IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Civil Revision No. S – 66 of 2010

(Gul Muhammad & others v. Sardar Khan & others)

Date of hearing: **16.05.2022**
Date of Judgment: **16.05.2022**

Mr. Safdar Ali Bhatti, Advocate for the Applicants
Mr. Nishad Ali Shaikh associate of Mr. A. M Mobeen Khan, Advocate for the Respondents

JUDGMENT

Muhammad Junaid Ghaffar, J. – Through this Civil Revision, the Applicants have impugned judgment dated 16-01-2010 passed by II-Additional District Judge, Khairpur in Civil Appeal No.28 of 1999, whereby, while dismissing the Appeal, the judgment and decree dated 26-03-1999 passed by II-Senior Civil Judge, Khairpur in F.C Suit No.63 of 1983 has been maintained through which the Suit of private respondents was decreed. .

2. Heard learned Counsel for the Applicants and perused the written arguments filed on behalf of Respondents.

3. Learned Counsel for the Applicants while making his submissions has only raised one legal proposition to the effect that the Suit in question filed by the Respondents was not maintainable, as according to him their earlier Suit bearing No. 06 of 1973 had been dismissed for non-prosecution vide order dated 28.3.1978, against which a time barred Application was filed for recalling of the said order, which was also dismissed vide order dated 06.01.1979; then successfully impugned in Appeal; however, a learned Judge of this Court by way of judgment dated 06.10.1982 in Civil Revision Application No.99 of 1981 had been pleased to set-aside the Appellate order by restoring the order of the trial Court, through which the restoration Application was dismissed; hence, both the Courts below have failed to appreciate this legal aspect of the matter while decreeing the Suit of the private Respondents, and therefore, this Revision Application merits consideration. On the other hand

Respondents Counsel has filed written arguments wherein the two impugned judgments have been supported.

4. It appears that the Respondent Nos.1 and others had filed a Suit for Possession, Injunction & Mesne profits before Senior Civil Judge, Gambat bearing No.06 of 1973, and the same was dismissed on 28.3.1978 in the following terms;

> "Plaintiff and their advocate called absent. Defendants Advocate Mr. Jaffri is present with defendant Gul Mohammad. The matter was *fixed for final hearing* but today neither the parties *nor their witnesses are in attendance*, there is no intimation from their side. It is now 3.05 p.m. I dismiss the suit in default for *non prosecution of the plaintiffs and their witnesses*.

5. The Respondent No.1 filed an application under Order IX Rule 8 read with Section 151 CPC for recalling of the said order along with an application for condonation of limitation as the said application was admittedly time barred. Such applications were dismissed by the trial Court vide order dated 6.1.1979, which was then impugned in Appeal No. 08 of 1979 which was allowed by District Judge, Khairpur vide order dated 2.8.1980, against which the present Applicants filed a Civil Revision before this Court bearing No.99 of 1981, and vide judgment dated 6.10.1982, the same was allowed be setting aside the Appellate order. It further appears that more or less during the same period a Suit bearing No.21 of 1976 filed by the present Applicants against Respondent No.1 and others was already pending in the Court of Senior Civil Judge, Gambat, and vide judgment dated 27.1.1980 the same was dismissed, against which an Appeal also failed on 10.8.1981. The private Respondents pursuant to such judgments passed in the Suit of the Applicants filed a fresh Suit bearing No.63 of 1983 (Old No) on the same cause of action with more or less the same prayer of possession. Written Statement was filed and objection was raised as to maintainability of the fresh suit in view of the earlier round of litigation. In the said Suit the learned trial Court while dealing with this objection had settled various issues in the following terms;-

1. Whether suit is not maintainable according to law?
2. Whether the suit is time barred?
3. Whether the suit under valued? If so; its effect?

4. Whether the plaintiffs are precluded from filing this suit, in view of dismissal of earlier suit filed by them?

5. Whether dismissal of the suit of No.33 of 72 renumbered as suit No.21 of 1976, by the learned Senior Civil Judge Gambat has given a fresh cause of action to the plaintiffs to file this suit?

