

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

***High Court Appeal No.258 of 2017***

PRESENT:

MR. JUSTICE AQEEL AHMED ABBASI  
JUSTICE MRS. KAUSAR SULTANA HUSSAIN

***Ameer Ali***

***Vs.***

***Syeda Fazle Fatima Fazli & 14 others***

***Appellant:*** through Mr. M. Imtiaz Khan, advocate

***Respondent Nos.3, 9 to  
11, and 13:*** through Mr. Wasim Iqbal, advocate

***Respondent No.14:*** through Mr. Altamash Faisal Arab, advocate

***Date of Hearing:*** 29.09.2021.

***Date of Order:*** 29.09.2021.

**O R D E R**

**AQEEL AHMED ABBASI, J:-** Instant High Court Appeal has been filed against an order dated 02.02.2017 passed by the learned Single Judge of this Court in Suit No.2624/2016, whereby, while hearing the parties on the objection as to maintainability of the Suit raised by the learned Single Judge vide order dated 30.12.2016, the Suit has been dismissed for being not maintainable along with all pending applications.

2. Learned counsel for the appellant has submitted that Suit for specific performance of an agreement dated 15.05.2003 executed between the appellant and respondent No.1, and also seeking cancellation of sale agreement dated 30.11.2002 executed between

respondents No.1 to 13 and respondent No.14 was filed by the appellant, by disclosing the material facts and also the cause of action which accrued to the appellant when the appellant acquired the knowledge that respondents having failed to perform their part of performance of the agreement, have already entered to another agreement of sale in respect of same subject property with respondent No.14. According to learned counsel, the claim of the appellant, seeking specific performance and cancellation of aforesaid agreement was, therefore, within the period of limitation, whereas, according to learned counsel, without framing the issues and recording the evidence, the issue of maintainability of Suit as well as merits of the case could not be decided. However, per learned counsel, through impugned order, the learned Single Judge has been pleased to dismiss the Suit of the appellant while holding that Suit is not maintainable in as much it seeks specific performance of agreement which stood expired on 14.05.2009, therefore, barred by limitation. It has been further contended by the learned counsel for the appellant that pursuant to agreement executed between the appellant and respondent No.1, the appellant undertook various steps by investing money for the purposes of acquiring the land for the respondents from the Revenue Authorities, whereas, due to efforts of the appellant, the summary was approved by the then Chief Minister of Sindh on 26.05.2019, for grant of land to respondents No.1 to 13, in the province of Sindh. However, according to learned counsel, the Revenue Authorities did not act upon such summary. Learned counsel for the appellant further argued that subsequently, the summary was approved and the land was allotted in favour of respondents No.1 to 13, therefore, the appellant approached the respondents for their share as per agreement dated 15.05.2003,

however, the respondents refused to act on their commitment on the pretext that the period of six (06) years as provided in the agreement has expired, therefore, appellant is not entitled to specific performance of the agreement, and any share in the property. It has been further contended by the learned counsel for appellant that as per terms of the agreement, the appellant was entitled to 60% share in the land, whereas, period of six (06) years, which according to learned counsel for the appellant, was verbally extended, whereas, the respondents never approached the appellant for seeking cancellation of the agreement dated 15.05.2003 or the General Power of Sub-Attorney of the same date issued by respondent No.1 in favour of the appellant. According to learned counsel for the appellant, the above facts were fully disclosed by the appellant in the Suit, which were required to be examined and decided after framing of issues and recording of evidence, by the learned Single Judge who was not justified to dismiss the Suit on technicalities in a summary manner. It has been prayed that the impugned order may be set-aside and the learned Single Judge may be directed to decide the Suit of the appellant after recording of evidence by framing issues, including the issue of limitation, which according to learned counsel for the appellant is a mixed question of facts and law and requires evidence to be recorded.

3. Conversely, learned counsel for respondents No.3, 9 to 11 & 13 has vehemently controverted the submissions of the learned counsel for appellant and submits that the Suit filed by the appellant, seeking specific performance of an agreement dated 15.05.2003, after expiry of period of limitation incorporated in the agreement itself i.e. six (06) years maximum from the signing of the agreement, was hopelessly time barred, whereas, there was no clause in the agreement, according to which, the period of performance of agreement was extendable. It has been further contended by the learned counsel for respondents that contention of the learned counsel for the appellant to the effect that in the General Power of Sub-Attorney issued by the respondent No.1 in favour of the appellant, there was a clause, according to which, the period of General Power of Sub-Attorney was extendable is also false and frivolous as such clause has been inserted with a hand written note while committing forgery in the General Power of Sub-Attorney dated 15.05.2003 by the appellant to justify their claim and to cover-up the issue of limitation. According to learned counsel, without prejudice to hereinabove objection with regard to validity of the hand written note, it may be observed that according to such note, period of six (06) years from the date of signing of General Power of Sub-Attorney was purportedly extendable for the period of another six (06) years subject to progress of works, however, the appellant did not produce any document or evidence to establish that the period of (06) years as mentioned in General Power of Sub-Attorney and the agreement dated 30.11.2002, as referred to hereinabove, was extended by the respondents. It has been further contended by the learned counsel that the agreement was time

