

# IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1132 of 2011

[Nazir Hussain *versus* Mst. Shahnawaz Begum and others]

along with

Suit No.991 of 2013, J.M. Nos.40 of 2014,  
30 of 2016, Execution No.53 of 2016 &  
Suit No.2826 of 2021

Date of hearing : 19.10.2022.

Plaintiff : Nazir Hussain, through M/s. Raj Ali Wahid Kunwar and Jamshed Ahmed Abbasi, Advocates.

Defendant No.1 : Mst. Shahnawaz Begum, through Mr. Amir Saleem, Advocate.

Defendant No.2 : The Secretary, Pakistan Defence Officers Housing Authority, through Ms. Huma Sadiq, Law Officer.

Defendants No.3 : Irfan Wahid, through Mr. Bassam Ali Dahri, Advocate

## **ORDER**

**Muhammad Faisal Kamal Alam, J:** Both applications-C.M.A.

Nos.9309 of 2013 and 5692 of 2016, are filed by Defendants No.1 and 3, respectively, under Order VII, Rule 11 of Civil Procedure Code, 1908 (“CPC”), for rejection of the plaint. Both applications are opposed by the Plaintiffs’ counsel by filing Counter Affidavits.

2. It is necessary to mention that in respect of the Property – M-86, Khayaban-e-Ittehad, Defence Housing Authority, Karachi (“**Suit Property**”), number of cases are filed\_

1. Present *Lis*.
2. Suit No.1104 of 2004, earlier filed in the Court of learned IXth Senior Civil Judge, Karachi South, which was withdrawn by the present Plaintiff.

3. Suit No.991 of 2013 filed by Irfan Waheed, against present Defendant No.1 (owner of the suit property), for specific performance of contract.
4. Judicial Miscellaneous (J.M) No.40 of 2014, filed by present Plaintiff [Nasir Hussain], seeking setting aside of Order and Decree dated 26-8-2013.
5. Judicial Miscellaneous (JM) No.30 of 2016, filed by present Defended No.1 against above Irfan Wahid and others.
6. Execution Application No.53 of 2016 (between the same parties. viz. Irfan Wahid versus Mst. Shahnaz Begum and DHA).
7. Suit No.2826 of 2021 preferred by another Vendee, namely, Parvez Farooq and Defendant No.1.

3. For deciding the controversy, background facts are necessary. Present Plaintiff-Nazir Hussain (“**First Purchaser**”) [of Suit No.1132 of 2011] is a closed relative (maternal uncle) of Defendant No.1-Mst. Shahnawaz Begum, who is undisputedly the owner of the above Suit Property. It is claimed by Plaintiff that the Suit Property was sold by Defendant No.1 (hereinafter be referred as “**Owner**”) to Plaintiff under an Agreement for Sale dated 04.03.1997 (*at page-25*), which is disputed by the present Owner. Suit No.991 of 2013 is filed Irfan Wahid (“**Second Purchaser**”) against the Owner, which was eventually compromised followed by a Decree dated 11.09.2013; crux of which is that Owner agreed to transfer the Suit Property to Second Purchaser (Irfan Wahid). However, in due course the said Compromise was challenged by filing a J.M. No.30 of 2016 by the Owner, which is still *sub judice*. Similarly, the said Compromise – Settlement Decree is also challenged by First Purchaser in J.M. No.40 of 2014, *primarily*, on the ground that the Suit Property has already been purchased by the said First Purchaser under the alleged Sale Agreement between him and Owner.

4. Suit No.2826 of 2021 is recently filed by one Pervez Farooq [**Third Purchaser**] against the Owner, stating that it is actually him who has

provided finance to Irfan Wahid (Second Purchaser) for the sale transaction and thus he is the ultimate beneficiary / purchaser of the Suit Property and eventually a new Sale Agreement dated 05.10.2018 was executed by Third Purchaser with Owner, *inter alia*, increasing the sale price from Rupees Sixty Million to Rupees Hundred and Three Million. Execution No.53 of 2016 is also *sub judice* filed by Second Owner (Irfan Wahid) for execution of the Compromise Decree.

