SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

Mr. Justice Munib Akhtar
Mr. Justice Shahid Waheed
Ms. Justice Musarrat Hilali

Civil Appeal No.1877 of 2016

(On appeal against the judgment dated 27.05.2016 passed by the Islamabad High Court, Islamabad in Civil Revision No.65 of 2016)

Matloob Ellahi Paracha ... Appellant

VERSUS

Raja Arshad Mahmood & another ... Respondents

For the Appellant : Ms. Hifza Ibrar Bokhari, ASC
Ch. Akhtar Ali, AOR

For Respondent No.1 : Mr. Zulfiqar Ali Abbasi, ASC
Syed Rifaqat Hussain Shah, AOR

For Respondent No.2 : Nemo

Date of Hearing : 14.11.2023

JUDGMENT

Shahid Waheed, J. This direct appeal is by the unsuccessful plaintiff and excites two legal questions. The first is whether the plaintiff, after withdrawing his suit for specific performance of the agreement to sell, could file a fresh suit to recover the earnest money paid to the defendants under the said agreement. The second is what the limitation period would be if the second suit is found to be competent.

2. The above questions arise from a suit brought by the plaintiff for recovery of earnest money, which was a sequel to his suit for specific performance. The pivot of both the suits was an agreement to sell dated 20th of July, 2005. The need, therefore, is to

state the cause which led the plaintiff to institute both suits so as to find a clear answer to the moot questions. The unvarnished facts constituting the cause in brevity are that defendant No.2, Raja Arshad Mehmood, was the owner of 1200 kanals of land located in Mouza Sihala and Mouza Gagir, Tehsil and District Islamabad. Malik Ghulam Murtaza, now represented by his legal heirs, was his attorney. He was arrayed as defendant No.1 in the suit. On 20th of July, 2005, the plaintiff entered into an agreement with defendant No.1 to purchase the land of defendant No.2 for Rs.785,000 per kanal and paid Rs.5,000,000 as earnest money. After that, certain disputes arose between the parties, the details of which need not be mentioned here, which led to the cancellation of the sale agreement. According to the plaintiff, the cancellation of the agreement was the result of coercion and force exerted on him by the defendants, which became the cause of bringing a suit (the first suit) for declaration, possession and specific performance of agreement dated 20th of July, 2005. This suit was instituted in the original jurisdiction of the Islamabad High Court. There is no denying that on the 6th of May, 2009, defendant No.1 appeared before the Deputy Registrar (Judicial) of the Islamabad High Court and recorded his following statement:

> "Statement of Malik Ghulam Murtaza s/o Malik Sher Muhammad defendant No.1 on oath:-
> The plaintiff had entered into an agreement with me for purchase of suit land. The suit land was owned by Raja Arshad Mehmood, defendant No.2 and I was attorney of defendant No.2. Thereafter, some settlement was made between the plaintiff and defendant No.2 in which it was decided that the agreement executed between me and plaintiff be cancelled, and Arshad Mehmood had promised to refund the earnest money of Rs.50,00,000/- to the plaintiff. I have got no concern with this suit. The Hon'ble Court may decide the suit on merits.
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> Deputy Registrar, Judicial"

As the other defendants in the case were not present on the date when the above statement was recorded, notices were issued to them. It is also on record that based on the above statement, the plaintiff subsequently applied for withdrawal of the suit with permission to file a fresh one. Notice was issued to the defendants on this application (i.e. C.M No.249 of 2013) vide order dated 3rd of July, 2013, and finally, on 18th of November, 2013, the suit was dismissed as withdrawn; and permission was not given to institute a fresh suit. Here end the facts of the first suit.

3. A perusal of the record indicates that on the 13th of February, 2014, the plaintiff brought his second suit for recovery of Rs.5,000,000. This suit was instituted in the Civil Court, Islamabad (West). It is evident from the contents of the plaint of this suit that it stated the facts up to the withdrawal of the first suit. The cause for instituting this suit was stated to be premised on the statement recorded by defendant No.1 before the Deputy Registrar (Judicial) of the Islamabad High Court, as a result of which a compromise was reached between the parties, and the first suit was withdrawn. Defendant No.1 filed cognovit, while defendant No.2 invoked Order VII, Rule 11 CPC, seeking rejection of the plaint on four grounds: firstly, the first suit was to include the whole of the claim, but the plaintiff omitted to sue for the relief of recovery of the amount and only sued for specific performance of the agreement, and as such, the second suit was barred under Order II, Rule 2 CPC; secondly, simple withdrawal of the first suit under Order XXIII, Rule 1 CPC renders the second suit incompetent; thirdly, per Section 19 of the Specific Relief Act, 1877, the plaintiff ought to have claimed compensation in his first suit; and lastly, the second suit was barred by time. The plaintiff, by his reply, contested each of the grounds stated above.

