

IN THE HIGH COURT OF SINDH KARACHI

Suit No. 1560 of 2008

[M/s. Islamic Education Institute v. Mohammad Sadiq]

Plaintiff : M/s. Islamic Education Institute, through
Syed Shahid Mushtaq, Advocate.

Defendant : Mohammad Sadiq through Mr.
Muhammad Abu Bakar Khalil, Advocate.

On Court notice : Mr. Pervez Ahmed Mastoi, Assistant
Advocate General, Sindh.

Date of hearing : 21-01-2021

Date of Decision : 19-03-2021

ORDER

Adnan Iqbal Chaudhry J. - By CMA No. 9185/2009 under Order VII Rule 11 CPC, the Defendant seeks rejection of the plaint on the ground that the suit is barred by *res judicata*.

2. The Plaintiff is Chairman of a trust namely, Islamic Educational Institute for Women. Earlier, in the beginning of December 2006, the Plaintiff had filed Suit No. 1411/2006 before XII Civil Judge, Karachi East. He had pleaded that on 20-09-2006, the Defendant had gifted to the said Institute, Plot No. 1/2-A and Plot No. 1/1-A, old Survey No.L-22, Sheet No. 24, Model Colony, Karachi ('suit plots'), and delivered over possession to the Plaintiff; that on 20-11-2006, when the Plaintiff had commenced construction of a mosque and madrassah at the suit plots, the Defendant interfered with said construction and attempted to dispossess the Plaintiff; hence the suit for permanent injunction against the Defendant.

3. By order dated 15-02-2007, the learned Civil Judge rejected the plaint of Suit No. 1411/2006 on the ground, firstly that a suit for injunction without a prayer for declaration was not maintainable;

and secondly, that the value of the suit plots exceeded the pecuniary jurisdiction of the Civil Judge. Against the rejection of plaint, the Plaintiff preferred Civil Appeal No. 33/2007 before V-Additional District Judge, Karachi East, which was disposed of vide order dated 26-04-2008 as under:

“The Appellant present in person submits that he did not want any proceedings and further controversy against the Respondents the property in question. He submits that he has handed over the property in question to its owners and admits that the value of the property in question is more than 30 Lacs, he only prayed that he wants to return back his fund which he has spent over construction work on the said property.

Heard and perused. It is an admitted fact that the value of the property in question is exceeded Rs.30,00,000/- (Rupees Thirty Lacs) and has not denied by the learned counsel for the appellant. It is also an admitted position that the property in question has been handed over to the Respondents and the appellant does not want any further proceedings against them. Since the valuation of the property exceeded from the pecuniary jurisdiction of Civil Court, the Civil Court has no jurisdiction to entertain the suit. The plaint would be return to the plaintiff instead of reject. However, since the property in question has been handed over to the respondent, the appeal in hand is become infructuous. So far the grievance of the appellant regarding the recovery of amount is concerned he is at liberty to invoke the jurisdiction of the competent court for the recovery, if so advise. Consequently, instant appeal is dismissed being infructuous.”

4. On 06-11-2008, the Plaintiff filed the present suit alleging that he had been dispossessed by the Defendant from the suit plots. This time it is alleged that the Defendant had executed two gift deeds dated 20-09-2006 to gift the suit plots to the Plaintiff. Though the plaint avers that the gift deeds were registered, the gift deeds filed are not. At one place the plaint alleges that the Plaintiff was dispossessed on 07-12-2006, and at another place the date of dispossession is mentioned as 20-09-2006. The suit prays for a declaration that the Plaintiff is owner of the suit plots, and for possession, damages, injunction and mesne profits.

5. Learned counsel for the Defendant submitted that the Defendant had never delivered possession of the suit plots to the Plaintiff; that in any case, once the Plaintiff had withdrawn his claim

to the suit plots and had acknowledged that he had voluntarily delivered possession to the Defendant, as recorded in the order dated 26-04-2008 in Civil Appeal No. 33/2007, the Plaintiff was barred from filing a fresh suit for any relief with regards to the suit plots. On the other hand, learned counsel for the Plaintiff submitted that the Plaintiff did not give up his claim to the suit plots; and that the instant suit was maintainable as it was on a fresh cause of action which accrued when the Defendant dispossessed the Plaintiff from the suit plots.

