

IN THE HIGH COURT OF SINDH AT KARACHI

Before:

Mr. Zulfiqar Ahmad Khan, J

Suit No.2717 of 2016

[Syed Nasim Ahmed v. Nafeesuddin and others]

Plaintiff : Through Ch. A. Rasheed, Advocate
Defendants : Through Khawaja Shams-ul-Islam, Advocate
Date of Hearing : 07.08.2018
Date of Order : 07.08.2018

ORDER

Zulfiqar Ahmad Khan, J:- Through instant application (CMA No.6285 of 2017) made under Order VII Rule 11 Civil Procedure Code, 1908 read with Section 151 CPC, the Court has been approached for dismissal/rejection of the plaint alleging that the suit in question is barred under Section 11 CPC and on the doctrine of *res judicata* since on 25.11.2016 this Court had already rejected the plaint of the previous suit bearing Suit No.231 of 2013 filed by the Plaintiff on the same ground with costs of Rs.25,000/- and against which an appeal bearing HCA No.406 of 2016 was preferred by the Plaintiff, which however was not pressed on 25.05.2017, resultantly the appeal was dismissed as not pressed, which fact was affirmed by a statement filed by the Plaintiff dated 09.09.2017 in the present suit, as well as that the defendants have no privity of contract with the Plaintiff in respect of the suit property inasmuch as Plaintiff having no cause of action against defendants. It is also alleged that the Plaintiff has no legal character within the parameters of sections 42 and 56 of the Specific Relief Act, 1877.

2. By way of background, counsel by referring Para-29 of the plaint, distinguished that the cause of action in the instant suit arose out of the sale agreement dated 22.07.2005 which was also the subject matter of the previous

suit. Per counsel, not only the Plaintiff is the same, but the defendants arrayed in both the suits are also identical with the exception of Mst. Nazish wife of Shahabuddin, who was arrayed as Defendant No.5 in the previous suit but for the reasons best known to the Plaintiff, has not been arrayed as such in the current suit. Per counsel, on the similar application made by him under Order VII Rule 11 CPC in the earlier suit, vide order dated 25.11.2016, learned Single Judge while reaching to the conclusion that the suit was barred in law as well as beyond the period of limitation prescribed in law, led the objections raised on these grounds sustained and rejected the plaint by allowing his order VII Rule 11 application. Not only that the learned Single Judge rejected the plaint, however additionally observed that since that was a frivolous case dragging the defendants unnecessarily, cost of Rs.25,000/- in favour of Sindh High Court Clinic was also imposed. By way of background, learned counsel for the applicants/defendants further submitted that both the suits revolve around an allegation that the Plaintiff entered into an Agreement to Sell dated 22.7.2005 in respect of Plot No.2, Survey Sheet No.10, Serai Quarter, Saddar Town, Karachi, measuring 194 square yards and that the Plaintiff allegedly claims to have become a shareholder in the said plot. Per counsel, the instant suit was filed when the appeal preferred against the rejection of his previous Suit No. 231 of 2013 was pending, however mischievously the present suit was presented on 23.12.2016, thus the Plaintiff has grossly misused the process of law and has not come with clean hands since the appropriate remedy would have been to proceed with the appeal which he filed against the previous rejection order rather than presenting a new suit. As per counsel, no party can be vexed twice in the same cause. The counsel further submits that the instant suit is barred under Section 11 CPC and by having chosen to withdraw appeal filed by the Plaintiff against the previous orders, the plaint had attained finality. Learned counsel for the applicants/defendants placed reliance on 2013 YLR 504, 2007 CLC 483 and PLD 2011 Karachi 550 in support of his arguments that the instant suit was hit by

Order II Rule 2 CPC. On the point that the instant suit is also hit by Section 11 CPC, the counsel relied on 2012 SCMR 366, 2012 SCMR 280, 1999 SCMR 1633. On the point of limitation under Articles 91 and 113 of the Limitation Act, 1908 reliance was placed on 2006 YLR 1090, 2013 YLR 2581 and PLD 2012 Sindh 92.

3. To the contrary, learned counsel for the Plaintiff attempted to distinguish the instant suit from the previous one and submitted that while the previous suit was filed seeking declaration, injunction, cancellation of documents and damages, the instant suit is filed for the specific performance of contract, damages and permanent injunction. By his own admission while referring to Paragraph-2, the counsel acknowledged that the cause of action in the present case arose from the sale agreement dated 22.07.2005, which ironically was also the subject matter of the earlier suit. Per counsel, the Plaintiff paid a sum of Rs.1.75 Million through four cheques detailed in Paragraph-2, as well as, by referring to Page-67 attempted to show the Court that in fact five additional payments were also made by the Plaintiff to the defendants through different pay orders, however, was unable to place any properly stamped and dated receipt and not to mention that the copies of the said pay orders were also not provided by the Plaintiff to substantiate his claim.

