

ORDER SHEET
HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD

IInd Appeal No.70 of 2021
(Mehfooz Ahmed versus Mst. Rehmat Begum & Ors)

DATE	ORDER WITH SIGNATURE OF JUDGE
Appellant	: Through Mr. Imdad Ali Unar advocate
Respondent No.1	: Through Mr. M. Arshad Pathan advocate
	Through Mr. Allah Bachayo Soomro Additional Advocate General Sindh
Date of hearing:	01.11.2021
Date of decision:	22.11.2021

O R D E R

ADNAN-UL-KARIM MEMON, J. - This appeal has been directed against the judgment and decree dated 06.08.2021 passed by learned IXth Additional District Judge / MCAC-I Hyderabad in Civil Appeal No.142 of 2020 [*Re: Mehfooz Ahmed versus Mst. Rehmat Begum & others*], whereby the learned Judge was pleased to maintain the order dated 29.10.2020, through which learned VIIIth Senior Civil Judge Hyderabad rejected the plaint of F.C Suit No.523 of 2020 [*Re: Mehfooz Ahmed versus Mst. Rehmat Begum & Ors*] under Order VII Rule 11 CPC.

2. Mr. Imdad Ali Unar learned counsel for the appellant contends that the appellant and respondent No.1 have been carrying on partnership business with the name and style of "M/s Haji Motors along with Abdul Qayoom Zareen Imtiaz through The Deed of Partnership dated 15.04.2013, duly registered with respondent No.2, vide certificate of registration bearing No.24271 dated 10.07.2013; however, later on, both the partners with their mutual consent and agreement stood retired from partnership of firm; and, such deed of retirement was executed on 15.09.2015; and, the respondent No.2 had also issued the amended certificate accordingly on 30.10.2015, resultantly the appellant and respondent No.1 only remained partners of the firm; and, mutually agreed to carry on the business, and accordingly, they executed the deed on 16.09.2015 before respondent No.2. He next contended that both the appellant and

respondent No.1 were having 50% share in the business and later on respondent No.1 agreed to sell her 50% to the appellant and accordingly they entered into a sale agreement on 23.09.2019 against total sale consideration of Rs.5,00,00,000/-, out of which appellant had paid her Rs.2,50,00,000/- through pay orders, which were also acknowledged by respondent No.1. He further contended that the remaining amount of sale consideration was settled to be paid on 19.12.2019; and, the same was duly arranged and offered by appellant to respondent No.1 on the due date; however, she requested the appellant to delay the sale transaction as her husband was admitted in NICVD Hyderabad; who later on passed away on 17.01.2020 and in February 2020 the appellant again requested the respondent No.1 to receive the balance sale consideration and transfer the partnership; however, she kept him on false hopes and finally refused to execute the sale deed, hence he filed the subject suit for specific performance of contract; however, the plaint was rejected under Order VII Rule 11 CPC and appeal thereto was also dismissed. Learned counsel emphasized that the suit was dismissed on the ground of improper pleadings, which otherwise was not available under Order VII Rule 11; however, in appeal, an application for amendment of pleadings was filed, but the same was dismissed along with the main appeal. In support of his contention, he relied upon the case of Mst. Sharifan Bibi and others v. Malik Sharif Parvez and others (2008 SCMR 757); Saleem Malik v. Pakistan Cricket Board (PCB) and 2 others (PLD 2008 Supreme Court 650); M. Yousuf Adil Saleem & Co and 7 others v. Hamid Masood (2007 CLC 994).

3. Conversely Mr. M. Arshad Pathan, learned counsel for respondent No.1 argued that the appellant has no legal character and locus standi and he has chosen the wrong forum to contest the matter. He next argued that the appellant filed suit for Specific Performance of Contract in respect of the share, which is not covered under the Specific Relief Act. He also argued that admittedly the appellant has unfolded the registered partnership, hence by all means Partnership Act would be applicable and the Companies Act as well, according to which the transfer / purchase of share is the prerogative of the company judge sitting at the Principal Seat of this Court at Karachi as provided by Section 5 of the Companies Act; and, the civil court has no jurisdiction at all. He while reiterating the

