

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO. 1240 / 2001

Plaintiffs: Mst. Bilquees & others through Mr. Khalid Javed Advocate.

Defendants No. 2 & 3: Muhammad Rafiq & another through Mr. Mansoorul Arfin Advocate.

Intervener: Akhtar Ali through Mr. Mr. Abdul Khalil Advocate.

- 1) For hearing of CMA No. 226/2013.
- 2) For hearing of CMA No. 8988/2007.
- 3) For hearing of CMA N. 8728/2006.
- 4) For hearing of CMA N. 8680/2007.

Date of hearing: 17.04.2018.
Date of order: 17.04.2018.

ORDER

Muhammad Junaid Ghaffar, J. This is an application (CMA No. 8988/2007) under Order 7 Rule 11 CPC filed on behalf of Defendants No. 2 & 3 for rejection of plaint.

2. Learned Counsel for the Defendants submits that plaint in this Suit for the first time was amended pursuant to order dated 10.02.2005 through which the Plaintiffs also sought cancellation of a Sale Deed which is jointly in the name of Defendants No.2 and 3 and one Nazir Ahmed, whereas, the said Nazir Ahmed was never joined as a party in this matter, and therefore, instant Suit is bad for non-joinder of a necessary party; hence, plaint be rejected. He further submitted that such fact regarding a Sale Deed jointly in the name of Defendants and Nazir Ahmed came on record on 10.10.2001 through written statement of Defendants No. 2 & 3, whereas, the limitation for seeking cancellation of the Sale Deed of Nazir Ahmed has also expired therefore, in terms of

Article 91 of the Limitation Act, 1908, Suit is otherwise, liable to be dismissed. Per learned Counsel through CMA No. 5633/2002 similar prayer was made, whereas, the said Nazir Ahmed has expired on 31.05.2006. Learned Counsel has further submitted that once a necessary party is not joined, the Suit is not maintainable and plaint is liable to be rejected as according to the learned Counsel, Decree if any, cannot be executed against the said person. In support he has relied upon **AIR 1941 FC 16 (United Provinces v. Mt. Atiqa Begum and Ors)**, **PLJ 1987 Lahore 460 (Government of Punjab, Health Department through Secretary health, Lahore and another v. Naila Begum)**, **1981 CLC 462 (Salma Abbasi v. Ahmed Suleman)**, **PLD 1987 Lahore 387 (Muhammad Suleman v. Abdul Rashid)**, **2006 YLR 1595 (Faqir Muhammad Through Legal Heirs v. Muhammad Younis)**.

3. On the other hand, learned Counsel for the Plaintiffs has referred to various orders passed in this case including order(s) dated 27.04.2007, 25.05.2007, 24.08.2007 and finally 21.09.2007 and has contended that through the last order, upon Defendants failure to lead evidence, their side was closed and subsequently on 27.10.2007 this application has been filed which is belated in nature and is to avoid judgment and decree against them with malafide intentions. He further submits that without prejudice, the said Defendants have got nothing to do with the case of Nazir Ahmed, and it is not understandable as to why they are pleading his case as it is for the Plaintiffs to prove and the Court to decide as to whether, the relief as sought can be granted or not. He has further contended that an application under Order 7 Rule 11 CPC can only be decided by examining the contents of the plaint and not beyond that whereas, the entire case set up by the Defendants through this application is premised on written statement and other subsequent

events. In support of this proposition he has relied upon the case reported as ***Jewan v Federation of Pakistan (1994 SCMR 826)***. Learned Counsel has also read out Order 1 Rule 9 CPC and submits that no case is made out, whereas, there are no penal consequences for a non-joinder and misjoinder of a party; hence, the application is liable to be dismissed. He finally submits that the Defendants have failed to point out any law under which the Suit is barred and plaint can be rejected.

