IN THE HIGH COURT OF SINDH AT KARACHI

HCA No.178 of 2018

[M/s. Democrat Construction Company (Pvt.) Ltd. Vs. Abdul Hameed]

Date	Order with signatures of Judge(s)

PRESENT:
Mr. Justice Irfan Saadat Khan
Mr. Justice Arshad Hussain Khan

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Appellant	Through M/s. Wasique Ahmed Kehar and Zameer Ahmed Bhutto, Advocates.
Respondent	Through Mr. Safdar Mehmood, Advocate.
Date of Hearing:	16.02.2023 & 23.02.2023
Date of Decision	22.03.2023

JUDGMENT

Arshad Hussain Khan, J: Through instant High Court Appeal, the Appellant has challenged the Order and Decree dated 16.03.2018 and 12.04.2018, respectively, passed by learned Single Judge of this Court in Suit No.207/2009, whereby the plaint of Appellant's suit was rejected under Order VII Rule 11 CPC.

2. Briefly, the facts giving rise to the present High Court Appeal are that the appellant/plaintiff-company filed Civil Suit No.207/2009 on the original side of this court for declaration, cancellation of lease and permanent injunction against the respondent/defendant stating therein that the previous management of the appellant-company out of 16200 Sq. Yards., initially sold out the portion of land measuring 3250 Sq.Yrds situated in Survey No. 572, Deh Gujro, Tappo Songal, District Central, Block No.9. Federal 'B' Area, Karachi [**subject property**] to the respondent and lease was executed in favour of the respondent on 22.05.1986 [**lease deed**]. Subsequently, the previous management of the appellant-company had entered into an agreement of Settlement on 15.02.1992 [**Settlement Agreement**] whereby the respondent had agreed to surrender the above said lease in respect the subject property in favour of the appellant-company against the payment of 30,00,000/- to be paid in six installments @ Rs.500000/- each starting from 20.08.1992 to 20.06.1993 and as per the terms and conditions of the settlement agreement, the previous management started to pay the amount to the

respondent and till 18.06.2007 they paid Rs.13,84,100/-. Thereafter, the previous management sold out the company to the new management. The new management of the company after coming to know the settlement agreement showed its willingness to pay the balance amount as per the settlement agreement, however, the offer was turned down by the respondent; resultantly the appellant-company filed the above suit on the original side of this court. Upon notice of the case, written statement on behalf of the respondent/defendant was filed wherein he denied all the allegations leveled against him and sought dismissal of the suit. During proceedings of the case, Application [CMA 12105/2010] under Order VII Rule 11 CPC was filed on behalf of the respondent seeking rejection of the plaint, inter alia, on the ground of limitation, which was heard and decided, vide order dated 16.03.2018, whereby the plaint of the aforesaid suit was rejected. The appellant, being aggrieved by the said order has preferred instant High Court Appeal.

3. Upon notice of this appeal, objections on behalf of the respondent have been filed stating therein that the appeal is baseless and misconceived; as such the same is liable to be dismissed with special costs. It is stated that the suit was hopelessly time barred and the learned single judge had rightly dismissed the suit of the appellant.

4. During the course of the arguments, learned counsel for the appellant while reiterating the contents of the appeal has contended that learned single judge rejected the Plaint on the factual controversies, which cannot be resolved without leading evidence. It is contended that the appellant is a private limited company whereas the lease deed dated 22.05.1986 in respect of subject property in favour of the respondent was fraudulently executed by one of the Directors in his own capacity, who had no authority to deal with the company's property as there was no board's resolution in his favour to alienate the company's property, as such, the lease deed itself is untenable in law. He has further contended that the alleged lease was not within the knowledge of the company as no board resolution was passed by the company for disposal of the project land i.e. Lal Shahbaz Nagar to third party. Furthermore, without the Board Resolution, the company had no authority to sell or lease out any part/portion of the land approved for housing project (Lal Shahbaz Nagar), which was booked by respective allottees of the said project. It is also contended that the allottees of Lal Shahbaz Nagar filed suit No.763 of