5. Crux of the arguments of both learned Advocates for Defendants No.1 and 3 (Applicants of present Applications) is that the present Suit is not maintainable because the Suit No.1104 of 2004 was earlier filed, which was withdrawn by Plaintiff, without seeking permission to file a fresh Suit. Averred that present Suit is adversely affected by Order XXIII, Rule 3, Order II, Rule 2 of CPC and principle of *res judicata*; besides, present *Lis* is also time barred in view of Article 113 of the Limitation Act [1908], which provided three years' time for filing a Suit for specific performance of contract, *whereas*, through present *Lis* filed in year 2011, Plaintiff is seeking enforcement of Agreement for Sale dated 4<sup>th</sup> March 1997; it means that present Claim is time barred by thirteen years. Mr. Aamir Saleem, Advocate for the Applicants / Defendants, in support of his arguments, has cited the following case law\_

- i. **2013 S C M R 464**  
[*Muhammad Yar (Deceased) through L.Rs. and others versus Muhammad Amin (Deceased) through L.Rs. and others*] – **Amin Case**;
- ii. **2016 S C M R 1916**  
[*Azhar Hayat versus Karachi Port Trust through Chairman and others*].

6. Gist of the above case law is\_

Interpreting the provision – Order XXIII, Rule 1 of CPC, Honourable Supreme Court has held that once suit is withdrawn then a

person is precluded from instituting a fresh suit on the basis of same cause of action / subject matter and against the same Defendant; however, to take advantage of Sub-Rule 2[a] [b], for filing a fresh suit after the withdrawal of previous suit, then he has to seek permission of the Court, which cannot be granted as a matter of course / routine, but Court has to record reasons for giving such permission; but in case, permission is refused, then suit should not be dismissed as withdrawn, because the plaintiff in such an eventuality may be remedyless, or might review his stance about withdrawal. After discussing case law, it was concluded, that in certain situation where such permission to file fresh suit is not given by simply recording 'dismissed as withdrawn', the safer course would be to imply that Court has given a permission, otherwise serious prejudice shall be caused to the plaintiff, in view of the bar mentioned in Sub-Rule 3.

7. Mr. Raj Ali Wahid Kunwar, Advocate, along with Mr. Jamshed Ahmed Abbasi, Advocate, representing the First Purchaser – Plaintiff in Suit No.1132 of 2011 has argued that the present *Lis* is not barred by law, as it is based on a distinct cause of action, *whereas*, the above previous Suit was filed on a different set of facts, thus, none of the statutory provisions cited by Defendants' Advocates are applicable here. Contended by referring to the Pleadings of the earlier Suit number 1104 of 2004 [at page 101 of the Court File], that it was mainly filed to pursue the Defendant No.1- Owner to complete the sale transaction as mentioned in the first Agreement of Sale [*ibid*] between them, besides, present Defendant No.2-DHA by its Letter dated 30<sup>th</sup> April 2004 have refused to transfer the Suit Property in the name of Plaintiff/ the said First Purchaser. Thus it is argued that the earlier Suit number 1104 of 2004 was within time, that is three years, as prescribed by the Article 113 of the Limitation Act. To emphasize that present *Lis* is also within time, the learned Counsel [of Plaintiff] has referred to the E-mails

appended with his Rejoinder (*at Page 177, Part 2 of the File*), to show that these emails were exchanged between Plaintiff and Fahad, son of Defendant number one – owner; in particular he has referred to E-mails of September 7, 2009, August 7, 2009 and May 25, 2009, to substantiate his arguments about the fact that both Plaintiff and Defendant No.1 till such time intended to complete the transaction in respect of the Suit Property; consequently, present Suit [*Lis*] filed on 16 September 2011, is within prescribed time of Three years and not barred by any law. To augment his arguments, learned counsel for the Plaintiff has cited the following reported decisions\_