4. Taking stock of the material placed on record and appraising the rival contentions of the parties, the Trial Court came to hold that recording of evidence is necessary to answer the question whether the statement of defendant No.1, recorded before the Deputy Registrar (Judicial), was binding on defendant No.2, and as such, it was premature to say about the question of limitation and applicability of Order II, Rule 2 CPC, and Section 19 of the Specific Relief Act, 1877. The application seeking rejection of the plaint was, thus, dismissed by order dated 24th of November, 2015, and defendant No.2 was directed to file a written statement.

5. Defendant No.2 was not satisfied with the findings returned by the Trial Court and, therefore, sought revision. The High Court found merit in the stance of defendant No.2 and proceeded to observe that the relief claimed by the plaintiff was available when filing the first suit, even so, he deliberately chose to file a suit for specific performance of the agreement, and thus, the bar of Order II, Rule 2 CPC was attracted. The suit was found to be out of time, and also incompetent under Order XXIII, Rule 1 CPC. However, the High Court did not say anything about Section 19 of the Specific Relief Act, 1877. By judgment dated 27th of May, 2016, the revision was granted.[1]

6. Having now noted the facts which gave rise to the cause of action of each of the two suits, we have to determine which of the Courts below has correctly dealt with the objections to the maintainability of the second suit. In furtherance of this objective, in the first place, it is to be looked into whether the second suit for recovery of earnest money was barred by the provisions of Order II,

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[1] This judgment is now reported as *Raja Arshad Mahmood v. Matloob Ellahi Paracha* [2016 YLR 2063]

Rule 2 CPC. It is now old-line that this Rule is intended to deal with the vice of splitting a cause of action. It provides that a suit must include the whole of any claim that the plaintiff is entitled to make in respect of the cause of action on which he sues and that if he omits (except with the leave of the Court) to sue for any relief to which his cause of action would entitle him, he cannot claim it in a subsequent suit. The object of this salutary rule is doubtlessly to prevent a multiplicity of suits. It is to be noted that alongside the above, this rule does not require that when several causes of action arise from one transaction, the plaintiff should sue for all of them in one suit. This proposition gets strength from Saminathan Chetty v. Planaiappa Chetty,[2] in which the Privy Council observed that Rule 2 of Order II CPC is directed to securing the exhaustion of the relief in respect of a cause of action and not to inclusion in one and the same action of different causes of action, even though they arise from the same transactions. In light of the anatomy of this rule, it is clear that the cause of action in the second suit was not the same as in the first suit. The first suit was brought alleging that the defendants illegally got cancelled an agreement to sell dated 20th of July, 2005, and as such, the plaintiff claimed a decree for possession of the property by specific performance of the said agreement. Whereas the second suit of the plaintiff was based upon the allegations that the agreement to sell dated 20th of July, 2005, was cancelled by mutual consent of the parties, and it was agreed that the defendants would return the earnest money of Rs.5,000,000 to the plaintiff. In support of these allegations, the plaintiff relied on the statement of defendant No.1, which he recorded before the Deputy Registrar (Judicial) of the Islamabad High Court, and the prayer of the plaint was for recovery of earnest money. This relief could not have been claimed by the

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[2] *Saminathan Chetty and another v. Planaiappa Chetty* [(1915) 26 IC 228]

plaintiff in his first suit for possession of the property by specific performance of the agreement to sell dated 20th of July, 2005, because the right to possession accrues only when specific performance is decreed, similarly, the right to refund of earnest money accrues only when specific performance is denied. As such, the facts relating to the denial of specific performance resulting from the cancellation of the agreement to sell dated 20th of July, 2005, and the settlement agreement in the case constituted a fresh cause of action, and therefore, the second suit for recovery of money based thereon could not be held to be barred under Order II, Rule 2 CPC.

7. Apropos of the objection based on the bar contained in the provisions of Order XXIII, Rule 1 CPC, it would be enough to say that the subject-matter or claim of the second suit, as stated above, was different from the first suit and, as such, the plaintiff could not be held to be precluded from instituting the second suit.

8. The next objection of the defendants was that the plaintiff could not have instituted a separate suit for specific performance and recovery of earnest money by virtue of the provisions of Sections 19 and 29 of the Specific Relief Act, 1877. Again, this objection was unfounded. Section 19 enables a person claiming specific performance to seek compensation in addition. Section 29 prohibits a suit for compensation after the dismissal of a suit for specific relief. None of these sections have anything to do with the plaintiff's second suit, where the claim is for recovery of earnest money.

9. The last plea raised was that of limitation. The High Court was of the view that Article 181 of the Limitation Act, 1908, was the Article applicable to the facts of the second suit which

provided for a period of limitation of three years and was, therefore, barred by time. The High Court concluded that if the cause of action available to the plaintiff was based on 20th of July, 2005, the date of the agreement to sell or 5th of August, 2005, when the said agreement was allegedly cancelled, the period of limitation computing from either of the stated dates had expired. We disagree with this. The law of limitation being a disabling provision, its various Articles is to be construed by its plain language. The suitor approaching the courts for adjudication of his claim is entitled to a trial on the merits unless his claim is time-barred. The provision of Article 181, being a residuary Article, applies to any or all applications for which, specifically, no limitation period is provided elsewhere. It does not apply to any suit.

