

Form No. HCJD/C-121
ORDER SHEET

**LAHORE HIGH COURT,
RAWALPINDI BENCH, RAWALPINDI.
JUDICIAL DEPARTMENT**

C.R.No.206-D of 2023

IMTIAZ ALI. Versus MUHAMMAD SADIO.

<i>S.No.of order / Proceeding</i>	<i>Date of Order/ Proceeding</i>	<i>Order with signature of Judge, and that of parties counsel, where necessary</i>
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27.03.2023 *Petitioner in person.*

The petitioner while banking upon an agreement to sell dated 12th February, 2015 instituted a suit for declaration, specific performance, rendition of accounts and cancellation of post-dated cheques averring therein that the respondent entered into a sale transaction with him with regard to land measuring 300-Kanal in furtherance of an oral deal whereafter he provided copies of revenue record showing his ownership to the extent of 251-Kanal 10-Marla and assured that he will provide the title documents to the extent of remaining land measuring 48-Kanal 10-Marla at the earliest. The petitioner though remained in touch with respondent and consistently persuaded him to deliver remaining documents and possession of suit land but suddenly he disappeared from the scene. This prompted the petitioner to get the documents verified from the relevant quarters upon which it revealed that the documents delivered by the respondent are bogus and fake. The petitioner then lodged a complaint before the police, which resulted into registration of first information report. It is asserted by the petitioner that though he has performed his part of agreement but the respondent without any lawful excuse betrayed the terms and conditions of the same.

2. Suit was resisted by the respondent on the ground that it is not maintainable. By way of order dated 1st March, 2022, plaint was rejected under Order VII Rule 11 of the Code of Civil Procedure (V of 1908) (hereinafter referred to as "CPC"). The petitioner feeling aggrieved preferred an appeal before the learned Additional District Judge but his appeal was dismissed vide judgment and decree dated 20th December, 2022, hence this petition under Section 115 of "CPC".

3. This petition is prosecuted by the petitioner in person, who in support thereof contended that suit was though well within time but plaint has been rejected in an illegal and unlawful manner on the ground of limitation. It is also contended that first suit was instituted well within time, which was withdrawn with the permission of the Court to file afresh, so petitioner cannot be non-suited on the ground of limitation. Placed reliance on JAMSHED and 13 others v. Mst. SHUJAAT BEGUM and 4 others (2016 YLR 2764).

4. After having heard the petitioner at considerable length, I have perused the record.

5. Suit is rested upon an agreement to sell dated 12th February, 2015 purportedly executed interse parties. It is an admitted fact that previously the petitioner instituted a suit on 23rd November, 2017 with regard to the same cause, which was withdrawn by him with permission to file afresh vide order dated 13th January, 2021, which is reproduced below for ready reference and convenience:-

"Keeping in view the application moved by plaintiff and statement recorded by learned counsel for the plaintiff, suit in hand is hereby dismissed as withdrawn. Permission to file afresh suit is granted subject to cost of Rs.1,000/- and principle of estoppel as well as all legal and codal exceptions. Plaintiff is also allowed to withdraw court to the tune of Rs.15,000/- affixed by him."

(underlining supplied for emphasis)

From the above, it is crystal clear that permission for filing the fresh suit was subject to all legal and codal exceptions.

6. *Article 113 of the Limitation Act, 1908 provides three years period of limitation for instituting a suit seeking specific performance of an agreement to sell from the date fixed for the performance or if no such date is fixed when the plaintiff has noticed that performance is refused. As per petitioner's own assertion in the plaint, cause of action firstly accrued to him against the respondent on 12th February, 2015 when he entered into agreement to sell and secondly when the respondent continued delivering the bogus copies of the mutation and copies of record of rights after receiving the full sale consideration.*

7. *First suit was instituted on 23rd November, 2017, which was undoubtedly well within time. After withdrawal of the said suit, the petitioner instituted the suit at hand on 24th August, 2021, which was resisted by the respondent on the ground that it is barred by time. While acceding the objection, the learned Civil Judge proceeded to reject the plaint while invoking Order VII Rule 11 of "CPC". The petitioner though preferred an appeal but of no avail.*

8. *The moot point which requires determination of this Court is as to what would be the limitation for the subsequent suit after withdrawal of first suit? As already observed that in terms of Article 113 of the "Act, 1908" suit for specific performance is to be instituted within three years from the date fixed for the performance or if no such date is fixed when the plaintiff has noticed that performance is refused.*

9. *There is no cavil that first suit was instituted by the petitioner within prescribed period of limitation but he withdrew the suit on 13th January, 2021 with permission to*

file afresh, which permission was conditional. Order XXIII Rule 2 of "CPC" caters the situation, which reads as under: -

XXIII(2). Limitation law not affected by first suit. In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

It is manifestly clear from the above that for the purposes of limitation, first suit, which has been withdrawn, is not to be taken into consideration at all, so the time spent on such a suit is not to be deducted for the subsequent suit. Judgment in the case of JAMSHED and 13 others v. Mst. SHUJAAT BEGUM and 4 others supra, with all reverence, is not founded on well entrenched principles of law.

