

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.119 of 2006

[Mrs. Shabeena Farhat vs. M/s. Highway Housing Project and others]

Date of hearings : 14.01.2019, 21.01.2019,
30.01.2019,15.02.2019
and 22.02.2019.

Date of Decision : 02.09.2019

Plaintiff
[Mrs. Shabeena Farhat] : Through M/s. Badar Alam
and Kashif Badar,
Advocates for the Plaintiff.

Defendants
*[(i)M/s. Highway Housing Project,
(ii) Sadruddin Hashwani and
(iii) M/s. Associated Builders (Pvt.) Ltd.,]* : Through M/s. Abdul Qadir
Khan and Syed Nouman
Zahid Ali, Advocates, for
Defendants.

Case law cited by learned counsel for Plaintiff

1. 2006 CLC 430
[Mrs. Shabeena Farhat vs. Highway Housing Project and 2 others).
2. PLD 1966 Supreme Court 505
[Habibullah Khan and others vs. Qazi Muhammad Ishaq and others].
3. PLD 1977 Karachi 377
[Custodian of Enemy Property, Islamabad vs. Housing M. Dastur and 5 others].
4. 1979 SCMR 191
[Custodian of Enemy Property vs. Housing M. Dastur and others].
5. PLD 1993 Supreme Court 109
[Pakistan Fisheries Ltd., Karachi and others vs. United Bank Ltd].

6. 2010 PLC (C.S) 1150 (Karachi High Court)
[American Life Insurance Company (Pakistan) Ltd vs. Commissioner, Sindh Employees' Social Security Institution and others].

Case law relied upon by learned counsel for Defendants.

1. PLD 1993 Supreme Court 147
[Province of the Punjab through Member Board of Revenue, (Residual Properties), Lahore and others vs. Muhammad Hussain through Legal Heirs and others].
2. 2010 CLC 532 [Karachi].
[Anwar-ud-Din vs. Fahmida Akhtar and 8 others].
3. 2017 CLC 646 [Balochistan].
[Murad Bakhsh and 4 others vs. Mst. Syeda Ashraf Jahan and 4 others].
4. 2009 SCMR 1435 [Supreme Court of Pakistan].
[Abdul Rashid vs. Director General, Post Offices, Islamabad and others].
5. 2007 SCMR 1560
[Rehmat Din and others vs. Mirza Nasir Abbas and others].
6. PLD 2009 Lahore 52
[Pakistan Industrial and Commercial Leasing Ltd through Authorized Manager Recover vs. Haq Knitwear (Pvt.) Ltd through Chief Executive and 2 others].
7. PLD 2007 Karachi 573
[Bosicor Corporation Ltd through Attorney vs. Aman-ur-Rehman].
8. 2004 SCMR 145
[Nazakat Ali vs. WAPDA through Manager and others].
9. 2003 YLR 673 [Karachi].
[Zafar Iqbal vs. Sher Muhammad and 3 others].
10. 2016 MLD 14 [Sindh]
[Raisuddin through Legal heirs vs. Mst. Rabia Begum and 11 others].
11. PLD 1974 Supreme Court 139
[Muhammad Husain Munir and others vs. Sikandar and others].
12. 2006 SCMR 1670
[Malik Muhammad Inam and others vs. Federation of Pakistan and others].
13. PLD 1961 Supreme Court 76

[M.M. Ispahani Ltd vs. Haji Muhammad Sultan Deceased through his legal heirs and legal representatives Arif Sultan and others]

14. 2008 SCMR 913
[Muhammad Khan vs. Muhammad Amin through L.Rs. and others].
15. 2011 SCMR 1013
[State Life Insurance Corporation of Pakistan and another vs. Javaid Iqbal].
16. 1992 ALD 492 (2) [Lahore]
[Alliance Agencies vs. Additional District Judge and others].
17. PLD 1995 Supreme Court 351
[Mian Iqbal Mahmood Banday vs. Muhammad Sadiq].
18. 1979 SCMR 191
[Custodian of Enemy Property vs. Housing M. Dastur and others].
19. PLD 1957 (W.P) Karachi 352
[(Khan Sahib) Muhammad Ibrahim Khan vs. Latif and others]
20. 2009 SCMR 623
[Mst. Nagina Begum vs. Mst. Tahzim Akhtar and others]
21. 2010 SCMR 829
[Messrs Kamran Construction (Pvt.) Ltd vs. Nazir Talib]
22. SBLR 2017 Sindh 76 [High Court of Sindh (Karachi)]
[Ahmad Mian Siddiqui vs. Kenya Airways Limited]

- Law under discussion:**
- (1). Specific Relief Act, 1877. ***[SPR].***
 - (2). The Qanoon-e-Shahadat Order, 1984. ***[the Evidence Law].***
 - (3). The Code of Civil Procedure, 1908 ***[CPC].***
 - (4). Limitation Act, 1908. ***[Limitation Law].***
 - (5). Tort Law.