- i. **2002 S C M R 1877**  
[*Muhammad Bakhsh versus Muhammad Aish*];
- ii. **2004 M L D 943**  
[*Khairat Masih through L.Rs. versus Aziz Sadiq*];
- iii. **2017 S C M R 316**  
[*Syed Hakeem Shah (Deceased) through LRs and others versus Muhammad Idrees and others*].
- iv. **2017 C L C Note 136**  
[*Sajid Latif versus Abdul Latif and 3 others*]

8. Summary of the case law relied upon by Plaintiff (First purchaser) is as follows\_

Limitation is a mixed question of law and fact, thus evidence is to be recorded and plaint cannot be rejected by invoking provisions of order VII, Rule 11 of CPC. Petitioner (of the reported case) earlier filed the suit for permanent injunction on the basis of his ownership and subsequent suit was filed for declaration, challenging ostensible ownership. It is held in this background that a case which is not decided on merits, bar under Order II Rule 2 of CPC is not attracted. Earlier, a constitution petition was filed by petitioner regarding his employment, which was not pressed, followed by a new suit, that was converted into a constitution Petition; however, legal objection of respondent about maintainability was not sustained, as decision

on merits was given. Honourable Supreme Court has over ruled the bar of limitation because seller had received the entire price and possession was handed over to vendee, but sub-lease could not be executed due to ban; it is held that law of limitation cannot adversely affect the existing right and interest and purchaser has a right to seek execution of sub-lease when the ban was lifted. First, suit was withdrawn by filing an application under Order XXIII, Rule 1 of CPC with a request to file a fresh one, but the learned Court after recording the statement of plaintiff's counsel dismissed the suit as withdrawn. Objection was raised on filing of subsequent proceeding which was not sustained by the Appellate Court, by ruling that if in the application for withdrawal a permission is sought for filing a new suit, then unless some reasons are given by the Court for dis-allowing the permission to file a fresh proceeding, it will be presumed that application for withdrawal has been granted in terms of the prayer clause embodied in the Application. Earlier suit was withdrawn on the basis of compromise, and purchaser received a certain amount for redeeming the property from the bank, but, he gifted away the land in favour of his son, which was again challenged by the vendee; objection that subsequent suit is hit by Rule 2 of Order II of CPC, was discarded, due to the above facts, besides, that a separate cause of action accrued in favour of Vendee for filing the subsequent Suit.

9. Arguments heard and record considered.

10. Although Defendant No.1 / Owner in her Written Statement has specifically denied any sale transaction between the First Purchaser, that is, Plaintiff of present *Lis* and herself, but what is required to be seen for deciding these applications is the undisputed record and pleadings of the plaintiff.

11. Earlier Plaintiff filed a Constitution Petition No.D – 950 of 2004, seeking directions against Defendant No.2 – DHA, for mutating the Suit Property in the

name of present Plaintiff, because DHA had refused the mutation and required personal appearance of Defendant No.1 – Owner. The said Constitution Petition was withdrawn by the Plaintiff vide Order dated 16.09.2004, which states that Plaintiff intends to file a Suit. Subsequently above Suit No.1104 of 2004 was filed with regard to same Sale Agreement dated 04.03.1997, which is the subject matter of present *Lis*. It is mentioned in Paragraph-5 [of the earlier plaint] that present Defendant No.1 / Owner after signing the above Sale Agreement, left for the USA and is a permanent resident there; Paragraph-7 averred that present Defendant-Owner was reluctant to come to Pakistan and since Defendant DHA had refused to transfer the Suit Property in the name of Plaintiff and insisting that owner should be present, therefore the Suit was filed, which was withdrawn by filing an Application under Order XXIII, Rule 1 of CPC, after 4 years from the date of its institution. It is mentioned in the Application that Plaintiff and present Defendant No.1 have settled their dispute out of Court, as the latter has agreed to come to Pakistan for transfer of the Suit Property. Advocate for Defendant DHA recorded his no objection and the Order dated 27.05.2009 was passed on the said Application allowing the Suit to be disposed of accordingly. It is pertinent to mention that in the said Application, **no permission was sought** to file a fresh proceeding. Learned counsel for the Plaintiff states that the present *Lis* is filed after new cause of action accrued to Plaintiff in view of the above mentioned emails exchanged between Plaintiff and the son of the Owner / Defendant No.1. The first Email referred to is about the visit of Defendant No.1 to Pakistan concerning ‘Gulshan-e- Iqbal Property’ **and not the Suit Property.** The other emails on behalf of present Plaintiff only mentions enhancement of amount to Rs.4,000,000/- from Rs.3,000,000/-, but nowhere in the emails the present Suit Property has been mentioned.

