

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 199 of 2010

Muhammad Soof Muhammad Bachal & Others v.

Muhammad Ayoob (deceased) through his legal heirs and others

Date of hearing: **07.03.2022**

Date of judgment: **07.03.2022**

Mr. Nisar Ahmed Bhanbhro Advocate for the Applicants.

Mr. Sikandar Ali Junejo for Respondents.

Mr. Ahmed Ali Shahani Assistant Advocate General.

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J U D G M E N T

Muhammad Junaid Ghaffar, J. – Through this Civil Revision Application, the Applicants have impugned judgment dated 24.9.2010 passed by the Additional District Judge, Kandiaro, in Civil Appeal No.24 of 2004 whereby, while dismissing the Appeal, the judgment dated 11.2.2004, passed by Senior Civil Judge, Kandiaro, in F. C. Suit No.60 of 2001 through which the Suit of the Respondents was decreed has been maintained.

2. Applicants Counsel has raised only one legal objection to the effect that admittedly the earlier Suit filed by the present Respondents had been dismissed for want of evidence under Order 17 Rule 3 CPC, whereas, while filing the 2nd Suit, it was stated that the same was dismissed for Non-prosecution, which fact has been admitted by the two Courts below without proper examination of the record while holding that the Suit was competent. Per learned Counsel this is a case of not only misreading of the evidence and record; but so also of jurisdiction, as apparently, if the contention of the Applicants is accepted, then the Court had no jurisdiction to entertain the 2nd Suit. While Confronted, learned Counsel for Respondents has not been able to controvert this factual assertion of the Applicants Counsel.

3. Heard arguments and perused the record. The facts as narrated hereinabove, are not in dispute at least to the extent of filing of an earlier Suit bearing F.C. Suit No.105 of 1996. However, the confusion is whether it was dismissed for want of evidence or in non-prosecution as claimed on behalf of the Respondents. From the record the contention of the Respondents is belied; as its dismissal vide order dated 23.12.2000 for want

of evidence in terms of Order 17 Rule 3 CPC is a matter of record. The said order is available at page 183 of this Revision Application which clearly reflects that the said order was passed in presence of the Counsel for Respondents as no evidence was led by them since long despite several chances. However, at the same time while filing the 2nd Suit in para 21 of the plaint it was averred “*that the plaintiff had filed F.C. Suit No. 105 of 1996 in this Hon’ble Court but the same was dismissed for non-prosecution on ... (no date has even been mentioned) as the plaintiffs could not appear in Court on the said date of hearing*”. This assertion of the Applicant in the 2nd Suit has been accepted by the two Courts below without examining the real facts and the order of dismissal of the earlier Suit as above in terms of Order 17 Rule 3.

4. Per settled law the dismissal of Suit for want of evidence under Order 17 Rule 3 CPC is an appealable order; and not an order under Order 9 Rule 3 and 8 CPC for Non-prosecution of which any restoration could be sought in terms of Rules 4 and 9 *ibid*. The learned trial Court while discussing this aspect has observed that “*The previous suit was not decided by the court on merits hence a fresh suit is competent*”. This is a very generalized observation; and may not hold field in many situations; like the one in hand. The order of dismissal is clear in terms that it was passed under Order 17 Rule 3 CPC, and either ought to have been appealed or reviewed. None of this has happened. The provision of Order 17 Rule 3 CPC has been held to be penal in nature¹; therefore, the said order remains in field until set-aside or reviewed, and cannot be overcome in this manner. Similarly, the Appellate Court even went a step ahead by holding that since this objection was not raised in the written statement; nor the trial court has dilated upon this; therefore, the same stands overruled. With respect this again is not a correct appreciation of facts and law. The Appellate Court, when assisted that even a Revision against the order of dismissal of Suit had failed²; ought to have decided this vital legal issue as to maintainability of the 2nd Suit. It couldn’t have been brushed aside that no limitation runs in such matters. It was not so simple as vested rights had accrued to the Applicants which cannot be taken away by mere assertions and observation not supported

¹ Reliance may be placed on the case of *Shahid Hussain v Lahore Municipal Corporation* (PLD 1981 SC 474); *Moon Enterprises CNG Station v SNGPL* (2020 SCMR 300); *Rana TANVEER KHAN v NASEER-UD-DIN and others* (2015 SCMR 1401); *Syed TAHIR HUSSAIN MEHMOODI and others V Agha Syed LIAQAT ALI and others* (2014 S C M R 637)

² Order dated 30.4.2003 in Civil Revision No.02 of 2003(see typed page 10 of judgment of the Appellate Court).

by any law. The entire facts were a matter of record and therefore, even if it was not pleaded in the written statement or no evidence was led as noted in the Appellate order; it was the duty of the Court(s) below to look into the same and decide it in accordance with law. An issue in respect of the very maintainability of the Suit was always there; hence, it ought to have been decided accordingly.

5. Admittedly, the dismissal of the earlier was not under Order IX Rule 3 CPC; nor it attracted the provisions of Order IX Rule 4 CPC where under two remedies are provided; viz. the plaintiff may, subject to the law of limitation, bring a fresh suit, **or** he may make an application for setting aside the dismissal order. This had never happened; in fact, a remedy by way of a Revision was availed in which they again failed. Once that remedy was elected, then, by implication of the doctrine of election, the other remedy of a fresh suit came to be barred³. In the case of ***Iqbal Ahmed***⁴, it has been held that rejection of plaint in the 2nd Suit after dismissal of the first Suit under Order 17 Rule 3 CPC is lawful and is also hit by the provisions of Section 11 CPC as Resjudicata also applies.

6. In the given facts of the case it is clearly established that both the Courts below have committed an error in law and facts and it is a case of misreading and non-reading of the evidence; rather it is also a case of illegal exercise of jurisdiction by the courts below which was not vested in them in the given facts; hence, requires interference by this Court under its Revisional jurisdiction under Section 115 CPC; and therefore, this Civil Revision Application is **allowed** by setting aside the impugned judgments dated 24.9.2010 and 11.2.2004 respectively, of the two Courts below and by holding that the 2nd Suit of the Respondents was not maintainable and was incompetent; hence, the Suit stands dismissed accordingly.

J U D G E

³ Reliance can be placed on the cases of *Trading Corporation of Pakistan v. Devan Sugar Mills Ltd.* (PLD 2018 SC 828); and *Daan Khan v. Assistant Collector* (2019 CLC 483).

⁴ 2015 Y L R 2572