JUDGMENT

Muhammad Faisal Kamal Alam, J: The present *lis* has been instituted by Plaintiff for Specific Performance of the Contract, Permanent and Mandatory Injunctions and Damages. The Plaint contains the following prayer clause_

“The Plaintiff, therefore, humbly prays that this Hon'ble Court may be pleased to pass Judgment and Decree in her favour as follows:-

“a. Direct the Defendants 1 & 2 jointly and / or severally to specifically perform the contract created by receipt dated 09.11.1978, Notice dated 10.12.1979, receipt dated 05.01.1980, letter dated 03.03.1982 and receipt dated 01.03.1982 (annexures A, B, C, F & G to the plaint), by executing Lease Agreement/Sub-Lease in favour of Plaintiff and get it registered before the concerned Sub-Registrar in respect of commercial Plot No.CA/15, measuring 120 Square Yards, Highway Housing Project, at plot of land No.52, Deh Khanto Tapoo Landhi, Karachi, and to hand over vacant possession thereof to the plaintiff and in case the said defendants fail to comply therewith within a specific time, the Nazir of this Hon'ble Court may be directed to execute the aforesaid Lease Agreement/Sub-Lease in favour of the plaintiff before the concerned Sub-Registrar for and on behalf of the defendants No.1 and 2 jointly/or severally.

b. grant damages in the sum of Rs.1,87,16,000/- to be paid by the defendants No.1 and 2, jointly and / or severally to the plaintiff, with further profit / markup @ 20% per annum from the date of suit till full and final realization of decretal amount.

c. for future loss of rentals of three shops at the rate of Rs.3000/- per month for each shop (total Rs.9000/- per month) and two flats at the rate of Rs.4000/- per month for each flat (total Rs.8000/- per month), total of aforesaid monthly rents Rs.17,000/- per month [mentioned in paras 5 (iii) & (iv) above] w.e.f. September 2004 onwards.

d. In alternative of prayer clause (a), (b) & (c) above, the defendants No.1, 2 and 3 jointly and / or severally, may be directed to provide alternate commercial plot(s) having equal value to plaintiff's claim in the present suit i.e. Rs.1,87,16,000/- and future rentals, in their latest Housing Scheme namely “Golden Palm City”, situated at Gawadar, Balochistan.

e). In the meantime till disposal of suit or realization of decretal amount, as the case may be, this Hon'ble Court may be pleased to restrain or injunct the sale, creation or transfer of any interest, by the defendants, jointly and / or severally, of commercial plots in "Golden Palm City", Gawadar, Baluchistan, as per Rate List (annexure "O" to the plaint) equivalent to plaintiff's claim of Rs.1,87,16,000/- plus loss of future rentals.

f. permanent injunction restraining the defendants No.1 and 2 jointly and / or severally from disposing of or alienating the commercial plot No.CA/15, measuring 120 Sq. Yards, at main plot of land No.52, Deh Khanto Tapoo Landhi, Karachi to anyone else or creating any 3rd party interest thereon.

g. grant any further better relief or reliefs which this Hon'ble Court may deem fit and proper in the circumstances of the case.

h. grant full cost of the proceedings".

2. As per the averments of Plaintiff, the Plaintiff has booked an open commercial Plot No.C-A/15, measuring 120 Square Yards at the total costs of Rs.14,400/- (*Rupees Fourteen Thousand Four Hundred only*) in the Housing Project launched by Defendants by the name '**Highway Housing Project**'. The entire sale price was paid but the possession of the subject plot was not delivered. Mr. Badar Alam, the learned counsel for Plaintiff argues that after passage of considerable time when the Defendants did not fulfill their obligations, a Legal Notice was addressed to Defendants (*produced in the evidence as Exhibit P/13*) dated 26.06.2004. It is the case of Plaintiff, that the Defendants have launched another Housing Scheme, namely, '**Golden Palm City**' at Gwadar by using the funds of genuine allottees of subject Housing Project. It is further pleaded that Plaintiff has suffered colossal losses because in the intervening period, the costs of construction is increased manifolds and in this regard the Plaintiff has quantified her damages to the tune of Rs.1,37,16000/= (*Rupees One Crore Thirty Seven Lac Sixteen Thousand only*). The Plaintiff has also demanded

that to compensate the latter, Defendants should allot a plot of same value as of subject property in its above named new Housing Scheme.

3. On the other hand, the Legal Team of Defendants led by Mr. Abdul Qadir Khan, Advocate, has controverted the stance and has vehemently argued that the present proceeding is hopelessly time barred, as the same is filed after 22 years from the date of transaction. It is further argued so also pleaded in the Written Statement that the Plaintiff is not entitled for any damages or compensation because the Defendants have committed no wrong against the person of Plaintiff nor acted in an illegal manner, which could rise the claim of damages.

4. From the pleadings of the parties, following Issues were framed by the Court vide order dated 18.11.2013.

- “1. *Whether the defendant No.1 admittedly having already received entire consideration amount prior to filing of suit and lease money and stamp duty during proceedings in the suit, is bound to execute Indenture of Sub-Lease before the concerned Sub-Registrar, in favour of plaintiff, in respect of commercial plot No.CA/15 measuring 120 Sq. Yds., situated in its Housing Scheme at 52 Deh Khanto, Tapo Landhi, Karachi?*
2. *Whether the defendant avoided and failed to perform its obligations within a reasonable time to develop its Housing Scheme, handover possession of subject plot to the plaintiff and to execute Indenture of Lease in her favour, if so its effect?*
3. *Whether the plaintiff is entitled for specific performance of the contract if any, upon having committed breach by not paying the outstanding dues on time inspite of Circular / Notice dated 10.12.1979 and reported reminders dated 11.11.1981 and 24.02.1982 by the defendant?*
4. *Whether due to any act and omission by the defendant, plaintiff has suffered losses and is entitled to claim compensation / damages as prayed in the plaint, if so to what extent?*

5. *Whether the claim of the plaintiff is sustainable in law in absence of any express agreement/brochure?*
6. *What should the decree be?"*

5. Both Plaintiff and Defendants led the evidence by examining one witness each.

It is also relevant to mention that initially the plaint (of present *lis*) was rejected on the Office Objection, vide Order dated 22.09.2004, but it was set aside in the High Court Appeal No. 241 of 2004 and the decision of the learned Division Bench is reported in 2006 CLC page-430.

