IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Muhammad Ali Mazhar** and **Agha Faisal**, **JJ**.

HCA 235 of 2009	:	Hameed A. Haroon vs. Hussain A. Haroon & Others
HCA 239 of 2009	:	Muhammad Hanif & Another vs. Hameed A. Haroon & Others
For the Appellants	:	Mr. Mansoor ul Arfin, Advocate Mr. Rasheed A. Razvi, Advocate (HCA 239 of 2009) Mr. Faisal Siddiqui, Advocate (HCA 235 of 2009)
For the Respondents	:	Mr. Mansoor ul Arfin, Advocate (HCA 235 of 2009 for Respondent nos. 7 & 8) Mr. Rasheed A. Razvi, Advocate (HCA 235 of 2009 for Respondent nos. 8 & 9) Mr. Faisal Siddiqui, Advocate (HCA 239 of 2009 for Respondent no. 1)
Dates of Hearings	:	22.11.2018 28.11.2018 21.12.2019 06.02.2019 27.02.2019 14.05.2019 28.05.2019 20.09.2019 03.10.2019 15.11.2019.
Date of Announcement:		17.02.2020

JUDGMENT

Agha Faisal, **J**. The present appeals assail respective findings in the order dated 08.07.2009 ("Impugned Order") rendered by a learned Single Judge of this Court in Suit 264 of 2007 ("Suit"). The appellant in HCA 235 of 2009 has impugned the dismissal of CMA 1777 of 2007 and CMA 1778 of 2007 ("Stay Applications") and the appellants in HCA 239 of 2009 have impugned the dismissal of CMA 4047 of 2007 and CMA 4223 of 2009 ("O.VII r.11 Applications"). Since the order impugned vide the subject High Court Appeals is common *inter se*, therefore, the said appeals were heard conjunctively and shall be determined by this common judgment.

2. Briefly stated, the facts relevant to the present controversy are that the appellant, in HCA 235 of 2009, had filed the Suit for declaration, injunction and cancellation and the learned Single Judge was seized of the matter. The said appellant had also filed the Stay Applications, seeking interim protective relief, whereas the appellants, in HCA 239 of 2009, preferred applications for rejection of the plaint, being the O.VII r.11 Applications. The learned Single Judge dismissed the applications under scrutiny, albeit the Stay Applications were dismissed with certain directions, hence, the present appeals.

3. The operative constituents of the Impugned Order, wherein findings were recorded in respect of the applications mentioned in the subject appeals, is delineated herein below:

Impugned findings with respect to the Stay Applications

> "22. This brings me to the injunction applications of the Plaintiffs. The judgment of the Division Bench of this Court reported as Hussain A. Haroon and others v. Laila Sarfaraz 2003 CLC 771 upheld in High Court Appeal the interlocutory order of injunction dated 10.10.2000 passed in suit No.596/1998. The Defendants appear to be correct in stating that once the said suit 596/1998 was withdrawn on 17.3.2006, all the interlocutory orders flowing from the said suit including the appellate order reported as 2003 CLC 771 would seize to hold the field. However, the principle of law decided in the latter reported judgment can be looked into for the purposes of deciding a case. In other words, the judgment passed in 2003 CLC 771 may not be applicable here as a judgment in personam but the law declared therein, will be available for any subsequent judicial determination (see in this regard Pir Bakhsh v. Chairman, Allotment Committee PLD 1987 SC 145, Atta Muhammad v. Member BoR 2003 CLC 149, Ikram Bari v. NBP 2005 SCMR 100 and Tara Chand v. KWSB 2005 SCMR 499.
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> 23. In 2003 CLC 771 (cited supra) it was held that once a Waqf was created, the right of the Waqif was extinguished and the ownership of the property which was the subject matter of the Waqf was transferred to God. It was also discussed in that case that the Mutawwalis were only managers and could not deal with the property as owners or act in a manner which was violative of the Waqf Nama/Waqf deed. In other words, it was observed that the mutawwalis could not act in violation of purpose and mandate prescribed by the Waqf. It was further pointed out that neither the mutawwalis nor the beneficiaries could waive any condition attached to the Waqf for the simple reason that a person could only waive his rights by way of estoppel or otherwise if he possessed those rights. In this property the mutawwalis or the beneficiaries could not change the conditions and requirements of the Waqf. It was further observed that any majority decision, beneficial to them would be no excuse to violate the mandate of the Waqf. Hence any amalgamation of the properties or correspondence exchanged by the beneficiaries in this regard would be of no consequence. The only exception provided in the precedented judgment under discussion is the doctrine of Cypres, which means "as nearly as possible". While relying upon the judgment reported as Salibai v. Bai Safiabeen ILR Vol. 36 Bom 111 and the Halsubry's Laws of India, Butterworths, New Delhi at paras 290 – 280, 290-281 and 290-282 it was held that if the original purpose of a trust could not be fulfilled, the Court could permit the utilization of the trust property for a purpose as nearly as possible to the original purpose under the doctrine of Cypres. I have further been able to lay my hands on Balkrishna Vishvanath v. Vinayak Narayan AIR 1932 Bombay 191 wherein it has been held, in the context of a will, that the doctrine of Cypres, can employed where due to the lapse of time and changed circumstances it is impossible to beneficially employ the property left by the founder donor as per his original directions. In Commissioner Lucknow v. Deputy Commissioner of Partabgarh AIR 1937 PC 240 it was observed that in the event of impracticability the trustees

