IN THE HIGH COURT OF SINDH, KARACHI
High Court Appeal No.158 of 2019
[Mrs. Naveen Irfan Puri v. Mst. Shama Parveen and others]

Present:
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Muhammad Osman Ali Hadi

Date of hearing: 29.04.2025.

Mr. Omair Nisar Khan, advocate for Appellant.
Mr. Basil Nabi Malik, advocate for respondent No.2.

J U D G M E N T

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MUHAMMAD IQBAL KALHORO J: Appellant filed a suit for specific performance, injunction and refund against, amongst others, respondent Nos. 1 and 2. The case of the appellant/plaintiff was based on a sale agreement dated 19.12.1996, whereby purportedly respondent No. 2 himself and acting as attorney for co-owner respondent No. 1 had agreed to sell two plots Survey No.20 and Survey No.52, Sheet No. C-F-1-5, Clifton Quarters, Karachi, admeasuring 2400 sq. yds. and 2600 sq. yds. against a total sale consideration of Rs.60,000,000/- (Rupees Sixty Million), out of which, Rs.10,000,000 (Rupees Ten Million) as earnest money was paid. Rs.20,000,000/- was agreed to be paid on or before 19th January, 1997, while the balance sale consideration viz. Rs.30,000,000/- (Rupees Thirty Million) was agreed to be paid on or before 19th July/August, 1997.

2. Both the plots are situated adjacent to the Mohatta Palace, Karachi. Before the sale could be completed in terms of sale agreement, appellant came to know that fate of the said two plots had come under the cloud, as the government had decided to convert them into a public park, and as compensation was attempting to offer alternative plots to

respondents. When appellant confronted the said facts to the respondents, they assured her that remaining sale consideration would only be charged when the said issue was resolved. Yet, they sent a legal notice dated 08.04.1997 to her demanding balance sale consideration and warning that her failure would result in forfeiture of the part payment and cancellation of sale agreement.

3. It is the case of appellant/plaintiff that somehow a further payment of Rs.43,000,000/- was made to defendants towards the sale consideration as per sale agreement dated 19.12.1996. Thereafter, appellant/plaintiff vide second sale agreement dated 02.10.1997, entered into sale with defendant No. 1 to the extent of her half share viz. 31.25% in the suit plots against a total sale consideration of Rs.3,906,250/-. The sale was made, and consequently defendant No. 1 executed General Power of Attorneys, duly registered, one for each of the two plots, in favour of appellant/plaintiff's brother with authority to transfer the same. On the same date, defendant No. 1 delivered possession of her said share to appellant/plaintiff. Subsequently, on the basis of General Power of Attorneys, brother of appellant/plaintiff executed two Conveyance Deeds, duly registered, to the extent of said area in both the plots transferring the title thereof to appellant/plaintiff. Hence, the appellant/plaintiff became co-owner to the extent of 31.25% in both the plots.

4. Appellant/plaintiff further claims to enter into an oral contract dated 30.05.1998 with defendant No. 1 for purchasing her remaining share to the extent of 31.25% in each of the plots against sale consideration of Rs.23,100,000/-. Thereafter, appellant/plaintiff pursued the defendants to complete the sale in respect of the suit properties but when they failed to fulfill their promise, she filed the suit on 23.07.2015.

5. In the suit, defendant No. 2/respondent No. 2 filed a CMA No.11934/2015, under Order 7 Rule 11 CPC and appellant/plaintiff CMA No.10616/2015, under Order 39 Rules 1 and 2 CPC. Both the applications have been decided by the impugned judgment dated 03.09.2018 and decree dated 02.03.2019 in the terms detailed here in below.