6. Whether the plaintiffs are the owners of the suit land?

7. Whether the plaintiffs are entitled to mesne profits? If so; at what rate and since what date?

8. Whether the plaintiffs are entitled to the reliefs claimed?

9. What should the decree be?

Additional issue

10. Is the plaintiff entitled to get consequential relief of possession?

6. By way of judgment dated 28.8.1988, Issue Nos.1, 4 and 5 were decided together and it was held that the Suit of Respondent No.1 and others was not maintainable; hence, the same was dismissed as such. An Appeal bearing No.08 of 1989 was preferred, wherein, the matter was remanded with certain directions by framing an additional issue *"whether the findings given on issue Nos.4,5 & 6 in judgment dated 27.1.1980 in Civil Suit No.21/76 and order passed in civil appeal No.24/80 dated 10.8.81 had created fresh cause of action for the appellants / plaintiffs to file the present suit?"* The trial court in the second round vide its judgment dated 26.31999 gave its findings in respect of these legal / additional issues in the following terms;-

> "These issues are inter-connected, as such, the same are being discussed together. The perusal of record shows that the earlier suit of the plaintiffs was dismissed for non-prosecution. The restoration application was also dismissed by the learned Senior Civil Judge Gamat, vide order dated 6.1.1979 but the said order was set aside in appeal by the Honourable District Judge, Khairpur. Later on the Honourable High Court in revision petition set aside the order of honourable District Judge, Khairpur and restored the order of the learned Senor Civil Judge, Gambat. The defendants had also filed a Civil Suit regarding the ownership of the suit land, which was dismissed and the appeal against the said judgment and decree was also dismissed by the Honourable IInd. A.D.J Khairpur, vide judgment and decree dated 10.8.1981. Against that judgment and decree no revision as filed before the Honourable High Court of Sindh, therefore, the same attained finality. The case of the plaintiffs is that they have accrued fresh cause of action after the dismissal of the suit of the defendants in which they have been declared lawful owner of the suit land, whereas, according to the defendants the plaintiffs have no right to do so and they are precluded from filing suit being barred u/o 9 R 9 CPC because the earlier suit of the plaintiffs was dismissed for non-prosecution.
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> It is an admitted position that the learned Senior Civil Judge Gambat, had not mentioned any provision of law under which the suit of the plaintiffs had been dismissed for non-prosecution. Admittedly who

had dismissed the suit of the plaintiff at the adjourned date of final hearing, therefore, in my humble view that order of dismissal is liable to be treated as order of dismissal passed u/o XVII R II CPC because the same was passed at the adjourned dates. There would be no denial of the legal proposition that the provision applies where the parties made fault on the first date of hearing whereas, the order XVII R II CPC applies when the plaintiff or defendant has already appeal but he has failed to appear at the adjourned dates of hearing of the case, because order IX relates to the date of hearing for which the summon has been issued to the defendants, while order XVII relates to the adjourned dates of hearing. As Rule 1 of the Order IX will show that this order only states the procedure of the court on the date fixed in the summon sent to the defendants. Whereas, order XVII provides that if the party fails to appears" on the day to which hearing is adjourned" the cour4t may proceed to pass the order in accordance with order IX or make, such, order as it thinks fit. The order dismissing the suit of the plaintiff due to non-appearance on the first date hearing is always treated to be an order passed u/o IX R VIII CPC. This principle is laid down in a number of reported authorities reported in PLD 1981 S.C Page 21, PLD 1964 S.C 97 and 1984 CLC Page 424. In such circumstances I am of the considered view that the present suit cannot be said to be barred in the above provision of law. If the earlier suit of the plaintiffs would have been dismissed on the first date of hearing due to non-appearance then the present suit could have been said to be barred under the above provision of law viz: U/o IX R IX CPC, therefore, the plaintiffs are held to be not precluded from filing the present suit and the present suit is also held to be maintainable according to law. Moreover, in my humble view the plaintiffs have also accrued cause of action after the dismissal of the suit of the defendants in which they have been declared lawful owner of the suit land by the Court. The prayer made and the cause of action shown in the present suit is also different from that of earlier suit. Apart from these factors, it is a fundamental policy of the law that no one should be deprived from his right forever. It is also the case of re-accruing of action because the suit is based on the continuous right, therefore, the fresh suit will also not be barred. These issues are, therefore, answered accordingly."

7. Similarly the Appellate Court has also settled Point No.iii for determination in respect of these issues and the finding of the Appellate Court reads as under;-

"Point No.iii:-

It is admitted position that the respondents/plaintiffs had filed suit No.06 of 1973 with same prayer regarding same property and that suit was dismissed in non-prosecution 28.03.1978 but at that time the judgment and decree dated: 28.08.1988 & 12.10.1988 and so also 26.03.1999 passed in the F.C Suit No.16 of 98 (old No.63/83) was not in to existence. It is important to note here that then learned Senior Civil Judge Gambat in his judgment dated 27.01.1980 has concluded (see preceding paragraph No.13) that the then defendants No.1, 2 & 3 and now respondents/plaintiffs have been forcibly dispossessed and with such finding the title of the suit land was also decided in favour of respondents/plaintiffs and this has created a fresh cause of action in favour of respondent/plaintiffs and in these circumstances, I hold that the suit No.63 of 83 is maintainable and accordingly the point No.iii is replied in negative."