4. I have heard both the learned Counsel and perused the record. Firstly, I would like to deal with the objection of the Plaintiffs that it is only the contents of the plaint which should be considered while deciding an application under Order 7 Rule 11 CPC and would like to observe that for the present purposes, it is the amended plaint before the Court in which the cancellation of Sale Deed of Nazir Ahmed is being sought; hence, the objection of the Plaintiffs Counsel to that effect is not relevant. It is only the amended plaint which is being considered and relied upon by the learned Counsel for the Defendants and no other document, therefore, I need not engage any further into deciding this aspect, at least for the present purposes. Notwithstanding this, even otherwise it is not that the Court is prohibited from considering any other material in addition to the plaint for deciding an application under Order 7 Rule 11 CPC as it entirely depends upon the facts and circumstances of a given case. A complete guideline to this effect has been provided by the Hon'ble Supreme Court in the case of ***Haji Abdul Karim and others V. Messrs Florida Builders (Pvt.) Limited (PLD 2012 SC 247)*** after tracing out the history and precedents on the issue and it has been held that;

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.

5. Insofar as the Defendants case is concerned, the only legal ground urged upon is that the plaint is liable to be rejected for non-joinder of Nazir Ahmed. Firstly, I may observe that insofar as Order 1 Rule 10 CPC is concerned, there are no penal consequences provided for a party who fails to array a necessary Defendant. In fact it is the other way round in terms of Order 1 Rule 9 CPC, which provides that no Suit shall be defeated by reason of mis-joinder or non-joinder of parties and the

Court may in every Suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it. Reliance in this regard may be placed on case of **Central Government of Pakistan and others V. Suleman Khan and others (PLD 1992 SC 590)** wherein following observations has been made:-

“Order I, rule 9; C.P.C. gives also, very strong support for the foregoing approach regarding interpretation and application of Order I, rule 10, C.P.C. This provision (Rule 9) is in a mandatory negative form; namely, that no suit shall be defeated by reason of the misjoinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties are concerned. It is not at all in dispute nor the High Court had any such constraint that what is applicable to the plaintiff and defendant at the trial stage can also apply in appeal, to the appellant and the respondent in so far as these two provisions in Order I, Rules 9 and 10, C.P.C. are concerned.”

6. This has been followed by a learned Division Bench of this Court in the case reported as **Muhammad Younus Shaikh v Corex Enterprises (2007 MLD 508)**, wherein, plaint was rejected by a learned Single Judge of this Court on an application under Order 7 Rule 11 CPC, on the ground that the Suit was hit by non-joinder of Federation of Pakistan being hit by Section 79 CPC and Article 189 of the Constitution and the Appellate Court after relying upon the case as above, set aside the order of rejection of plaint. In that case in fact the requirement of joining of a particular party was pursuant to provisions of Section 79 CPC, and for non-compliance, plaint was rejected, but such rejection was not maintained, whereas, in the instant matter, it is the claim and stance of defendants No.2 & 3 that one Nazir Ahmed ought to have been joined. I am afraid such assertion is too far stretching and it is not a case where a plaint can be rejected by this Court, for such alleged non-joinder of a party. Therefore, simply for the fact that if one party, which according to the Defendants ought to have been joined, has not been joined, the plaint cannot be rejected. It further appears that this application under

Order 7 Rule 11 CPC has been filed after the said Defendants failed to lead any evidence in this matter and after appropriate chances their side was closed vide order dated 21.09.2007. This appears to be a belated attempt on the part of the Defendants, whereas, even otherwise, their case is premised on a very weak assertion that since Nazir Ahmed has not been joined, the Suit is bad for non-joinder. It is not understandable as to why by the non-joinder of Nazir Ahmed, they would be affected, and any relief could be sought by them on this ground. Therefore, even otherwise, the application appears to be misconceived.

7. And finally it is also to be noted that there may be a case that ultimately the Suit at the trial is dismissed as not maintainable, but on the same issue it is not necessary that the plaint may also be rejected under Order 7 Rule 11 C.P.C. The Hon'ble Supreme Court in a recent judgment in the case of ***Al-Meezan Investment Management Company Ltd & Others V. WAPDA First Sukuk Company Limited, Lahore, etc*** reported as **PLD 2017 SC 1** has observed that *...Suffice it to say that the question of whether a suit is maintainable or not is moot with respect to whether or not a plaint is to be rejected as being barred by law. Both are a different species altogether and it may well be that a plaint is not rejected in terms of Order 7 Rule 11 CPC but the suit is dismissed eventually as not maintainable for a possible host of reasons.*

8. In view of hereinabove facts and circumstances of this case, listed application was dismissed by means of a short order on 17.04.2018, and above are the reasons thereof.

J U D G E

ARSHAD/