IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SARDAR TARIQ MASOOD
MR. JUSTICE MUHAMMAD ALI MAZHAR

CIVIL PETITIONS No.2608 & 2609 OF 2019
(Against the judgmentof the Lahore High Court, Rawalpindi Benchdated 14.03.2019in Civil Revision Nos. 1165-D& 1166-D/2017)

Muhammad Iftikhar Abbasi

...Petitioner

VERSUS

Mst. Naheed Begum and others ...Respondents

For the Petitioner: Mr. Agha Muhammad Ali Khan, ASC
Syed Rifaqat Hussain Shah, AOR

For the Respondents: N.R.

Date of Hearing: 11.04.2022

JUDGMENT

MUHAMMAD ALI MAZHAR, J:-TheseCivil Petitions for leave to appeal are directed against the consolidated judgment passed by the learned Single Judge of Lahore High Court, Rawalpindi bench in Civil Revision No. 1165-D/2017and 1166-D/2017 on 14.03.2019, whereby both the Civil Revisions were dismissed.

2.The compendiously and tersely, the facts necessary for the disposal of these Civil Petitions are that the petitioner filed a suit for specific performance of contract dated 30.6.2001 in respect of the subject property against the respondents, whereas the respondentshad synchronouslyinstituted their own suit for recovery of possession of the sameproperty from the petitioner. The Trial Court had consolidated both the suits and after settlement of issues and recording of evidence, decided the both the suits through a consolidated judgment and decree dated 12.05.2015.As a result thereof, the suit for specific performance

of the contract filed by the petitioner was dismissed, whereas the suit filed by the respondents for recovery of possession was decreed.The appeals against the judgment and decree were dismissed by the learned Appellate Court vide judgment dated 7.12.2017.

3. The learned counsel for the petitioner argued that the impugned judgments of the lower fora are based on misreading and non-reading of evidence. It was further stated that the Trial Court wrongly considered the matter time barred under Article 113 of the Limitation Act. He further argued that after death of Rashid Pervaiz before expiry of time mentioned in the agreement to sell, the sale deed could not be executed without procuring guardianship certificate of the minor legal heirs, therefore by consent of major legal heirs the time was extended which amounts to novation of contract hence the suit could not be dismissed on the basis of original time fixed in the agreement for execution of sale deed and since no time was fixed in terms of novation therefore, the limitation for filing suit started from the date of refusal of performance.

4. Heard the arguments. It is lucidly manifesting from the record that the agreement to sell was executed on 30.06.2001 wherein specific date of its performance was fixed as 30.06.2002. Whereas the suit for specific performance was filed on 4.4.2011, the petitioner took the instance before the Trial Court that Rashid Pervaiz one of the signatories of the agreement had died in the year 2002, their successors-in-interest postponed the performance of the agreement to sell till obtaining some legal documents from the Court and also pleaded novation of contract.

5. To start with, we would like to advert to the question of limitation. It is precisely demonstrable and conspicuous that Article 113 of Limitation of Act, 1908 has two tentacles. In the firstfragment, the right to sue mounts up within three years if the date is specifically fixed for performance in the agreement itself whereas in its posterior constituent, the suit for specific performance may be instituted within a period of three years from the date when plaintiff has noticed that performance has been refused by the vendor. The first part denotes the

rigors of its application where the time is of the essence which connotes a particular timeline fixed for the performance by the parties. In thiscondition, the limitation period will be reckoned from that date and not from date of refusal but if no exact date is predeterminedthen obviously, the right to sue will accrue from the date of knowledge vis-à-visthe refusal. The intelligenceand perspicacity of the law of Limitation does not impartor divulge a right, but it commands animpedimentfor enforcing an existing right claimed and entreated after lapse of prescribed period of limitation when the claims are dissuaded by efflux of time. The acid test is to get the drift of whether the party has vigilantly set the law in motion for the redress or remained indolent. Under Section 3 of the Limitation Act, the Court is obligatedto advert to the question of limitation. In the instant case the Trial Court found the suit time barred and its findings were maintained by the learned Appellate Court and High Court.The learned counsel for the petitioner further articulated that after the death of Rashid Pervaiz, his legal heirs had given some assurances to performthe agreement to sell and some of the legal heirs were also minors. We are not enthralled with this argumentto overlook or relax the starting point of limitation for accrual of cause of action under Article 113 of the Limitation Act.If there was any novation of contract, the same should have been placed on record in black and white but nothing is available on record that the parties rescinded earlier agreement and agreed to perform on the basis of novation and or the legal heirs executed any further contract represented through their guardian ad litem which superseded the earlier agreement if signed by their predecessor in interest.