could not abadon the claim nor could they employ the doctrine of Cypres without recourse to the Court of law. In S.B. Ajaib Singh v. Smt. Harnam Kaur AIR 1954 Punjab 150 it was held that the doctrine of Cypres has been evolved as an auxiliary to the main purpose of the trust and the said doctrine ipso facto is no excuse to defeat the original purpose of the trust and the said doctrine ipso facto is no excuse to defeat the original purpose of the trust. There are indeed clear judgments from the Indian jurisdiction which hold that the doctrine of Cypres is applicable to Muslim Waqfs [see Salebai v. Safiabai ILR (1905) 36 Bom 111 cited in Hussain A. Haroon and others v. Laila Sarfaraz 2003 CLC 771; Kusum Bibee v. Golam Hossein (1908) 10 CWN 449 and Nawab Syed M. Hashim Ali v. Iffat Ara Hamidi AIR 1942 Cal 180.

The doctrine of Cypres is applicable where although the original object to the charitable trust cannot be achieved, an object as nearly as possible similar to the original objective can be achieved. But where neither the original purpose nor a purpose similar thereto may be achieved, the doctrine of Cypres will not be able to save trust. In Re Hillier (1954) 2 All ER 59 it was held that the erection of a voluntary hospital delayed by war was impracticable after the National Health Services Act, 1946 precluded the erection of any new voluntary hospital. Other illustrations where the doctrine of Cypres was not able to save the “impossible” trust are:-

a) Re White’s Trusts (1886) 33 ChD 460 where the trusts were found to be impossible ab initio since suitable land could not be found to built institutions intended by the donors;

b) Re Burton’s Charity (1938) 3 All ER 90 and Murray v. Thomas (1937) 4 All ER 545 where the money donated was found to be insufficient for the achievement of the purposes proposed;

c) the precedent cited in sub-para (a) of Re White’s Trusts is also an authority for the proposition that the trust could fall where although there is sufficient donated money to establish a proposed institution, no funds are available for its maintenance;

d) Re Dominion Students’ Hall Trust (1947) Ch 183 where the trust failed since the consequences of observing the terms of the trust could lead to defeating the charity’s main object;

e) Re Woodhams (1981) 1 All ER 202 where acceptance of the trust by the trustees, named in the trust, was an essential part of the beneficial intention. Upon refusal of the proposed ‘trustee’ to act as a trustee or to accept the trust on the terms originally proposed, resulted in the failure of the trust.

25. In the present case the admitted position is that the suit property has already been demolished except an out house on the ground floor which is in a dilapidated state. Vide order dated 10.10.2000 passed in suit 596/1998 the Argument dated 25.11.1999 was stayed. Such order was upheld in High Court Appeal (see 2003 CLC 771). However, suit 596 of 1998 was withdrawn on 17.3.2006, whereafter the construction around the out-house was demolished. At the time when the order dated 10.10.2000 (in suit 596/1998) was passed, perhaps the out-house did not stand on its own. But now the position is different. The Court has ample power to notice a change in the surrounding circumstances (see Asghar v. Creators 2001 SCMR 279) Prima facie it appears to me that in view of that the remaining construction having been demolished, the out house cannot survive on its own. Also suit No.596/1998 was withdrawn on 17.3.2006, vacating all the interim orders operating therein. The Plaintiff waiting all along for nearly a year, whereafter the present suit was filed on 3.3.2007. No plausible explanation has been given by the Plaintiff to explain this inordinate delay during which the Defendants Nos. 8 and 9 have taken steps forwards the implementation of the agreement dated 25.11.1999 by carrying out the act of demolition and construction in question. In Abdul Ghafooor Memon v. Mohammad PLD 1975 Kar 464 a learned Single Judge of this Court refused to grant injunction when the objector to the construction had filed the suit 6 months after the commencement of the construction.