10. It is an oft repeated principle of law that when once the limitation starts running, it cannot be stopped. Limitation is always pivotal question, which cannot be ignored by the Court even by invoking the principles of equity. Guidance in this respect can be sought from MUHAMMAD ANWAR (decd) through L.Rs. and others v. ESSA and others (PLD 2022 Supreme Court 716). The relevant extract from the same is reproduced below:-

"8. In the like manner, Order XXIII, Rule 1, C.P.C., which allows the plaintiff to withdraw his suit or abandon part of his claim, empowers the Court to allow such withdrawal with permission to file a fresh suit. However, such permission is to be granted by the Court after satisfying itself and recording reasons that unless such permission is allowed, the suit would fail by reason of some formal defect. The Court can also allow such withdrawal with permission to file a fresh suit in case where the Court is of the view that there are other sufficient grounds for allowing plaintiff to withdraw his suit with the permission to file a fresh suit. A case law study shows that the suit may be allowed to be withdrawn in a case where the plaintiff fails to implead necessary party or where the suit as framed does not lie or the suit would fail on account of misjoinder of parties or causes of action or where the material document is not stamped or where prayer for necessary relief

has been omitted or where the suit has been erroneously valued and cases of like nature. It is always to be kept in mind that where such defect could be remedied by allowing amendments, the Court should liberally exercise such powers but within the parameters prescribed by Order VI, Rule 17, C.P.C. Besides while exercising powers under this provision the Court must identify the defect and record its satisfaction that the defect is formal and does not go to the root of the case. It is also to be kept in mind that such withdrawal would not automatically set-aside the judgment and decree which has come against the plaintiff unless such judgment and decree is set-aside by the Court after due application of mind. In the instant case, the suit was concurrently dismissed by the Courts after having been found barred by law/time, therefore, the High Court had no power to allow withdrawal of the suit with the permission to file a fresh unless it had reversed the concurrent findings on the question of limitation. Even otherwise, if permission is granted for filing a fresh suit under Order XXIII, Rule 1, C.P.C., then, pursuant to Order XXIII, Rule 2, the plaintiff is bound by the law of limitation in the same manner as if the first suit had not been filed, therefore, no fresh cause of action would accrue from the date when such permission was granted by the Court. Reference is made to the cases of Muhammad Saeed Bacha and another v. Late Badshah Amir and others (2011 SCMR 345). In these circumstances, the second suit filed by the plaintiff was barred by the principle of res-judicata."

Reference can also be made to MUHAMMAD YOUSAF and others v. NAZEER AHMED KHAN (DECEASED) through LRs and others (2021 SCMR 1775).

11. In somewhat similar circumstances, in the case of Syed ATHAR HUSSAIN SHAH v. Haji MUHAMMAD RIAZ and another (2022 SCMR 778), the Supreme Court of Pakistan held as under: -

"10. The petitioner's conduct in filing the first suit, not paying requisite court fee, which resulted in the rejection of the plaint, filing the second suit, withdrawing it, and then filing the third suit is inexplicable. However, what requires determination is whether the third suit was filed within the prescribed period of limitation. It needs consideration whether once the period of limitation commences it can be stopped or be avoided by introducing another cause of action or relief in the suit or by reformulating them. The answer is provided by section 9 of the Limitation Act, 1908,

reproduced hereunder:

'9. Continuous running of time: Where once time has begun to run, no subsequent disability or inability to sue stops it.'

The rejection of plaint in the first suit and the withdrawal of the second suit would not help avoid the period of limitation as is made clear from Rule 2 of Order XXIII of the Code, reproduced here:

'2. Limitation law not affected by first suit.

In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.'

11. We now proceed to consider the applicable period of limitation. The first suit had sought the specific performance of the agreement and the second suit also the cancellation of the sale deed. For both these causes of action the prescribed period of limitation is three years as respectively provided under Article 113 and Article 91 of the First Schedule of the Limitation Act, 1908. The petitioner's third suit had sought the specific performance of the agreement, the cancellation of the sale deed, which was executed when there was no suit pending, and a declaration with regard to the ownership of the land. The third suit was filed after three years and was time-barred with regard to seeking the specific performance of the agreement and for the cancellation of the sale deed. We are now left to consider whether the third suit was saved because it had also sought a declaration of ownership of the land as submitted by the petitioner's learned counsel for which Article 120 prescribes six years period of limitation. The Privy Council in the case of *Janki Kunwar v. Ajit Singh* held that the substance of the relief has to be seen, and if a relief is added for which there is a longer period of limitation it would not save the suit. That was a case in which the plaintiff had added the relief of possession of immovable property, which had 12 year's limitation, to the relief of setting aside a deed of sale, for which the period of limitation was three years under Article 91. In *Muhammad Javaid v. Rashid Arshad* this Court held that, 'If the main relief is time barred and the bar is not surmounted by the respondent, the incidental and consequential relief has to go away along with it and the suit is liable to be dismissed on account of being time barred'. An examination of the petitioner's plaint makes it clear that the petitioner had primarily sought the specific performance of the agreement, then the cancellation of the sale deed and had added the declaratory relief to primarily save the third suit from the consequence of having been

filed beyond the period of limitation."

12. *There are concurrent findings of the two courts of competent jurisdiction founded on well-established principles of law. The petitioner has failed to point out any illegality or material irregularity in the judgments of both the Courts.*

13. *Needless to observe that the scope of revisional jurisdiction is circumscribed to the eventualities mentioned in Section 115 of the "CPC". The revisional powers are limited and can only be exercised when the petitioner(s) succeed(s) in establishing that the impugned order or judgment suffers legal infirmities, hedged in Section 115 of Code supra. The revisional jurisdiction can only be invoked, if some patent illegality is floating on the surface of record. No jurisdictional defect or material irregularity is pointed out by the petitioner in the judgment/order under challenge, therefore, I am of the considered view that the instant petition is ill-founded and mischievous. Resultantly same is **dismissed in limine**.*

Mirza Viqas Rauf
JUDGE

Approved for reporting.

JUDGE

Zeeshan

