Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A No. 01 of 2021

Naeem Akhtar Khokhar, etc.
Vs
Mohammad Rauf, etc.

APPELLANT BY:	Raja Nisar ul Haq Abbasi, Advocate.
RESPONDENTS BY:	Mr. Fida ur Rehman, Advocate for respondents No. 1 to 7. Rana Ali Ammar and Mr. Adnan Ahmed Khan, Advocates for respondents No. 11 and 12. Mr. Muhammad Farhan Ali Khokhar, Advocate for respondent No.13. Respondent No.8 proceeded ex-parte.
DATE OF HEARING**:**	01-02-2021.

BABAR SATTAR, J.- The appellants filed Civil Suit No. 1283/2011 for specific performance of agreement of exchange dated 26.05.2008, which was dismissed by the learned Senior Civil Judge, East Islamabad by judgment, dated 12.12.2020. Aggrieved by the judgment and decree, the appellant filed the instant appeal.

2. The dispute emanates from the agreement of exchange dated 26.05.2008 ***("Agreement")*** between predecessor-in-interest of the appellants in one part and respondent No.8 and predecessor-in-interest of respondents No. 1 to 7 in the other part. The appellant asserted in the suit

that their predecessor-in-interest performed his part of the bargain by transferring 05-marlas of land through registered sale deed on 24.05.2008 to the predecessor-in-interest of respondents No. 1 to 7. However, the predecessor-in-interest of respondents No. 1 to 7 and respondent No.8 did not discharge their obligations under the Agreement and consequently the appellants sought specific performance of the Agreement. The learned trial Court framed the following issues:

1. *Whether the plaintiffs are entitled for decree of specific performance of agreement dated 26.05.2008 or in alternative, decree for cancellation of said agreement? OPP*
2. *Whether the plaintiffs are also entitled for decree for permanent injunction restraining the defendants from alienation of land measuring 09 marlas? OPP*
3. *Whether the suit of the plaintiffs is time barred? OPD*
4. *Whether the suit of the plaintiffs is not maintainable due to non-joinder and misjoinder of parties?*
5. *Relief.*

3. In relation to issues No. 1 and 2, the learned trial court found that the predecessor-in-interest of respondents No. 1 to 7 transferred four and a half (4-1/2) marlas of land to appellants No. 1 and 5 who are sons of the plaintiff in the suit (i.e. Muhammad Bashir) pursuant to the Agreement. The learned trial court concluded that predecessor-in-interest of respondents No. 1 to 7 had discharged his obligations under the Agreement and no outstanding promise remained to be

enforced against him. It further found that the appellants had been unable to establish any claim against respondent No.8. In relation to issue No.3, the learned trial court placed the onus of establishing that the suit was time-barred on the respondents/defendants and held that the suit was filed on 15.12.2011 for performance of the Agreement but that the cause of action accrued when the respondents refused performance of the Agreement before a Jirga convened a month before filing of the suit and consequently the suit was within the period of limitation for purposes of Article 113 of the Limitation Act, 1908 and the defendants had failed in discharging the onus to establish that it was filed seven months after the expiry of period of limitation. Issue No.4 was never pressed. In view of its findings the learned trial court dismissed the suit.

4. Learned counsel for the appellants has submitted that the Agreement was admitted by DW-1 who claimed that the Agreement had been performed; that the learned trial court did not appreciate that the appellants and their predecessor-in-interest did not receive any property in exchange for the property transferred to the predecessor-in-interest of respondents No. 1 to 7; that transfer of property to the predecessor-in-interest of respondents No. 1 to 7 took place with the consent of respondent No.8 and thus respondent No.8 was liable to transfer 6-marlas of land to the predecessor in interest of the appellants which he never did;