In the Order of 15-12-2008, paragraph 4 of the Written Statement has been referred, wherein, Defendant has stated that **subject plot is still lying vacant and not leased out to any other party.** There was some talk of compromise but it could not be materialized.

6. Findings on the Issues are as follows:

ISSUE NO.1	:	Affirmative.
ISSUE NO.2	:	Affirmative.
ISSUE NO.3	:	As under.
ISSUE NO.4	:	As under.
ISSUE NO.5	:	As under.
ISSUE NO.6.	:	Suit partly decreed.

ISSUE NO.3.

7. It is an important Issue to be determined first. If the reply is in Affirmative, that whether the Plaintiff has committed default, then obviously extending relief of Specific Performance would be difficult. It is admitted by the witness of Defendant [DW-1] in his cross-examination that

entire sale price of Rs.14,400/- (*Rupees Fourteen Thousand Four Hundred only*) has been paid by Plaintiff to Defendants way back in the year 1982. It is a matter of record that vide order dated 03.02.2009, the Plaintiff deposited the requisite charges for execution of lease, so also acknowledged by the above named Defendants' witness. Exhibit-5/3 dated 09.11.1978 is the receipt issued by Defendant to Plaintiff for a sum of Rs.7,200/- (*Rupees Seven Thousand Two Hundred only*) as first installment for booking the subject plot, which is the half of the sale price offered. The document exhibited as P-5/5 dated 05.01.1980 is again an acknowledgment receipt issued by Defendants to Plaintiff against receipt of Rs.3,500/- (*Rupees Three Thousand Five Hundred only*) towards installment of the subject plot. Document exhibited as P-5/6 dated 11.11.1981 is a general reminder on behalf of Defendants to all allottees for payment of Rs.3,700/- (*Rupees Three Thousand Seven Hundred only*) as next installment. The document exhibited as P-5/7 dated 24.02.1982 is a general notice on behalf of Defendants to allottees, who have not cleared / paid the final installment. It has been acknowledged by the Defendant witness that after 5.01.1980, the Defendant never demanded the charges towards lease and registration in respect of the subject plot from the Plaintiff. In this connection the last document is **Exhibit P-5/8 dated 01.03.1982**, which is a receipt, issued by Defendant to Plaintiff clearly mentioning '*balance of full payment.....*'. The **Exhibit-5/9** is the correspondence dated 03.03.1982 of Defendants, where under, they have acknowledged the receiving of final payment from Plaintiff; all these documents are undisputed.

Consequently, in view of the above evidence, **Issue No.3 is answered accordingly**, to the extent that Plaintiff has not committed breach and on 01.03.1982 vide a receipt of same date Exhibit P-5/8, which

is an admitted document, the entire sale price was paid to Defendant, so also acknowledge by its witness.

ISSUES NO.1 AND 5

8. These two Issues are pivotal. After appraisal of the evidence of witnesses of Plaintiff and Defendant, following undisputed position emerges_

- i. The Defendants through Advertisement have offered sale of various plots in its Housing Scheme, namely, '**Highway Housing Project**'.
- ii. The Plaintiff purchased the subject plot in pursuance of the Advertisement published in the Newspapers.
- iii. Defendants have addressed letters to Plaintiff for clearing her dues towards the subject plot from 10.12.1979 upto 24.02.1982; Exhibits P-5/4, 5/6 and 5/7, which show that Defendants were well aware about the whereabouts of Plaintiff.
- iv. It has been admitted by the Plaintiff's witness that the present *lis* is filed after 22 years of the booking of the subject plot; whereas, the Defendant witness admitted so also the document/receipt dated 1-3-1982 issued by Defendant and Exhibited as 5/8 acknowledges that Plaintiff paid the entire sale price.
- v. Exhibit P-5/4, a demand Notice, in lieu whereof payment was made by Plaintiff, clearly states that process of lease and its registration had commenced and allottees, including Plaintiff were called upon to contact Defendants from 15.12.1979 to 30.12.1979. The evidence brought on record vividly shows that during the above period, the Plaintiff had approached the Defendants for payment of installment as directed in the aforesaid correspondence of 10.12.1979 (Exhibit P-5/4) because the Defendants have issued a receipt of payment dated 05.01.1980, produced in the evidence as Exhibit P/5/5;

however, the process of lease and registration never completed. Subsequently, in the present proceeding, lease money was deposited by the Plaintiff.

- vi. That on 15.12.2008, it has been observed that the plot in question is still lying vacant and not leased out to any other party, so also mentioned in the Written Statement. Hence, the *status quo* is maintained in respect of the subject plot.