1987, inter alia, against the appellant-company [previous management] for declaration and injunction wherein the official assignee was also appointed as receiver and as such specific performance in terms of the settlement agreement was not possible. However, subsequently, the said suit was decreed by way of compromise on 12.12.1994. It is argued that after the said decree the respondent on 19.10.1998 executed an affidavit of No Objection for construction and also started receiving payment, which he had received till June 2007. However, on 22.01.2209 the appellant-company [present management] had noticed that the respondent refused to perform the agreement. It is also contended that Article 113 of Limitation Act provides three years limitation from the date fixed for the performance, or if no such date is fixed when the plaintiff has noticed that the performance is refused; hence time of limitation started from the date when appellant noticed the performance is refused i.e. 22.01.2009 and the suit was filed on 13.02.2009, which was within one month of refusal; hence the suit was within time and cannot be held to be barred by limitation. Lastly, he has contended that the impugned order is bad in law and facts both as such the same is untenable and liable to be set aside. In support of his arguments, learned counsel has relied upon the cases of *Abdul Rehman and others v. Ghulam Muhammad through L.Rs.* [2010 SCMR 978], *Tariq Mahmood Chaudhry, Kamboh v. Najam-un-Din* [1999 SCMR 2396], *Muhammad Yaqoob v. Mst. Sardaran Bibi and others* [PLD 2020 SC 338], *Mst. Shamshad Begum and 2 others v. Mst. Laila Khanum and others* [2022 MLD 341], *Sadiq and 5 others v. Mst. Ulfat Jan (widow) and 38 others* [2019 YLR 1912], *Abdul Ghani and 5 others v. Ist Additional Sessions Judge and 18 others* [2019 CLC 1721], *Munawar Ali and others Umar Daraz and others v. Umar Daraz and others* [2022 CLC 920], *Aamer Shahzad Dhody v. Adamjee Insurance Co. and others* [2020 CLD 1329], *Muhammad Anwar Khan v. Ghulam Farid and others* [2014 YLR 2244], *Peer Bukhsh Brohi through Attorney v. Dhani Bukhsh through Attorney and another* [2020 YLR Note 24 (Sindh)], *Muhammad Ismail v. Zamindaran-e-Jaffarabad through Representatives and 2 others* [2019 YLR 646], *Munir Ahmad v. Hassan through L.Rs. and others* [2021 CLC 1575], *Rehmat Hayat and 11 others v. Rafiq Ahmad Khan and others* [2021 YLR 607], *Abdul Ghani Khan v.Dino Bandhu Adhikari and another* [PLD 1963 Dacca 777], *Sheikh Muhammad Javaid v. Sartaj Saqlain and 5 others* [2018 CLD 1237], *Mst. Asia Begum and 2 others v. Muhammad*

Alam and 3 others [2015 CLC 54], *Rafique Ahmed v. Ashok Kumar and 5 others* [2017 CLC 317], *Messers Shah Nook Studios v. W. Z. Studios* [1980 CLC 433], *Jawaid and 6 others v. Province of Sindh through Minister, Ministry of Local Government and 4 others* [2019 CLC 1032 (Sindh)], *Allah Ditta and others v. Akbar Ali and others* [2003 YLR 1222], *Syed Hamid Mir and another v. Board of Revenue and others* [2020 YLR 1547], and *Muhammad Taj v. Arshad Mehmood and 3 others* [2009 SCMR 114].

5. On the other hand, learned counsel for the respondent has vehemently opposed the arguments put forth by learned counsel for the appellant. He while reiterating the contents of the Objections filed on behalf of the respondent has contended that the impugned order is well reasoned and within the parameters of law as such does not warrant any interference by this Court. It is contended that the appellant has failed to satisfy the learned single judge that its claim was within the period of the limitation as such the plaint of appellant's suit was rightly rejected by learned single judge. It has been argued that the provisions of Order VII Rule 11 CPC provides the mandate to the court to examine the plaint and its attachments thoroughly, which has been done by learned single judge and after considering all material facts passed the impugned order, which is very comprehensive in its terms. It is next argued that bare reading of the impugned order reflects that the learned single judge examined each and every aspect of the Plaint while passing the same within the terms of clause (d) of Order VII Rule 11 CPC. It has been further argued that the appellant could not point out any single ground, which if was raised by it but the learned single judge overlooked to discuss the same in the impugned order. It is urged that in the present appeal the appellant has taken new/fresh grounds, which he had neither taken in the plaint nor at the time of arguments before the learned single judge and further the relief of cancellation of lease deed has been sought on the basis of new assertions and the grounds 2 to 7 as set forth in the memo of appeal. It is stated that mere an agreement does not create any right and title in favour of the appellant to seek declaration of his ownership in the subject property, which is lawfully owned by the respondent through a valid and subsisting document i.e. 99-years lease deed. Lastly, he has contended that the order impugned in the present proceeding does not suffer from any

illegality and infirmity as such present appeal is liable to be dismissed with cost.

