

**IN THE HIGH COURT OF SINDH
AT KARACHI**

SUIT NO. 1251 OF 2013

Plaintiff : Majeedan, through Mr. A. B. Lashari,
Advocate

Defendants. : Mohammad Jamil, through Mr. Afzal
Khan, Advocate

Date of hearing : 06.09.2018

ORDER

YOUSUF ALI SAYEED, J - In terms of the Application under consideration (i.e. CMA 1524/2017), the Defendant has prayed that further proceedings in this Suit be stayed on the ground that the matter in dispute is presently *sub judice* before the learned Vith Senior Civil Judge, at Karachi, South in a previously instituted suit involving the parties, bearing Suit Number 806/2013 (the "**Prior Suit**").

2. This Suit was instituted on 05.10.2013, and in view of the valuation thereof being in excess of Rupees 15 million, the same was filed before this Court under its original civil jurisdiction in terms of Section 7 of the Sindh Civil Courts Ordinance 1962.

3. In terms of the plaint filed in this matter, it has been pleaded that the Plaintiff had transacted to purchase a 148 square yard portion of Plot No.1 (measuring a total of 817 square yards), Survey No. 24/2, Sheet No.LY-28, situated in Lyari Quarters, Karachi (Old Survey No.5/16, Sheet No. K-177) with her own funds. It was averred that with the concurrence of the Plaintiff, the said plot was transferred vide Sale Deed dated 06.04.1988 in the name of the Defendant, who is her son, on the understanding that the same would be held by him for the benefit of his five brothers and subsequently be transferred in their names.

4. It was averred further that construction was raised on the plot with funds derived through the sale of another property belonging to the Plaintiff as well as the income generated through a joint business of the Plaintiff and her sons, whereafter they all took up residence at such premises and remain in occupation thereof. It was submitted that the Plaintiff resiled from his commitment to transfer the plot when requested, and instead proceeded to file the Prior Suit against his brothers, seeking permanent injunction, possession and mesne profits, thus necessitating the filing of the instant Suit whereby the Plaintiff has sought a declaration that the property is being held benami on her behalf, as well as cancellation of the Sale Deed,

5. It is in this backdrop that in terms of the Prior Suit the Defendant had prayed for judgment and decree in the following terms:
 - “a) To grant permanent injunction against the defendants, their heirs, agents, supporters and any other person or persons on their behalf restraining and prohibiting them from dispossessing the Plaintiff from the premises standing on Plot No.1, Survey No.24/2, Sheet No.LY-28, situated at Street No.6, Kara Kareem Compound, Usmanabad, Lyari Quarters, Karachi and creating third party interest in respect of the said property and they may also be restrained from making and doing business of any kind of the intoxicating material and keeping the same in the premises in their occupation without due process of law or to cause or cause to be done any act prejudicial to the Plaintiff's right in respect of the said premises.
 - (b) For possession of the portion in occupation of the defendants upper floor of the house standing on Plot No.1, Survey No.24, Sheet No.LY-28, situated at Street No.6, Kara Kareem Compound, Usmanabad, Lyari Quarters, Karachi.
 - (c) Mesne profits at the rate of Rs.10,000/- per month from the date of Suit till decree and possession.
 - (d) Cost of the Suit.” [sic]

6. Conversely, in terms of the present Suit, the Plaintiff has prayed for judgment and decree:

- “(a) To declare that the property bearing Plot No.1, measuring 148 sq yards, Survey No.24/2, Sheet No.LY-28, situated in Lyari Quarters, Karachi, which is in the name of defendant is benami transaction and he is just ostensible owner as the sale consideration was paid by the Plaintiff and she is sole owner of the said properties.
- (b) To cancel the sale deed dated 06.04.1998 of property bearing Plot No.1, measuring 148 sq.yards, Survey No.24/2, Sheet No.LY-28, situated in Lyari Quarters, Karachi from the name of the defendant and direct the defendant to transfer the same in the name of the Plaintiff and on his failure, the Nazir of this Court may be directed to transfer/mutate the property in the name of the Plaintiff from the concerned office/authorities.
- (c) To restrain the defendant, her servants, agents, attorneys or any other person(s) acting on her behalf from transferring, alienating, encumbering and disposing of the property bearing Plot No.1, measuring 148 sq. yards, Survey No.24/2, Sheet No.LY-28, situated in Lyari Quarters, Karachi to any person and/or creating third party interest in any manner whatsoever.
- (d) Award any other relief(s) which this Hon’ble Court may deem fit and proper under the circumstances of the suit may be awarded.” [sic]

7. While the Plaintiff was apparently not originally impleaded as a Defendant in the Prior Suit, per learned counsel she subsequently came to be joined as the Defendant No.6 in that matter, wherein issues have been framed as follows [sic]:

Issue No.1. Whether the suit of the plaintiff is maintainable?

Issue No.2. Whether the plaintiff is the owner of the suit property and is entitled for the possession of remaining portion along with mense profit?

Issue No.3. Whether the Plaintiff is the benamidar owner and property was purchased by Mst. Majida?