contentions of his counter-affidavit, prayed for dismissal of this appeal. In support of his contention, he relied upon the cases reported as Haji Abdul Karim and others v. Messrs Florida Builders (Pvt) Limited (PLD 2012 Supreme Court 247); Managing Director, Oil and Gas Development Company Ltd v. Syed Najmul Hassan Naqvi (2005 SCMR 890); Atta Muhammad Khan and another v. Lasbella Cement Ltd (1999 CLC 1795); Messrs M.A Majeed Khan v. Karachi Water and Sewerage Board and others (PLD 2002 Karachi 315) & The Collector of Customs (Appraisement) Collectorate of Customs, Government of Pakistan, Customs House, Karachi and others v. Messrs Imran Enterprises through Proprietor and others (2001 CLC 419).

4. I have heard learned counsel for parties and perused the material available on record and the case-law cited at the bar.

5. It is well settled that under the Partnership Act if any dispute or difference arises amongst the partners concerning partnership deed or the business of partners or to any matter relating to the partnership firm, the same should be resolved by arbitration and the judgment on arbitration shall be treated as final. The said judgment shall be acceptable and binding upon all the parties to the partnership deed and their legal heirs and nobody shall take recourse to any court of law.

6. The question involved in the present proceedings is whether F.C. Suit No. 523 of 2020 for Specific Performance of Contract, Recovery of Amount and Permanent Injunction filed by appellant/ plaintiff against respondent / defendant No.1, in respect of her 50% share in the firm M/S Haji Motors, was / is barred by any law; and plaint was rightly rejected by the learned trial court vide Order dated 29.10.2020 on the ground of improper pleadings, which otherwise was not available under Order VII Rule 11 CPC?

7. Learned Appellate Court to ascertain the legal position of the case, framed the points of determination to the extent whether the learned trial court while passing impugned Order dated 29.10.2020 in F.C Suit No. 523 of 2020 filed by Appellant Mehfooz Ahmed has committed any illegality or irregularity and same calls for interference; and after hearing the parties dismissed the appeal of the

appellant vide judgment and decree dated 6.8.2021, with the following reasoning:-

POINT No.I.

“11. A perusal of the R&Ps shows that appellant/plaintiff filed suit for Specific Performance of Contract, Recovery of Amount and Permanent Injunction. The appellant alleged in plaint that he and defendant No.1 were partners in partnership firm to the extent of 50% share each and he further alleged that through sale agreement dated 23.09.2019 the defendant No.1 agreed to sell her 50% share in partnership firm to the plaintiff and he further alleged that defendant No.1 received Rs.51,098,660/- in respect of different jobs and the defendant No.1 is still liable to pay difference amount to plaintiff. The suit filed by the plaintiff/appellant is with regard to partnership between two partners. The main grievance of the plaintiff is transfer of 50% share in his favour by defendant/respondent No.1 and he prayed for execution of sale deed through Nazir. The learned trial court has rightly observed that the suit was not for Specific Performance of Sale agreement of any immovable property and no specific immovable property is the subject matter of the suit and moreover, the defendant/respondent No.1 is not the owner or co owner of any specific immovable property for the sale she executed the subject sale agreement. The learned trial court has rightly observed that the case of the appellant is not for the specific performance of the sale agreement of the immovable property but on the contrary with regard to sale of partnership firm by one partner to another partner, hence the record reveals that appellant/plaintiff has availed wrong remedy. The learned trial court has rightly observed that the suit of the plaintiff is not maintainable and the Nazir of the court cannot be directed to execute registered sale deed of transfer of share in the partnership firm in favour of the plaintiff, hence the learned trial court has rightly observed that no cause of action had occurred to plaintiff to file suit seeking performance. The filing of an application U/O 6 Rule 17 CPC by learned counsel for appellant is also admission on his part that the suit was filed before learned trial court with wrong prayers and suit was incompetent and the amendments so sought by him shall change the entire nature and character of the suit and moreover since the plaint was rejected by learned trial court, hence the same amendment cannot be permitted at this belated stage. The filing of the application U/O 6 Rule 17 CPC along with appeal and the prayer of learned counsel for appellant to allow the appeal along with listed application clearly indicate that the amendments so sought change the entire nature and character of the suit as well as cause of action. It is well settled that incompetent suit must be buried to its inception to save the precious time of the court. The learned trial court has passed the order rightly and no illegality or irregularity has been pointed out by the learned counsel for the appellant, hence the same order calls for no interference of this court **“Finding Accordingly”**.

