

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Const. Petition No. D – 3248 of 2011

Before:

**Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Zulfiqar Ali Sangi**

Petitioners: Sajadullah & others through Mr. Manoj Kumar Tejwani, Advocate.

Respondents No.1 to 7: Province of Sindh & others through Mr. Ahmed Ali Shahani, Assistant Advocate General.

Respondent No.8 to 11: *Nemo* present on behalf of private Respondents.

Date of hearing: **19-04-2022**

Date of Judgment: **19-04-2022**

J U D G M E N T

Muhammad Junaid Ghaffar, J. – None present on behalf of any of the contesting Respondents nor any intimation received. Record reflects that continuously private Respondents' Counsel has been called absent. This Petition is pending since 2011; therefore, same is being decided with the assistant of Petitioners' Counsel and the available record.

2. Through this Petition, the Petitioners have impugned Judgment dated 30.06.2010, passed by Additional District Judge-III, Sukkur in Civil Revision No.48 of 2010 (**Seema Naz v. Sajadullah & others**), whereby, Civil Revision has been allowed and the Plaint has been rejected under Order VII Rule 11 CPC by setting aside the Order dated 08.09.2010, passed by Trial Court in F.C. Suit No.154 of 2008 (**Sajadullah v. Province of Sindh and others**), whereby such Application was dismissed.

3. Learned Counsel for the Petitioners has contended that the Order of the Trial Court was correct in law; whereas, the Revisional Court has erred in allowing the Application under Order VII Rule 11 CPC, as neither the principle of *res judicata* under Section 11 CPC was applicable nor Order 2 Rule 2 CPC could have been applied inasmuch as in the earlier Suit, the Plaint was though rejected under Order VII Rule 11 CPC, but there was no discussion on merit, hence impugned Judgment be set aside and the matter be sent to the Trial Court to decide the same on merits. In

support of his contention, he has relied upon cases reported as *Abdul Hakim and others v. Saadullah Khan and others* (**PLD 1970 Supreme Court 63**) and *Parveen Akhtar and others v. Additional District & Sessions Judge, Muzaffarabad and others* (**PLD 2015 High Court (AJ&K) 7**).

4. We have heard Petitioners' Counsel and perused the record.

5. Insofar as the Trial Court is concerned, the relevant observations in the Order dated 08.09.2010 whereby the application for rejection of plaint was dismissed reads as under:

"I have considered the arguments advanced before me from both sides and have gone through the averments of the plaint and have also gone through the order dated 5.2.2003 passed by learned 2nd Senior Civil Judge, Sukkur in F.C.Suit No.124/2000 Re: Sanaullah & others Vs. Mst. Hajira Begum & others.

From perusal of the order it reveals that the parties in both suits are different as in the F.C. Suit No.124/2000 plaintiffs are same while the defendants were Mst. Hajira and official defendants but in the present suit the defendants are Mst. Seema Naz, Mst. Nargis and 7 official defendants, therefore the suit is not hit by Resjudicata. The plaintiffs have cause of action to file the suit shown in Para No.13 & 14 of the plaint. It is settled principle of law that at the time of deciding the application U/O VII Rule 11 CPC the averments of the plaint and documents produced, admitted by both parties be considered.

In view of the above discussion, circumstances of the case, I am of the humble opinion that the application U/O VII Rule 11 CPC stands no merits and is liable to be dismissed. Accordingly the application is hereby dismissed with no order as to costs".

6. The private Respondents being aggrieved preferred Civil Revision and the Revisional Court in the impugned Judgment has been pleased to observe as under:-

"Point No.1.

On deliberation the court finds that the present respondents/plaintiffs earlier filed a suit bearing No.124/2000 in the Court of Senior Civil Judge-II Sukkur regarding the same properties with the only difference that the said earlier suit was filed against Mst. Hajra Begum from whom the present appellant and respondent No.17 has acquired three of the referred properties. In the circumstances learned trial Court is found to have erred in observing that in the present subject suit and the referred earlier suit No.124/2000 the plaintiffs were same but the defendant was Mst. Hajra and not the present private defendants. Further, the order passed earlier in the referred suit No.124/2000 is not shown to have been challenged by the private respondents/plaintiffs. Still further it is found that the plaintiffs/private respondents have not mentioned in the plaint of subject suit (124/2008) about the earlier litigation regarding their claim over the subject properties though they were obliged to specifically mention such details and to file the copies of pleadings and orders of the referred earlier litigations regarding the subject properties and such fact alone