9. Even though, no Agreement has been produced by the either parties regarding which the Plaintiff is claiming Specific Performance but it is a matter of common knowledge that in such type of cases where a person, in the present case, present Plaintiff books a plot or Apartment in a Housing or multi storey building project, usually original Agreement is retained by the developer or builder, as the case may be. In any event, the factum of subject transaction is not disputed. Plaintiff has booked the aforementioned subject plot and the Defendants are admitting that, but as argued by the Legal Team of Defendants, that due to negligence of Plaintiff, the transaction in question has ended and the present *lis* is hopelessly time barred.

Notwithstanding the above, it was more an obligation of Defendant to have a custody of any such agreement and hence should have been produced, so that all the terms and conditions of the subject transaction could have been brought on record for adjudicating the matter.

10. It is also a matter of record that lease money and other charges were also paid by the Plaintiff in the present proceeding and at some point of time it appeared that the parties may compromise the matter, but that could not happen. The case law relied upon by Legal Team of Plaintiff and Defendants with regard to the point of limitation and suit for Specific Performance has to be analyzed in view of the factual aspect of the case, that Defendants advertised their Housing Scheme, which is an offer, which was responded to by Plaintiff by booking a subject plot and making

payments of the entire price, that is, acceptance by Plaintiff and the sale consideration is fully paid to Defendants. The subject matter of the dispute, that is the plot, is also ascertainable. Basic conditions of a contract has been fulfilled, that is, offer of Defendants to sell the subject plot has been accepted by Plaintiff in lieu of a consideration (price), which too was fixed by the former and duly paid by the latter. Now the only question remains that whether the present transaction is barred by time.

11. The learned Advocate for Defendants has relied upon the following case law to augment his defence on limitation_

i). The first case cited by the learned counsel for Defendants is *Province of the Punjab vs Muhammpriya ad Hussain-PLD 1993 Supreme Court page-147*, wherein claim was made by the respondent in respect of a land after 30 years. The reported Judgment of Hon'ble Supreme Court has been carefully perused. The basic facts of this case are that the predecessor-in-interest of respondent (of the reported case) filed suit on 27.07.1978 in respect of a property, which was claimed to have been purchased on 14.06.1946 from a Hindu Evacuee. It was averred that plaintiff / predecessor-in-interest of the respondents was not aware of his property and rights therein till 1977 and after getting particular of the property and documents, he instituted the suit which was decreed and the Judgment was maintained till the case reached the Hon'ble Apex Court in which all earlier decisions were overturned. The record of the case belied the claim of the respondents, as the property involved had changed many hands and in this regard earlier also the same claimants / respondents filed a proceeding before the Custodian of Enemy Property in which other necessary persons were impleaded but when the above suit was instituted those persons were not made party, which conduct of the claimant was deprecated by the Apex Court; in the context of this undisputed factual position, it was held, that

once the period of limitation for bringing an action expires, then there is no such principle that it can be revived again. In my considered view, the rule laid down in the reported Judgment is not applicable to the facts of the present *lis*, because the Plaintiff has neither concealed the earlier facts nor valuable third party interest have accrued in favour of some other persons / parties nor the subject plot has changed hands; more so, present Plaintiff paid the full price at the relevant time.

ii). The second case is 2010 CLC page-532 (*Anwar-ud-Din vs. Fahmida Akhtar and 8 others*); an order delivered by this Court on an application of Order VII Rule 11 of CPC. A general principle with regard to law of limitation has been reiterated that the litigant has to first successfully cross the hurdle of limitation and thereafter merits of a case are to be examined. This has already been done in the present *lis*, when the above referred High Court Appeal was preferred by the present Plaintiff against rejection of his plaint, and the said appeal was allowed and the learned Division Bench set-aside the order and the same is also reported in 2006 CLC page-430 (*Mrs. Shabeena Farhat vs. Highway Housing Project and 2 others*), relied upon by Plaintiff's counsel. Whether or not the decision of learned Division Bench has finally determined the controversy, would be decided in the paragraphs to follow.

iii). The third case of *Murad Bakhsh case (supra)* 2017 CLC page-646, is also distinguishable because in the reported case a mutation entry of 1979 was challenged in the suit in the year 2009, without specifying in the plaint, that when the petitioner / plaintiff (of the reported case) acquired knowledge of the mutation entry under challenge. In these circumstances, the decision of dismissing of his suit was maintained by the Revisional Court.

iv). The fourth cited decision of Hon'ble Supreme Court handed down in *Abdul Rashid Case (ibid)*-2009 SCMR page-1435, has been carefully perused and respectfully the same is also distinguishable because the said reported case is in respect of a time barred Service Appeal preferred before the Hon'ble Supreme Court under Article-212 of the Constitution of Pakistan, 1973. The general principle of limitation has been reiterated that the “*law favours the diligent litigant and not the negligent.*”

v). The fifth case is of *Rehmat Din and others vs. Mirza Nasir Abbas and others*-2007 SCMR page-1560; facts are that appeal was dismissed by Apex Court on non-prosecution and an application for its restoration was filed after 621 days; *secondly*, petitioners filed an appeal before the Hon'ble Supreme Court against persons / respondents who died during litigation. The ground as taken by the petitioners was that their Advocate on record passed away three years back, therefore, they were unaware about the dismissal of Appeal. The Hon'ble Supreme Court did not agree with the justification on the ground that (i) the name of petitioner's counsel appeared in the Cause List when the dismissal order was passed; (ii) the Court cannot exercise the discretion arbitrarily, but it should be based on a principle of equity and fair play; (iii) valuable rights accrue in favour of opponents after expiry of limitation period; (iv) the object of law of limitation is to help the vigilant and not indolent; and (v) even if an important point is involved in a case, that would not be a justification to override the provisions of Limitation Law. It is also necessary to mention that the Hon'ble Supreme Court was of the view that the petitioners concealed the material facts from the Court, which makes the petitioner disentitled for an equitable relief. This decision relates to a situation where the parties were already litigating before a Court and when Appeal was dismissed, name of the Advocate for petitioners appeared in the Cause List. It is a settled rule that in such type of situations, already Courts have ruled

that a party / person cannot claim that he or she was kept in dark about the proceeding. The ratio *decidendi* of this reported decision is altogether different from the facts of the present case.