26. Again it is not denied by the Plaintiff that the Defendants Nos. 8 and 9 contributed by paying Rs.5 million to seek restoration of the lease in respect of the suit property which had expired. The said Defendants 8 and 9 appear to have also substantially expended on the trust property. Thus prima facie, the property no capable of being employed for the original purpose of the Waqf as contemplated in clause 15 of the Waqf Nama, the injunction applications being hit by laches and the equities not being in favour of the Plaintiff for the grant of the injunction in view of the contribution made by the third parties i.e. Defendants No. 8 and 9 to seek restoration of the lease of the trust property, this is not a fit case where the injunction can be granted. Accordingly,

CMAs Nos. 1777/2007 and 1778/2007 are hereby dismissed and the interim order is recalled, with no order as to costs…

28. Before parting it may be stated that the doctrine of Cypres cannot be employed without the permission of the Court, as observed above. Equally, various issues discussed above, inter alia, including and not limited to the aspect with regards the failure of the Trust/Waqf are left open. The parties are of-course at liberty to move the proper forum for the latter purposes. Decision, if any, will have to be taken, if called upon, keeping in view the equities tilting in favour of any of the parties, including the Defendants nos. 8 and 9. All observations as above are tentative in nature."

Impugned findings with respect to the O.VII r.11 Applications

"17. Admittedly, the Plaintiff was not a party or a signatory to the undertaking dated 16.3.2006. he also did not sign or gave consent to CMA No.1765/2006 in suit No.596/1998 (under order 23 rule 1 of the CPC) which culminated into passing of the order dated 17.3.2006 whereby the said suit 596/1998 was withdrawn. The record also shows that the order of 17.3.2006 passed in suit 596/1998 does not record the presence of the Plaintiff or his counsel. Therefore, it can be safely said that any compromise or agreement arising out of the CMA No.1765/2006 in suit 596/1998 culminating into any order of the Court or decree is only binding vis-à-vis the parties who consented to the undertaking dated 16.3.2006 or CMA No.1765/2006. The argument that the provisions of section 12(2) of the CPC bars a fresh suit and the Plaintiff could at best have filed an application u/s 12(2) challenging the order dated 17.3.2006 whereby suit No.596/1998 was withdrawn, is again misconceived. It is a settled proposition of law that a decree passed in a case is only binding on the parties of the lis and furthermore, consent decree or consent orders only bind those parties or persons who gave consent to the order or decree (on his point I have been able to lay my hands on Sarwar Khan v. Mir Ali 1980 CLC 110, Abdur Razzaq v. Abdul Aziz 1991 MLD 889, Sher Muhammad v. Barkat Bibi 1993 MLD 692, Muhammad Yar v. Sawan Mal 1993 SCMR 251, Ahmed Khan v. Irshad Begum 2007 MLD 331 and Muhammad Kalim Khan v. Muhammad Farouk Khan PLD 1987 Kar 38). The plaintiff not having given his consent to the undertaking dated 16.3.2006 or CMA no.1785/2006 in (suit 596 of 1998), the present suit is not barred u/s 12(2) of the CPC. Logically, the principle of res judicata, as mooted by the Defendants, was applicable to the consenting parties to the undertaking and withdrawal application in the earlier suit. And for similar reasons the suit is not found barred under the principle of res judicata.

18. The next objection of the Defendants is that since the Plaintiff was not a party to the agreement dated 25.11.1999, he cannot proceed to show that the consent for the purposes of the said agreement was obtained through fraud, coercion or misrepresentation; hence the provision of section 39 of the Specific Relief Act is not applicable. The argument is devoid of any merit. As correctly pointed by Mr. Adnan Chaudhry, Advocate, an agreement can be declared to be void without the need of having to cancel the same. In coming to such a conclusion I am fortified by the judgments relied upon by Mr. Chaudhry, in particular Mst. Halimah Bibi v. Muhammad Bashir 1989 CLC 1588.

19. The objections that the present suit is barred under sections 42, 54 and 56 of the Specific Relief Act, 1877 have also no substance. Much water has flown under the bridge. In H.A. Rahim v. Province of Sindh 2003 CLC 649 a learned Single Judge of this Court while repelling a similar argument was pleased to hold that section 42 is not exhaustive; and even if a declaration cannot be given, a Court is still empowered to grant injunction. This judgment of the learned Single Judge in H.A. Rahim has been cited with approval by a Division Bench of this Court in Arif Majeed Malik v. Board of Governors, Karachi Grammar School 2004 CLC 1029. Hence the argument of the Defendants in this regard is also rejected.