disentitles them for any relief from Court, more; specifically in equity. Plaintiffs/private respondents should have mentioned the order dated 5.12.2003 passed in referred earlier suit No.124/2000 whereby their plaint was rejected. Further the referred earlier suit was disposed of on 5.12.2003 and it cannot be understood as to how till then the plaintiffs herein were ignorant about registered sale deed dated 24.1.2001 and another registered sale deed regarding another subject property registered on 4.4.2001 in favour of the appellant herein. Whereas yet another property was mutated on 6.8.1991 in favour of Mst. Nargis Gul. In the circumstances the subject suit of the plaintiffs beside being barred by Specific Relief Act, 1877 and the principle of pleadings (more specifically under Order II r. 2 CPC) is also found to be hit by Limitation Act, 1908. In the circumstances the plaintiffs were obliged to explain for delay of each and every day. It appears that there was further litigation between the plaintiffs and said Mst. Hajra and Mst. Khadeja which the plaintiffs have concealed and about which the present applicant may not have the knowledge as she was not a party at the said time. It also appears that said Mst. Hajra disposed of all her properties during her life time, and successfully resisted the claim of the plaintiffs over the properties but one of such property has remained in the name of deceased Mst. Hajra (bearing C.S.No.A-1383/4) and the plaintiffs have succeeded in getting the same mutated in their favour in the city survey record apparently. Because there was no other claimant to challenge their claim and now they have based their claim on such mutation ignoring the fact that the same can not have an over riding effect over the earlier Court decision. It also can not be comprehended as to how the plaintiffs were seeking their remedy before the revenue authorities despite the fact that there were Court pronouncements against them with regard to said property and it appears that they had concealed such fact of civil litigation and pronouncement from the revenue authorities as well and that is how they got the only property left in the name of deceased Mst. Hajra transferred in their favour in the city survey record, else the same would also not have been possible had such fact been brought in the knowledge of city survey officer. In the circumstances the case law cited on behalf of the private respondents is not found attracted. The plaintiffs earlier litigation with the deceased Mst. Hajra and Mst. Khadejad had the basis on inheritance but the same is not the case against the applicant and respondent No.17 specially as the registered sale deeds in favour of the appellant pertaining to year 2001 carry a presumption of truth and even the plaintiffs have not alleged the same to be a forged or fabricated document. There is no caveat to the proposition of law settled in the case law cited on behalf of respondents but the same are not found attracted in the circumstances of the present case. The Court instead finds attracted the cited Mst. Anwari Begum through attorney Vs Mst. Asghari Khanum and 7 others case (2009 MLD 1279);and Muhammad Nawaz Vs Additional District Judge and others case (2002 MLD 507).

Foregoing in view learned trial Court is found to have erred seriously in not allowing the subject application U/O VII rule 11 CPC, ignoring the fact that repeated litigation over the same properties and cause of action amounts to harassment beside being barred inter-alia by resjudicata and Order II r. 2 CPC). Consequently the point is answered in affirmative.

7. From perusal of the aforesaid findings of the Revisional Court, it appears that the Court by itself has deliberated on the very merits of the case including registration of sale deeds in favour of the Respondents and so also various other factual aspects of the matter which could only have been decided after evidence and *per se* ought not to have been

adjudicated or discussed while deciding an Application under Order VII Rule 11 CPC. The Revisional Court has time and again observed that it cannot be comprehended as to how the Petitioners were unaware of various events and the transfer of the properties in favour of the private Respondents. Such observations are not required to be given while deciding Application under Order VII Rule 11 CPC, as it is only to be decided on the basis of pleadings in the plaint. In fact, the said finding in the impugned judgment by itself supports the case of the petitioner that evidence ought to have been led for threshing out such facts. The Revisional Court while finally concluding has allowed the Application primarily on two grounds, one the suit being hit by *res judicata* (Section 11 CPC); and second that the suit was barred under Order 2 Rule 2 CPC.

8. As to the applicability of Section 11 CPC is concerned, it may be observed that though in the earlier proceedings plaint was rejected, but that is not a judgment on merits and within itself cannot be a case of *res judicata* under Section 11 CPC, because the litigation referred to above ended up in rejection of plaint, and since rejection of plaint does not operate as *res judicata*, against the plaintiff in subsequent suit, it cannot operate as such against a party who was defendant¹. If the suit was rejected under Order VII Rule 11 of the Civil Procedure Code and the judgment was not on merits, therefore, neither the provisions contained in section 11 nor Order II Rule 2 of the Civil Procedure Code are attracted in the present case². Moreover, even dismissal in non-prosecution also does not operate as *res judicata*³. The same also does not apply to cases of compromise decrees⁴.

9. As to the applicability of Order 2 Rule 2 CPC, it may be observed that subsequent Suit is not between the same parties⁵, whereas, it is the case of the petitioner that there were subsequent developments in respect of the suit properties and their further transfer, and therefore this provision also cannot be invoked. As a matter of fact, on perusal of record it appears that the case of the Petitioners is based on some claim of inheritance and this Court on 23.04.2019 was pleased to observe that the Petitioners' claim is based on their respective share and since Ghous Bux

¹ Province of Punjab v Syed Ghazanfar Ali Shah (2017 SCMR 172)

² Parveen Akhtar v ADJ Muzaffarabad (PLD 2015 High Court (AJ&K) 7

³ Allahwala Foundation v Province of Sindh (2002 SCMR 798)

⁴ Gul Farosha v Umar Gul (1985 CLC 810)

⁵ Ramchand v ADJ Larkana (2001 YLR 980)

was not survived by any male descendant as apparently the principle of Radd applies in the case of the Petitioners. In that situation even the plaint in the earlier suit could not have been rejected as the matter pertains to some claim in respect of heirship and ought to have been decided on its own merits.

10. Be that as it may, we are of the view that the learned trial Court had correctly dismissed the Application under Order VII Rule 11 CPC; as it not a case whereby plaint could have been rejected, whereas, the Revisional Court has not appreciated the facts as well as law, and therefore impugned Judgment dated 30.06.2011, passed by the Revisional Court is hereby set aside and that of the Trial Court dated 08.09.2010, is hereby restored. The application under Order 7 Rule 11 CPC stands dismissed, whereas, the suit has to proceed in accordance with law on merits.

11. The instant Petition stands **allowed** in the above terms.

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