4. In order to escape from the restrictive covenants of Section 11 CPC, the counsel placed reliance on 2017 SCMR 172 stating that since the first suit filed by the Plaintiff was not decided on merits rather its plaint was rejected, therefore Section 11 CPC does not apply. Similar contention was raised by referring 2002 SCMR 300, where the apex Court has held that the question of *Res Judicata* in a case where previous suit was dismissed for non-prosecution does not arise.

5. Perusal of the record reflects that while Plaintiff instituted the earlier suit bearing Suit No.231 of 2013 for declaration, injunction, cancellation of documents and damages but in the entire body of the plaint nothing was brought to show as to what damage was caused to the Plaintiff. It could also be observed that the said suit was not merely a suit for damages particularly as its

subject matter was the same agreement allegedly entered into between the parties and it was alleged that the said agreement was violated. Admittedly, the agreement is the same which is dated 27.07.2005. The order dated 25.11.2016 rejecting the plaint of the earlier suit clearly refers to the fact that the said suit was filed in the year 2013 for an agreement entered into the year 2005, thus hopelessly time barred. The relevant portion of the said order is reproduced as under:-

“Admittedly, the agreement was executed on 27.7.2005, whereas, instant Suit has been filed in the year 2013 and is hopelessly time barred, insofar as if any specific performance is being sought. Even otherwise, it is also time barred in respect of claiming recovery of the alleged amount paid by the plaintiff. It further appears that the plaintiff is seeking declaration on the basis of an agreement and I am afraid that no such declaration of ownership can be granted to the plaintiff on the basis of this agreement, which even otherwise is in favor of other parties (defendants) who have not alleged any violation nor have sought any specific performance. It also appears from the plaint that though the plaintiff has also relied on the Sale Deed purportedly executed in respect of Plot No.1, but on perusal it appears that the said Sale Deed was in the name of his mother and according to the defendants such share of 25% was sold to them and thereafter a proper Conveyance Deed has been registered in their name. Moreover, no cancellation prayer has been made in respect of such conveyance Deed. In the circumstances, it appears that the plaint is barred in law and so also time barred, whereas, it is a settled proposition of law that a still born Suit must be buried at its inception and it is the primary duty of the Court to examine and see that whether the Suit is maintainable and the relief(s) being sought can be granted by the Court or not. Rather the Court is under an obligation to reject the plaint in such Suit without any formal application from the party. Reliance in this regard may be placed on the case of ***Raja Ali Shan v. Essem Hotel Limited (2007 SCMR 741)***, ***Haji Abdul Karim and Others v. Messers Florida Builders (Pvt.) Limited (PLD 2012 SC 247)***, ***Haji Abdul Mateen Akhuzada & another v. District Co-ordination Officer/Deputy Commissioner, Quetta & 5 others (PLD 2012 Baluchistan 154)***).

In view of hereinabove facts and circumstances of the case I am of the view that instant Suit is barred in law as well as beyond the period of limitation prescribed in law and therefore, objection raised on 7.5.2014 must sustain. Accordingly, the plaint is rejected by allowing the application under Order 7 Rule 11 CPC listed at S. No.2. Since a frivolous Suit has been filed dragging the defendants unnecessarily and interim orders have been obtained on 24.11.2016 by means of a short order plaint in the instant Suit was rejected with cost of Rs.25,000/- to be deposited in the account of Sindh High Court Clinic and above are the reasons in support thereof.”

6. Not only that it is abundantly clear in the instant suit specific performance of the same agreement of 22.07.2005 is sought, however this time the second suit is filed in the year 2016 rather than 2013 when the earlier suit was filed therefore the question of limitation becomes more serious clearly

leaving no hope for the Plaintiff as the case being miserably time barred even if for a moment it is presumed that the present suit arises out of an independent cause of action and has no nexus with the earlier suit, however the instant claim seeking specific performance of a contract after thirteen years from the date of its execution has no possibility of maintainability either.

7. In view of these facts and circumstances of the case, I have reached to the conclusion that the instant suit is beyond the period of limitation prescribed in law therefore objection raised through the present application made under Order VII Rule 11 CPC listed at Sr.1 succeeds. Accordingly, the plaint is rejected. I also cannot resist from holding that the Plaintiff is bent upon dragging the defendants unnecessarily and after rejection of his first plaint even during the pendency of an appeal filed this suit with the clear objectives of misusing the process of law. I therefore, impose a cost of Rs.30,000/- (Rupees Thirty Thousand only) on the Plaintiff, which cost is to be deposited in the account of Sindh High Court Clinic.

These are the reasons of my short order announced in the Court today, where for the reasons to be recorded, I allowed the application moved by the defendants under Order VII Rule 11 CPC.

JUDGE