

IN THE HIGH COURT OF SINDH AT KARACHI

BEFORE:
Mr. Justice Muhammad Shafi Siddiqui

Second Appeal No.49 of 2011

Zaka-Uddin
Versus
M/s S. Ashrafi Abbasi Associates

Date of Hearing: 01.11.2017

Appellant: Through Mr. Abdul Qadir Khan Advocate.

Respondent: Through Mr. Shahenshah Husain along with Mr. Arshad Ali Advocates.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- This Second appeal is arising out of concurrent findings of two Courts below. The respondent filed a suit for recovery of an amount of Rs.2 Million which suit was decreed followed by dismissal of appeal of the appellant hence this Second Appeal.

2. Brief facts of the case, as incorporated in the plaint, are that in pursuit of acquiring a property through auction proceedings conducted by the Official Assignee in liquidation proceedings, the appellant on account of paucity of funds contacted respondent initially to provide services in respect of the subject plot. It is alleged in the plaint by the respondent that appellant wanted respondent to be engaged as an architect and consulting engineer for preparation of drawings. The appellant claimed to have taken initial amount by way of loan vouchers from April, 1990 to May 1990 followed by another loan amount of Rs.1,60,000/- through pay order drawn at Allied Bank Limited dated 05.05.1990 bearing pay order No. PO 582121.

3. It is further alleged in the plaint that the appellant also offered partnership for the construction of a project over the said plot to which

he (respondent) agreed and a draft Technical Assistant Agreement was prepared but it was never signed. It is further alleged in the plaint that on 06.06.1990 the appellant again contacted respondent and made a promise to pay back total loan amount of Rs.4,69,259/- by 30.09.1990. The appellant again claimed to have contacted respondent in May 1992 for another proposal for respondent's appointment as an architect on 9% professional charges of total value of the project amounting to Rs.3,20,00,000/-. On this oral understanding, as stated in the plaint, he (respondent) continued to work and further spent Rs.4 lacs on the preparation of structural designs/drawings and other works and the respondent claimed to have ultimately suffered loss of 2 Million. It is stated that they respondent had also associated other firms in doing such works who are also demanding their outstandings.

4. During the pendency of suit it appears that S. Ashrafi Abbasi, the proprietor of M/s. S. Ashrafi Abbasi Associates, the respondent, expired and one of his sons as his legal heir filed affidavit-in-evidence (Ex. P/1) supporting the contents of the plaint and produced related documents as Ex. P/1 to P/7. However, he was never cross examined by the appellant. Consequently the suit was decreed and against such decree the appeal of the appellant bearing No.140 of 2009 was also dismissed on 24.03.2011 hence this Second Appeal.

5. Learned counsel for the appellant has started with a ground of limitation against the concurrent findings of the Courts below. He submitted that at the time when suit was filed, the claim, as mentioned in paragraphs 4 and 5 of the plaint, was barred by time and since the subsequent claim, as raised in paragraph 8 of the plaint, was dependent upon the claim, as raised in paragraphs 4 and 5, therefore, entire claim has lost its credibility. He further submitted that though this point of limitation was never taken as defence throughout but it being a legal

point can always be raised at any stage of the proceedings, including but not limited to this Second Appeal.

6. In support of his arguments learned counsel for the appellant has relied upon the following case law:-

- i) Hakim Muhammad Buta v. Habib Ahmad (PLD 1985 SC 153)
- ii) Nazakat Ali v. WAPDA (2004 SCMR 145)
- iii) Farzand Raza Naqvi v. Muhammad Din (2004 SCMR 400)
- iv) Muhammad Aslam v. Mst. Ferozi (PLD 2001 SC 213)
- v) Pakistan Industrial & Commercial Leasing Ltd. V. Haq Knitwear (Pvt.) Limited (PLD 2009 Lahore 52.

7. On the other hand learned counsel for respondent submitted that the limitation is a mixed question of law and fact and the contents of the plaint were supported by affidavit-in-evidence which has gone unrebutted and unchallenged. The claim of the respondent, as raised in the plaint, was never specifically denied. The initial amount may have been paid in between April and May 1990 but the understanding continued until May 1992 and it continued when he (respondent) moved an application to this Court in JM 14 of 1981 in which order was passed on 10.02.1993 whereby his application was dismissed followed by Suit No.102 of 1994 filed in January, 1994, the subject suit bearing new number as 1010 of 2003.

8. I have heard the learned counsel for the parties and perused the material available on record.

9. There is no cavil to the proposition that the point of limitation could be raised at any stage of the proceedings including but not limited to the Second Appeal, even if it is not set up as a defence earlier. In the instant case however the pleadings of the respondent in Suit No.102 of 1994 (New Suit No.1010 of 2003) provides that the cause continued from the first payment i.e. 20.04.1990. He (plaintiff/respondent) approached this Court under section 316(1) of the Companies Ordinance, 1984 by

moving an application which was dismissed on 10.02.1993. Within one year after that the suit was filed.