Issue No.4. What the Judgment and decree should be?”

8. It is in this framework that the Application under reference has been filed and thus falls to be determined. Whilst the Application seeks to invoke both Sections 10 and 11 CPC, it was conceded at the outset by learned counsel for the Applicant that the latter provision would not be directly applicable since there had been no final determination as yet in the earlier suit, hence the further submissions advanced at the bar proceeded on the touchstone of Section 10, which reads as follows:

“No Court shall proceed with the trial of any Suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit is pending in the same or any other Court in [Pakistan] having jurisdiction to grant the relief claimed, or in any Court beyond the limits of [Pakistan] established or continued by [the Federal Government] and having like jurisdiction, or before [the Supreme Court].”

9. With reference to Section 10, learned counsel for the Defendant submitted that the entire controversy was essentially covered under Issue No.3 framed in the Prior Suit, hence proceedings in the instant Suit ought to be stayed in terms thereof. By contrast, learned counsel for the Plaintiff contended that the application of Section 10 was not attracted in the exigencies of the given situation, as the Court seized of the Prior Suit lacked pecuniary jurisdiction to adjudicate the present Suit and grant the relief claimed. He submitted that the appropriate course of action under the circumstances would be for the Prior Suit to be called up and for the suits to be consolidated and tried together. In support of this contention he placed reliance on a judgment of the Honourable Supreme Court in the case reported as Muhammad Yaqoob v. Behram Khan 2006 SCMR 1262 and pointed out that Civil Transfer Application No. 7 of 2018 filed by the Plaintiff is pending in that regard.

10. In this context, it is pertinent to observe that Section 10 CPC essentially codifies the principle of *res sub judice*, the object of which is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits and also to avoid inconsistent findings on the matters in issue. The provision is in the nature of a Rule of procedure and does not affect the jurisdiction of the Court to entertain and deal with the latter suit nor does it create any substantive right in the matter.
11. The necessary conditions for the application of this section are: (1) that the matter in issue in the second suit is also directly and substantially is issue in the first suit; (2) both suits must be between the same parties or their representatives; (3) the parties to the previous suit and subsequent suit must be litigating under the same title in both suits, and (4) that the court in which the first suit is instituted is competent to grant the relief claimed in the subsequent suit.
12. As such, Section 10 applies in cases where the whole of the subject matter in both the suits is identical. The key words are "the matter in issue is directly and substantially in issue" in the previous instituted suit. The words "directly and substantially in issue" are used in contra-distinction to the words "incidentally or collaterally in issue". Therefore, Section 10 would apply only if there is identity of the matter in issue in both the suits. The fact that there is an additional party in one suit is of no consequence as it is not necessary that all the parties on either side should be the same in both the suits, it being enough if there is substantial identity of the parties. The fundamental test to determine whether the application of Section 10 is attracted is to see whether on final decision being reached in the previous suit, such decision would operate as *res judicata* in the subsequent suit. To this extent, it is pertinent to mention that Section 11 of the CPC, which codifies the principle of *res judicata*, *inter alia* states as follows:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

13. Whilst the issue of whether the present Defendant is the benamidar owner and whether the property was purchased by the present Plaintiff may indeed be a point for determination in both matters and pivotal to the dispute in the latter suit, it merits consideration that for the bar of res judicata to strictly operate, the former suit should also have been decided by a Court “competent to try” the subsequent suit. However, under the prevailing legal framework, in view of Section 7 of the Sindh Civil Courts Ordinance, 1962, the Court seized of the Prior Suit evidently lacks the pecuniary jurisdiction to adjudicate over the present suit, hence the doctrine of res judicata would not operate, ergo Section 10 would also not apply.

14. In India, the anomalous situation arising in such cases (i.e. where the pecuniary jurisdiction of Courts differs) appears to have been addressed through an amendment to the CPC vide the insertion of Explanation VIII to Section 11, which states as follows:

“Explanation VIII.-An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.]”

15. Prior to Explanation VIII being added to S. 11, the position was that the Court which decided the former suit must have been competent to decide the subsequent suit as well, and if it was not, then res judicata would not apply. However, with the insertion of Explanation VIII, even if the Court which decided the former suit is not competent to decide the subsequent suit, res judicata will still apply provided that the former suit was decided by a competent Court. Accordingly, in case of differing pecuniary jurisdiction, where the second suit does have certain issues which were decided in the former suit, albeit by a Court that could not decide the subsequent suit, res judicata would still apply to the extent of those issues which were competently decided in the former suit. In such a case, the Court seized of the second Suit would not decide those issues that were decided by the first Court in the former suit. However, under our prevailing system, the position under the CPC remains unaltered, as no such explanation has been introduced. Be that as it may, as the issue of benami ownership is involved in the instant case as well as the Prior Suit, the underlying object of preventing parallel litigation in respect of the same issues and avoiding conflicting findings thereon could be served through consolidation of the matters.

16. In view of the foregoing, I am of the opinion that the present Suit is not liable to be stayed in terms of Section 10 CPC, and the Application under reference is accordingly dismissed, with no order as to costs.

JUDGE