6. The doctrine of novation is decipherableand acclimatized under Section 62 of the Contract Act, 1872 which elucidates and explicates that if the parties to a contract come to an understanding to surrogate a new contract or to rescind or alter it, the original contract need not be performed.The word novation practicallyand rationally denotes to substitute with a new contract where the obligations under the existing contract bring to an end or extinguished. Prerequisitesand rudiments of Section 62 of the Contract Act are consensus ad idem amongst the parties; there must be a previous contract between the same parties; recession or alteration of a contract for a new contract and termination of the original contract. This can be done where the

obligation under a contract is replaced with a new one or where a party is replaced by another party and if the terms of the contract provides for the replacement of one party to the contract by another party, this creates an obligation for such party in place of another party and new party assumes all the obligations under that contract.If a new contract is subsequently substituted for an existing one, it would only way be to adjust the remedial rights arising out of the breach of the old contract. The chronicle and etymology of the word "*novation" reveals that it was borrowed* from Latin word *novātiōn, novātiō* or*novāre* to make new, renew and replace an existing legal obligation with a new one. Ref: https://www.merriam-webster.com.According to traditional meaning of novatio or novation in English (with some legal use of this Latin concept in England and the United States), the substitution of a new debt or obligation for an old one, which latter is thereby extinguished. It is novation if either the debtor, creditor or the obligation be changed.Ref: 137 N. Y. 542; Robinson's Elementary Law Revised edition, 294. https://legaldictionary.lawin.org.According to Black's Law Dictionary, 2nd Edition:Novation is the substitution of a new debt or obligation for an existing one. Civ. Code Cal. § 1530; Civ. Code Dak. § 863; Hard v. Burton, 62 Vt. 314, 20 Atl. 269; McCartney v. Kipp, 171 Pa. 644, 33 Atl. 233; McDonnell v. Alabama Gold L. Ins. Co., 85 Ala. 401, 5 South. 120; Shafer's Appeal, 99 Pa. 246. Novation is a contract, consisting of two stipulations, one to extinguish an existing obligation; the other to substitute a new one in its place. Civ. Code La. art 2185. The term was originally a technical term of the civil law, but is now in very general use in English and American jurisprudence. In the civil law, there are three kinds of novation: (1) Where the debtor and creditor remain the same, but a new debt takes the place of the old one; (2) where the debt remains the same, but a new debtor is substituted; (3) where the debt and debtor remain, but a new creditor is substituted. Adams v. Power, 48 Miss. 451. Ref: https://openjurist.org.Along the lines of "Cheshire and Pifoot's Law of Contract" (Ninth Edition), Novation is a transaction by which, with the consent of all the parties concerned, a new contract is substituted for one that has already been made. The new contract may be between the original parties, e.g., where a written agreement is later incorporated in a deed; or between different parties, e.g., where a new person is

substituted for the original debtor or creditor. Whereas Lindley on the Law of Partnership (Thirteenth Edition),delineates this doctrine as a liability which is originally joint, or joint and several, may be extinguished by being replaced by a liability of a different nature; and this may happen in one of two ways, viz., either by an agreement to that effect come to between the parties liable and the person to whom they are liable, or by virtue of the doctrine of merger, independently of any such agreement. Sometimes called novation (see Commercial Bank of Tasmania v. Jones [1893] A.C. 313, 316). In the case of Mussarat Shaukat Ali v. Mrs. Safia Khatoon and Others (**1994 SCMR 2189**), the Court held that Section 62 of the Contract Act deals with the effect of novation, rescission and alteration of contract. The above provisions make it clear that if the parties to the contract agree to substitute a new contract in place of the original one, then the original contract need not be performed. Therefore, performance of original agreement between the parties is dispensed with only where the parties to the contract agree to substitute the original contract by a new contract. Whereas the Court in the case of Benjamin Scarf v. Alfred George Jardine(**(1882) 7 AC 345**) (HOL), held that in the court of first instance the case was treated really as one of what is called “novation,” the term being derived from the civil law that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties, the consideration mutually being the discharge of the old contract. In the case of Lata Construction & others v. Dr. Rameshchandra Ramniklal Shah & another (**AIR 2000 SC 380)**,the Court held that one of the essential requirements of “novation” as contemplated by Section62 is that there should be complete substitution of a new contract in place of the old. Substitution of a new contract in place of the old contract which would have the effect of rescinding or completely altering the terms of the original contract has to be by agreement between the parties. The substituted contract should rescind or alter or extinguish the previous contract.

7. There was no legal hindranceor impediment against the petitioner not to knock the doors of the Court within the period of limitation and implead the legal heirs of Rashid Pervaiz and if some of them were minors then, their mother Mst. Naheed could be appointed guardian ad

litem under Order XXXII Rule 3 C.P.C on an application to the Court but no such efforts were made by the petitioner within time thus on the face of it, the Courts below have rightly held that the suit was time barred. So far as the next plea of novation is concerned, that was never pleaded or proved that any understanding was reached or reduced in writing with the legal heirs apart from the crucial question whether the mother could enter into any alleged understanding without guardianship certificate from the competent court of law, hence the plea of novation of contract was also not available to the petitioner which was neithersubstantiatedin the trial court nor any issue was settled for inviting the parties to lead evidence. We have gone through the evidence available on record and the issue wise findings recorded but neither have we found out any misreading or non-reading of evidence by the Courts below nor any illegality or irregularity in the impugned judgments.

8. As a result of above discussion, no case for interference is made out, therefore, these Civil Petitions are dismissed and leave is declined.

Judge

Judge

Islamabad the
11th April, 2022
Khalid
Approved for reporting