

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

R.A. No. 23 of 2011

Appellant(s): Through Mr. Parkash Kumar, advocate
Respondents No. 1 to 3: Through Mr. Arbab Ali Hakro, advocate.
The State: Through Mr. Wali Muhammad Jamari, A.A.G.
Date of hearing: 17.09.2019
Date of decision: 17.09.2019

J U D G M E N T

MAHMOOD A. KHAN, J. 1. This revision has been filed impugning the order of learned appellate Court wherein the order of the learned trial Court of rejection of the plaint in exercise of powers under Order VII rule 11 CPC was set-aside and the matter was remanded to be tried on merits. The facts in the matter are that the present private respondents filed the subject suit bearing No.29/2009 for declaration, partition, possession, cancellation, rendition of accounts, mesne profits, mandatory & permanent injunction and recovery of damages and compensation of Rs.2,00,00,000/- in respect to the alleged share of the said plaintiffs and defendant Nos.7 to 12 for the properties mentioned therein said to be owned by their father Late Ahmed Sher and one widow Mst.Zaibun Nisa being legal heirs which were claimed to have been fraudulently transferred without any consent/participation and authority of the said plaintiffs. It is further stated in the plaint that an earlier suit bearing No.77/1989 was also filed in the matter which was dismissed for no-prosecution, claiming

that in the said suit the parties are different and different issues are involved and that the plaintiffs have come to know about the fraud committed in July 2008. Learned trial court was pleased to order dismissal of the plaint on the application of defendant Nos.7(i) to (iii) U/o 7 rule 11 CPC by rejecting the plaint holding the same to be barred under Sec.11 as well as U/o 9 rule 4 CPC and Articles 91 and 120 of the Limitation Act 1908 and having no cause of action as in the earlier plaint subsequent transfer/s stood referred and in the subsequent plaint knowledge of fraud stated to have been acquired in July 2008 was contradictory. In the appeal however the said order was reversed on the ground that the earlier suit was dismissed in default and non-prosecution as such resjudicata was not applicable whereas matter pertaining to inheritance of property flux of time was of no effect.

2. Learned counsel for the appellants contends that an earlier proceeding initiated in the year 1989 was present in the matter and on filing of the present suit the application under Order 7 Rule 11 CPC was filed, wherein, the learned trial Court was pleased to consider the element of limitation and filing of the suit earlier in the matter and as such the powers were rightly exercised. The same however, were not appreciated by the learned appellate Court and the matter was remanded without considering that once the party has filed the suit the said party is barred from re-agitating the same in subsequent proceedings. He further contends that at the time of earlier suit gift was admittedly present, which was subsequently challenged when the execution of sale deed by the donee was executed.

and as such where the right of predecessor-in-interest was not denied a challenge to the subsequent right acquired thereby was not open to disturbance. In support of his arguments he has relied upon 2016 SCMR 910, 2012 SCMR 280 and on the element of re-continuation of cause of action learned counsel has relied upon 2014 MLD 1417 and 2019 CLC 1466.

3. Learned counsel for the private respondents, however, contends that the applicant under Order VII rule 11 CPC was based on the ground of Section 11 CPC and Section 174 of Specific Relief Act, wherein, time barred element in cause of action was not available. He further contends that the element of Order II rule 2, CPC was never available or discussed during the proceeding in any of the orders passed in the matter. He also contends that the respondents have claimed the proceedings and their right against the allegation of fraud and misrepresentation and when such allegations are made limitation will not be applicable as the subsisting rights are available and limitation in such circumstances cannot be claimed. As to the reoccurrence of cause of action he has relied upon 1995 SCMR 284 contending that last attack is considerable for re-continuation of cause of action. Learned counsel has also relied upon PLD 2004 Lahore 01, 2015 CLC 672 and 2007 YLR 2134. Learned counsel for the private respondents also contends that revisional powers, as are being called to be exercised, are not available as no final adjudication has been made and the learned appellate Court was pleased to remand the matter, which is yet to be concluded.

4. Learned AAG supports the appellate Court's impugned order contending that although limitation may be present, the matter of inheritance requires appreciation on merits.

5. Learned counsel for the appellants in rebuttal contends that although fraud has been alleged but once the said fraud has come to light limitation will start and cannot be stopped.

6. Having heard the learned counsel and gone through the record. It is firstly noticeable that the impugned order of the learned appellate Court is a remand order requiring adjudication on merits and not a concluding order. As it is settled law that for exercise of powers under Order 7 Rule 11 primarily contents of the plaint are liable to be considered. The paragraph Nos. 26, 27 and 28 of the subject plaint as present on record are liable to be referred;

26. *That previously the plaintiffs No. 2 & 3 had instituted F.C. Suit No. 77 of 1989 in this Hon'ble Court, the said suit was dismissed for non-prosecution. That the earlier suit was on different cause of action while the instant suit is on different cause of action. That in earlier suit the parties to the suit were different and different issues were involved, however, in instant suit the parties are different and different issues have been involved. However, it is well settled principle of law, that if any order or act of any functionaries is/are illegal void, mala-fide, fraudulent and collusive than it will not come in the way of justice*

27. *That the plaintiff No. 1 made every possible effort for settlement of dispute outside the Court, with defendants No. 7(i) to 23, but still no positive result came on record. That the defendants No. 7(i) to 23 in the last week of March, 2009 finally refused to settle the dispute and threatened to the Plaintiffs No. 2 and 3 and attorney of the plaintiff No. 1 for bad consequences, if they demanded share in suit properties again, from the defendants No. 7(i) to 23, the plaintiffs have no other way, except to file instant suit, hence this suit.*

28. *That the cause of action for filing present suit first time arose to the plaintiff, specially to the Plaintiff No. 1 in July 2008, when the plaintiffs came to know about the fraudulent act of the defendants No. 7(i) to 8(vi) and secondly in the month of August,*

2008, when the plaintiffs first time came to know about the sale transaction between the defendants No. 7(i) to defendants No. 23, lastly in the last week of March, 2009 when the defendants No. 7(i) to 23 finally refuse to settle the dispute and threatened to the plaintiffs of bad consequences and cause of action is recurring day to day to the plaintiffs within the territorial jurisdiction of this Hon'ble Court.

7. According to the said contents only plaintiff Nos.2 & 3 instituted the first suit, irrespectively to the presence of name of plaintiff No.1 in the title present on the order sheet of dismissal order of said suit present on record, it yet to be ascertained that the plaintiff No.1 was having proper participation thereto. The learned appellate Court has already discussed the matter of resjudicata to which no dispute in actuality can be raised as the earlier suit was never concluded, the bar under Order 2 Rule 2 is also found no applicable as the earlier suit having been dismissed in default/non prosecution, no question of permission arise. As to bar of limitation the same is also found to be a mixed question of fact/s and law, even otherwise fraud has been alleged in the matter, requiring details which are yet to come on record along with their resulting implication as such the bar of limitation is not found conclusively attracted especially at this early stage. For the restraint under order 9 C.P.C. it may be observed that the plaintiff has stated in the plaint that the cause of action is not only different the same is described not only of having arose subsequently as described it can also be termed as of the reoccurring and reconstitution nature especially at this early stage. The nature of proceedings pertaining to inheritance deprived as referred to by the learned appellate Court cannot be lightly ignored. Irrespectively the finding as to limitation without recording,

of evidence is at this stage is a presumption only and not a deduction.

In the present circumstances this revision application is found without having merits and is accordingly dismissed with costs.

Sd/- MEHMOOD A. KHAN,
JUDGE