that PW-1 and PW-2 denied the performance of Agreement by the respondents, that witnesses of the Agreement were acquaintances of respondent No.8 and did not appear to prove the execution of the Agreement as they were under the influence of respondent No.8 and the application filed by the appellants seeking production of such witnesses through court order was dismissed by the learned trial court on 15.07.2009 on the basis that onus of establishing the execution and contents of the Agreement was on the plaintiff; that the claim against respondent No.8 should have been allowed as the contentions against such respondent were never denied given that respondent No.8 as defendant No. 2 in the suit never appeared before the court; that the learned trial court erred in holding that the predecessor-in-interest of respondents no. 1 to 7 had performed his part of the Agreement by transferring four and a half marlas (4-1/2) of land to appellants No. 1 and 5 given that the said appellants were sons of the plaintiff and the transferred land was part of a separate transaction between the parties and that pursuant to the Agreement it should have been transferred to the plaintiff and not his sons.

5. Notices were issued to the respondents. Despite receipt of notice, respondent No.8 did not enter appearance.

6. Learned counsel for respondents No. 1 to 7 has submitted that the suit is time barred and should have been dismissed at the outset as that was the preliminary objection taken up by the respondents before the learned trial court; the story regarding the accrual of cause of action is false and no Jirga was ever convened where respondents No. 1 to 7 or their predecessor-in-interest refused performance of the Agreement; that the appellants never led any evidence to establish that such Jirga was ever convened or that respondents No. 1 to 7 refused performance of the Agreement; the written statement and testimony of DW-1 were consistent in that the property in question under the Agreement was transferred through a registered sale deed by the predecessor-in-interest of respondents No. 1 to 7 to appellant No. 1 and 5 during life time of their predecessor-in-interest and thus the agreement stood performed.

7. Learned counsel for respondents No. 11 and 12 has stated that they had nothing to do with the suit property.

8. Learned counsel for respondent No. 13 has stated that he was subsequent purchaser and had signed an agreement to sell with respondents No. 1 to 7 and was impleaded as party in the suit through application under Order 1 Rule 10 of CPC filed by the appellants.

9. The questions that emerge from the arguments of the learned counsels for the parties, the impugned judgment and decree and record are as follows:

(i). *Did the learned trial court err in holding that predecessor-in-interest of respondents No. 1 to 7 had discharged his obligations under the agreement?*

(ii). Did the learned trial court err in holding that no claim had been established against respondent No.8?

(iii). Did the learned trial court err in holding that the suit was maintainable and had been filed within the period of limitation for purposes of Article 113 of First Schedule to the Limitation Act, 1908?

10. The appellants have acknowledged that the witnesses to the execution of the Agreement were never examined and their claim is rooted in the admission of DW-1 who was successor-in-interest of defendant No.1 and not a party to the Agreement. Thus, the appellants neither independently proved the execution of the Agreement nor its contents for purposes of sections 72 and 81 of the Qanun-e-Shahadat Order, 1984 ***("Order")***. The appellants also never led evidence to establish that 4-1/2 marlas of land admittedly transferred by the predecessor-in-interest of respondents No. 1 to 7 to appellant No. 1 and 5 during the life time of their predecessor-in-interest who was a party to the Agreement that they seek to enforce in these proceedings, was part of an independent transaction and not in discharge of obligations

under the Agreement. The Agreement itself states that the predecessor-in-interest of respondents No. 1 to 7 i.e. Shabbir Ahmed Khokhar has already transferred three (03) marlas of land to the predecessor-in-interest of the appellants through a registered sale deed. The Agreement further states that the predecessor-in-interest of the appellants was to transfer five marlas of land to the predecessor-in-interest of respondents No. 1 to 7 and respondent No.8 within a period of one month after the transfer of land by the predecessor-in- interest of respondents No. 1 to 7. It is an admitted fact that predecessor-in-interest of the appellants transferred his land through a registered deed on 24.05.2008 i.e. two days prior to the date of execution of the Agreement. In view of the scheme of the Agreement, the predecessor-in-interest of the appellants was to receive land from the predecessor-in-interest of respondents No. 1 to 7 and respondent No.8 and then discharge his promise to transfer his land. Given that the predecessor-in-interest of the appellants transferred his land on 24.05.2008, and the land transferred by the predecessor-in-interest of respondents No. 1 to 7 to appellant No. 1 and 5, through a registered deed, took place prior to the date of execution of the Agreement, there seems no inconsistency within the provisions of the Agreement and the facts as asserted by respondents No. 1 to 7. Learned counsel for the appellants made a half hearted argument that the provision of the Agreement that states that the predecessor-in-interest of respondents No. 1 to 7 has already performed his part of the