6. CMA No.11934/2015 under Order 7 Rule 11 CPC has been allowed in the terms whereby the suit has been dismissed as barred by time to the extent of prayer clauses (a), (b), (c) and (f); and the suit to continue for the remedy of injunction and consequential reliefs set out in prayer clauses (d), (g) and (h). The application under Order 39 Rules 1 and 2 CPC has been decided in the following terms:-

> (a) the defendants 1 and 2 are restrained from creating any third party interest in the suit plots and from raising any construction on the suit plots;
>
> (b) until further orders are passed in this suit or in Suit No.2449/2015, the following arrangement made for the protection of the suit plots vide order dated 15-05-2018 in Suit No.2449/2015 shall be the order of the Court for the purposes of this suit as well:
>
> " In order to preserve the suit properties, the following order is passed to signify that the suit properties are under supervision of this Court.
>
> (i) The Nazir to deploy at least two security guards at the suit properties round-the-clock with instructions to report to the Nazır immediately of any activity out of the ordinary at the suit properties. If both parties consent the Nazir may deploy a third security guard as it is said that the boundary wall has three entrances. This be done without removing the security guards of the plaintiff;
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> (ii) The Nazır to affix a sign-board at the suit properties to inform the public that the suit properties are under supervision of the Nazır of this Court;
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> (iii) If the parties consent, the Nazir may install CCTV cameras at the suit properties with arrangements to secure the footage of such cameras;
>
> (iv) The cost for (i) to (in) above shall be shared equally by the parties and shall be paid in advance, so also the Nazır's fee of Rs.40,000."

The appellant has challenged the impugned order mainly for what has been decided on application under Order 7 Rule 11 CPC.

7. We have heard the parties. Learned counsel for appellant has argued that the impugned judgment and decree are not sustainable in law, the same have been passed in negation of facts and grounds; that learned single Judge has not appreciated arguments of appellant's counsel in true context; that it is well established that a plaint cannot be rejected in piecemeal under Order 7 Rule 11 CPC; that the question of limitation is a mixed question of law and facts and the learned single Judge did not appreciate that timeframe fixed in the first agreement dated 19.12.1996 was dispensed with/novated by the subsequent agreements of sale dated 02.10.1997 and 30.05.1998; that learned single Judge has decided the case of appellant on the issue of specific performance of relief without recording evidence; that there was no evidence that respondents had refused to perform agreement of sale with the appellant and hence the suit filed by the appellant was within time

8. Learned counsel further argued that for the purpose of deciding application under Order 7 Rule 11 CPC, the contents of plaint are presumed to be correct and when we see the contents of the plaint, *prima facie,* the case in favour of the appellant is made out; that learned single Judge has wrongly construed 19th July/August 1997 mentioned in the agreement of 1996 as a final date fixed for performance. The prayer for refund was not barred by law but it has also been dismissed; that learned single Judge has wrongly observed that plea of novation of contract or dispensation of date has not been taken in the plaint. Learned counsel to support his arguments has relied upon the cases of (1) **Mst. Samina Sohail v. Humaid Naseer Al-Owais and 2 others (1989 CLC 1949)**, (2) **Muhammad Hayat Khan and 3 others v.**

Ali Akbar Khan (1998 CLC 209), (3) **Mst. Bibi Sundas and others v. Mst. Bibi Shahid and others (2020 CLC 1475)** and (4) **Faryal Arif Latif v. Arif Latif (2025 SCMR 395).**

9. On the contrary, learned counsel for respondent No. 2 has supported the impugned judgment.

10. We have considered the pleas and perused the material available on record. Appellant/plaintiff in the suit has sought following reliefs:-

> "a) order specific performance of Agreement of sale dated 16-12-1996 (sic-should be 19-12-1996) and the oral agreement dated 30- 05-1998 against the Defendants nos. 1 and 2, jointly and severally;
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> b) direct the Defendants nos. 1 and 2 to complete sale of this suit property by executing the sale deed jointly and severally for the remaining 68.5% share in favour of the Plaintiff;
>
> c) in default of prayer (b) the Nazir may be directed to execute the sale deed for the remaining 68.5% share in the suit property in favour of the Plaintiff;
>
> d) permanently and pending disposal of the main suit restrain the Defendants 1 and 2, their officers, agents and privies from dispossessing the Plaintiff, raising any construction over the suit property or creating any third party rights in relation to the said suit property or encumbering the suit property in any manner whatsoever, including acceptance and taking over of alternate plots;
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> e) direct the Nazir of this Hon'ble Court to conduct inspection of the suit property, so as to ascertain (by taking photographs) who is in possession of the same;
>
> f) direct the Defendants nos. 1 and 2 to refund Rs.1 crore, jointly and severally, in the ratio commensurate with their referred shares alongwith markup at bank rate and order indexation from the date of payment by the Plaintiff till the date of refund.
>
> g) grant costs;

h) grant any other adequate relief deemed fit in the circumstances."