vi). The sixth decision relied upon by the learned Legal Team of Defendants is reported as PLD 2009 Lahore page-52 [*Pakistan Industrial and Commercial Leasing Ltd. vs. Haq Knitwear (Pvt.) Ltd.*]. A suit for recovery brought by the appellant (of the reported case) against the respondent, was dismissed by the learned Banking Court, which was challenged before the learned Appellate Lahore High Court. After shedding light on the object and scope of Limitation Act, 1908, the established rule has been reiterated that filing of earlier civil proceedings and its rejection would not be a good ground in every case to take advantage of Section 14 of the Limitation Act, 1908, which provides for exclusion of limitation period, which was consumed *bona fide*ly in some other litigation. **Secondly**, the learned High Court observed that earlier suit by the Leasing Company was not dismissed on account of some legal defect but it was filed unauthorizably, which aspect does not fall within the ambit of afore-referred Section 14. Accordingly, the Appeal was dismissed. *Ex facie*, this case law is not attracted to the present *lis*.

vii). The seventh case is of *Bosicor Corporation (ibid)*-PLD 2007 Karachi page-573; in this matter the dispute was about shareholding in the appellant company. The case of the appellant was that its substantial shareholding was offered to respondent No.1, primarily on a condition that the latter will serve the company for at least five years and when the respondent No.1 resigned in the intervening period, he was called upon vide a letter dated 30.09.1996 to surrender the shareholding / the disputed Share Certificates, which he refused through his response dated 07.10.1996. The respondent No.1 addressed another letter dated 22.12.2003, exercising the option of first refusal, which was replied by respondent No.6 on

26.12.2003 and followed by institution of suit on 15.01.2004. In this backdrop, the learned Division Bench of this Court maintained the order of learned Single Judge, rejecting the plaint, and holding that the cause of action did not start when the last correspondence of 22.12.2003 was written by respondent No.1, but the cause of action started much earlier and once if commenced, the same cannot be stopped.

viii). The seventh cited Judgment of Hon'ble Supreme Court delivered in the case of *Nazaqat Ali (ibid)*-2004 SCMR page-145, is also very much distinguishable on the facts, as this reported decision is in respect of a Service Appeal preferred by an employee, who was terminated by the order dated 11.11.1993 and he firstly approached National Industrial Relations Commission on 20.07.1995, that is, after two long years from his dismissal and after rejection of his Application before NIRC he on 09.09.1997, he invoked the jurisdiction of Federal Service Tribunal, which met the same fate. Admittedly in the reported decision the petitioner knew about his remedies and the impugned action taken by the respondents, yet he did not take any action, but in the present case, the Defendant till date has not taken any action detrimental to the interest of present Plaintiff, which the latter could consider a wrong done to the person of Plaintiff.

ix) Similarly, the eighth decision in *Zafar Iqbal case*-2003 YLR 673, learned Single Bench of this Court while exercising Revisional Jurisdiction, dismissed the revision, *inter alia*, maintaining the earlier decision of courts below, refusing specific performance, primarily on the ground, because the plaintiff (of the reported case) admitted in the cross-examination that he approached the vendor / seller for execution of sale agreement but it could not happen. The learned Court has rightly held, the vendor who died eight years before the filing of the suit, when refused the transaction, the proceeding should have been filed much earlier, because it was a sufficient

notice to the plaintiff / Applicant that performance of contract has been refused.

x). The ninth cited Judgment of *Raisuddin (supra)* in 2016 MLD page-14, is also distinguishable for the reasons that (i) the sale transaction itself was disputed by the defendant / respondent (ii) it is held that if alleged agreement of sale is accepted, even then the suit admittedly filed after ten years of its execution, besides, other terms mentioned in the disputed Sale Agreement, were not complied with. In this backdrop, it is held, that merely serving of notice upon the vendor / respondent in the year 2006 would not provide a cause of action to the Applicant for maintaining the suit for specific performance after lapse of 10 years of alleged sale agreement and the Revision was dismissed. Conversely, in the present case, neither the sale transaction has been disputed nor the fact that the entire sale price of the subject plot has been received by the Defendant way back in the year 1982.

xi). The tenth decision of *Muhammad Husain (supra)* reported in PLD 1974 Supreme Court page-139, has been cited by Mr. Abdul Qadir Khan, the learned counsel for Defendants, to fortify his arguments that equity and fair play must yield to the provision of law. He has made this submission in order to address the observation of the Court that even if the Court thinks that equity and fair play leans in favour of Plaintiff, in view of the undisputed record of the case, as discussed herein-above, yet the present proceeding has to be dismissed being time barred and clearly hit by Article-113 of Limitation Law. The principle explained in this reported decision is a settled one but its applicability to the facts of present case is to be seen.