bargain is forged. However, the appellants led no evidence to prove this assertion before the learned trial court and had nothing to say to substantiate such assertion even before this Court. The appellants have failed to establish any infirmity in the finding of the learned trial court that the appellants failed to discharge the onus to prove that the predecessor-in-interest of respondents No. 1 to 7 had reneged on his obligations under the agreement. The appellants have not been able to establish any claim against respondent No.8, who did not enter appearance before the learned trial court or this Court. It was for the appellants to establish that respondent No.8 was party to the Agreement that he reneged on his obligations under the Agreement and that the appellants had a right to be granted discretionary relief of specific performance of the Agreement for purposes of section 22 of the Specific Relief Act, 1877.

11. Under section 17 of the Order an agreement pertaining to financial or future obligations, if reduced to writing, must be attested by two men and under section 79 of the Order such agreement cannot be used as evidence until two attesting witnesses have been called for the purpose of proving its execution. The Agreement was not a registered document and consequently the proviso of section 79 is not relevant. It was held by the august Supreme Court in *Hafiz Tassaduq Hussain vs. Muhammad Din* [PLD 2011 SC 241] that even a scribe of the document could not be a substitute

for testimony of witnesses to such document for purposes of Article 79 of the Order even though he could be examined by a concerned party for corroboration of evidence of marginal witnesses, as when law required an act to be in a particular manner and it had to be done in such manner and not otherwise. In *Farzand Ali and another v. Khuda Bakhsh and others* [PLD 2015 SC 187], the august Supreme Court held that *"an agreement to sell an immovable property squarely falls within the purview of the provisions of Article 17(2) of the Qanun-e-Shahadat Order, 1984 and has to be compulsorily attested by the two witnesses and this is sine qua non for the validity of the agreement. For purposes of proof of such agreement it is mandatory that two attesting witnesses must be examined by the party to the lis as per Article 79 of the Order".* In *Muhammad Iqbal Khan v. Mst. Farhat Nisa* [PLD 2017 Lahore 727], the learned Lahore High Court held that Article 79 of the Order does not envisage admission of execution of a document by implication in relation to a defendant who is not before the court and has made no statement with regard to the validity and execution of such document and that a court can make no assumption regarding the execution of the document only because the defendant if not before the court and has not controverted assertions in the plaint.

12. In view of the provisions of the Order and settled principles of law, the appellants have failed to establish the

execution of the Agreement to the extent of respondent No.8 or that respondent No.8 owes any legal obligation to the appellants the performance of which should have been ordered by the learned trial court.

13. It is settled law that section 3 of the Limitation Act, 1908 is a mandatory provision and that "a suit instituted after the period of limitation prescribed**...**shall be dismissed although limitation has not been set up as a defence". This provision makes it obligatory for the court to look into the question of limitation even when no objection is being raised by a party to the suit. Reliance may be placed on *Noor Muhammad v. Additional District judge Gojra* [2004 MLD 1321] and *Nawab Din v. Muhammad Hussain* [2004 CLC 269]. It was held by the august Supreme Court in *Dilmir v. Ghulam Muhammad* [PLD 2002 SC 403] that the interest of disposing matters on merit is an insufficient consideration in itself for condoning delay for purposes of limitation.