bound, whereas, the appellant admittedly, could not perform his part of performance within the stipulated period of limitation as agreed between the parties, therefore, on expiry of period as on 14.05.2009 ceased to have effect and was not enforceable in any manner, particularly, when the time period stood expired and the appellant failed to get subject plot of land allotted in favour of respondent Nos.1 to 13 from the Revenue Authorities. According to learned counsel for respondents, specific performance of an agreement is otherwise a discretionary relief and cannot be claimed as a matter of right, therefore, under the facts and circumstances of this case, the learned Single Judge was justified in law and facts to dismiss the Suit of the appellant, which was barred by law, and was also not maintainable for the reason that specific performance of an agreement which stood expired, could not be sought by filing a Suit for specific performance, whereas, the appellant admittedly failed to perform his contractual obligation during the stipulated period of limitation. While concluding his arguments, learned counsel for the respondents further submitted that the learned Single Judge was legally justified to dismiss the Suit instead of rejecting the plaint under Order VII Rule 11 CPC, while invoking the inherent authority vested in the Court under Section 151 CPC as well as Section 9 CPC and Order XV Rule 3 CPC, as according to learned counsel, in order to prevent the abuse of process of law and to safeguard the interest of justice Court has the power to dismiss a Suit at any stage of proceedings if it is barred by law, including law of limitation. It has been prayed that instant High Court Appeal is devoid of any merits, the same may be dismissed with cost.

4. Learned counsel for the respondent No.14 while supporting the submissions as advanced by the learned counsel for respondent Nos.3, 9 to 11 & 13, has further argued that from perusal of record and the pleadings in the Suit filed by the appellant against the respondents it is obvious that specific performance of an agreement dated 15.05.2003 executed between the appellant and respondent No.1, has been sought, however, after expiry of six (06) years from the date of signing of the agreement, which was the validity period of the agreement as well as General Power of Sub-Attorney dated 15.05.2003 issued by the respondent No.1 in favour of the appellant, whereas, neither in the pleadings there has been any mention of alleged extension of the aforesaid period nor any document or evidence, whatsoever, has been attached along with Suit to this effect. It has been further contended by the learned counsel for respondent No.14 that though, limitation for seeking specific performance of an agreement is three (03) years under Article 113 of the Limitation Act, 1908, whereas, under Article 91 of the Limitation Act, 1908, limitation for seeking cancellation of an agreement is also three (03) years from the date of knowledge. However, according to learned counsel, if such period is taken to be the period of six years as agreed between the parties in the agreement, even then the Suit filed by the appellant seeking specific performance of an agreement, which stood expired on completion of six (06) years maximum, from the date of signing of the agreement on 15.05.2009, whereas, the Suit has been filed in the year 2016, which according to learned counsel, is hopelessly barred by limitation, hence not maintainable and liable to be dismissed at the very initial stage of the proceeding without recording any evidence on merits of the case. Learned counsel for the respondent has further

argued that appellant being a broker otherwise, has no right, title or interest whatsoever in the subject land, which was to be allotted to respondent No.1 pursuant to decision of the Hon'ble Supreme Court in Civil Appeal No.K-16/1985 dated 01.07.1991, whereas, as per terms of the subject agreement, the appellant was under legal obligation to procure land 18595 P.I. Units or less approximately 676 acres to respondent No.1 pursuant to the aforesaid order of the Hon'ble Supreme Court, whereas, expenses if any, were to be incurred and borne by the appellant from his own resources. It has been further contended by the learned counsel for the appellant that as per terms of the agreement, in case of failure on the part of the appellant to discharge his obligation, the appellant had no right or interest in the subject land nor shall have any claim under the agreement, therefore, the argument of the learned counsel for appellant to the effect that appellant has incurred some expenses towards procurement of land from Government of Sindh and managed to get the summary approved from the Chief Minister, is therefore, of no avail to the appellant, as according to learned counsel, admittedly, neither the land was not procured nor appellant could get it transferred in the name of respondent No.1 within the stipulated period, which stood expired on 15.05.2009. According to learned counsel, the appellant did not seek any extension of time nor filed a Suit for specific performance uptill the year 2016, when the respondent, pursuant to another agreement, got the subject land allotted in their favour, whereafter, 3<sup>rd</sup> party interest has been created, which proceedings could not be challenged or questioned by the appellant in the Suit for specific performance of a contract executed between the appellant and respondent No.1. According to learned counsel, the appellant having no case on merits, could not