10. In our view, the only Article which could have been applied, in the given circumstances, was Article 97. This Article deals with a suit "for money paid upon an existing consideration which afterwards fails". We say so because a plain reading of it dictates three ingredients for its applicability: firstly, the suit must be for money; secondly, such money must have been paid upon a consideration which was in existence at the time of the payment; and lastly, the said consideration must have afterwards failed. Be it noted that if all these ingredients are established, the application of Article 97 cannot be resisted, and the starting point of limitation of three years under it would be not the date when the money was paid but when the consideration fails. Now, let us see if these ingredients are fulfilled in this case or not. As to the first ingredient, we would like to point out that payment of earnest money under the agreement to sell dated 20th of July, 2005, would fall within the meaning of the phrase "for money paid". The next factor which must be satisfied is that such

money must have been paid upon an existing consideration. It is clarified that money paid under an agreement is paid for "existing consideration". We are, therefore, clearly of the opinion that the present case meets this qualification. Now, it remains to be seen, whether it can be predicated that the consideration for which the money had been paid had afterwards failed. We have no hesitation in holding in the circumstances of the case that it had failed. It may be reasoned that the earnest money is intended to serve as evidence of the buyer's (in this case plaintiff's) *bona fide* so that the amount will be forfeited if the transaction is terminated due to the buyer's cause, or if this is due to the seller (in this case the defendants) then the money will be refunded. It may also be noted that if the transaction proceeds, the earnest money becomes part of the purchase price. The facts stated by the plaintiff in the second suit show that the transaction did not fructify in a completed sale and thus the inevitable conclusion is that the consideration for which the money was paid was extinguished. Thus, it will be seen that all the three requirements of Article 97 are fully met in the present case, and, that being so, the limitation for the plaintiff's second suit would rightly start from the date of failure of the consideration, and the second suit would be within time having been brought within three years of the date of the failure of the consideration, which in this case could be said to have failed only when the first suit was dismissed.[3] So, we are definitely of the opinion that the plea of limitation has no force and must be repelled.

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[3] *Mussamat Basso Kuar and others v. Lala Dhum Singh [*15 Indian Appeals 211 (PC)],
Udit Narain Misr and others v. Muhammad Minnat-Ullah [(1903) ILR 25 Allahabad 618 (PC)], &
Amna Bibi and others v. Uditnarain Misra and others [36 Indian Appeal 44 (PC)].

11. Before parting, we find it necessary to observe that suits for recovery of earnest money after failure of a suit for specific performance is a common law development and dates back to more than a century. To the legal mind, this procedural aspect is correct, but what is worth noting, which this case effectively illustrates, is that the sale agreement was executed on 20th of July, 2005. After that, a suit for specific performance was instituted. The case continued until it was dismissed on 18th of November, 2013, after eight years of litigation. On 13th of February, 2014, the second round of litigation was brought by the plaintiff to recover earnest money, to which the cause of action arose after the dismissal of the first suit for specific performance, and has reached us in appeal 18 years after the agreement. In total, these two rounds of litigation, starting with the same agreement, will complete 19 years of litigation this year. The famous saying of Justice Oliver Wendell Holmes Jr. fits here perfectly that "the life of law has not been logic: it has been experience", and therefore, based on empirical study it is advisable to suggest that suitable amendments to the Specific Relief Act, 1877, be made so as to do away with such litigations and reduce the burden on the courts and on parties. The proposed amendments should provide for a provision by which any person suing for the specific performance of a contract for the transfer of immovable property, in appropriate cases, may ask for (a) possession or partition and separate possession, of the property in addition to such performance; or (b) any other relief to which he is entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.

12. Given the preceding discussion, we conclude that the opinion propounded by the Islamabad High Court suffers from

misreading of facts and misapplication of law and thus cannot be approved. This appeal, therefore, succeeds. The judgment dated 27th of May, 2016, of the Islamabad High Court is set aside, and resultantly, the application filed by defendant No.2 under Order VII, Rule 11 CPC is dismissed. The trial Court is directed to decide on the merits of the suit in accordance with the law.

13. The Registrar of this Court shall forward a copy of this judgment to the Hon'ble Chairperson of the Law and Justice Commission, Attorney General for Pakistan and Secretary Law to Government of Pakistan and to Provincial Governments for their information and necessary action.

Judge

Judge

Judge

Announced in open Court on ..... 2024 at Islamabad.

Judge

Islamabad, the
14.11.2023
"Approved for reporting"
Sarfraz Ahmad & Agha M. Furqan. L.C/-