POINT No.II.

12. In view of above discussion the appeal in hand stands dismissed along with listed applications with no order as to costs. Consequently, the order dated 29.10.2020 passed by learned trial court is hereby maintained.”

8. In principle, the plaint of the appellant in his suit for Specific Performance of Contract dated 23.9.2019, Recovery of Amount and Permanent Injunction regarding the sale of 50% shares in the partnership firm M/S Haji Motors with further prayer for payment of Rs.12,869,654, has been rejected by learned trial Court on the ground that the case of the appellant is not for specific performance of sale agreement of immovable property but on the contrary concerning the sale of partnership firm by one partner to another partner; however, the same findings were concurred by the learned Appellate court holding the same position.

9. Learned counsel representing the respondents has heavily relied upon Section 5 of the Companies Act 2017 and argued that the subject suit is barred under the aforesaid law; he also cited various provision of Specific Relief Act and reiterated the same stance.

10. To see whether the suit is barred under the Companies Act 2017, an excerpt of Section 5 of the Companies Act 2017 is reproduced as under:-

“5. Jurisdiction of the Court and creation of Benches.—(1) The Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situated.

(2) Notwithstanding anything contained in any other law no civil court as provided in the Code of Civil Procedure, 1908 (Act V of 1908) or any other court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Court is empowered to determine by or under this Act.

(3) For the purposes of jurisdiction to wind up companies, the expression —registered officel means the place which has longest been the registered office of the company during the one hundred and eighty days immediately preceding the presentation of the petition for winding up.

(4) There shall be, in each High Court, one or more benches on permanent basis, each to be known as the Company Bench, to be constituted by the Chief Justice of the High Court to exercise the jurisdiction vested in the High Court under this Act: Provided that Benches constituted under the Companies Ordinance, 1984 (XLVII of 1984), shall continue to function accordingly unless otherwise notified by the respective Chief Justice of the High Court: Provided further that provisions of section 6 shall be effective from the date of notification by the Chief Justice of the respective High Court within

one hundred and eighty days from the date of the commencement of this Act.

(5) There shall be a Registrar to be known as –Registrar of the Company Bench duly notified by the Chief Justice of the respective High Court who shall be assisted by such other officers as may be assigned by the Chief Justice of the respective High Court.

(6) The Registrar of the Company Bench shall perform all the functions assigned to it under this Act including all ministerial and administrative business of the Company Bench such as the receipt of petitions, applications, written replies, issuance of notices, service of summons, and such other functions or duties as may be prescribed under section 423.

(7) The Chief Justice of the respective High Court, if deemed appropriate, may also establish a secretariat in each Company Bench of the respective High Court in such form and manner to provide secretarial support and to perform such functions as may be prescribed under section 423.”

11. Prima-facie, the stance of respondent is entirely misconceived on the aforesaid proposition. The above provision explicitly provides that notwithstanding anything contained in any other law no civil court as provided in the Code of Civil Procedure, 1908 (Act V of 1908) or any other court shall have jurisdiction to entertain any **suit or proceeding in respect of any matter which the Court is empowered to determine by or under this Act.** Primarily, the Companies Act, 2017 deals with the issues arising out of companies registered under the Companies Act, and not otherwise, whereas the subject issue is arising out of Partnership Firm, which is duly registered under the Partnership Act and not under the Companies Ordinance and /or Companies Act, 2017, thus filing an application for rejecting the plaint on the plea that the suit is barred under the Companies Act, 2017 was / is the erroneous approach.

12. The private respondent by filing written statement controverted the averments of the plaint, and denied the allegations leveled about its failure or inability to perform its part of the agreement; however, there is no specific denial of the factum of payment of amount through pay orders, which needs evidence. Even there was / is no plea that the suit filed beyond the period of three years from the date of alleged agreement; and, was hopelessly barred by time, besides, filing written statement, the respondent also moved a separate application under Order VII Rule 11, C.P.C. seeking rejection of plaint, on account of being barred by law. It is on this application that the impugned order dated 29.10.2020 was passed by the learned

trial Court, which has been upheld in 1st Appeal and is now under challenge.