justify the maintainability of the Suit filed after expiry of six (06) years, being the validity period of the agreement and the Power of Attorney, therefore, the learned Single Judge has rightly dismissed the Suit for being barred by limitation on the one hand and not maintainable for having been filed in the year 2016, whereas, the agreement stood expired on 15.05.2009, therefore, the same was not enforceable in law. Learned counsel for the respondent has further submitted that the grounds and the scope of provision of Order VII Rule 11 CPC, are different and distinguished from the ground for dismissing the Suit at any stage of proceeding for being barred by law and not maintainable, while exercising inherent jurisdiction vested in the learned Single Judge of this Court under Section 151 CPC as well as under Section 9 read with Order XV Rule 3 CPC. While concluding the arguments, learned counsel for respondent No.14 submits that impugned order passed by the learned Single Judge does not suffer from any factual error or legal infirmity, therefore, instant appeal having no merits is liable to be dismissed.

5. We have heard the learned counsel for the parties, perused the impugned order and the record with their assistance and have also examined the relevant provisions of law relating to authority of the Court to dismiss a Suit if it is barred by law. Since the parties have not disputed the facts, except purported extension of period of limitation as argued by the learned counsel for appellant, therefore, we need not repeat the same, and would address the legal points agitated through instant appeal by both the parties, keeping in view the material available on record. Crux of the matter is that the subject Suit has been filed by the appellant against the respondents seeking specific performance of an agreement dated 15.05.2003 executed between the respondent No.1 and the appellant, according to which



the appellant was required to procure the land in the name of respondent pursuant to an order passed by the Hon'ble Supreme Court in Civil Appeal No.K-16/1985, from the Revenue Department, Government of Sindh within a period of maximum six (06) years from the date of execution of such agreement, whereas, the expenses, if any, were to be incurred by the appellant out of his own resources. However, as per terms of the agreement, in case of any default in performance of aforesaid agreement or discharge of obligation in part or full, the appellant was not entitled to claim any right and interest in the subject land. It will be advantageous to reproduce the relevant clauses of the agreement with regard to responsibility and obligation of both the parties, which read as follows:-

VALIDITY OF THE AGREEMENT AND POWER OF ATTORNEY	(06) YEARS MAXIMUM FROM THE SIGNING OF THIS AGREEMENT
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### 3. "AA's RESPONSIBILITIES

"AA" will perform the following responsibilities:

- i) To incur all out of pocket expenses required for execution of the transaction while dealing with the government officials including payment of stamp duties required for the transfer of the title and related expenses.
- ii) Ensure that the land is procured from the Government of Sindh within the validity period of this Agreement and is free from all encumbrances and vacant position of land is provided to "FF" on her "**Nominee**".
- iii) To transfer land in favour of "FF" or her nominee "**Muhammad Mohammad Arif Hussain Arab**" upon procurement within the validity period of this Agreement if desired by them.

### 4. PERFORMANCE OF SERVICES

"AA" shall exercise all reasonable skill, care and diligence in the performance of the services under the Agreement and

shall carry out all his responsibilities in accordance with this Agreement and if "AA" is unable to discharge his obligations in part or in full, he shall have no rights and interests in the subject lands, or have any claim under this Agreement.

**5. CONSIDERATION FOR PROCUREMENT OF LAND**

Upon procurement of land "FF" and "AA" agree to share the land in a fair and just manner as per the agreed ratio of 40% : 60% respectively, keeping in view the market value of the land to be shared. In the event "AA" fails to procure the land within the validity of signing of this Agreement, the Agreement shall stand void and cancelled and "AA" will not have any claim on the lands or "FF" or her "Nominee" under this agreement in any matter whatsoever."