8. From perusal of the aforesaid finding of the two courts below, it appears that insofar as the trial Judge is concerned, apparently he has far exceeded his jurisdiction in deciding these issues in favour of Respondents, inasmuch it was never the case of the said Respondents that whether the earlier Suit was dismissed under Order IX or Order XVII CPC. The entire record, including the file of earlier Civil Revision available before this Court nowhere discloses any such argument which may have been raised by the Respondents. Rather, the entire case of Respondents was that since an application for compromise was also pending; hence, the Suit could not have been dismissed for Non-prosecution, and it was only an application which could have been dismissed. However, the said argument was decided finally against the Respondents and now at this stage no further comments can be made on the merits of such decision as the Respondents had accepted the said judgment and never preferred any further appeal before the Hon'ble Supreme Court. On the contrary, the Judge of the trial Court has made an attempt to interpret the judgment of this Court dated 06.10.1982. Such authority or jurisdiction was never available to the said Judge and he could not have held that the order of dismissal in the earlier Suit was liable to be treated as an order of dismissal under Order XVII Rule 2 CPC, and consequently a fresh suit was not barred. This was never a question before him, and the judge while deciding the legal issue in a subsequent Suit, could neither interpret the said order; nor even pass any remarks or observations in respect of such order which had attained finality up to the level of this Court. In fact, as trial court judge, he ought to have restrained himself from such an exercise. Further, it is settled law that, even an obiter dicta of a superior Court is binding on a Court lower to it[1]; therefore, such conduct of the trial Courts judge needs to be looked into as well, warranting action against the trial Judge; however, this Court cannot do so in view of the pronouncement of the Hon'ble Supreme Court in the case of ***Miss Nusrat Yasmin v Registrar Peshawar High Court (PLD 2019 SC 719)*** and can only send a memorandum to the Hon'ble Chief Justice for appropriate action which is being done separately. Admittedly, restoration Application filed by the Respondents was by itself an admission that the Suit was dismissed under Order IX CPC, and that is why, they filed an appropriate Application under Order IX Rule 8 read with section 151 CPC, as is discernable from

[1] (a) Dr. IQRAR AHMAD KHAN V Dr. MUHAMMAD ASHRAF (2021 SCMR 1509)- (b) Justice Khurshid Anwar Bhinder v. Federation of Pakistan (PLD 2010 SC 483)

the available record. If there would have been any other intention of the Respondents, then they should have filed an appeal; but they didn't. Once that remedy was elected, then, by implication of the doctrine of election, the other remedy of a fresh suit came to be barred[2]. Therefore, the trial Judge has seriously fallen in error by holding that the said order of the dismissal of the Suit of the Respondents was an order under Order XVII Rule 2 CPC, and presumably, a fresh suit could be maintained in such circumstances as the dismissal was not on the first date of hearing after issuance of summons. However, this is not so borne out from the record; but even if it is assumed as such, in that case the remedy was never by way of seeking recalling of such an order of dismissal. 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. In fact, only an appeal is to be filed against such an order, as it is an order which is appealable and a decree is issued[3]. 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. In that case, this observation of the learned Judge again has fallen short of any legal support. It appears from the record that that the previous suit of Respondent No.1 & others was dismissed for default under Order IX Rule 8 CPC as none was in attendance on their behalf, whereas, Applicant as well his Counsel were in present. The effect of, and the remedy against dismissal of a suit under Order IX Rule 8 CPC is provided by Order IX Rule 9 CPC , wherein out of the two remedies, the Respondents had availed one i.e. an attempt to seek restoration. It may be observed that the dismissal of an earlier suit under Order XVII, Rule 3 CPC amounts to a dismissal on merits and the provisions of section 11 CPC, do apply to such a case[5]. Notwithstanding, the order of dismissal of the Suit and the subsequent Application clearly reflects that on the fateful day the matter was also fixed for attendance of witnesses and evidence; hence, the observations of the learned trial Judge cannot be sustained. In

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[2] 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).