11. A perusal of the impugned judgment shows that while considering arguments of the parties, learned single Judge has observed that the date for final payment viz. 19th July/August, 1997 mentioned in the sale agreement dated 19.12.1996 was not even disputed by learned counsel appearing for the appellant. The only argument in this respect presented before him was that the said date was dispensed with by the subsequent sale agreement dated 02.10.1997 and oral agreement dated 30.05.1998. The said argument however could not convince the learned single Judge because he after perusing the entire plaint had realized that such plea was an afterthought as it was not even taken in the plaint. To substantiate the same, learned single Judge has reproduced paras. 15, 17 and 19 of the plaint in the impugned judgment which on our perusal clearly show that the stance of dispensation of final date was not urged by the appellant in the suit. Yet, it seems, learned single Judge proceeded to examine the question whether or not the subsequent sale agreement dated 02.10.1997 had dispensed with the date fixed on the original sale agreement dated 19.12.1996. In para. 18 and 19, the learned single Judge has observed as under:-

"18. The Sale Agreement dated 19-12-1996 can be said to have embodied the following four (4) distinct obligations: (1) the contract to sell the share of defendant No.1 in Survey No.20; (ii) the contract to sell the share of the defendant No.1 in Survey No.52 (ii) the contract to sell the share of defendant No.2 in Survey No.20; (iv) the contract to sell the share of the defendant No.2 in Survey No.52. The percentage of land holding of each seller was specified, so also the price per square yard. In the circumstances, any of the said four (4) contracts could have been performed independently or jointly with one or more of the other contracts embodied in the Sale Agreement dated 19-12-1996, that was actually done under the subsequent Sale Agreements dated 02-10-1997 as discussed infra.

As against the Sale Agreement dated 19-12-1996 where the defendant No.1 had agreed to sell to the plaintiff her entire share of 62.50% in both the suit plots, under the subsequent Sale Agreements dated 02-10-1997 the defendant No.1 agreed to sell to the plaintiff only half of the defendant No.1's share in both the suit plots, ie. 31.25% in each of the suit plots, while retaining the other half (31.25%) with herself. The price per square yard that works out under subsequent Sale Agreements also varies from the price per square yard agreed under the original Sale Agreement. The subsequent Sale Agreements dated 02-10-1997 do not to keep alive the original Sale Agreement dated 19-12-1996 as between the plaintiff and the defendant No.1. Therefore, it is not that the subsequent Sale Agreements dated 02-10-1997 dispensed with the date fixed under the original Sale Agreement dated 19-12-1996, but that the contract as between the plaintiff and the defendant No.1 embodied in the Sale Agreement dated 19-12-1996 stood substituted and novated within the meaning of Section 62 Contract Act, 1872. In other words, after the Sale Agreements dated 02.10.1997, the original Sale Agreement dated 19.12.1996 only embodied the contract between the Plaintiff and the Defendant No.2 who was not party to the novation.

19. Having seen as discussed in the para above that the Sale Agreements dated 02-10-1997 had substituted the Sale Agreement dated 19-12-1996 to the extent it was between the plaintiff and defendant No.1, and the Sale Agreements dated 02-10-1997 having been duly performed vide Conveyance Deeds dated 03-03-1998, the question of specific performance of the contract between the plaintiff and the defendant No.1 under the Sale Agreement dated 19-12-1996 does not arise. As regards the contract between the plaintiff and the defendant No.2 that continued under the Sale Agreement 19-12- 1996, the relief for specific performance of that contract is time barred by nearly 15 years. Even if I were to hold that Sale Agreements dated 2-10-1997 and/or the oral contract dated 30-05-1998 between the plaintiff and the defendant No.1 had somehow dispensed with the date fixed under the original Sale Agreement dated 19-12-1996, Mr. Farogh Naseem was not able to convince this Court as to how that could dispense with the date fixed in the contract between the plaintiff and the defendant No.2 when the defendant No.2 was not party either to the subsequent Sale Agreements dated 02-10-1997 or the alleged oral contract."