6. From perusal of hereinabove terms of the agreement, it has been observed that in the event, if the appellant fails to procure the land within the validity period of the agreement i.e. six (06) years from the date of signing the agreement, the agreement shall stand void and cancelled, whereas, the appellant will have no claim on the land or against the respondents under the said agreement in any manner whatsoever. It has been further observed that there is no clause authorizing the parties to extend the period of six (06) years, nor anything has been produced by the appellant either in writing or through averments as made in the plaint to the effect that the time period of six (06) years was duly extended for another period of six (06) years as alleged by the appellant. As regards a hand written note in the General Power of Sub-Attorney dated 15.05.2003 issued by the respondent No.1 in favour of the appellant, it has been observed that it only provides that the validity of Power of Attorney could have been extended after expiry of six (06) years from the date of signing of Power of Attorney, for the period of another six (06) years subject to progress of work. However, even such hand written note, which has been seriously disputed by learned counsel for the

respondents, to be forged, does not suggest that the period of Power of Attorney was duly extended. Moreover, in the absence of any extension of period under the agreement itself, the claim of such purported extension of time period to validate the General Sub-Power of Attorney, which also stood expired after (06) six years, would otherwise, not enlarge the period of agreement. The appellant has failed to make out a prima-facie case for grant of interim relief, as nothing has been produced to establish that appellant performed his part of agreement before the expiry of six years, nor has been able to show as to why, Suit for specific performance has been filed after a lapse of about seven (07) years from the date of expiry of the agreement on 15.05.2009. It will not be out of place to observe that the Suit for specific performance is otherwise a discretionary relief which can be entertained by the Court only in appropriate cases, and in lawfully instituted proceedings. However, if such Suit is filed after expiry of period of limitation and no substantial material or evidence is placed on record to justify such delay reasonably, Court is not under legal obligation to entertain such Suit, while ignoring the maintainability of the Suit, on the grounds of limitation or jurisdiction of the Court to entertain such Suit. It is the duty of the learned Judge to first examine the jurisdiction of the Court to entertain a case filed in Court and also the issues relating to maintainability of the Suit filed at original side of this Court. If any Suit filed before the Court is barred by any law including law of limitation, then it can be dismissed in limine at any stage of proceeding, however, after confronting the plaintiff to this effect. Court can pass appropriate orders, including, dismissal of the Suit, while exercising inherent powers as vested in the Court under Section 151 CPC as well as under the provision of Section 9 and Order XV Rule 3

CPC. Reliance in this regard can be placed in the case of ***Haji Abdul Karim and others v. Messrs Florida Builders (Pvt) Limited (PLD 2012 SC 247)***, wherein, the Honour'ble Supreme Court while examining the scope of the provisions of Order VII Rule 11 CPC, Order XVII Rule 6 in Suit for specific performance of sale agreement has been pleased to hold as under:-

“13. We have examined the plaint on the touchstone of the above criteria and find that from the admittedly executed agreement between the parties, which is the document sued upon and the entire case of the petitioners is structured thereupon, it postulates a 'date fixed' for the performance thereof and no case for the exemption, the enlargement and the exclusion of period of limitation has been set out, in the plaint as per Order VII, Rule 6, C.P.C. therefore, the suit undoubtedly appeared from the statement in the plaint to be barred by the limitation and has been rightly rejected by the Courts.

14. While considering the other submissions of the learned counsel for the petitioners, i.e.(i) regarding the stipulation in the agreement to pay markup as liquidated damages, on account of delayed payments of consideration by the petitioners as per the schedule of the agreement (ii) the effect of the pending litigation. In relation to the first, it is held that such stipulation again may have relevance about the question before the Court whether the contract should be enforced or not, and the time is the essence of the contract or otherwise, but undoubtedly it has nothing to do with the proposition of limitation. About the second plea, it has neither been averred in the plaint nor any order of the court of competent jurisdiction has been filed along with the suit to establish, if any injunctive or prohibitory order was passed by the Court, on account of which the vendor was specifically restrained to complete the transaction qua the agreement between the parties and/or to file the suit. Mere initiation of a lis by a third party shall not be a cause or a ground for the exclusion of the period of limitation within the parameters of section 15 of the Act, entitling a party to an agreement to avoid and/or of his own refrain to perform his obligations of the agreement and to wait for such litigation to end and allow the statutory period of limitation to pass by. No exclusion/exemption qua the period of limitation in law can be claimed by the plaintiff on account of the pendency of the litigation simplicitor, where there is no order of the court preventing him to file the suit. See *Narayan Jivangouda Patil and another v. Puttabai and others (AIR 1945 PC 5)*.”

7. Accordingly, we are of the opinion that the impugned order passed by the learned Single Judge is unexceptionable, hence does not warrant any interference by this Court, therefore, instant High Court Appeal was dismissed vide short order dated 29.09.2021 and above are the reasons of such short order.

**JUDGE**

**JUDGE**

Nadeem