12. Adverting to the comparison of pleadings of earlier and present Suits. Prayer Clauses of both Suits are identical with slight difference in the phraseology, besides, in the present *Lis* an additional prayer of permanent injunction is added. Earlier Suit was filed on the refusal of DHA vide Correspondence dated 17.04.2004 and the same situation persists till date. Except

for Legal Notice(s) including of 04.08.2011, at page 121 of the File, sent to the Defendant No.1, there is no *prima facie* evidence on record to show that what are the new facts for filing the present Suit, in respect of the Sale Agreement of 04.03.1997 [after 14 years], which were not there when the earlier Suit was filed; that too was instituted after seven years from the date of the Sale Agreement. Plaintiff in Paragraph-14 of the plaint has stated that he has paid an amount of Rs.1,084,000/- [Rupees Ten Lacs Eighty Four Thousand only] on 09.01.2004, to the daughter of Defendant No.1 through one cheque; but no documentary evidence / Annexure is filed, which could have been a good ground for a fresh cause of action; *similarly*, it is averred in Paragraph-17 of his plaint, that Plaintiff went to America to get signatures of Defendant No.1 before the Pakistan Embassy, but when he reached there, the Defendant No.1 / Owner left for Canada for few days. To support this material stance of Plaintiff, if at all it is true, which can at least confirm a relevant fact [requiring a trial] about the subject sale transaction, he [Plaintiff] should have produced the Air Ticket and Passport Entries with the plaint, but even after passage of so many years from the date of filing the present Suit, nothing has been brought on record.

13. Undisputedly, Defendant No.1 is the owner of Suit Property and according to Plaintiff's pleadings, is a permanent resident of United States of America. In this present controversy the close relationship between Plaintiff and Defendant No.1 cannot be ignored. Even if a General Power of Attorney [*allegedly*] was given in favour of the wife of Plaintiff [though denied by Defendant / Owner in her Written Statement], that is because of the trust reposed in Plaintiff due to close relationship between Plaintiff and Defendant No.1, who used to reside with former being her maternal Uncle, but, this is not a new fact or development in the controversy, justifying this *Lis*.

14. Admittedly, all the earlier proceedings have been unilaterally instituted by the present Plaintiff and later withdrawn. It is a settled rule that once a cause of action starts running then it does not stop, unless there are certain exceptional circumstances, which are not present in the instant Case. Pleadings and Prayer Clauses of both Suits in effect are similar, except the addition of above Legal



Notices. The case law cited by Plaintiff's counsel, is distinguishable, because the present Plaintiff has never obtained permission from the Court [in his application for withdrawal of earlier Suit], to file a fresh proceeding and admittedly this *Lis* is about the same dispute and cause of action amongst same Parties, thus, what is held in **Amin case** [*supra*] is applicable to the facts of present Case, that Plaintiff in such circumstances is precluded from instituting a fresh Suit.

15. Conclusion of the above discussion is that present Suit is barred by law, that is, under Order XXIII, Rule 3 of CPC, so also Article 113 of the Limitation Act, prescribing 3 years' time limitation for filing a Suit for Specific Performance. The present Suit is hopelessly time barred. Thus, Plaint is rejected and all pending Applications are disposed of. Office to draw up a Decree.

**Judge**

**Karachi.**  
**Dated: 06.03.2023.**

Riaz / P.S.