12. Learned counsel for appellant could not point out any illegality in the above observations, learned single Judge has taken into account both the agreements and has rejected the plea of the appellant that by subsequent agreement dated 02.10.1997, the date fixed for final payment viz. July/August 1997 stood dispensed with. According to his view, the subsequent sale agreement dated 02.10.1997 had substituted the sale agreement dated 19.12.1996 to the extent of defendant No. 1's half share in the suit plots. The agreement of the year 1996 was to the extent of defendant No. 1's entire share of 62.50% in both the plots; whereas the sale agreement of the year 1997 was limited to her half share in both the plots i.e. 31.25%. So, it is clear that sale agreement dated 19.12.1996 between plaintiff and defendant No. 1 relating to her entire share in both the plots stood novated/substituted by subsequent sale agreement dated 02.10.1997. This permutation, agreed by appellant and defendant No. 1 would not mean that the date for final payment for defendant No. 2 respecting his share would stand dispensed with and he would be affected by the latter agreement. The sale agreement of the year 1997 was between defendant No. 1 and the appellant, it had nothing to do with defendant No. 2. His obligations arising out of sale agreement of the year 1996 upon the appellant remained intact with all the consequences to follow in case of failure of the appellant to perform her part.

13. Next, the record shows that appellant had gained knowledge of refusal on the part of respondents to abide by the terms and conditions of the sale agreement dated 19.12.1996 through a legal notice dated 08.04.1997 sent by them. In the said legal notice, appellant was reminded to make payment of remaining sale consideration on the dates fixed in the said sale agreement with a warning that in case of non-payment, the respondents would be entitled to forfeit part payment and

dispose of the plots as per their own terms. The appellant's own documents show that thereafter on 13.02.2001 and 27.11.2001, she came to know that defendants/respondents were negotiating with the government for acquiring some other plots in lieu of the said plots. She therefore raised the issue with the relevant government authorities by writing letters to them (one of which is available at Page 245). Even if that was not enough, appellant herself has written in para. 9 of the plaint that she acquired knowledge on 15.01.2012 that defendants had started making some construction on the suit plots; hence she got published a public notice on 23.02.2012 warning the public not to enter into any transaction with the respondents over the suit plots. So there are at least three events occurring on different dates which show that appellant/plaintiff was sufficiently alarmed by respondents' intention to refuse to perform their part of contract for one reason or the other. First, through a legal notice dated 08.04.1997 when she was called upon to make payment of remaining sale consideration, then her own knowledge that the respondents were trying to dispose of the plots in lieu of alternative plots and hence her writing letters on 13.02.2001 and 27.11.2001 to different authorities and finally on 15.01.2012 when she gained knowledge of construction going on over the plots at the behest of the respondents. Yet, she preferred to file the suit on 23.07.2015 after a period of three years provided in terms of second part of Article 113 of Limitation Act, 1908.

14. It is settled that in a case where no date for performance of sale agreement is fixed, limitation will run from the date plaintiff has notice of refusal to perform the contract, so even if the argument of learned counsel for appellant is accepted (which we do not) that the date fixed 1996 agreement stood dispensed with, her knowledge gained through a legal notice dated 08.04.1997 reminding her to make payment of sale

consideration or to face the consequences including termination of the contract was sufficient communication to her about the notice of refusal ensuing automatically in the wake of her inaction in making final payment. Then, in the year 2001 her gaining knowledge that respondents were trying to dispose of the said plots by negotiating with the government was sufficient circumstance to prompt her to call for performance of the contract by the respondents and come in the Court, if they refused to do so. Instead, appellant/plaintiff without any rhyme and reason waited till 2015 to file the suit seeking performance of the contract entered into the year 1996. Apparently, the suit was time barred and there was no evidence to justify condoning such delay.