20. The last objection in pursuance of applications under order 7 rule 11 is that the suit is barred under articles 91 and 100 to the schedule of the Limitation Act. Again I am no impressed with this argument at this stage for the simple reason that prima-facie section 10 of the Limitation Act has excluded the application of latter statute in respect of Waqf properties. The judgment reported as Abdul Hameed v. Mahmood 1993 SCMR 1334 confirms this point. And even otherwise it is not known as to the exact time when the Plaintiff found out about the agreement dated 25.11.1999. Indeed, there is some merit in the contention of the Defendants that the construction work all was along underway and there was every likelihood of the Plaintiff all along knowing about the agreement dated 25.11.1999 and did nothing about it till the filing of the present suit. However, nothing can be decided on presumptions and this issue will require evidence. Also the above observations with regard to the application of the Limitation Act, in the peculiar facts and circumstances of the present suit, are

> tentative and the issue of limitation is left open to be decided after the recording of evidence.
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> 21. In light of the above discussion no case is made out for the rejection of the plaint under order 7 rule 11. Hence CMAs Nos. 4047 and 4223 of 2007 are hereby dismissed with no order as to costs."

4. The scope of this deliberation is demarcated by the ambit of the appeals under scrutiny and in such regard it is considered illustrative to reproduce the respective prayer clauses herein below:

HCA 235 of 2009

> "(a) set aside the Impugned Order dated 8/7/2009 passed in Suit No.264/2007 and allow CMA No.1777/2007 and CMA 1778/2007 filed in the said Suit…."

HCA 239 of 2009

> "It is therefore prayed in the interest of Justice, equity and good conscience that this Hon'ble Court may be pleased to set-aside/recall the order upto the extent of dismissal of the application under Order VII Rule 11 CPC and the plaint of the suit no.264/2007 may be rejected…."

It is considered imperative to record at this juncture that the appellants in HCA 239 of 2009 have confined their challenge to the findings in the Impugned Order with respect to the O.VII r.11 Applications and have pleaded no cavil to the determination undertaken by the learned Single Judge with regard to the Stay Applications.

5. In HCA 235 of 2009[1] the basic crux of the argument was that the dismissal of the Stay Applications was unmerited as it amounted to sanctioning the dissipation of the *corpus* of the *lis* during pendency of the suit. It was argued that the entire Suit would be rendered infructuous if third party interests are permitted to intervene.

It was argued that the learned Single Judge had accepted the plea that the suit property was trust property and had thus required that dealing therein be with the permission of the court, pursuant to the doctrine of cy-près. It was thus sought to be demonstrated that even though the Stay Applications had been dismissed, restrictions had been imposed / recognized with regard to treatment of the suit property. Learned counsel submitted that while the respondents never obtained any permission from the court, pursuant to the doctrine of cy-près, yet are proliferating unsanctioned dissipative activity upon the suit property.

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[1] Mr. Faisal Siddiqui, Advocate.

6. In HCA 239 of 2009 the petitioners' counsel[2] argued that the plaint in the Suit ought to have been rejected by the learned Single Judge, *inter alia*, on the grounds of *res judicata*. It was submitted that the Suit was not maintainable per the Specific Relief Act 1877. In addition thereto it was also averred that the Suit was barred by limitation.

7. We have heard the respective learned counsel at length and have also appreciated the documentation and authority to which our surveillance was solicited. It is observed at the very onset that the Suit remains pending as of date, therefore, we shall endeavor to confine ourselves to the specific issues before us, being the findings with respect to the two sets of applications, and proffer no observations, upon the merits, that may influence the proceedings in the Suit.

The pleadings of the present appeals circumscribe the scope of this determination to whether the findings rendered in the Impugned Order, with respect to the Stay Applications and the O.VII r.11 Applications, are sustainable. All the learned counsel sought to argue the present appeals at the *kutcha peshi* stage, with the assistance of the record and proceedings of the Suit, hence, the appeals were heard to length to adjudicate the following points for determination, framed in pursuance of Order XLI rule 31 CPC:

i. *Whether the findings of the learned Single Judge in the Impugned Order, with respect to the Stay Applications, are sustainable.*

ii. *Whether the findings of the learned Single Judge in the Impugned Order, with respect to the O.VII r.11 Applications, are sustainable.*

Stay Applications

8. The Stay Applications were filed with the ostensible intent to preserve the *corpus* of the *lis* pending adjudication of the Suit.

