

## **ORDER SHEET.**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
**JUDICIAL DEPARTMENT.**

**W.P No. 163/2016**

Muhammad Naseer

versus

Khalil-ur-Rehman, etc.

<b>S. No. of order/ proceedings</b>	<b>Date of order/ Proceedings</b>	<b>Order with signature of Judge and that of parties or counsel where necessary.</b>
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(09)

18.04.2016

Syed Wusat-u-Hassan Shah, Advocate for petitioner.  
Mr. Gul Hussain Jadoon, Advocate for respondent No. 1.

**Mohsin Akhtar Kayani J.** Through the instant

writ petition, petitioner has assailed the order dated 17.12.2015 passed by the Additional District Judge East, Islamabad whereby the appeal filed by respondent No. 1 against the dismissal of application U/O VII Rule 11 CPC was accepted and as a result whereof the plaint of suit titled "Muhammad Naseer Chohan V.s Khalil-ur-Rehman and others" was rejected.

2. Brief facts of the case are that the petitioner filed a suit for Specific Performance and Permanent Injunction on 26.06.2014 in Civil Court for the specific performance of agreement to sell dated 28.01.2010, whereby, respondent No. 1 Khalil Ur Rehman being owner of land measuring 05 Kanal and 16 Marlas in Khasra No. 614, 616, 617 and 620 situated at Moza Moorian, Tehsil and District, Islamabad sold the said land to petitioner against the total sale consideration of Rs. 16,24,000/- @ Rs.280,000/- per Kanal. Respondent No. 1 had received Rs. 100,000/- as earnest money and the same was acknowledged in the sale agreement and it was decided between the parties that

remaining sale consideration will be paid at the time of execution of sale on or before 20.02.2010.

3. The agreement was not honoured as a result whereof the petitioner filed a suit for Specific Performance of agreement to sell on 24.05.2011 on the basis of cause of action accrued on dated 22.05.2011 as mentioned in para 8 of the plaint. However, said suit was dismissed for non prosecution on 13.01.2014 although issues had framed on 20.08.2013 and the case was fixed for recording of evidence of plaintiff/petitioner.

4. The petitioner after dismissal of his suit filed the second suit on the basis of same cause of action on 26.06.2014. Respondent No. 1 filed an application U/O VII Rule 11 CPC as well as written statement. The learned Civil Court after hearing the parties rejected the application U/O VII Rule 11 CPC vide order dated 02.07.2015.

5. Respondent No. 1 being aggrieved by the said order filed a Civil Revision Petition before the Court of Additional District Judge East, Islamabad, the same was accepted by the learned Additional District Judge East, Islamabad vide impugned order dated 17.12.2015. Resultantly the plaint filed by the petitioner was rejected U/O VII Rule 11 CPC, hence instant writ petition.

6. Learned Counsel for the petitioner contends that the impugned order dated 17.12.2015 is against the law and facts and it is settled law that matter should be decided on merits and the parties should not be knocked on technicalities Learned Counsel for the petitioner contends that the first suit filed by the petitioner was within the

period of limitation and as he was serving in Karachi, therefore, he could not appear on 13.01.2014 and the suit was dismissed due to non prosecution and the petitioner filed second suit on 26.06.2014. Learned Counsel for the petitioner further contends that the period already consumed during the previous round of litigation has to be condoned and the same will not be considered in the present suit. Reliance is placed upon 1989 SCMR 58, 1991 SCMR 205, 1991 SCMR 207 and PLD 1984 289.

7. Conversely, learned Counsel for respondent No. 1 has opposed instant writ petition on the ground that the question of limitation cannot be decided in the instant writ petition as scope of writ petition is not meant for adjudication of disputed questions which are based on factual controversies. Learned Counsel for the respondent No. 1 further contends that petitioner himself referred the date of accrual of cause of action in the plaint as 22.05.2011 and after the dismissal of that suit on 13.11.2014, second suit was filed on 26.06.2014 but the petitioner failed to submit reasons for exemption and condonation in terms of Order VII Rule 6 CPC, whereby, the mandatory duty of the plaintiff is to refer all those facts through which he claims the condonation. Learned Counsel for respondent No. 1 further contends that limitation for filing of suit for specific performance under Article 113 of Limitation Act is three years from the date of refusal of performance of agreement to sell or the date referred in the agreement for specific performance. He put his reliance upon 2002 SCMR 361,