10. In the case of Hakim Muhammad Buta (Supra) the suit was instituted after the period of limitation despite the fact that the limitation was not set up as defence, the contents and statement of the plaint was taken into consideration. It was observed that the matter of limitation was not dependent upon pleadings of the parties but a duty was imposed on Court itself as limitation being mandatory and it could not be waived and even if waived could be taken up by the party waiving it and by the Court itself. In cases where it is not a mixed question of fact and law waiver by parties would not relieve Court itself of its duty under section 3 of the Limitation Act.

11. In the subsequent case of Nazakat Ali (Supra) the Hon'ble Supreme Court held that limitation once allowed to commence could not be stopped. The Supreme Court however further observed that section 14 of the Limitation Act provides a remedy for the exclusion of time spent by a party seeking remedy before wrong forum in good faith.

12. In the case of Farzand Raza Naqvi (Supra) the Hon'ble Supreme Court observed that even in ex parte proceedings, non-representation of defendant would be insignificant in respect of an obligation to attend the important questions relating to maintainability of the suit and genuineness of the claim.

13. In support of challenge to concurrent findings, learned counsel for appellant has relied upon the case of Muhammad Aslam (Supra) that these concurrent findings could not be considered as sacrosanct and High Court was competent to interfere if such findings were based on insufficient evidence, misreading of evidence non-consideration of material evidence, erroneous presumption of facts and consideration of

inadmissible evidence. The case was considered to be time barred by the Hon'ble Supreme Court which escaped notice and resulted in miscarriage of justice and it was observed that the High Court had rightly reversed the concurrent findings of both the Courts below.

14. The Division Bench of Lahore High Court in the case of Pakistan Industrial & Commercial Leasing Ltd, referred above, while dealing with the issue of limitation observed that the structure of law is founded on legal maxim that delay defeats equity, time and tide wait for none and law helps the vigilant and not the indolent. Bar of limitation in the adversarial litigation creates valuable right in favour of other party. Thus it is the duty under section 3 of the Limitation Act to first advert to questions of limitation irrespective of the fact as to whether the same has been set up as a defence or not.

15. Article 57 of the Limitation Act is in respect of recovery of money lent from the date of loan and the prescribed period is three years. The contents of the plaint show that first set of claim on the basis of voucher was in between 22.04.1990 to 10.05.1990. The second set of claim in the sum of Rs.1,60,000/-, which was allegedly paid to Official Assignee, was also of 05.05.1990. These two sets of amount in the sum of Rs.4,69,259/- was allegedly promised to be paid by 30.09.1990. The pleadings further shows that the respondent came with another proposal in May 1992 to appoint him as an Architect on 9% professional charges which was not materialized, however respondents claimed to have spent Rs.4 lacs and ultimately claimed to have suffered losses in the sum of Rs.2 Million. The first set of amount/claim is in fact claimed to be a loan as mentioned in paragraph 4 of the plaint. In paragraph 6 again it is admitted that the said two amounts are loan amount. In paragraph 8 as well the said amount was considered to be loan amount. The computation of the limitation triggered from the date of loan made. The

loan amounts ('a' to 'f') mentioned in paragraph 4 have their own independent computation in terms of their dates however even if the last date of 10.05.1990 is taken to be a date of loan, the period would expire on 09.05.1993.

16. In terms of Section 14 of the Limitation Act, the respondent may be entitled for the exclusion of period spent in seeking remedy before wrong forum. The respondent claimed to have filed an application in the liquidation proceedings wherein the property was auctioned for which loan amount was required. The application was filed on 22.10.1992 and was dismissed on 10.02.1993. This at the most could exclude 112 days out of computation. Ultimately a suit for recovery of amount was filed on 02.02.1994 for recovery of:

- i) Rs.160,000/- towards alleged loan given to the appellant;
- ii) Rs.309,259/- towards cash loan through alleged vouchers given to the appellant;
- iii) Rs.4,00,000/- allegedly spent by respondent in the appellant's project;
- iv) Rs.20,00,000/- towards damages.

17. Excluding the aforesaid period, which was spent by the respondent for the recovery of the amount in the wrong forum in terms of Section 14, the respondent should have filed this suit for recovery of the amount by adding 112 days in period of limitation i.e. 09.05.1993. The period of limitation (three years) would then (after re-computing) would expire on 28.08.1993. The first two amounts shown in the statement is claimed to be a loan amount and section 57 of Limitation Act provides its recovery within three years from the date of loan. The subject amount is thus barred by time as the suit was filed on 02.02.1994.