[3] 2015 MLD 681 (Mst. Naseem Ahmed v Mst. Anwar Sultan)

[4] 2015 Y L R 2572 (Iqbal Ahmed v Province of Sindh)

[5] 1996 MLD 865 (Mehboob Ali v The Director Katchi Abadi)

the case reported as *Shahid Hussain v Lahore Municipal Corporation* (**PLD 1981 SC 474**), the Hon'ble Supreme Court has been pleased to hold as under:

> It is clear from the wording of the said rule that on the failure of a party to produce its evidence or to do any other act necessary for the purpose o the case, for which time had been allowed to him, the Court shall proceed to *decide the suit* forthwith. As such an order dismissing the suit under *,9* Order XVII, rule 3, C.P.C., would be deemed to be a judgment on merits, unlike an order under rule 2 of the said Order. Reference may be made to *Rahim Bux and 2 others v. Mst. Nazir Khanum and another (*1980 C L C 595*)* and *Nlla v* Punun (**A I R 1936 Lah. 385**). This would, therefore, operate as res *judicata* between the parties barring the maintainability of the second suit on the same issue, *Har Dayal v. Ram Golam* (**A I R 1944 Oudh 39- A I R 1936** Lah. 385). As held by Shadi Lal, C. J., in *Gal Chand v. Kaka Ram (*A I R 1927 Lab. 562*)* remedy against such an order would be an appeal against the decree. This view is clearly supported by the language of rule 3, of Order XVII read with the definition of `Decree' in section 2(2), C.P.C. Under Order *D* XVII, rule 3, C. P. C., the Court is required, on the failure of the party to do the needful, to proceed to *decide the suit* forthwith. As such, the decision is obviously an adjudication in which the Court conclusively determines the rights of the parties with regard to matters in controversy in the suit between the parties and that is why it has been held to operate as *res judicata* between them, barring any other suit relating to the same controversy.

9. As to the finding of the Appellate Court it may be noted that once by itself the Appellate Court admits that the cause of action is the same, the property is the same and the parties are same, and then how and in what manner the bar of a second Suit on the same cause of action can be overcome on the pretext that pursuant to dismissal of Applicants Suit a fresh cause of action has accrued. Admittedly, the cause of action as narrated by the Respondents in their earlier plaint is in respect of the some purported dispossession allegedly by the present Applicants. This was the final cause of action and was never recurring in nature. Merely for the fact that a separate Suit of the present Applicants was also pending at the relevant time, and was thereafter dismissed against which Appeal also failed, would not by itself create a fresh cause of action to the private Respondents so as to make their dead Suit alive. In fact, even any observation in the said judgments of dismissal of the Suit and the Appeal of the Applicants, could not bear any fruits for the Respondents insofar as the finality of their own Suit is concerned. If this is permitted then the bar as contained in Order IX Rule 4 & 9 CPC would become redundant and in every case a fresh Suit would lie, which is not a correct approach. It is also a matter of record that there is no substantial change in the relief being sought by the Respondents in their second Suit and per settled law, even mere change of words cannot create a fresh cause of action as admittedly it is the dispossession, allegedly by the Applicants, which is the main cause of action. It is not a case of any recurring cause of action. Recurring

or successive wrongs are those which occur periodically, each wrong giving rise to a distinct and separate cause of action[6].

10. It may further be observed, that in the second plaint, the Respondents also failed to disclose the dismissal and finality of the first Suit up to this Court, which conduct by itself deprives them from claiming any discretionary relief from the Court. It may also be important to observe that what would have been the situation, if the Applicants had withdrawn their Suit without any final adjudication of the same. In that case, would a fresh cause of action could have accrued to the Respondents and the answer would be a definite No; therefore, any decision in the Applicants' Suit, either way, could not have created a fresh cause of action for the Respondents to maintain their second Suit. Both the Courts below have seriously fallen in error in arriving at the conclusion that the second suit was competent, as the same is not supported by any law and have in fact misapplied the law; exercised jurisdiction which was never vested in them; and therefore, both the impugned judgments cannot be sustained. Since this Court has come to a definite conclusion that the second Suit in hand was by itself not competent, therefore, any discussion on merits of the case is unwarranted.

11. 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, even concurrent findings can be interfered with by this Court under its Revisional jurisdiction under Section 115 CPC in view of the dicta laid down by the Hon'ble Supreme Court[7] and therefore, this Civil Revision Application is ***allowed*** by setting aside the Judgment of the trial Court dated 26-03-1999 and that of Appellate Court dated 16-01-2010, respectively, by holding that the second Suit of the Respondents was not maintainable and was incompetent; accordingly, it stands dismissed.

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[6] Union of India v. Tarsem Singh, (2008) 8 SCC 648 and Sultan Ali v Khushi Muhammad (PLD 1983 SC 648)

[7] Nazim-Ud-Din v Sheikh Zia-Ul-Qamar (2016 SCMR 24), Islam-Ud-Din v Mst. Noor Jahan (2016 SCMR 986) Nabi Baksh v. Fazal Hussain (2008 SCMR 1454), Ghulam Muhammad v Ghulam Ali (2004 SCMR 1001), & Muhammad Akhtar v Mst. Manna (2001 SCMR 1700)

Judge

ARBROHI