xii). In the same vein reliance is placed on the eleventh reported Judgment of *Malik Muhammad Inam vs. Federation of Pakistan-2006 SCMR page 1670*, relating to the imposition of tax on an amount received by employees, who availed voluntary separation scheme and golden handshake. The Hon'ble Apex Court has held that hardship or inconvenience cannot come in the way of implementation of a clear provision of law or determining its legality, if the subject falls within the ambit of the statute. One should be mindful of the fact that it is an established rule of interpretation, particularly for fiscal and penal statute, which has been highlighted in this reported case; however, facts whereof are completely different from the present one. This decision is also distinguishable because in the governing statute-Specific Relief Act, **concept of hardship is provided in Section-22** and the same could be a one of the considerations for refusal of Specific Performance, therefore, this reported decision which relates to a tax matter and interpretation of fiscal law is not applicable to the facts of present case.

xiii). Similarly, the twelfth case of *M.M. Ispahani Ltd vs. Haji Muhammad Sultan-PLD 1961 Supreme Court page-76*, has been relied upon to further endorse the above line of arguments of Legal Team of Defendants that cases are to be decided within the parameters of law and not on humanitarian grounds. The Revisional Court modified the order to the extent that the tenant of the premises may be allowed sufficient time to transfer his business either to someone else or to find another place / premises. This was eventually set-aside by the Hon'ble Supreme Court, *inter alia*, on the ground that finding of the Court below on the basis of humanitarian aspects was beyond its jurisdiction and was thus not tenable.

xiv). The thirteenth cited decision of *Muhammad Khan case (ibid)*-2008 SCMR page-913, in which the leave was refused by the Apex Court against the Judgment of this Court (*Sukkur Bench*), was based on the admitted fact as mentioned in the plaint (of the reported case) that the cause of action accrued in January 2000 in respect of property in question but the suit was filed on 05.01.2004, that is, beyond the period of prescribed limitation as mentioned in Article 113 of Limitation Law. With respect, this decision is also clearly distinguishable for what has been discussed herein-above.

xv). The other cited decisions pertain to the Issue about damages and will be discussed after determination of these pivotal Issues.

12. On the other hand Mr. Badar Alam, Advocate for Plaintiff in support of his arguments that the present suit is not time barred and not adversely affected by Article 113 of the Limitation Act, 1908, has relied upon the decision of learned Division Bench, handed down in the afore-referred High Court Appeal, which was subsequently reported as *2006 CLC page-430*, and the said decision was not over-ruled by Hon'ble Supreme Court, as the Appeal of present Defendants was dismissed for non-prosecution. [Besides this, the learned counsel for Plaintiff has relied upon the case law mentioned in the opening part of this Decision]. The above Judgment of learned Division Bench passed in the present matter has been carefully examined; it has two parts. In the first part it has been held that it is not mandatory that to maintain a suit for specific performance, a written agreement should also be filed, because in the instant matter, since the parties have not denied the offer and acceptance of purchase of a plot covered with receipts and demand Notice, therefore, it was held that the present suit, *prima facie*, has all the necessary ingredients constituting an Agreement of Sale enforceable under the law. Consequently, the earlier

order passed in the present suit, whereby the plaint was rejected on the basis of an Office objection, was set aside. Since, it was a High Court Appeal based on an order passed at a preliminary stage, therefore, a tentative assessment was given on the factual aspect of the case by observing that ***“Even otherwise all such matter are to be thrashed out at the time of evidence and not at the stage of office objection.”***

The second part of the above cited decision relating to the applicability of Article 113 of the Limitation Law is very much relevant for deciding the present controversy. After going through the undisputed record of the present case, it has been held that the subject dispute is covered by second part of Article-113, that is, where no date was specified for completing a contract and limitation will commence from the date when the Plaintiff acquires notice of refusal by the Vendor / Defendant. It is held, in such type of cases, limitation is to be liberally construed. It would be pertinent to reproduce the relevant paragraph of the cited case herein below_

“Limitation to seek specific performance of contract is governed under two eventualities are contemplated by Article 113 of the Limitation Act, that sets the limitation rolling in cases of specific performance of contract, one where time is essence of the contract and is fixed. Secondly where no time is fixed for the performance of contract. There is no dispute as regard first part of Article 113 of Limitation Act is concerned limitation of three years would commence from the date fixed in the Agreement. Instant case is covered by second part, where no date is specified, then limitation of three years would start rolling from the date when the plaintiff had notice of refusal by the vendor. In cases of such nature, limitation is to be liberally construed without causing any injury to the intention to the legislature, it must be in aid to advance cause of justice and to curb mischief. In present case there is nothing on record to show that Appellant/Plaintiff had any notice of refusal by the Respondents and there seems to be no reasons for the refusal as entire sale consideration, was apparently received. Case of the Appellant is support by judgment reported as Habibullah Khan v. Muhammad Ishaq (PLD 1966 Supreme Court 505, 507 and 509) and case of Subanullah v. Maryam 1988 CLC 890.”

