

**IN THE HIGH COURT OF SINDH AT
KARACHI**

Suit No. 300 of 2015

Plaintiff : Mst. Nargis Ara, through Mr. Yousuf Khan, Advocate.

Defendant : M/s. Hussain Developers, through Mr. Mehar Khan, Advocate.

Date of hearing : 19.04.2019

ORDER

YOUSUF ALI SAYEED, J. – In terms of CMA 1691/17 filed under Order 7, Rule 11 CPC, the Defendant seeks rejection of the plaint on the ground that the Suit, being one for specific performance is barred by limitation.

2. It is common ground that as the Suit is for specific performance, the aspect of limitation is governed under Article 113 of the Limitation Act, which provides as follows:

Description of Suit	Period of Limitation	Time from which period begins to run
For specific performance of a contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

3. As is apparent, Article 113 of the Limitation Act, prescribes a three-year period of limitation in respect of a suit for specific performance, which in the case of the date for performance being fixed in terms of the agreement would begin to run from that date, and if no such date is fixed, would begin to run from the date that a plaintiff has notice that performance is refused.

4. Learned counsel for the Defendant submitted that the contract in question was encapsulated in the Terms and Conditions set out in the Allocation Letter dated 25.05.1992 issued to the Plaintiff by the Defendant in relation to Apartment No. C-811, on the 8th floor a project by the name of “Cliff Towers” to be constructed on Plot No. GC/1, Block No. 8, Scheme No.5, Clifton, Karachi (the “**Project**”), Clause 11 of which stipulated as follows:

“The construction of project is supposed to be completed within 30 months from the date of starting construction (i.e. 4 months after the date of announcement) subject to the condition of force-majeure, strike, riots, war and other calamities which are beyond the control of the company. This also includes, changes in fiscal policies of the government, non-availability of necessary materials/labourers, etc., further the delays in payment of installments by the applicants. In such condition the builder shall be at liberty to revise/Interrupt the construction schedule.”

[Sic]

5. It was contended that Clause 11 thus fixed a date for performance of the contract, being 30 months from 25.05.1992, and the three-year period of limitation began to run as on the lapse of this 30-month timeframe. It was submitted that the period of limitation, thus computed, lapsed on 25.11.1997, whereas the Suit was filed on 23.02.2015, hence was barred by limitation, and the Plaintiff was liable to be rejected accordingly. Reliance was placed on the judgment of the Honourable Supreme Court in the case reported as Haji Abdul Karim v. Florida Builders PLD 2012 SC 247, wherein it was held that where the sale agreement contains a date fixed, a suit for its specific performance attracts the first part of Article 113 Limitation Act, 1908 and “...the limitation shall

commence forthwith from the date fixed by the parties, notwithstanding the alleged failure, inabilities of the respondent to perform its part of the obligations, the alleged interaction between the parties, their conduct, which shall have no relevance in the context of the limitation of those suits covered by the first part of the Article.”

6. Conversely, learned counsel for the Plaintiff submitted that construction of the Project had been suspended due to intervening factors, and, by mutual agreement, performance of the respective obligations of the parties remained in abeyance until the circumstances so changed as to admit to construction of the Project being recommenced.

7. It was pointed out that the very case set up in the Plaintiff was that construction had come to a halt in 1993 due to action initiated against the Project by the planning authority as well as an interim injunction granted by this Court in favour of an NGO, and that the Plaintiff had been assured by the Defendant’s officers that the same would be recommenced upon such injunction being vacated and had also been instructed that further payments need not be made in the meanwhile, and that there had been consensus in that regard. It was submitted that it was only in February 2015, when the Plaintiff visited the Defendant’s office, that a copy of a letter dated 15.08.2014 which had purportedly been sent to her by the Defendant at a defunct address was handed over, reflecting that the impediments to construction had finally been removed. It was submitted that an enhanced price far in excess of the sum initially contracted for was then demanded, coupled with threats of cancellation in the event of non-payment.

8. It was pointed out that the factum of such litigation and stoppage of construction had been admitted in the Written Statement of the Defendant No.1, wherein it has been acknowledged that construction had firstly been restrained by virtue of an Order made in Constitutional Petition No. D-3007/1992, which was disposed of on 10.12.2004, and then by virtue of action initiated by the Cantonment Board Clifton so as to declare the Project to be dangerous and threaten its demolition, which had been assailed by the Defendant vide Suit Number 699 of 2005, as then came to be decided in its favour in January 2014.

9. It was refuted that Clause 11 operated so as to fix a firm and specific date for performance and it was submitted that such matter remained fluid, as envisaged in terms of the very clause itself. It was submitted that even if the 3-month period were taken as being fixed, such period had ceased to be of effect by virtue of the mutual understanding that had then arisen, as per which there was no such period or date fixed. It was stated that the matter thus fell within the scope of the second limb of Article 113 and for purposes of reckoning when time would begin to run the date of refusal of performance was to be determined, which in the instant case was 04.02.2015, hence the Suit was within the period of limitation, when reckoned from that date.

10. Having examined the contentions of respective counsel, the case set up in the Plaint appears to essentially that the time for performance of the contract was varied though mutual agreement so that the timeframe for performance as provisionally envisaged in terms of Clause 11 was not applicable as a fixed date or period, hence the matter fell within the realm of the second limb of Article 113.

11. The circumstances underpinning the matter at hand appear somewhat akin to that which came up before the Honourable Supreme Court in the case reported as Inam Naqshband v. Haji Shaikh Ijaz Ahmad PLD 1995 SC 314, where the aspect of limitation was found to entail a mixed question of law and fact. Similarly, under the particular course of event as have been narrated in the pleadings and referred to during the course of arguments, a determination of whether the Suit is barred by limitation or not would depend on the conduct of parties, an ascertainment of the exact terms and conditions of their agreement and how they understood such terms and conditions would operate. Whist it may be that the Suit is found to be time barred at the final stage, once the parties have had opportunity to lead evidence on such matters, at this stage it cannot be said within the limited framework of Order 7, Rule 11 that this is so. As such, subject to the determination of the matter of limitation at the final stage, CMA 1691/17 stands dismissed accordingly.

JUDGE

Karachi
Dated _____