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[2] Mr. Mansoorul Arfin, Advocate & Mr. Rasheed A. Razvi, Advocate.

The Supreme Court held in the *Muhammad Zaman case*[3] that the object of interlocutory orders was to maintain the situation subsisting on the date when the party concerned had approached the court and to prevent the creation of a new situation. In the *Rahat Khan case*[4] it was observed that in a suit with respect to land if any encumbrance or interest was permitted to be created during the tenancy of the suit then the same may be prejudicial to any determination arrived at upon the conclusion of the said suit.

This Division Bench has consistently maintained, in the *Mondelez International case*[5], *Rani case*[6] and the *Chishti case*[7], that an interim order, as envisaged in Order XXXIX CPC, is intended to be a preventive or protective remedy for the purposes of preserving the status quo or preserving the corpus of the litigation pending the final determination thereof.

Ajmal Mian CJ. had observed[8] that interlocutory orders, of a competent court, would generally only merit interference to obviate a miscarriage of justice. Therefore, it is in this context that we shall endeavor to determine whether the findings of the learned Single Judge, with respect to the Stay Applications, are in accordance with the law.

9. The Suit is ostensibly in respect of trust property, which assertion is denied by some of the defendants therein[9]. The Stay Applications *inter alia* sought the preservation of *status quo* with respect to the suit property. The learned Single Judge, while treating the suit property as trust property, dismissed as Stay Applications on the premise of intervention of rights of specified third parties[10] therein. Since the suit property was treated as trust property, hence, any subsequent use of thereof was predicated upon orders of the court in employment of the doctrine of cy-près. It is considered expedient to reiterate that the

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[3] Per *Ajmal Mian CJ.* in *Islamic Republic of Pakistan vs. Muhammad Zaman Khan & Others* reported as *1997 SCMR 1508*.
[4] Per *Nadeem Azhar Siddiqui J.* in *Rahat Khan vs. Captain (r) Tahir Naveed & Others* reported as *2009 CLC 433*.
[5] *Ismail Industries Limited vs. Mondelez International & Others* reported as *2019 MLD 1029*.
[66] *Shahnawaz Jalil vs. Rani & Company & Others* reported as *2019 CLD 1338*.
[7] *Suriya Iqbal Chishti & Another vs. Rubina Majidullah & Others* reported as *2019 CLC 211*.
[8] *Islamic Republic of Pakistan vs. Muhammad Zaman Khan & Others* reported as *1997 SCMR 1508*.
[9] Appellants in High Court Appeal 239 of 2009.
[10] Appellants in High Court Appeal 239 of 2009.

contesting party[11] has not challenged these findings of the learned Single Judge.

10. The doctrine of cy-près, applicable in matters pertaining to trusts, was elaborated upon in the *Kandawala Trust case*[12] as follows:

> "17…. doctrine of Cypres has been evolved as an auxiliary to main purpose of the trust and the said doctrine ipso-facto is no excuse to defeat the original purpose of the trust. The doctrine Cypres is applicable where although the original object to the charitable trust cannot be achieved but an object as nearly as possible similar to the original objective can be achieved. But where neither the original purpose nor a purpose similar thereto may be achieved, the doctrine of Cypres will not apply to save the trust. In Halsbury's Law of India (Butterworth, New Delhi) "doctrine of Cypres has been explained as follows:--
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> "Cypres means following as nearly as possible the intention of donor. When a particular mode of charity indicated by donor is not capable of being carried into effect but the donor has expressed a general intention of charity, the Court does not allow the trust to fail but execute it 'Cypres' that is in some way as nearly as possible to that which the testator specified.
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> Failure of object given by the testator essential.
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> For the application of Cypres, the failure of the particular object specified by the testator is an essential pre-condition. Alternatively this doctrine can be applied when surplus is left after satisfying the purpose specified by donor.
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> The prime rule to be observed in the application of the Cypres doctrine is that donor intention must be observed as far as possible"
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> Reference can be made to the case of Hussain A. Haroon and others v. Mrs. Laila Sarfraz and others reported in 2003 CLC 771 and case of Hameed A. Haroon v. Yousuf A. Haroon and 10 others reported in 2009 MLD 1259.
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> 18. Halsbury's Laws of England, (4th Edition, Vol.5 page 430, paragraph 696) explains Cypres in the words that where a clear charitable intention is expressed, it will not be permitted to fail because, the mode if specified cannot be executed but the law still substitute another mode Cypres as near as possible to the mode specified by the donor. An application Cypres results from the exercise of the court's ordinary jurisdiction to administer a charitable trust of which the particular mode of application has not been defined by the donor. Where he has in fact prescribed a particular mode of application and that mode is incapable of being performed, but he had a charitable intention which transcended the particular mode of application prescribed, the court, in the exercise of this jurisdiction, can carry out the charitable intention as though the particular direction had not been expressed at all. In the case of Dr. Man Singh reported in 1974 Delhi 228, it was held that the judicial doctrine of Cypres adhered to by Courts whereby if a person had expressed a general intention with regard to his property and also directed a particular mode in which the general intention had to be carried out. Particular mode so set out is or has become either contrary to law or has otherwise not capable of being carried out either of lapse of time or change of circumstances, they in adequate cases try to give effect to that personals general intention as near as possible even by deviating from the original intention written by the settler and applying it beneficiary to similar purposes by or through an mode different from that enacted."