13. At this stage it would be appropriate to have a glance over Order VII Rule 11 CPC, which is reproduced as under :

"(11) Rejection of plaint. ---The plaint shall be rejected in the following cases:

- (a) Where it does not disclose a cause of action.
- (b) Where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) Where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- (d) Where the suit appears from the statement in the plaint to be barred by any law.

14. The Honorable Supreme Court in the case of Haji Abdul Karim & Others vs. Messrs Florida Builders (Private) Limited **PLD 2012 Supreme Court 247** has held that the court must reject the plaint if one or more of the four clauses is found to be applicable. This is made clear by the use of the word "shall" in the opening phrase. The first clause need not detain us for long since it contains a clear statement that in case the plaint does not disclose a cause of action it is to be rejected. The next two clauses, namely, clauses (b) and (c) relate to the valuation of plaint and the stamp duty to be affixed thereon and again do not require much discussion. It is the last clause, namely (d) to which most of the litigation has taken place; therefore, it requires careful analysis. Clause (d) has three constituent elements; first part uses the important word "appears", the second part relates to statements made in the plaint, (i.e. there is no reference to the written statement) and the third part states the inference to be drawn if a suit "appears" from the statement in the "plaint" to be "barred" by any law. If this is read in conjunction with the opening words of Rule 11 it makes mandatory for the court to reject the plaint.

15. It is apparent from the foregoing that for consideration of an application under Order VII Rule 11 CPC it is the content of the plaint that is to be given primacy. The determination required to be undertaken is to fall squarely within the parameters whether the suit appears from the statement in the plaint to be barred by any law. Respectfully, the learned trial Judge has rejected the plaint in presence of grounds and prayers contained in the plaint, exclusive to the issue whereupon findings were rendered, on the unsustainable ground.

16. Therefore, in presence of independent additional grounds and prayer clauses, not found to be barred in law by any statement in the plaint, the rejection of a plaint could not be sustained in law. On the aforesaid proposition, I am fortified by a Division Bench judgment of this Court dated 01st September 2010 passed in *HCA 203 of 2009* titled *Muhammad Amin Lasania vs. M/s. Ilyas Marine & Associates (Pvt.) Limited* ("**Amin Lasania**"), wherein it was held as follows:

“a plaint cannot be rejected in part. Therefore, even if the main or primary cause of action is barred, and it is only a secondary (and clearly less important) cause of action that is not, the plaint cannot be rejected in respect of that part which relates to the primary cause of action.”

17. *Amin Lasania* was followed by another Division Bench judgment of this Court in *Nishat*, wherein it was held as follows:

“It is also a well-accepted principle for deciding an application under Order VII, Rule 11 CPC that plaint in a suit cannot be rejected in piecemeal.”

18. The judgment of honorable Supreme Court titled *Jewan & Others vs. Federation of Pakistan & Others* (reported as **1994 SCMR 826**), discussed in *Haji Abdul Karim*, articulated the principle that while hearing an interim application all material available on record may be evaluated but in the determination of whether a plaint was liable to be rejected only the plaint and its accompaniments were required to be examined.

19. In my considered opinion, that in the present facts and circumstances, applying the ratio of judgments cited supra, rejection of plaint under Order VII Rule 11 CPC, 1908, was not warranted.

20. In the light of what has been discussed above, I see massive illegality and perversity in both the judgments passed by learned Courts below on the point of law, as such, both the decisions need to be set at naught.

21. In view of foregoing, the judgment and decree dated 06.08.2021 passed by learned IXth Additional District Judge / MCAC-I Hyderabad in Civil Appeal No.142 of 2020; and, the order dated 29.10.2020, through which learned VIIIth Senior Civil Judge Hyderabad rejected the plaint of F.C Suit No.523 of 2020 under Order VII Rule 11 CPC is set-aside, resultantly this IInd Appeal No. 70 of 2021 is allowed. The matter is remitted to learned trial Court, for further proceedings in Suit No.523 of 2020, under the law and subject to this decision.

Sajjad Ali Jessar

JUDGE