6. We have heard learned counsel appearing for the parties and perused the material available on the record as well as considered the case law cited at the Bar.

7. Precisely, the appellant/plaintiff in suit No.207 of 2009 sought declaration that the agreement of settlement dated 15.2.1992 as well as an affidavit dated 19.10.1998 executed by the respondent are valid documents entitling the appellant to claim a lawful ownership of the subject property. Furthermore, in view of the above settlement agreement the lease deed dated 22.05.1986 is liable to be cancelled. The plea of the appellant in the case is that the said settlement agreement entered into between the previous management of the appellant-company and the respondent came into their knowledge in the year 2007 when the new management after becoming owner had taken over the control of the company and after coming to know about the said agreement the respondent was immediately approached and was paid certain amounts. However, when the respondent refused to accept and abide by the terms and conditions of the settlement agreement, the appellant filed the aforesaid suit. Thus, as per the appellant, the limitation would start from 2007, however, learned single judge has erroneously reached to the conclusion that the suit was time barred and resultantly the plaint was rejected.

8. Insofar as the contention of learned counsel for the appellant that the appellant management had no knowledge of execution of the said leased deed is concerned, it may be observed that it is not the case of knowledge of one person or the previous management, here it is the company who had knowledge of the transaction. It is an admitted position that the appellant's present management under the memorandum of understanding had taken over the company from the previous management, which despite having knowledge of the said lease deed did not take any step to get the same cancelled, as such, the appellant's present management, which had derived right from the previous management and had stepped into their shoes was debarred from seeking cancellation in respect thereof and had to sail and sink with the previous management and any lacuna or flaw in the transaction shall always travel with the property and subsequent management [present appellant] had to

suffer for non-taking diligent and stringent legal steps for cancellation of the lease at the right time by the previous management.

9. As regards the contention of learned counsel for the appellant that the execution of lease deed of the subject property in favour of the respondent by the managing director of the company [previous management] without having board resolution of the company whereby he sold out company's asset is not sustainable in law and such the same is liable to be cancelled, it may be observed that firstly, this plea has been taken by the appellant first time in the present appeal as this ground/objection was neither taken in the plaint of suit No.207 of 2009 nor at the time of arguments before the learned single judge. On the contrary, the case of the appellant in the suit was that in view of the settlement dated 15.02.1992, inter alia, between the company and the respondent as well as affidavit dated 19.10.1998 executed by respondent, the lease deed dated 22.05.1986 in favour of the respondent may be cancelled. A perusal of the above said lease deed and the settlement agreement reflects that in both the documents there is no mention of company's board resolution. Whereas the appellant in the present appeal accept the settlement agreement being validly executed document and seeks direction of its validity while disputing the lease deed on the ground that the same was executed by a person having no authority by means of board's resolution in his favour. Secondly, the lease deed which is sought to be cancelled has already been accepted and further the appellant-company [previous management] while accepting the said documents entered into a settlement agreement dated 15.02.1992 with the respondent wherein the company had agreed to pay sale consideration to the respondent for surrendering the said lease deed. In such circumstances, this plea of the appellant appears to be an afterthought and also hit by the doctrine of approbate and reprobate, as such, all the contentions of learned counsel with regard to the acts and deeds of previous management and/or its director appears to be misconceived, hence the same are untenable in law.