11. It is manifest that the interests of the two individuals[13] was given credence pursuant to an agreement. Per learned counsel, the same agreement is pending adjudication[14] for cancellation *inter alia* on

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[11] Appellants in High Court Appeal 239 of 2009.

[12] Per *Muhammad Ali Mazhar J.* in *Kandawala Trust & Another vs. The State* reported as *2013 MLD 640*.

[13] Appellants in High Court Appeal 239 of 2009.

[14] *Suit 713 of 2013*, plaint available at page 473.

account of non-performance by the same parties referred to supra. For the sake of argument, if we consider the observation of the learned Single Judge, dismissing the Stay Applications in view of intervening interests of two individuals, it would then raise the question as to whether the said decision would suffice to prevent the possibility of creation of any further third party interests in the suit property.

12. The issue before the learned Single Judge, on the date of determination of the Stay Applications, was to decide the best course of action in order to ensure that no (*further*) encumbrance or interest was permitted to be created in respect of the suit property during the tenancy of the Suit, so as to preclude any prejudice to the final determination thereof. It is our view that dismissal of the Stay Applications, albeit with the caveat of cy-près, did not adequately address the requirements of the law.

13. It is, thus, our considered view that the decision of the learned Single Judge, in respect of the Stay Applications, does not preserve the *corpus* of the *lis* pending adjudication of the Suit on the anvil of the authority discussed supra[15], hence, cannot be sustained. Therefore, we consider this to be fit circumstance meriting interference in the decision of the learned Single Judge under scrutiny, in keeping with the principles enunciated by the Supreme Court vide the *Muhammad Zaman case*[16].

O.VII r.11 Applications

14. In application of Order VII rule 11 CPC, it is settled law that the question of whether a suit was likely to succeed or not was irrespective of whether or not the plaint ought to have been rejected[17]. It is often seen that while a plaint could not have been rejected, however, a suit was dismissed eventually for a host of reasons. The evolution of law with respect to rejection of plaints was chronologically catalogued in the *Florida Builders case*[18] wherein *Saqib Nisar J.* illumined as follows:

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15 *1997 SCMR 1508*; *2009 CLC 433*; *2019 MLD 1029*; *2019 CLD 1338*; *2019 CLC 211*.

16 Per *Ajmal Mian CJ.* in *Islamic Republic of Pakistan vs. Muhammad Zaman Khan & Others* reported as *1997 SCMR 1508*.

17 *Al Meezan Investment Management Company Limited & Others vs. WAPDA First Sukuk Company Limited & Others* reported as *PLD 2017 Supreme Court 1*.

18 *Haji Abdul Karim & Others vs. Florida Builders (Private) Limited* reported as *PLD 2012 Supreme Court 247*.

"11. We now need to examine the grounds on the basis of which a plaint is to be rejected. There is a considerable amount of case-law on the point. This covers a wide spectrum with, on the one hand, emphasis being placed on the primacy of the statements in the plaint to the exclusion of everything else and, on the other hand, to include a perusal not merely of the plaint but also the documents attached therewith and, stretching the point even further, the other clear and obvious material on the record. The following are some of the important judgments on the point:

(i) In the case of Jewan and 7 others v. Federation of Pakistan (1994 SCMR 826), it was held that the law permits consideration only of the contents of the plaint and the defence raised in the written statement is to be disregarded. However, it was also observed that in addition to the plaint if there is some other material also available before the court which is admitted by the plaintiff the same can also be looked at. It was further observed that the court would not be entitled to examine any other material unless it was brought on record in accordance with the rules of evidence.