14. Article 113 of the First Schedule to the Limitation Act, 1908 prescribes, for performance of a contract, a limitation period of three years from "the date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused." It was the obligation of the learned trial court to satisfy itself that the suit had been filed within the period of limitation and was maintainable. It appears from reading of section 3 together with Article 113 of the First Schedule to the Limitation Act that the question of

limitation did not hinge on any factual controversy and consequently did not require recording of any evidence for its just determination. In the instant case respondents No. 1 to 7 also raised an objection regarding limitation as a preliminary matter and the learned trial court ought to have determined the question before proceeding to adjudicate the suit. It is settled law that the question of maintainability of a suit ought to be decided at the earliest.

15. In *Haji Abdul Karim and others v. Messrs. Flordia Builders (Pvt) Ltd*. [PLD 2012 SC 247] the august Supreme Court, while tracing the legislative history of Article 113 of the Act and elucidating its meaning and import held that:

> *"Thus now the three years period mentioned in Column No. 3 of the Article runs in two parts:--*
>
> > *(i) from the date fixed for the performance; or*
> >
> > *(ii) where no such date is fixed when the plaintiff has notice that performance is refused.*
>
> *The reason for the said change as stated above is obvious. In the first part, the date is certain, it is fixed by the parties, being conscious and aware of the mandate of law i.e. Article 113, with the intention that the time for the specific performance suit should run therefrom. And so the time shall run forthwith from that date, irrespective and notwithstanding there being a default, lapse or inability on part of either party to the contract to perform his/its obligation in relation thereto. The object and rationale of enforcing the first part is to exclude and eliminate the element of resolving the factual controversy which may arise in a case pertaining to the proof or otherwise of the notice of denial and the time thereof. In the second part, the date is not certain and so the date of*

> *refusal of the performance is the only basis for computation of time. These two parts of Article 113 are altogether independent and segregated in nature and are meant to cater two different sorts of specific performance claims, in relation to the limitation attracted to those. A case squarely falling within the ambit of the first part cannot be adjudged or considered on the touchstone of the second part, notwithstanding any set of facts mentioned in the plaint to bring the case within the purview of the later part. In other words, as has been held in the judgments reported as Siraj Din and others v. Mst. Khurshid Begum, and others (2007 SCMR 1792) and Ghulam Nabi and others v. Seth Muhammad Yaqub and others (PLD 1983 SC 344) "when the case falls within first clause the second clause is not to be resorted to". However, the exemption, the exclusion and the enlargement from/of the period of limitation in the cases of first part is permissible, but it is restricted only if there is a change in the date fixed by the parties or such date is dispensed with by them, but through an express agreement; by resorting to the novation of the agreement or through an acknowledgment within the purview of section 19 of the Act."*

16. It was held by the august Supreme Court in *Muhammad Ramzan vs. Muhammad Qasim* [2011 SCMR 249] that even when the month is mentioned for purposes of contract and not a specific date, it is deemed as "date fixed" and the limitation is to run from the end of the month mentioned. In *Zain Khan and others v. Taj Roshan and others* [2018 CLC Note 116] the learned Sindh High Court also held that when an agreement is to be performed by the end of certain time period, the end of such time period is to be deemed as "date fixed" for purposes of Article 113 of the First Schedule to the Limitation Act. It is only when no specific

date is mentioned in an agreement, the performance of which is being sought that the clock starts ticking from the refusal of performance of obligations of the agreement. And even in such cases it has been held that a plaintiff cannot approach the court after an inordinate delay as a reasonable person would notice that the performance was refused and the onus then is on the plaintiff to furnish a satisfactory explanation as to why he did not notice the defendants' refusal to perform. (see for examples *Abdul Salam v. Muhammad Siddique* 2019 CLC 1623 and *Shahzad Khan Khakwani v. Begum Shamim M.K Khakwani* 2017 YLR 1005).

17. In the Agreement, the period prescribed for performance of the Agreement for predecessor-in-interest of respondents No. 1 to 7 was one month from the date of execution of the Agreement (i.e. 26.05.2008). As the date of performance was fixed, the period of limitation began to run at the expiry of such period and, therefore, the suit filed on 15.12.2011 had been filed beyond the period of limitation.