The next case relied upon by Plaintiff side is of *Habibullah Khan and others vs. Qazi Muhammad Ishaq*-PLD 1966 Supreme Court page-505. In this case, a suit for Specific Performance was dismissed. The Agreement involved in the controversy (of the reported case) has two components; first one was for the sale of the properties by the predecessor-in-interest of appellants to the predecessor-in-interest of the respondents vide a registered Sale Deed of 24.03.1926; and the other component is another Agreement for re-conveyance was also executed on the same day, that is, the property can be re-conveyance on payment of the same amount of money after fifteen years. This second Agreement was registered on 27.03.1926. It is observed that the period expired on 13.03.1941 but successors-in-interest of the Vendors did not choose to exercise their option until (almost 28 years after), on 23.02.1954, when they caused a notice to be served on the Vendee to honour the Agreement, which was refused by the response dated 07.03.1954, leading to filing of suit on 12.03.1954, claiming Specific Performance. It is pertinent to reproduce the observation of Hon'ble Supreme Court with regard to the finding of learned High Court Peshawar holding the applicability of Article-113 of Limitation Law for dismissal of the above suit_

“In the view of the High Court even though the measure of time was, as specified in Article 113, three years from the date of refusal to perform, the latitude was not to be extended for an unreasonable or indefinite period. In other words, in the High Court’s opinion the three years should have commenced from a reasonable period after the expiry of the period of 15 years stipulated in the deed of sale as the period during which re-conveyance could not be claimed. The High Court though that even though this Article of the Limitation Act prescribed a period of three years from the date of non-performance, the suit should have been filed within at most five years from the date of the expiry of the period of 15 years. By waiting for 13 years, therefore, the plaintiffs in the suit had been guilty of laches which disentitled them to the discretionary relief of specified performance.”

The Apex Court (in the above mentioned case) disagreed with the impugned decision of High Court and consequently while overturning the same, **decreed the suit**. The Hon'ble Supreme Court while expounding Article-113 of the Limitation Law, has laid much emphasis on the phrase used in the above provision (ARTICLE 113), that, “when the Plaintiff has notice that performance is refused.” This has been interpreted as that date on which the parties seeking performance has notice that his right is denied. It is further **held**, where neither a particular event nor a fixed date is mentioned and the language used in an agreement is too indefinite about fixing a date for the performance; **secondly**, where the term of an agreement is too indefinite; **thirdly**, unless delay has caused some prejudice to the other parties; **fourthly** and quite significantly, if the matter remained in **status quo** and there is nothing to show that the party called upon to perform has been misled by the inaction of other party to alter his position “*in such a manner as to make it inequitable to force him to perform his part of the contract, lapse of time short of the period prescribed by the Limitation Act should not be allowed to operate as a bar to the claim of the relief.*” In the same Judgment, the Hon'ble Supreme Court has further explained the principle of waiver or acquiescence in the following words_

“Cornelius, J., (as he then was) has himself, in the case of Mohammad Wazir v. Jahangirimal (1), also very lucidly propounded the same principle in the following words:-

“It is well settled that where a statute of limitation imposes a bar, mere inaction by a claimant within the time allowed by the statute cannot be treated as evidence that he has waived or abandoned his rights, but, on the other hand, where a claimant knows that a party against whom he has a claim is altering his position in the belief that the claimant has abandoned or will not enforce his claim and even then, the claimant does nothing, his inaction may bar his claim even within the period of limitation.”

One of the factors which weighed with the Hon'ble Supreme Court (in the above reported case) to decree the suit for Specific Performance was that the parties to dispute did not alter their position causing any *prejudice* and *status quo* in respect of the disputed land was maintained.

The third case relied upon by the Legal Team of Plaintiff is of Custodian of Enemy Property-*PLD 1977 Karachi page-377*, handed down by the learned Division Bench of this Court. It has been held that Article-113 of the Limitation Law, presupposes the existence of a concluded and finalized contract between the Plaintiff and the Defendants, performance of which has been refused by the Defendant and of which the Plaintiff has notice. Onus is on Defendant to prove that his refusal to perform the contract was clear, unequivocal and unconditional, in order to set up a defence of Article-113.

The fourth cited Judgment is reported in 1979 SCMR 191 (*Custodian of Enemy Property, Karachi vs. Hoshang Dastur*), which in fact was the appeal preferred to the Apex Court against the above referred reported decision of this Court. The Hon'ble Supreme Court dismissed the appeal being barred by time; thus, the above reported decision of this Court attained finality.

13. In order to fortify his arguments in rebuttal, the learned counsel for Plaintiff has cited the case of *Pakistan Fisheries Limited vs. UBL-PLD 1993 Supreme Court page-109*. In this decision, the principle of stare decisis has been dilated upon, primarily given guideline about applying a judicial precedent to particular facts of a case.

14. The précis of the case law cited by the learned Advocate for the Plaintiff is that refusal to perform the contract should be clear and the opponent must have notice of it. Admittedly, in the present case, no notice has been issued by Defendant to Plaintiff that former (Defendant) is

forfeiting the sale price of the subject plot because the latter (Plaintiff) is sitting idle. *Secondly*, if by efflux of time, the parties have altered their respective position then it would be a good defence for Defendants to seek dismissal of suit for Specific Performance, but, where the position of the parties are neither altered with the passage of time nor property in dispute has changed hand, then Article-113 should be liberally construed. Again, this is what exactly has happened here; no third party interest is created in respect of the subject plot. *Thirdly*, a provision of law, including Article-113 of the Limitation Act, in my considered view, may not be invoked in favour of a party, result of which is to provide a legal cover to the default committed by that party.