2008 CLC 1570, 2010 MLD 68, 2008 SCMR 284, PLD 1974 Supreme Court 139.

8. Arguments heard, record perused.

9. From the perusal of record it transpires that the agreement between the petitioner and respondent No. 1 was executed on 28.01.2010 for the sale of land measuring 05 Kanal 16 Marlas in Khasra No. 614, 616, 617 and 620 situated at Moza Moorian, Tehsil and District, Islamabad wherein the date of performance of agreement was fixed as 20.02.2010. Suit for Specific Performance has been filed on 24.05.2011, whereas, para 8 of the plaint reveals that the cause of action accrued to the petitioner was two days before the filing of the suit i.e. 22.05.2011. Record further reveals that issues had been framed on 20.08.2013 on the basis of divergent pleadings of the parties and the case was fixed for production of evidence of the petitioner on 17.02.2013. However, witnesses were not present on the said date and the case was adjourned to 14.10.2013, 20.11.2013, 10.12.2013 and 13.01.2014 but on most of the hearings no one put appearance on behalf of the plaintiff/petitioner and the suit was dismissed in default on 13.01.2014 by the learned Civil Court. Thereafter, the fresh suit was filed by the petitioner on 26.06.2014 on the basis of same cause of action, hence, period of limitation shall be calculated from the date referred in the plaint, it is proved that the suit was time barred for 33 days. It is also evident from record that the petitioner has not referred any ground for exemption from limitation in terms of Order VII Rule 6 CPC whereby it is the duty of the plaintiff/petitioner to state

reasons of filing of the suit after the period of limitation and all those grounds shall be stated in the body of the plaint but no such plea has been raised by the petitioner. The provision of Order VII Rule 6 CPC is hereunder:-

"Grounds of exemption from limitation law.- Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed.

Hence, from the perusal of plaint it has been observed that petitioner has not claimed any exemption rather he has not mentioned any ground in terms of Order VII Rule 6 CPC whereas petitioner is under obligation to state the grounds if the suit has been filed beyond the period of limitation.

Even otherwise Article 113 of Limitation Act provides the limitation of three years for filing of the suit for Specific Performance and it is the trite law that question of limitation is mixed question of law and fact, the same can be adjudicated upon after recording of evidence but in the instant matter the petitioner has himself admitted that second suit filed by him was 33 days time barred and as such no justification has been given in the body of the plaint, whereas, it was obligation of the petitioner to state the reasons for exemption and condonation. Even otherwise Section 3 of limitation act reads as under:-

"Dismissal of suit, etc., Instituted, etc., after period of limitation.---Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made after the period of limitation prescribed therefore by the First Schedule shall be dismissed although limitation has not been set up as a defence."

10. It is evident from the bare reading of the above said provision of law that suit filed after the period of limitation

shall be dismissed. The word "shall" has been used in the above referred provisions of law, the courts are bound to act Suo Motto whenever the suit is beyond the period of limitation even otherwise the question of limitation has specifically been raised in the written statement as well as through a separate application U/O VII Rule 11 CPC, therefore, I am fortified by the view reported in **PLD 1985 SC 153 titled as "Hakim Muhammad Buta and another V.s Habib Ahmad and others"** wherein it was held that:-

*"The words of Section 3 of Limitation Act are mandatory in nature in that every suit instituted after the period of limitation shall, subject to provision of Section 4 to 25 of that act, be dismissed although limitation has not been set up as a defence. If from the statement in the plaint the suit appears to be barred by limitation, the plaint shall have to be rejected also under Order VII Rule 11 CPC. The law, therefore, does not leave the matter of limitation to the pleadings of the parties. It imposes a duty in this regard upon the court itself".*

From the perusal of the plaint it has been clearly established that the petitioner is negligent and has not pursued his previous suit as a result whereof the suit was dismissed in default, thereafter the petitioner filed a fresh suit on the basis of cause of action of the previous suit without considering the period of limitation of three years which has been provided in Article 113 Limitation Act and the same is reproduced below:-

Description of the suit	Period of limitation	Time from which period begins to run
For specific performance of contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused

11. The cause of action referred by the petitioner in para 8 of the plaint discloses the date of 22.05.2011 when the respondent has refused to execute the registered sale deed whereas the suit was filed on 26.06.2014. Hence, the present suit is time barred under Article 113 of the Limitation Act. I am fortified with the view **PLD 2012 SC 247 reported as "Haji Abdul Karim and others V.s Florida Builders Pvt. Ltd"**, wherein it was held that:-

*"After considering the ratio decidendi in the above cases, and bearing in mind the importance of Order VII, Rule 11, we think it may be helpful to formulate the guidelines for the interpretation thereof so as to facilitate the task of courts in construing the same.*

*Firstly, there can be little doubt that primacy, (but not necessarily exclusivity) is to be given to the contents of the plaint. However, this does not mean that the court is obligated to accept each and every averment contained therein as being true. Indeed, the language of Order VII, Rule 11 contains no such provision that the plaint must be deemed to contain the whole truth and nothing but the truth. On the contrary, it leaves the power of the court, which is inherent in every court of justice and equity to decide whether or not a suit is barred by any law for the time being in force completely intact. The only requirement is that the court must examine the statements in the plaint prior to taking a decision.*

*Secondly, it is also equally clear, by necessary inference, that the contents of the written statement are not to be examined and put in juxtaposition with the plaint in order to determine whether the averments of the plaint are correct or incorrect. In other words the court is not to decide whether the plaint is right or the written statement is right. That is an exercise which can only be carried out if a suit is to proceed in the normal course and after the recording of evidence. In Order VII, Rule 11 cases the question is not the credibility of the plaintiff versus the defendant. It is something completely different, namely, does the plaint appear to be barred by law.*

*Thirdly, and it is important to stress this point, in carrying out an analysis of the averments contained in the plaint the court is not denuded of its normal judicial power. It is not obligated to accept as correct any manifestly self-contradictory or wholly absurd statements. The court has been given wide powers under the relevant provisions of the Qanun-e-Shahadat. It has a judicial discretion and it is also entitled to make the presumptions set out, for example in Article 129 which enable it to presume the existence of certain facts. It follows from the above, therefore, that if an averment contained in the plaint is to be rejected, perhaps on the basis of the documents appended to the plaint, or the admitted documents, or the position which is beyond any doubt, this exercise has to be carried out not on the basis of the denials contained in the written statement which are not relevant, but in exercise of the judicial power of appraisal of the plaint.*

*We have examined the plaint on the touchstone of the above criteria and find that from the admittedly executed agreement between the parties, which is the document sued upon and the entire case of the petitioners is structured thereupon, it postulates a 'date fixed' for the performance thereof and no case for the exemption, the enlargement and the exclusion of period of limitation has been set out, in the plaint as per Order VII, Rule 6, C.P.C therefore, the suit undoubtedly appeared from the statement in the plaint to be barred by the limitation and has been rightly rejected by the Court."*

Hence it is manifestly clear that limitation period was fixed in the agreement, therefore, the same shall start from the said date although in present case the date of cause of action was specifically referred by the petitioner in plaint which is beyond the period of limitation. Even otherwise while deciding the application U/O VII Rule 11 CPC one has to look into the contents of the plaint. Reliance is placed upon 1994 SCMR 826, 1995 SCMR 459. Structure of law is founded upon legal maxim *delay defeats equity, time and tide wait for none. Law helps the vigilant and not the indolent*. More, it is settled principle of law that question of limitation cannot be



considered a "technicality" simpliciter as it has got its own significance and would have substantial bearing on merits of the case. In this regard I am fortified with the with the dictum laid down by Hon'ble Supreme Court of Pakistan vide judgment reported as "**2011 SCMR 8 (Muhammad Islam Versus Inspector General of Police, Islamabad and others**"). Therefore, I am of the view that the learned Revisional Court has rightly rejected the plaint being time barred and I am fortified with the view PLD 1984 SC 289, PLD 1983 SC 344 and 2011 SCMR 249.

12. In view of above situation, instant writ petition is devoid of merit and is hereby dismissed.

**(MOHSIN AKHTAR KAYANI)**  
**JUDGE**

Ramzan

Approved for reporting.

**JUDGE**

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