

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
LARKANA**

Civil Revision Application No.09 of 2010

Applicant: Assistant Administrator E.T.P Sindh,
Through Mr. Niaz Ahmed M. Shaikh, Advocate.

Respondent(s): Mohammad Ali Khan & others
Through Mr. Bashir Ahmed Dargahi, Advocate

Date of hearing: 30.11.2018

Date of decision: 30.11.2018

J U D G M E N T

KHADIM HUSSAIN TUNIO, J.- Through instant civil revision applications filed under Section 115 Cr.P.C, the applicant has challenged the order dated 04.12.2009, passed by the learned VIth Additional District Judge, Larkana in Civil Appeal No. 12 of 2007 wherein he allowed the appeal and set-aside the order of learned lower Court, rejected the plaint and in F.C Suit No. 59 of 2006 passed by learned 2nd Senior Civil Judge, Larkana under Order VII Rule 11 CPC filed by the appellant.

2. Brief facts of the prosecution case are that the respondent filed suit before trial Court for declaration and permanent injunction against the applicant while asserting that the properly bearing C.S. No.1507/2-C Ward C was purchased by the respondent from the legal heirs of one Ghulam Mustafa through registered sale deed and no objections were raised by anyone. Later on, the respondent was served notices by the Evacuee Trust Authority, whereby it was noted that the said property was in fact an evacuee trust property and the respondent provided his defence, however, the same was declared as a trust property, hence the respondent filed suit. The suit was

dismissed by the trial court after an application from the applicant u/o VII Rule 11 which was challenged by the respondent with the appellate Court, where the order of the trial Court was set aside and matter was remanded to the trial Court for recording of evidence.

3. Learned counsel for the appellant has contended that the appellate Court has grossly erred in passing the judgment in utter disregard of law and facts; that the impugned judgment violates the law and consists of patent illegality and irregularities; that the learned appellate Court has failed to apply his judicial mind while passing the impugned judgment; that the learned Appellate Judge has misconstrued the legal aspects of Order VII Rule 11 CPC and failed to apply the same, and failed to exercise jurisdiction; that the jurisdiction of the learned trial Court is barred and has no jurisdiction as per Section 14 of Act. No. XIII of 1975 Bar of Jurisdiction so as otherwise provided in this Act, no Civil Court shall have jurisdiction in respect of any matter which the Federal Government or an officer appointed under this Act to determine, and no injunction process or order shall be granted or issued by any court or other authority in respect of any action taken or to be taken in exercise of any power conferred by or under this Act.

4. Conversely, learned counsel for the respondents has opposed the instant civil revision application and supported the impugned judgment of the appellate Court.

5. I have given due consideration to the arguments advanced by the learned counsel for the parties and perused the record.

6. It is pertinent to observe here that the rejection of plaint in the meaning of Order VII Rule 11 C.P.C and dismissal of the suit on the ground of its maintainability on the factual pleas are entirely two

different things. Very basis of the suit disappears by the rejection of the plaint, while dismissal of the suit comes to an end. When factual controversy is involved, the plaint cannot be rejected in spite of the fact that the plaintiffs may not succeed in establishing allegations made in the plaint. Therefore, the same could not be decided while deciding an application under Order VII Rule 11 C.P.C as the question of factual controversies should have been resolved in the light of evidence adduced. The dispute of nature of property is a bundle of distorted facts which cannot summarily be decided while considering an application under Order VII Rule 11 CPC. Therefore, it may lead to an ultimate dismissal but not to a rejection of plaint.

7. It has been observed in the case of ***Muhammad Arif and two others v. Allah Wasaya (2016 CLC Note 29)*** that:-

It is by now established that in the light of referred provision plaint can only be rejected on the grounds mentioned therein and not otherwise. The disclosure of cause of action cannot be easily and readily accepted in cases where serious allegations are made and without recording evidence, the same cannot be acceded to by choosing easy path to get rid of the lis rather it is obligatory upon the court to ask for the defence and after affording opportunity of producing pro and contra evidence, the matter shall be decided and not to reject the plaint at outset without adhering to the legal provision applicable to the case. The same is the case with other conditions including the bar which is to be ascertained from the statement of plaint and if specific version is averred in the plaint, as in the instant case in Para 5 contains the allegations regarding the knowledge, two months prior to institution of suit, the same cannot be overlooked without being properly adjudged after asking for the defence and provision thereof through normal course provided for civil cases.

(emphasis supplied)

8. From the perusal of record, it pertains that the respondents claimed to be the *bona fide* purchasers of the property in question and they also claim that they have spent huge sums of money to renovate and rehabilitate the land in question. Per their claim, they had also submitted all the documentary evidence before the applicant to prove that the property was not a *trust property* and that they did not have to prove that the same was a trust property as it was the claim of *Evacuee Trust Authorities*, therefore the burden of proof was over them to prove that the property in question was indeed a trust property. The respondents also claimed that the property had been in their name before the year 1968 whereas it was proclaimed to be evacuee trust property until 1985. At this junction, I would like to

hold that the nature of any trust deed or the determination of nature of property to be a trust can only be affected if the same place is either a place related to a religious, charitable or educational cause or that the earnings from the same property were dedicated to a charitable cause. Since the order passed by the learned trial Court was not based on any evidence, evidence *has not* been produced in the present case, *at all*, the recording of the same is necessary to determine the question whether the property is indeed an *evacuee trust property* or not. The learned appellate court has rightly placed its reliance on cases reported as **1994 SCMR 1908 & 2000 SCMR 1371**.

9. It was further observed in the case of **Muhammad Arif**(*supra*) that:-

“11. The appellate court has on acceptance of appeal remanded the case to the trial court for decision in accordance with law and rightly done so, as the provision of Order VII, rule 11, C.P.C. are not attracted nor the lis can be hit under Order I, rule 9, C.P.C. and provision of Order I, rule 10(2), C.P.C. are there for redress, and warrants no interference, which is hereby upheld.

12. For the reasons mentioned above, the instant revision petition being bereft of any merit is hereby dismissed; leaving the parties to bear their own costs.”

10. In the light of above referred case law and from the aforementioned discussion and circumstances, learned appellate Court assigned sound reasoning, properly applied the relevant law and rightly set-aside the order of the trial Court and remanded the case, therefore the impugned order is upheld and the case is remanded back to trial Court with directions to frame issue on facts and law and record the evidence of the parties and to dispose of the matter according to law.

These are the reasons for the short order dated 30.11.2018.

JUDGE