

ORDER SHEET  
**IN THE HIGH COURT OF SINDH AT KARACHI**  
**SUIT No. 1267 / 2017**

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DATE	ORDER WITH SIGNATURE OF JUDGE
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- 1) For hearing of CMA No. 13517/2017.
- 2) For hearing of CMA No. 13558/2017.
- 3) For hearing of CMA No. 12436/2017.
- 4) For hearing of CMA No. 10150/2017.
- 5) For hearing of CMA No. 8004/2017.

**31.10.2017.**

Mrs. Kausar Anwar Siddiqui Advocate for Plaintiffs.  
 Ms. Saman Riffat Imtiaz Advocate for Defendants No. 1 to 4.  
 Mr. Munirur Rehman Advocate for Defendants  
 No. 10 & 11.  
 Ms. Saba Siddiqui Advocate for SBCA.  
 Ms. Nigar Afaq State Counsel.  
 Mr. Mian Mohsin Raza Advocate for Applicant / Intervener.  
 Mr. Arshad Tayyabaly Advocate for Applicant / Intervener.  
 Mr. Khalid Hayat Advocate for Applicant / Intervener.

- 2) This is an application filed under Order VII Rule 11 CPC on behalf of Defendants No.1 to 4 on the ground that instant Suit is barred under Order 9 Rule 9 CPC, and so also for having no cause of action.

Learned Counsel for the Defendants No.1 to 4 submits that earlier the same Plaintiffs and the deceased father of present Defendant No.5 had filed a similar Suit bearing No. 1054/1999 before this Court for Administration, Cancellation and Permanent Injunction. She submits that the issue so raised in that Suit was identical to the one which is now being agitated through instant plaint. She has referred to various paragraphs of the plaint, wherein, the cause of action has been stated as well as the properties have been mentioned. Learned Counsel submits that the said Suit was dismissed for non-prosecution through an order dated 14.11.2008, whereas, no efforts were made to get the

said Suit restored but instead a fresh Suit has been filed and the only reason which has been stated is that one of the Plaintiffs in that Suit has since expired and now his legal heirs have been arrayed as Defendant No.5. She submits that in these facts instant Suit is not competent and barred in terms of Order 9 Rule 9 CPC, and therefore, while allowing listed application the plaint be rejected.

On the other hand, Learned Counsel for the Plaintiffs submits that insofar as the parties to the earlier Suit are concerned, they were somewhat different, whereas, the cause of action is also different inasmuch as the Plaintiff No.1 in the earlier Suit has expired in 2016 and therefore, this is a fresh cause of action. She has read out the relevant paragraphs from both the plaints to justify the difference in the cause of action and the prayer clause(s). Insofar as the dismissal of the earlier Suit is concerned, she submits that the Plaintiffs had no knowledge about such dismissal and therefore, instant Suit is competent as the Plaintiffs have been deprived of their share in the assets of deceased brother and father.

Similarly Counsel for Defendants No.10 and 11 supports the case of Defendants No.1 to 4 and has contended that even an independent Suit bearing No. 1451/2015 has also been filed against his clients by the same Plaintiffs in respect of one of the properties in question and therefore, this Suit is not competent. He further submits that though this Suit has been filed for the alleged Administration of the Estate of the deceased; however, none of the properties were in the name of the deceased and have been sold way back. Per learned Counsel this Suit cannot be termed as a Suit for Administration.

