Damages, Defamation and Permanent Injunction in respect of an Agreement dated 15.10.1998, whereas, the Defendants have been declared ex-parte. He further submits that as per the Agreement, a sum of Rs.16,00,000/- was paid as advance and the balance sale consideration was to be paid by 31.03.1999, however, the Defendants could not manage the relevant NOCs and clearance of the documents on one ground or the other, and thereafter, upon their refusal, instant Suit has been filed on 02.09.2009. Learned Counsel has read out the Legal Notice dated 15.08.2009 as well as its reply and submits that the Agreement is acknowledged, whereas, the same was cancelled by the Defendants on 10.08.2009, therefore, instant Suit is within time. Learned Counsel has

relied upon the case laws reported as **2017 YLR Note 349** (*Mian Dost Muhammad Vs. Nazir Ahmad Khan*), **1973 SCMR 289** (*Jumma Khan and others Vs. Mahmud Khan and others*), **P L D 1961 (W.P.) Lahore 372** (*Inayatullah and others Vs Shah Muhammad and others*), **PLD 2009 Karachi 235** (*M/s. Sunley Developers Private Limited Vs. M/s. Mumair Associates through attorney and others*), **1992 C L C 1069** (*Bashir Ahmad Vs. Abdul Majid and 7 others*) and **2000 YLR 378** (*Muhammad Anwar and 8 others v. Bahan and another*)

On the other hand, learned Counsel for the Defendants submits that the Plaintiff is a tenant and was paying rent, whereas, the advance amount has been adjusted against the rent payable and the agreement stands cancelled since long. He further submits that instant Suit is hopelessly time barred as the Agreement is of the year 1998, hence the same may be dismissed.

I have heard both the learned Counsel and perused the record. This is a Suit for Specific Performance of an Agreement dated 15.10.1998 and admittedly the Suit has been filed on 02.09.2009. It appears that the matter was heard and reserved for orders on 21.05.2010 and thereafter on 31.05.2010 it was again listed for hearing confronting the Counsel for the Plaintiffs to satisfy the maintainability of present Suit on the ground of limitation as well as how the Suit for Specific Performance can be filed in respect of a property which was already mortgaged. Insofar as the question of limitation is concerned, the law is very clear and settled in terms of Article 113 of the Limitation Act that 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 the date when such performance is refused by a party. Admittedly in the agreement the date for performance / payment

of balance sale consideration is fixed as 31.3.1999 and that is not disputed. From such date the Suit is admittedly time barred. Even otherwise, for the sake of arguments, if the limitation is to be counted from the date of refusal, it is noticed that in the Legal Notice, which was issued on 15.08.2009 a very vague and unclear assertion has been made in Para-3 thereof by stating that from time to time numerous fake requests were made by the Defendants that their son, who is to execute the lease, will be back in the years 2003, 2004, 2005, 2006, 2007 and 2008 but all in vain. This clearly reflects that insofar as the Defendants are concerned, the performance of the Agreement was refused as early as in 2003 (by that time the limitation had expired in both situations as above). There is nothing on record in writing, which could suggest that before the expiry of the limitation period of three years any acknowledgement was made by the Defendants for extension of the time. Legal Notice itself was issued when such limitation period stood expired and any response thereto on behalf of the Defendants even including any alleged admission cannot enlarge the period of limitation. There is no enlargement of time within the limitation period. The law is clear and settled in this account that a Suit for Specific Performance is to be filed within three years as discussed hereinabove. The Hon'ble Supreme Court in the case of **Haji Abdul Karim v Florida Builders (Pvt) Limited (PLD 2012 SC 247)** has been pleased to uphold rejection of plaint in an identical situation wherein a Suit for specific performance was apparently time barred. The relevant finding is as under;