15. Mindful of the established rule that the Sale Agreement does not confer any right of ownership in favour of vendee/purchaser, but here, admittedly the position is quite different, as already discussed in the foregoing paragraphs, that the present Plaintiff has paid the entire sale price of the subject plot and nothing was left on the part of Plaintiff to perform anything further.

If Defendant was admittedly corresponded/communicated with Plaintiff for payment of installments, it (Defendant) should have also called upon the Plaintiff to make payment of fee and charges for execution and registration of lease of the subject plot, which undisputedly was never done. After receiving the entire sale price of a subject property, it was the duty and obligation of Defendant to complete the transaction by taking definite steps in this regard. Non-fulfillment of obligation on the part of Defendant cannot go in its favour (of the Defendant), *as it is also a settled proposition of law (legal maxim) that no one is allowed to reap benefit from his wrongful acts.* Thus, it is not a question of equity and fair play only, involved in the present case, but, substantial legal issue, as discussed in the

foregoing paragraphs; consequently, above referred case law relied upon by Defendant on the Issues under consideration, are not applicable and clearly distinguishable.

It is also highlighted in the afore referred reported decision of the learned Division Bench of this Court handed down in the present dispute, that though such Projects are announced with much fanfare but when it comes to fulfillment of respective obligations, “*Sponsors of such Project seldom live up to tall claims and commitments.*”

16. It is a matter of common knowledge and so is the business and market practice that monies / funds received from different allottees / public at large are utilized by builders / developers in completing projects and the same is also diverted in other business venture. It was not denied by the Defendant witness that ‘Hashoo Group’ belongs to Hashwani family and the other project by the name of “**Golden Palms**” at Gawadar is of Hashwani family. It can be deduced that there exists some intertwined relationship between the two Projects; the one mentioned above and the present one.

The upshot of the above discussion is that **Issue 5** is answered in the affirmative.

17. As far as the Issue No.1 is concerned, it has two parts; first one with regard to payment of entire sale consideration prior to filing of suit and second part is, payment of lease money and stamp duty during proceeding. The answer to both of them is in Affirmative because of the discussion in the foregoing paragraphs, *inter alia*, it is a matter of record and an admitted fact that entire sale consideration in respect of the subject property was paid way back prior to filing of present suit, whereas, the lease money and other charges were paid during pendency of the present proceeding. Hence, **Issue NO.1** is also replied in affirmative.

ISSUE NO.2.

18. The Plaintiff's witness has testified that she was reluctant to make further payments of instalments as development work was not carried out at site, but, on assurance of Defendant, remaining amounts were paid. It is further stated in the Affidavit in Evidence/Examination in Chief of Plaintiff that upon approaching the Defendant, she was informed that work at the subject site has been stopped due to some dispute with the Board of Revenue. On these material aspects, Plaintiff witness was not cross-examined and thus this portion of testimony (of Plaintiff) has gone unchallenged. Whereas, DW-1 (Defendant's witness) did not deny that the completion plan from the competent authority has not been obtained. He has further testified that electricity provision was not there at the Project, so is the case of Gas supply and no sewerage system is provided, as it is not the responsibility of Defendant. From this evidence it is not difficult to conclude that the Defendant has neither provided basic amenities in the Housing Scheme nor has produced any document, rules / bye-laws or Agreement between the parties hereto, to substantiate its evidence, that it is not the responsibility of Defendant to provide these basic amenities. Despite opportunity, non-production of the documents containing stipulations relating to the subject Housing Scheme by the witness of Defendant would go against it and an adverse inference is to be drawn as envisaged in Article 129 (g) of the Evidence Law { 'also known as 'best evidence rule' }, that had those documents, including the Advertisement and duly Approved Layout Plan produced in the evidence, it would falsify the claim of Defendant, particularly relating to provision of afore mentioned amenities at the subject Housing Scheme. From the evidence it can be inferred that the subject Housing Project launched by Defendant **was not complete at least till the time of giving evidence till September, 2014;** thus, the grievance of Plaintiff is of continuing nature, inter alia, in terms of

Section 23 of the Limitation Law. This is a further ground in addition to the above, for determining that the present *lis* is maintainable. During proceeding, a query about the effect of receiving full sale price by Defendant, is responded, that it stood forfeited with the passage of time. However, no case law has been cited in support of this plea that a sale price can be forfeited with the passage of time without any prior notice to Plaintiff. Even the Defendant has not offered to refund the full sale price with additional compensation in order to show its *bona fide*.

In view of the discussion, answer to this Issue No. 2 is also in Affirmative because up till September, 2014, (*as already determined herein above*) the Housing Project launched by Defendants was not complete as the basic amenities were not provided thereat. The effect of this default on the part of Defendant is that the latter is bound to execute sub-lease in respect of the subject plot and handover its vacant, peaceful and physical possession to Plaintiff.

ISSUES NO.4 AND 6.

19. Since the relief of Specific Performance has been granted, therefore, Issue No.4 with regard to claim of damages does not require any finding. Accordingly, the present suit is decreed in the above terms, that the Plaintiff is entitled for Specific Performance of Contract only and the Defendant should forthwith execute the sub-lease in respect of the subject property, costs/charges whereof is already deposited with the Nazir of this Court. However, if some additional charges are required to be paid, inter alia, towards stamp duty, execution and registering of sublease, then the same shall be borne by the Plaintiff.

20. Suit is partly decreed.

Dated 02.09.2019

JUDGE

M.Javaid P.A.