6. Heard learned counsel.

7. The order dated 26-04-2008 in Civil Appeal No. 33/2007 records the statement of the Plaintiff that he did not want to continue with the proceedings further as he had delivered possession of the suit plots to the Defendant. In my view, that statement by the Plaintiff was an abandonment of his claim to the suit plots and essentially a withdrawal of Suit No. 1411/2006. It is settled law that since an appeal is in continuation of the suit, a suit can be withdrawn also at the appellate stage.¹ Since the said suit was for an injunction against dispossession from the suit plots, there was no purpose left in the suit when the Plaintiff had voluntarily delivered possession of the suit plots to the Defendant; hence the appeal was disposed of as infructuous. However, since the Plaintiff reserved his right to recover money expended by him on construction at the suit plots, which relief was not, and could not have been sought by him in Suit No.1411/2006 as he was in possession thereof at the time, that is why the learned Appellate Court observed that he would be at liberty to file a suit for recovery. I may note here that it is not the Plaintiff's case that he had withdrawn the appeal to present a fresh plicant in respect of the same cause of action, nor is the previous suit or the appeal mentioned in the plaint of the present suit. Therefore, in the circumstances, the provision of Order VII Rule 13 CPC is neither attracted nor invoked.

¹ See *Pakistan Defence Officers Housing Authority v. Muhammad Afsar* (PLD 2015 Sindh 239).

8. In other words, the withdrawal of Suit No. 1411/2006 before the Appellate Court was unconditional, and not a withdrawal with permission to institute a fresh suit under sub-rule (2) of Rule (1) of Order XXIII CPC. Consequently, sub-rule (3) of Rule (1) of Order XXIII CPC precludes the Plaintiff from instituting a fresh suit for the relief of declaration, possession, injunction and mesne profits in respect of the suit plots after withdrawing his claim to the suit plots. Thus, prayer clauses (1), (2), (4) and (5) of the plaint are clearly barred by law. The question now is whether the relief for damages in prayer clause (3) can be sustained independently. If not, the plaint is to be rejected; but if prayer clause (3) sustains, the suit is to be dismissed in part to the extent of the relief that is barred.²

9. Though at the time of withdrawing Suit No. 1411/2006 the Plaintiff had reserved his right to claim recovery/damages for having expended on construction at the suit plots, the cause of action for such suit, if any, would have to flow from the fact that he had surrendered the suit plots to the Defendant while reserving his right to claim construction cost, as was conceded by him in Civil Appeal No. 33/2007. Needless to state that the Plaintiff would then also have to demonstrate that he was in lawful possession of the suit plots when he undertook such construction. But, that is not the case set-up by the Plaintiff in the instant suit, nor the cause of action of the instant suit. Though he has pleaded in paras 10 and 11 of the plaint that he had spent only Rs. 300,000/- on construction, the damages of Rs. 10 million prayed for in the suit are on the ground that the Defendant had unlawfully dispossessed him of construction material worth Rs. 13,00,000/- lying at the suit plots (para 13), and as a consequence of being dispossessed from the suit plots, he was deprived of anticipated profits of Rs. 72,80,000/- (para 15). Thus, the relief for damages in prayer clause (3) is not on a cause of action that is separate or independent of other relief sought in the suit, which relief, as already held, is barred by law.

² For the proposition that a suit can be dismissed in part, see *Naveen Irfan Puri v. Shama Parveen* (2019 YLR 1700).

10. Therefore, having discerned that the relief sought in the suit is barred by sub-rule (3) of Rule (1) of Order XXIII CPC, CMA No. 9185/2009 succeeds. The plaint is rejected. All other applications are dismissed as infructuous.

JUDGE

Karachi
Dated: 19-03-2021