18. In Florida Builders a suit had been rejected by the learned Sindh High Court on the basis of an application made under Order VII Rule 11 of CPC, as the agreement which was sought to be enforced through the suit had a date fixed for performance and it was held that in view of such date it was barred by law in view of Article 113 of the Act. The august Supreme Court held the following:

> *"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 Courts."*

19. In view of the principles laid down in Florida Builders read together with the otherwise settled principles cited above including, inter alia, that it is the obligation of a court to determine the question of maintainability at the outset even without any objection raised by a party, the following can be concluded in relation to the question of maintainability predicated on the ground of limitation:

> *(i). It is for the court to determine in the first instance the question of whether a suit has been filed within the prescribed period of limitation and is, therefore, maintainable before assuming jurisdiction to adjudicate the same.*
>
> *(ii). Where in relation to a suit for specific performance of an agreement, the agreement itself prescribes the date for performance, the matter falls within the first part of Article 113 of the Limitation Act and requires no recording of evidence to determine the question of limitation which ought to be determined by the court as a matter of law (unless it is stated in*

the plaint or emerges from undisputed documents placed on record that the period for performance fixed in the agreement has been amended or enlarged by the parties.)

(iii). Where (A) the date of performance is not fixed in the agreement sought to be enforced and the question of limitation is to be determined in accordance with the second part of Article 113 of the Limitation Act, or (B) it is averred that the date fixed in the agreement was subsequently enlarged or amended and such assertion is disputed by the other party, the question of limitation will become a mixed question of law and fact and it will require recording of evidence to be determined by the court.

(iv). In cases falling within the first part of Article 113 of the Limitation Act where the "date fixed" has not subsequently been amended thereby enlarging the period fixed for performance, the question of limitation is to be determined by the court as a matter of law and the onus cannot be shifted to the defendant to establish that the suit is barred on the ground of limitation.

(v). In cases where the date for performance is fixed in the agreement but the plaintiff claims that such date for performance was subsequently enlarged or amended bringing the suit within the period of limitation for purposes of Article 113 of the Limitation Act, the onus to prove such fact of enlargement or amendment ought to rest with the plaintiff for

purposes of Articles 118 and 119 of the Qanun-e-Shahadat Order, 1984.

(vi). In cases that fall within the second part of Article 113 of the Limitation Act, it is for the court to determine where lies the onus to prove when a party refused to perform the agreement in view of all attending circumstances for purposes of Articles 118 and 119 of the Qanun-e-Shahadat Order, and if enforcement of the agreement is sought after a period of three years since its execution, it would be for the party seeking its execution to explain when the performance was refused before shifting the onus onto the defendant to set up limitation as a defence.

20. In the instant matter the learned trial court erred firstly when it determined that the onus to establish that the suit was not maintainable on the ground of limitation was on the defendants. As here the determination regarding period of limitation was to be made on the basis of explicit provisions of the Agreement that the plaintiffs sought to enforce, which required no recording of evidence or proof by the defendants. It was, therefore, not for the defendants to furnish proof regarding filing of the suit beyond the period of limitation for purposes of sections 118 and 119 of the Order. And secondly the learned trial court erred in assuming that the question of limitation in the suit fell within the second part of Article 113 of the First Schedule to the Limitation Act and limitation would begin to run from when the performance of the agreement was refused as opposed to the date for

performance fixed by the Agreement, especially when it was not asserted by the plaintiff that this was a case where the date fixed for performance as reflected in the Agreement was subsequently changed by the parties with mutual consent.

21. In view of the above, the suit was not maintainable having been filed beyond the period of limitation. This appeal consequently fails and is dismissed with a cost of Rs.25,000/- payable to the respondents.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 12.02.2021.

JUDGE

Approved for reporting.

Saeed*