(ii) In the case of Haji Allah Bakhsh v. Abdul Rehman and others (1995 SCMR 459) it was observed that the averments contained in the plaint are presumed to be correct.

(iii) In the case of Anees Haider others v. Amir Haider and others (2008 SCMR 236) the court reiterated the principle that no reliance could be placed on the written statement.

(iv) The case of Saleem Malik v. Pakistan Cricket Board (PLD 2008 SC 650) is a little different to reconcile with the overwhelming weight of authority since that observation in this case was "that the court, may in exceptional circumstances, consider the legal objection in the light of averment of the written statement but the pleading as a whole cannot be taken into consideration for rejection of plaint under Order VII, Rule 11, C.P.C.". It is a little difficult to construe what the above observation means and perhaps the dictum contained herein should be confined and limited to the facts of this case alone.

(v) In the case, of Siddique Khan and 2 others v. Abdul Shakoor Khan and another (PLD 1984 SC 289) it was observed that Order VII, Rule 11 in a way is a penal provision to be strictly construed. However, this finding pertains to clause (c) of Order VII, Rule 11 alone which provides that a plaint is to be rejected only after the grant of the requisite time if the plaintiff has failed to pay the court fee. This case is thus not relevant or material for our purposes.

(vi) In the case of Muhammad Saleem and others v. Additional District Judge, Gujranwala (PLD 2006 SC 511) it was observed that Order VII, Rule 11 contemplates the rejection of a plaint only on the basis of averments made in the plaint and the pleas raised in the written statement are not to be considered. It was also observed that the court was entitled to rely on the documents annexed to the plaint.

(vii) In the case of S.M. Shafi Ahmed Zaidi v. Malik Hasan Ali Khan (2002 SCMR 338) the following finding was rendered:

"Besides, averments made in the plaint other material available on record which on its own strength is legally sufficient to completely refute the claim of the plaintiff, can also be looked into for the purpose of rejection of plaint. It does not necessarily mean that the other material shall be taken as conclusive proof of the facts stated therein, but it actually moderates that other material on its own intrinsic value be considered along with the averments made in the plaint. "It was further observed that "It is the requirement of law that incompetent suit shall be buried at its inception. It is in the interest of the litigation party and judicial system itself. The parties are saved their time and unnecessary expenses and the courts gets more time to devote it for the genuine causes."

(viii) In the case of Pakistan Agricultural Storage and Services Corporation Limited v. Mian Abdul Lateef and others PLD 2008 SC 371 it was held that the object of Order VII, Rule 11, C.P.C. was primarily to save the parties from the rigours of frivolous litigation at the very inception of the proceedings.

(ix) In the case of Salamat Ali v. Khairuddin 2007 YLR 2453 it was observed that although the proposition that a court while rejecting the claim under Order VII, Rule 11, C.P.C. could only examine the contents of the plaint, was correct nevertheless, this rule should not be applied mechanically.

(x) In the case of Arif Majeed Malik and others v. Board of Governors Karachi Grammar School (2004 CLC 1029) it was noted that the traditional view was that in order to reject a plaint under Order VII Rule 11 only the contents of the plaint were to be looked into. It was added, however, that this view had since been modified to the extent that an undisputed document placed on record could also be looked into for the aforesaid purposed.

(xi) In the case of Halima Tahir and 5 others v. Naheed and others (2004 MLD 227) it was held that in deciding a case under Order VII, Rule 11 only the averments in the plaint are to be considered.

(xii) In the case of Ghulam Dastagir and others v. Mariyum and others (1993 MLD 1005) the point was reiterated and it was added that the allegations in the plaint have to be accepted as correct.

(xiii) Additional High Court judgments which do not add anything further to what has been contained hereinabove are contained in the cases reported in 1981 CLC 1009, 2006 CLC 919, 2006 CLC 303, 1981 CLC 533, PLD 1981 Karachi 604, PLD 1978 Karachi 267 and therefore need not be examined any further.

12. After considering the ratio decidendi in the above cases, and bearing in mind the importance of Order VII, Rule 11, we think it may be helpful to formulate the guidelines for the interpretation thereof so as to facilitate the task of courts in construing the same.

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 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."

15. It merits mention at this juncture that the aforesaid observations are required to be paramount considerations before a learned Judge, seized of an application seeking rejection of a plaint, whereas, and the role of the appellate court is to consider whether the order passed was in consonance with the law.

16. It is demonstrated from the Impugned Order that learned Single Judge painstakingly addressed each of the averments of the appellants and concluded that the Suit was not barred pursuant to the principles of *res judicata* and / or the Specific Relief Act 1877.[19] In so far as the objection with respect to limitation is concerned it was observed that the said issue was left open to be decided after the recording of evidence.