10. Insofar as the point of limitation is concerned, from perusal of the plaint of suit No. 207 of 2009, it clearly reflects that although the appellant's suit was for declaration but in fact the appellant sought specific performance of the agreement. Learned single judge has rightly observed that the essence of the case is the agreement of settlement on the

basis of which the appellant/plaintiff claimed ownership of the land, therefore, mere mentioning declaration on the tile of the suit will not make the appellant's case as a suit for declaration. It will remain a suit for specific performance as the appellant has come to the court claiming that the agreement of settlement is a valid agreement and it has shown his willingness to pay the entire sale consideration in terms thereof, as such, limitation period for filing the suit for specific performance would be governed under Article 113 of the Limitation Act, which provides three years' time 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. In the present case, it is an admitted position that in the agreement of settlement date for performance / payment of balance sale consideration [last installment date] was fixed as 20.6.1993. If we compute the limitation period from the said date [20.06.1993] and the suit No. 2007 of 2009 was filed in the year 2009, which is hopelessly time barred. Even otherwise, for the sake of arguments, if the limitation is counted from the date of Affidavit of respondent i.e. 19.10.1998, again it is time barred. There is nothing available on the record, which could show that the appellant-company had approached to the respondent before the expiry of limitation period of three years and/or any acknowledgement was made by the respondent for extension of the time. Insofar as the payment receipts of 2007 are concerned, a perusal of the said receipts do not show that whether the same were issued in continuation of the Settlement Agreement or have any nexus with the terms and conditions of the Settlement Agreement. Moreover, the amounts mentioned in the said receipts do not corroborate with the terms and conditions of the Settlement Agreement and the amounts mentioned therein. It is also well settled proposition of law that any enlargement in limitation if made after expiry of the statutory period would be inconsequential. It is also well settled that tangible right accrues in favour of the adverse/rival party after lapse of the described period of limitation, which cannot be mutilated on the shallow assertion of indolent party who deliberately sleeps in deep slumber over his right. Learned single judge while dealing with this issue of limitation has discussed in detail in Para Nos. 5, 6, 7 & 8 of the impugned order, which is self-explanatory, and as such, in order to avoid repetition, the same are not being discussed here. Learned counsel

for the appellant has also failed to controvert such findings of the learned single judge through the material available on the record.

11. As regards contention of learned counsel for the appellant that the question of limitation is mixed question of fact and law as such the trial court in order to resolve the controversy had to record the evidence; it is observed that in view of the discussion in the preceding para, it manifestly reveals that the suit was filed beyond the period of limitation, which precluded the appellant from having recourse to the legal remedy. It may also be observed that the question of limitation rests on the circumstances, which are explained in the plaint, inasmuch as it has two-fold implications; and being a pure question of law, at times, it becomes mixed question of fact and law particularly when disputed facts in regard to reckoning of limitation from the acquisition of knowledge or origin of the cause of action from a specific date, need probe by recording evidence. The Supreme Court of Pakistan in the case of *Muhammad Khan v. Muhammad Amin* [2008 S C M R 913], inter alia, has held that:-

> "Evidently the suit was filed beyond the period of limitation prescribed under Article 113 of the Limitation Act it must be stated that the fact of limitation is evident from the averments made in the plaint itself. In such circumstances, the trial court was not required to frame issue and record evidence. The argument advanced by learned counsel for the petitioners is absolutely misconceived and not tenable."

In view of the foregoing, we are unable to accept the arguments of learned counsel for the appellant that the question of limitation is always a mixed question of fact and law as it varies according to the circumstances averred in the plaint and if a bare reading of plaint does not give rise to any such factual probe in respect of institution of suit beyond the limitation period, in such eventuality there is no need to frame issue and record evidence, and it is liable to be considered as a pure question of law.

12. In the present case, a perusal of the plaint does not show that the appellant has averred any disputed question of fact in his plaint concerning the institution of suit beyond the limitation period, therefore, it is held that in the instant case, the question of limitation was a purely that of law indeed and not that of fact. Hence, in our opinion, learned single judge has rightly reached to conclusion that the suit is hopelessly time barred as per the provisions of Article 113 of the Limitation Act and

has rightly rejected the Plaint of the aforesaid suit while allowing the Application under Order VII Rule 11 CPC through the impugned order. The other arguments of the learned counsel with regard to another Suit No. 763 of 1987 between appellant-company and allotees of Shabaz Nagar, and orders passed therein are also not entertainable as the same were neither raised by the appellant in the plaint of suit No. 207 of 2009 nor in the counter affidavit to application under order VII Rule 11 of CPC [CMA No. 12105 of 2010] filed in the said suit nor at the time of arguments before learned single judge at the time of passing of the impugned order. The case law relied upon by learned counsel for the appellant have been considered and found distinguishable from the facts of the present case as such the same are not applicable to the present case. Consequently, this Appeal being devoid of any merit is hereby dismissed with no order as to costs.

JUDGE

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