I have heard all the learned Counsel and perused the record. It appears that admittedly earlier a Suit bearing No. 1054/1999 was filed

wherein, the present Plaintiffs were Plaintiffs No. 2, 3 and 4, whereas, the deceased father of Defendant No.5 was Plaintiff No.1. The Suit was filed for Administration, Cancellation of Documents and Permanent Injunction. It has not been disputed that the entire properties listed in the earlier Suit for Administration and the present Suit are identical. However, it has been argued that since cause of action is different, therefore, instant Suit has been competently filed. On perusal of the cause of action so stated in both the plaints, it reflects that except the demise of Plaintiff No.1 of the earlier Suit (**who has now been arrayed through legal heirs as Defendant No.5**) there is no material change. Even the prayer clause(s) are substantially in respect of the same properties in addition to seeking cancellation of partition agreement of immovable properties dated 21.3.1983. The earlier Suit was for Administration of Estate of their father and uncle, whereas, the present Suit is also for the same purpose. In the given facts when plaintiff's primary case is regarding claim of their share in the Estate of deceased, then it can't possibly be a case of any fresh cause of action. It remains the same all along until finally adjudicated. The only difference in the cause of action is regarding disclosure of demise of the then Plaintiff No.1 (Now Defendant No.5 through legal heirs). This could hardly be termed as a different or fresh cause of action, as death of any of the parties does not give rise to a fresh cause of action and the appropriate course was to bring his legal heirs on record through an application as provided under Order 22, CPC.

Order 9 Rule 9 CPC provides that when a Suit is wholly or partly dismissed under Rule 8 the Plaintiff shall be precluded from bringing a fresh Suit in respect of the same cause of action but may apply for an order to set the dismissal aside and if the Court is satisfied that there

was sufficient cause of action for nonappearance when the Suit was called for hearing, the Court shall make an order setting aside the dismissal upon such terms as to cost or otherwise as it thinks fit and shall appoint a day for proceeding with the Suit. The rule further provides that provisions of Section 5 of the Limitation Act shall apply to an application made under sub rule 1. The Learned Counsel for the Plaintiffs was confronted by the Court that as to why instead of making an application under Order 9 Rule 9 CPC a fresh Suit has been filed, the learned Counsel stated that the Plaintiff had no knowledge of dismissal and it only transpired recently that the Suit was dismissed for Non-prosecution. However, mere ignorance or having no knowledge does not create a fresh cause of action to file a new Suit. In fact as soon as it came into the knowledge of the Plaintiffs that the earlier Suit has been dismissed for non-prosecution, a proper application as above could have been preferred. The provision also caters for condonation of delay under Sub-Rule (3). This has not been done and a fresh Suit has been filed, wherein the plaintiffs have though declared such fact in Para 10 of the plaint, however, the plaint is completely silent as to how and when this came to their knowledge and what efforts were made to get the same restored. There is nothing to satisfy the Court in this regard and without availing the appropriate remedy instant Suit has been filed.

It further appears that in the year 2015 another Suit bearing No. 1451/2015 was also filed in respect of one of the properties bearing Plot No. 90-2/2, Sher Bano Agaria Bagh, Ghulam Hussain Qasim Road, Garden West, Karachi, wherein, a Declaration was sought as to the ownership of the property in question. No plausible explanation could be given by the learned Counsel for the Plaintiff while confronted with this fact except that the said Suit was filed to stop the Defendant from

illegal construction, however; the plaint reflects that it was a Suit for Declaration regarding ownership of the property. It is also pertinent to mention that even otherwise; admittedly the properties so stated in the plaint at the time of filing of this Suit were not in the name of the deceased for which the Administration is being sought. In all fairness no such Suit for Administration could be entertained without first seeking a declaration of vesting of ownership of such properties as Benami, and this has resulted in filing of various Intervener applications on behalf of the actual and present owners of the properties. In fact the fresh Suit is barred in law.

In view of hereinabove facts and circumstances of the case, I am of the view that since a Suit was earlier filed on the same cause of action with similar relief(s) and the said Suit stands dismissed for non-prosecution, the appropriate remedy was by way of filing an application for restoration / recalling and setting aside of the said order under Order 9 Rule 9 CPC and not through a fresh Suit.

Accordingly, by means of a short order dated 31.10.2017 application bearing CMA No.13558/2017 was allowed and the plaint was rejected under Order VII Rule 11 CPC along with all pending applications and these are the reasons thereof.

**J U D G E**

ARSHAD/