17. The arguments advanced before us, by the learned counsel for the appellants, have been unable to dispel the reasoned conclusions arrived at by the learned Single Judge, while determining the O.VII r.11 applications.

The questions with regard to *res judicata* and the purported bar per the Specific Relief Act 1877 have been addressed in reliance upon an overwhelming preponderance of case law[20] and we find the observations of the learned Single Judge, in such regard, to be in consonance with the law.

In so far as the issue of limitation is concerned the learned Single Judge, in his wisdom, had observed that the said issue may be best determined post tendering of evidence, hence, was left upon. While the respective learned counsel had argued this issue before us, we consider it prudent to eschew any determination or commentary thereupon in view of the observation that this matter is required to be addressed once evidence has been adduced.

A Division Bench of this court has held in the *Rana Imran case*[21] that in the instance of controversial questions of fact and / or law, the provisions of Order VII rule 11 CPC would not be attracted and the proper course for the court, in such cases, was to frame the relevant issue/s and decide the same on merit in the light of evidence and in accordance with the law.

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[19] The relevant observations of the learned Single Judge are reproduced supra, hence, it is considered appropriate to eschew any reiteration thereof.

[20] *Sarwar Khan vs.* reported as *Mir Ali 1980 CLC 110*; *Abdur Razzaq vs. Abdul Aziz* reported as *1991 MLD 889*; *Sher Muhammad vs. Barkat Bibi* reported as *1993 MLD 692*; *Muhammad Yar vs. Sawan Mal* reported as *1993 SCMR 251*; *Ahmed Khan vs. Irshad Begum* reported as *2007 MLD* 331; Muhammad *Kalim Khan vs. Muhammad Farouk Khan* reported as *PLD 1987 Karachi 38*; *Halimah Bibi vs. Muhammad Bashir* reported as *1989 CLC 1588; Arif Majeed Malik vs. Board of Governors, Karachi Grammar School* reported as *2004 CLC 1029*.

[21] Per *Muhammad Ali Mazhar J.* in *Rana Imran & Another vs. Fahad Noor Khan & Others* reported as *2011 YLR 1473*.

18. The O.VII r.11 Applications were dismissed as it did not *appear* to the learned Single Judge that the plaint was barred by law. The import of the word *appear* has been considered in the *Florida Builders case*[22] and the Supreme Court has deciphered the legislative intent to mean that if *prima facie* the court considered that it *appears* from the statements in the plaint that the suit was barred, then it should be terminated forthwith. In the present facts and circumstances the learned Single Judge has cogently reasoned as to why the plaint in the Suit did not *appear* to be barred by law. Learned counsel for the appellants have been unable to demonstrate any lacuna in the reasoning and / or infirmity in the exercise of discretion by the learned Single Judge, hence, and we do hereby sustain the decision of the learned Single judge with respect to the O.VII r.11 Applications.

19. It is our considered view that the Impugned Order has exhaustively catalogued the averments of the appellants and addressed them for the purposes of determining the applications under scrutiny. It is noted that the learned Single Judge has clearly specified that certain matters may be addressed after recording of evidence as the same did not merit adjudication at a nascent stage on the basis of surmises and presumptions. The appellants have been unable to demonstrate any defect with respect to the findings of the learned Single Judge with respect to the O.VII r.11 Applications, therefore, High Court Appeal 239 of 2009 is hereby determined to be devoid of merit.

20. In view of the discussion and reasoning herein, the appeals under scrutiny are determined in the manner delineated herein below:

i. High Court Appeal 235 of 2009, along with pending application/s, is hereby allowed in the following terms:

a. The decision contained in the Impugned Order, in so far as the Stay Applications, being CMA 1777 of 2007 and CMA 1778 of 2007, are concerned, is hereby set aside.

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[22] *Haji Abdul Karim & Others vs. Florida Builders (Private) Limited* reported as *PLD 2012 Supreme Court 247.*

b. The Stay Applications are hereby disposed with directions that the defendants are restrained from creating any third party interests in the suit property and barred from raising any construction thereupon, till the final adjudication of the Suit.

ii. High Court Appeal 239 of 2009, along with pending application/s, is hereby dismissed with no order as to costs.

iii. The Impugned Order, dated 08.07.2009 in Suit 264 of 2007, stands varied to the extent provided herein.

iv. The learned Single Judge may adjudicate the Suit uninfluenced by any observations herein contained.

J U D G E

J U D G E

*Farooq PS/**