18. There is no acknowledgement in writing in terms of Section 19 of the Limitation Act and hence the applicability of Section 19 is also ruled out. If any reference is required the case of National Bank of Pakistan v.

Nisar Ahmed reported in 1991 CLC 1958 is available wherein it has been observed that:

"The plaintiff in his plaint in paras.3 and 4 has mentioned certain correspondence by the deceased defendant, whereby he has undertaken to repay the liabilities. This correspondence have been produced in form of various letters, which shows that the deceased defendant had admitted his liability and had been seeking for extension of time from the plaintiff to settle the dues. The last letter in the series of correspondence is dated 8th September, 1971, which has been produced as Exh.13/19. Mr. Azhar Ali Siddiqui, learned counsel for the defendant has submitted that the defendant has denied to have written these letters. These letters are said to have been signed by the deceased defendant Nisar Ahmed and a look at his signatures on these letters compared with his admitted signatures on Ext.6 and written statement would shows the similarity of his signatures beyond any reasonable doubt. In view of his acknowledgment of liability in his last letter written on 8.9.1971, the present suit having been instituted on 28.3.1974 is within time. I would, therefore, answer these issues against the defendant."

19. Similarly in the case of Habib Bank Limited v. Khalid Akbar reported in 1989 MLD 4098 learned Single Judge of this Court has observed as under:-

" It appears that both the Courts below were influenced by mistaken view of law. Article 64-A of the Limitation Act, which prescribes limitation for filing suit within three years from the date when the debt becomes due is applicable in suits which are filed by way of summary proceedings as contemplated under Order 37 C.P.C. In the instant case the suit was not filed under Order 37 C.P.C. but was filed in the ordinary course. For such suit for recovery of money in the ordinary course Article 57 of the Limitation Act would apply which prescribes period of three years for filing of suit from the date when the loan is made. Article 57 of the Limitation Act is to be read in conjunction with Section 25(3) of the Contract Act, which contemplates that agreement without consideration is void except in case when there is a promise made in writing and signed by the person to be charged therewith or by his agent generally or specially authorized in that behalf to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation

of suits. This provision prescribes two conditions. Firstly that there should be promise in writing which is different from acknowledgement in writing as contemplated under Section 19 of Limitation Act. Secondly that promise is made after the period of limitation has expired. It is also noteworthy and pertinent to point out that there is basic difference between Section 25(3) of Contract Act and Section 19 of Limitation Act. Requirement of Section 19 of the Limitation Act is that there is to be acknowledgement of liability in writing made before the expiry of period of limitation fixed in filing suit or application. There is noticeable difference between an acknowledgement of liability in writing which can be without promise to pay and the promise in writing in which there is categorical assurance for payment. In support of the proposition stated above, reliance can be made on the case of Habib Bank Ltd. v. Shamim Qureshi PLD 1988 Kar.481.

In the instant case, learned Additional District Judge was mistakenly under impression that Article 64-A of the Limitation Act would apply, which is meant only for suits filed under Order 37 C.P.C. Since this is a suit for recovery of money filed in the ordinary course, hence Article 57 of Limitation Act will apply to be read with Section 25(3) of the Contract Act...."

20. In the case of United Bank Ltd. v. Jamila Khatoon reported in 1981 CLC 299 it has been held as under:

"... Article 57 prescribes the period of limitation as three years for money payable for money lent and the point of time from which period begins to run is when the loan is made and each occasion when any part payment is made and other conditions of section 20 of the Limitation Act are satisfied the period is extended for another three years."

21. Though this point was not taken into consideration by the trial Court but in view of settled law that a question of limitation may be raised at any stage of proceedings despite it not being set up as defence, I am of the view that suit in respect of recovery of alleged loan in terms of Article 57 of the Limitation Act was barred by time.

22. The respondent has also unable to justify as to how he has suffered loss of Rs.2 Million when only an amount of Rs.4,60,000/- was

paid as loan and an amount of Rs.4 lacs was allegedly spent by the respondent for preparation of structural designs and drawings. The respondent has only produced alleged receipts of Rs.2000 and a sum of Rs.10,000 was claimed to have been paid to M/s The Peak and no contractual obligation is shown. It is only a word of mouth of the witness that he (respondent) has suffered loss of Rs.2 Million, which is without any justification.

23. The upshot of above discussion is that the findings recorded by the Courts below is not in conformity with the law settled by the superior Courts hence the appeal is allowed and the impugned judgments passed by the Courts below are set aside and the suit filed by the respondent against the appellant stands dismissed.

Dated:

Judge