

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

*Civil Revision Application No.31 of 2010*

**Applicant:** Akhtar Ali, through Mr. Abdul Rehman Bhutto, Advocate.

**Respondent(s):** Hazar Khan through L.Rs & others, through Mr. Noushad Ali Tagar, Advocate Res. No. 2-5 & 7-10

**The State:** Ali Akbar Kalhoro, state counsel.

**Date of hearing:** 20.12.2018

**Date of decision:** 20.12.2018

**ORDER**

**KHADIM HUSSAIN TUNIO, J.-** Through instant Civil Revision application filed under Section 115 Cr.P.C, the applicant has challenged the order dated 03.09.2009, passed by learned III<sup>rd</sup> Senior Civil Judge Larkana whereby he rejected the plaint of F.C Suit No. 92 of 2008 and judgment dated 10.03.2010 and decree dated 13.03.2010 passed by I<sup>st</sup> Additional District Judge Larkana in Civil Appeal No. 100 of 2009.

2. Briefly, facts initially leading to the filing of F.C Suit No. 92 of 2008 are that the applicant filed the suit for declaration, recovery of possession, mense profits and permanent injunction. Per his pleadings, he was the owner of a *sikni* plot measuring 6,000 Sq. Feet which was un-surveyed, formed out of agricultural land and survey No. 538 situated in Deh Naudero. He had purchased the same plot from Wazir Ali, through his Attorney Hazar Khan (*deceased*). Respondent No. 1 asked the applicant for permission to raise construction over the same plot as it was unoccupied, therefore applicant permitted him to do so. Thereafter, Respondent No. 1 raised a residential house and a small shop. In the year 2005, the applicant was surprised to see that the respondent No. 1, 3, 4 & 5 had started fortifying the construction (*pakka construction*) without the consent of the applicant, therefore the applicant asked to meet him, however the respondent avoided the meeting. The applicant met with

respondent Nos. 3, 4, 5 & 6 who disclosed that Respondent No.1 had claimed to be applicant's attorney and sold the land to the respondents. The applicant came to know that the respondent No. 1 had also sold further land of 3000 *sq. feet* to the respondents who were at that time minors, therefore transaction was made via Respondent No. 2. The respondents, to save themselves from being prosecuted, started negotiating with the applicant, however the applicant suffered cardiac disease and underwent by-pass surgery and was under bed rest for 12 months. During this time, respondents continued to rent out the shops that they had constructed. Therefore, the applicant finding no other alternative solution filed the Suit. Before framing of the issues, respondents filed an application u/o VII Rule 11 CPC and the applicant filed his objections. Learned trial court, after hearing the arguments of the parties, rejected the plaint of the applicant through impugned order. Being aggrieved, applicant filed Civil Appeal No. 100 of 2009 and ultimately learned appellate court, while upholding the trial court's order, dismissed the appeal, hence this Revision Application.

3. Learned counsel for the applicant has argued that the impugned order/judgment/decree suffer from legal infirmity and are bad in law thus liable to be set aside. He further argued that the same are based on conjectures and surmises and that the courts have erred by rejecting the plaint as the law requires adjudication on merits rather than trapping the parties on technical grounds. He also stated that the learned trial court erred in holding that the suit was barred by law of Limitation without considering the facts; that the vested rights and interests of the applicant were to be adjudicated, various factors were to be considered, and the plaint of such a suit was not to be rejected. He lastly contended that the learned trial Judge has not applied his mind while rejecting the plaint which reflects that the learned trial Judge has no knowledge of law and he believes in the technical disposal of the cases. He therefore prayed that the impugned orders/judgments be set aside.

4. Learned counsel for the respondents along with learned state counsel fully supported the impugned orders/judgments.

5. I have heard the learned counsel for either of the parties along with learned state counsel and have perused the record with their assistance.

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 & 2 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. Trial Court was under the obligation to see the factual controversies revolving around the matter before deciding as to when the cause of action had accrued to the applicant, which needed framing of issues from the pleadings of parties and recording of evidence, but the trial Court failed to do so. Not only this, the learned Appellate Court should have exercised the jurisdiction vested in it, but the Appellate Court simply upheld the judgment of the Trial Court without even going into the merits of the case. Therefore, findings of the Appellate Court, *as well*, were a result of jurisdictional defect and material irregularity. Therefore, the judgments and decrees impugned herein are not sustainable in the eyes of law and are liable to be set aside.

9. In the light of above referred case law and from the aforementioned discussion and circumstances, present Civil Revision Application was allowed vide short order dated 20.12.2018 and order/judgment/decree passed by the two courts below were set aside and the case was remanded back to the trial court for framing of issues and recording of evidence.

These are the reasons for the same.

**J U D G E**