5. ....And for the purpose of the above, it seems expedient to touch upon the legislative history of the Article. The prior Limitation Acts of 1871 and 1877, had in each of them the corresponding provision as in Article 113. However, the words in 1871 Act, were "when the plaintiff has notice that his right is denied", postulating that the second part of Article 113 was the only provision then regulating the limitation for the suits for specific performance and the commencement of three years period was dependent on the proof of the

fact of notice of denial and the question of limitation was accordingly to be decided, having no nexus with the date even if fixed by the parties for the performance of the contract. The said provision however was expanded and these words were substituted in the subsequent Act of 1877, as are also found in the third column of the present Act. The change brought by the Legislature in 1877 Act was retained in Article 113 of the Act, by including the first part that the time would run from the '**date fixed**' for the performance is thus purposive and salutary in nature, which contemplates and reflects the clear intention of the legislature to prescribe the same (three years) period of limitation, however, providing that the parties who otherwise have a right to fix a date of their own choice in the agreement for the performance thereof, such date in consequence of law shall also govern the period of limitation as well for the suits falling in this category. Thus now the three years period mentioned in Column No. 3 of the Article runs in two parts:--

(i) from the date fixed for the performance; or

(ii) where no such date is fixed when the plaintiff has notice that performance is refused.

The reason for the said change as stated above is obvious. In the first part, the date is certain, it is fixed by the parties, being conscious and aware of the mandate of law i.e. Article 113, with the intention that the time for the specific performance suit should run therefrom. And so the time shall run forthwith from that date, irrespective and notwithstanding there being a default, lapse or inability on part of either party to the contract to perform his/its obligation in relation thereto. The object and rationale of enforcing the first part is to exclude and eliminate the element of resolving the factual controversy which may arise in a case pertaining to the proof or otherwise of the notice of denial and the time thereof. In the second part, the date is not certain and so the date of refusal of the performance is the only basis for computation of time. These two parts of Article 113 are altogether independent and segregated in nature and are meant to cater two different sorts of specific performance claims, in relation to the limitation attracted to those. A case squarely falling within the ambit of the first part cannot be adjudged or considered on the touchstone of the second part, notwithstanding any set of facts mentioned in the plaint to bring the case within the purview of the later part. In other words, as has been held in the judgments reported as *Siraj Din and others v. Mst. Khurshid Begum, and others* (2007 SCMR 1792) and *Ghulam Nabi and others v. Seth Muhammad Yaqub and others* (PLD 1983 SC 344) "when the case falls within first clause the second clause is not to be resorted to". However, the exemption, the exclusion and the enlargement from/of the period of limitation in the cases of first part is permissible, but it is restricted only if there is a change in the date fixed by the parties or such date is dispensed with by them, but through an express agreement; by resorting to the novation of the agreement or through an acknowledgment within the purview of section 19 of the Act. And/or if the exemption etc. is provided and available under any other provision of the Act however, to claim such an exemption etc. grounds have to be clearly set out in the plaint in terms of Order VII Rule 6, C.P.C. We have examined the present case on the criteria laid down above, and find that according to the admitted agreement between the parties, 31-12-1997 was/is the 'date fixed' between them for the performance of the agreement, which has not been shown or even averred in the plaint to have been changed or dispensed with by the parties vide any subsequent express agreement. In this behalf, it may be pertinent to mention here that during the course of hearing Mr. Abdul Hafeez Pirzada, on a court query, has stated that there is no agreement in writing between the parties which would extend/dispense the date fixed and that he also is not pressing into service

the rule of novation of the contract. We have also noticed that the petitioners have neither alleged any acknowledgment in terms of Article 19 of the Act, which should necessarily be in writing, and made within the original period of limitation nor any such acknowledgment has been pleaded in the plaint or placed on the record. Besides, no case for the exemption etc. has been set-forth in the plaint and the requisite grounds are conspicuously missing in this behalf as is mandated by Order VII, Rule 6, C.P.C.

In view of the above discussion, I am of the view that instant Suit is hopelessly time barred as per the provisions of Article 113 of the Limitation Act, and therefore is barred in law. Accordingly, the Plaint is hereby rejected under Order VII rule 11 CPC.

In view of the above order, the listed applications are also disposed of as infructuous.

J U D G E

Ayaz P.S.