15. The arguments of learned counsel for appellant that plaint cannot be rejected in piecemeal has also been adequately addressed by learned single Judge in para.22 and in some portion of para. 23 of the judgment, which are reproduced as under for a ready reference:-

> 22. From the plaint it appears that the cause of action for the relief of injunction is independent of the cause of action for the relief of specific performance, and the relief for injunction can be sustained independent of the relief for specific performance. There is no bar to joining different causes of action in one suit. In the circumstances, the question that now arises is of the way forward when the Court concludes that the suit is barred by law for some of the reliefs but not for other relief inasmuch as, it is settled that the plaint cannot be rejected in piecemeal. The answer to that question also lies in the case of Florida Builders (refer to para 10 above) which postulates that while examining the plaint for rejection, the Court is not denuded of its inherent power of otherwise dismissing the suit if found to be barred by law. To explain that concept further, in case of rejection of plaint, Order VII Rule 13 CPC allows a plaintiff to present a fresh plaint in respect of the same cause of action where the ground for rejection of the plaint can be addressed and remedied. But where the ground for rejection of the plaint is such that it cannot be remedied at all, then the Court can dismiss the suit instead of rejecting the plaint. A suit barred by limitation is exactly such a

> case where Section 3 of the Limitation Act, 1908, state that "…… every suit instituted after the period of limitation ……. shall be dismissed……"
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> 23. In my view, dismissal of a suit can be dismissal of a part of the suit where the suit joins separate causes of action, and does this suit, and thus where a relief based on one cause of action is barred by law, the suit to the extent for that relief can be dismissed while allowing the suit to continue for other reliefs."

16. Learned single Judge has rightly observed that the Court is not divested of its inherent power to dismiss the suit if found barred by law on examination of the plaint under Order 7 Rule 11 CPC, and to support his view, he has referred to the case of **Haji Abdul Karim v. Florida Builders (PLD 2012 SC 247)**. While explaining the point, it has been rightly held that in case of rejection of plaint, under Order 7 Rule 13 CPC plaintiff is permitted to present a fresh plaint in respect of the same cause of action where the ground of the plaint can be remedied. But where the ground for rejection of the plaint is such that it cannot be remedied, then the Court can dismiss the suit instead of rejecting the plaint. A suit barred by limitation is the one which exactly falls into the second category. The ground of limitation cannot be remedied when there is no apparent justification to condone the delay, the plaintiff here has utterly failed to account for the time spent between the agreement (in 1996) and institution of the suit (in 2015). This flaw is irremediable and before us nothing to strike down the same has been brought up. The learned single Judge has, therefore, instead of proceeding to reject the plaint in respect of certain reliefs, has rightly dismissed the suit to the extent of prayer clauses (a), (b), (c) and (f) which cannot be considered illegal or amount to rejecting the plaint in piecemeal.

17. Learned counsel for appellant during the arguments has also questioned the impugned conclusion in respect of refund of amount

allegedly paid to the respondents. Be that as it may, it is not disputed that all the payments in this regard were allegedly made to the defendants up to the year 1998. Learned counsel could not explain as to how the suit for recovery of which filed after 17 years would be within time. The suit for recovery of money under the relevant provisions of Limitation Act, 1908 can only be filed within three years, whereas, the present suit admittedly was filed in the year 2015 after about 17 years. Observation of learned single Judge in para. 21 that the relief for recovery of amount that was last paid on 30.05.1998 is barred by time is spot on. Learned counsel for appellant has failed to explain as to how any exception could be taken to such finding.

18. The entire case of the appellant with regard to specific performance of contract was based on the ground that the date fixed in the sale agreement of the year 1996 was dispensed with by subsequent agreement in the year 1997 and on the ground that the respondents have never refused to perform their part of contract. Both the grounds have been addressed by learned single Judge in detail and he has proceeded to dismiss the suit in respect of certain reliefs found to be barred by time on solid grounds.

19. No material error or illegality in the impugned judgment and decree has been pointed out by learned counsel for appellant. Our own scrutiny of the material, as discussed above, has found that appellant had sufficient knowledge, evident from the documents submitted by herself with the plaint at least on three occasions, of refusal by the respondents to perform the contract. We, therefore, find no illegality or error to reverse the findings of the learned single Judge and allow the appellant to proceed with the suit in respect of the reliefs of specific performance of contract and refund of amount, if any, on merits, the

same being palpably barred by time; and hence dismiss this appeal along with pending applications.

These are the detailed reasons of our short order announced on 29.04.2025.

The appeal is accordingly disposed of.

JUDGE

JUDGE

HANIF