

IN THE HIGH COURT OF SINDH KARACHI

Suit No. 316 of 2016

[Khawaja Muhammad Arif another v. Mst. Zeenat Begum & Others]

Plaintiffs : Khawaja Muhammad Arif and another through Ms. Sabra Qaiser, Advocate.

Defendants 1 to 3 : Mst. Zeenat Begum and 2 others through Mr. Waqas Wajid Wyne, Advocate.

Defendants 4&5 : Nemo.

Defendant No.6 : Karachi Metropolitan Corporation (KDA Wing) through Mr. Khursheed Javed, Advocate.

Date of hearing : 15-12-2020

Date of decision : 12-02-2021

ORDER

Adnan Iqbal Chaudhry J.- By order dated 21-11-2017, the Plaintiffs' counsel was put on notice to satisfy maintainability of this suit.

2. Mr. Waqas Wajid Wyne, learned counsel for the Defendants 1 to 3 submitted that this is the second suit on the same cause of action which was filed without permission of the Court under Order XXIII Rule 1(2) CPC at the time of withdrawing the first suit; hence this second suit was barred by Order XXIII Rule 1(3) CPC and Order II Rule 2 CPC. Ms. Sabra Qaiser, learned counsel for the Plaintiffs submitted that this second suit was filed when the Court had dismissed the first suit due to a formal defect; but later, after this second suit was filed, the Court recalled the dismissal order of the first suit; thus the Plaintiffs were compelled to withdraw the first suit.

3. Heard the learned counsel and perused the record.

4. Suit No. 2359/2015 (first suit) was filed by the Plaintiffs against Zeenat Begum (mother) and Sulman Yousuf (brother)

contending that though plot No. E-113, Block-F, North Nazimabad, Karachi (suit plot) was the property of Plaintiff No.1, he had on the request of his father gifted the suit plot to his mother by way of a registered gift deed dated 21-09-1980 with the intent and understanding that such property would ultimately devolve on both the Plaintiffs and their brother Sulman Yousuf; that taking advantage of the ill health of their mother, Sulman Yousuf managed to obtain from her a registered gift deed dated 26-08-2013 of the suit plot in his favour to exclude the Plaintiffs; hence the suit for declaration that the mother held the property as *benamidar*, and for cancellation of the gift deed executed by her in favor of Sulman Yousuf.

5. By order dated 02-12-2015 in Suit No. 2359/2015, the Court was of the view that the declarations sought in said suit did not reconcile with the averments of the plaint inasmuch as, on the one hand the Plaintiff No.1 contended that he was owner of the suit plot before gifting it to his mother, and on the other hand he sought a declaration that the mother was *benamidar* for the Plaintiff No.1, and yet another declaration that the suit plot was held by the mother for the benefit of both Plaintiffs and Sulman Yousuf. Thus, the Plaintiffs were put on notice to satisfy maintainability of the suit. The order sheet of Suit No. 2359/2015, dated 22-12-2015, shows that though that suit was dismissed in Court for reasons to follow, that order was not signed by the learned Judge, and on 17-05-2016 the following order was passed:

"17.05.2016

After hearing the learned counsel for the plaintiffs on 22.12.2015, I had dismissed this suit through a short order announced in Court, which was not signed by me as the matter was lying for recording reasons. Thereafter, I was not available at the principal seat for a considerable time in view of my roster sitting at Circuit Court Hyderabad. Due to this reason, I could not record the reasons of the said short order. After going through the record as well as my notes, I now feel that the matter should be fixed for rehearing as I have some queries which need to be satisfied by the learned counsel for the plaintiffs. Office is therefore directed to fix this matter for rehearing on 23.05.2016 at 12:00 noon after notice to the learned counsel for the Plaintiff."

6. In the meanwhile, on 26-01-2016 (before the above order), the Plaintiffs had filed the instant Suit No. 316/2016 to clarify that the suit plot had in fact been purchased by their father in the name of the Plaintiff No.1; and that being the case, the Plaintiff No.1 had gifted the same to his mother so that all sons of his father would ultimately inherit equal shares in it.

7. When Suit No. 2359/2015 (first suit) came up for re-hearing on 30-05-2016, the following order was recorded:

“30.05.2016

Mr. Naveed Ahmed Khan advocate undertakes to file power on behalf of the plaintiff in the instant suit. He states that after the announcement of the short order on 22.12.2015 regarding dismissal of this suit, the plaintiff filed Suit No. 316/2016 which is subjudice before this Court. At his request, office is directed to tag the file of Suit No. 316/2016 with the present suit on the next date.

To come up on 03.06.2016 at 11:30 am.”

8. On 16-08-2016, Suit No. 2359/2015 (first suit) was allowed to be withdrawn as follows:

“16.08.2016

Mr. Naveed Ahmed Khan advocate, who is appearing on behalf of plaintiff No.1, has filed power on behalf of plaintiff No.2 as well on 13.06.2016, which is available on record. He reiterates the statement made by him on 30.05.2016 that the plaintiffs have filed a fresh suit bearing No. 316/2016 before this Court, which is subjudice. He seeks withdrawal of the instant suit in view of the above. Accordingly, the suit and the pending CMA No. 174668/2015 are dismissed as withdrawn.”

9. Apparently, the instant suit (second suit) was filed after a short order was announced in Court that Suit No. 2359/2015 (first suit) was dismissed, and before such dismissal was revisited and the first suit was posted for re-hearing. In other words, at the time the first suit was withdrawn, the second suit had already been filed, and thus there was no occasion to seek permission for a fresh suit under Order XXXIII Rule 1(2) CPC. It is settled that the bar contained in Order XXXIII Rule 1(3) is not attracted to a suit instituted before the withdrawal of the earlier suit. For that proposition, see the cases of

Ashfaq Ahmad Khan v. Custodian of Evacuee Property (PLD 1966 W.P. Karachi 597); *Ghulam Nabi v. Muhammad Yaqub* (PLD 1983 SC 344); and *Jeewan Shah v. Muhammad Shah* (PLD 2006 SC 202). In any case, it cannot be said that the second suit was filed before withdrawing the first suit only to avoid permission of the Court under Order XXXIII Rule 1(2) CPC.

10. Adverting to the objection of Order II Rule 2 CPC, it was also held in *Ghulam Nabi v. Muhammad Yaqub* (PLD 1983 SC 344) that the bar of Order II Rule 2 CPC is not attracted to the second suit where the relief claimed in the first suit was incompetent or barred by law. In the case at hand also, it is manifest that the second suit was filed by the Plaintiffs as their first suit was not maintainable due to defective pleading, and that is why they withdrew the first suit. The question to the maintainability of the first suit is recorded in the order dated 02-12-2015 passed therein. Therefore, in view of *Ghulam Nabi's* case, this suit is not barred by Order II Rule 2 CPC.

11. In view of the peculiar circumstances of the case, and the law cited above, I hold that the instant suit is not barred by Order XXXIII Rule 1(3) CPC nor by Order II Rule 2 CPC. The question raised vide order dated 21-11-2017 stands answered.

JUDGE

Karachi
Dated: 12-02-2021