

ORDER SHEET  
THE HIGH COURT OF SINDH AT KARACHI

R.A No.149 of 2019.

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Date:                      Order with signature(s) of the Judge(s)  
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For Directions.

For Orders as to maintainability.

08<sup>th</sup> May, 2023.

Mr. Sardar Sher Afzal advocate for the applicant.

Mr. Ayaz Ahmed Ansari advocate for respondent No.9.

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**Salahuddin Panhwar, J:-** Admittedly Suit for Specific Performance was filed by the present applicant was rejected by the trial court; subsequently, appeal was also dismissed and the applicant preferred Revision Application that was also decided by order dated 26.09.2019 [RA No.48/2018] with the consent of the parties. Operative para is reproduced as under: -

***"In view of the above, the instant Civil Revision Application No. 48 of 2018, stands disposed of along with pending application[s]. The applicant, as mutually agreed, shall file an application under Order 1 Rule 10 CPC in Suit No. 458/2005, for becoming party in the said Suit No.458/2005, within fifteen [15] days positively. As soon as, the applicant become party in the said suit within the consent of Respondent No.7 herein, thereafter, in the said suit to proceed on merits strictly in accordance with law. The disposal of this Revision Application, as agreed, shall not prejudice the contentions/plea of the parties herein in Suit No.458/2005, which suit, as agreed, shall be decided on merits and strictly in accordance with law. The parties herein, to maintain status-quo only for fifteen [15] days herefrom".***

2. Accordingly, applicant filed application under Order 1 Rule 10 CPC in Suit No. 458/2005 as well as he preferred fresh suit on the plea of Order VII Rule 13 CPC, however, said suit was dismissed and he preferred appeal; that was also dismissed, hence, present revision application was filed wherein learned counsel for Respondent No.9 while relying upon the case law reported in 2009 SCMR 1079 [Supreme Court of Pakistan] [Re. Muhammad Ali & Ors Vs. Province of Punjab & Ors] contends that the applicant has no right to file fresh suit on same cause of action.

3. Perusal of order passed by in Revision Application No 48/2018 reflects that applicant was allowed to file application under Order 1 Rule 10 CPC in Suit No. 458/2005 while observing that parties as agreed, shall not prejudice the contentions/plea of the parties in Suit No. 458/2005, which suit, as agreed, shall be decided on merits and strictly in accordance with law. Needless to mention that referred suit is also for specific performance of contract and the applicant was given liberty to agitate his plea in the suit filed by Respondent No.9.

4. It is well settled principle of law that rejection of the plaint under Order VII Rule 11, C.P.C. on its own force does not preclude the Plaintiff from presenting a fresh Suit as per provisions of Order VII Rule 13, C.P.C. yet in case the first Suit was either expressly or impliedly barred by any law for the time being in force, then the fresh Suit on the same cause of action would also be barred. In Case of **Muhammad Ali and others v. Province of Punjab and others (2009 SCMR 1079)**, it was held by the Apex Court that: *"No doubt Order VII, rule 13 does contemplate that rejection of a plaint shall not of its own force preclude the plaintiff from presenting a fresh plaint. Nevertheless the underlined words are important and clearly indicate that other provisions relating to avoiding multiplicity of litigation and attributing finality to adjudications could not be ignored. For instance if a plaint under Order VII, Rule 11 is rejected on the ground of the relief being undervalued or failure to affix proper court-fee stamps, a fresh plaint could always be presented upon rectifying the defects within the prescribed period of limitation. Nevertheless if the plaint is rejected after proper adjudication as to the non-existence of cause of action or upon the suit being barred by law the findings could operate as res judicata and would not enable the plaintiff to re-agitate the same question through filing a subsequent suit upon the same cause of action and seeking the same relief. In our humble view, therefore, the question whether a fresh plaint could be presented under Order VII, Rule 13 or otherwise would depend upon the nature of the order passed by the court in rejecting a plaint under Order VII, Rule 11".* Subsequently, in Case of **Haji Abdul Karim and others v. Messrs Florida Builders (Pvt.) Limited (PLD 2012 Supreme 247)**, it was held by the Apex Court as under:-

***"Rule 13 states the consequence of the rejection of the plaint. It is, in brief, to keep the right of the plaintiff alive to present a fresh plaint even if based on "the same cause of action" notwithstanding the rejection of the plaint. This is a distinctly unusual provision. It will be seen immediately that this marks a clear distinction from the provisions of section 11, C.P.C. which not merely imposes a legal bar on an unsuccessful plaintiff but actually takes away the jurisdiction of the court to try any suit or issue in which the matter directly or substantially in issue has also been in issue in a former suit between the same parties litigating under the same title in a court of competent jurisdiction which has been "heard and finally decided". This is of course the well-known principle of res judicata which is one of the foundational principles of our procedural law. It follows that in Order VII, Rule 11 read with Rule 13 the concept of rejection of a plaint is clearly distinct from that of a suit which is decided and disposed of in the normal course by a court of competent jurisdiction after recording evidence. The question which therefore arises is, what is the reason for this distinction and why has it been created? What has to be determined is, firstly the exact scope and ambit of Order VII Rule 11, and secondly, the effect of an order passed rejecting the plaint in accordance therewith".***

5. It is matter of record that the parties to both the Suits are same and the subject matter of both the Suits is also same; therefore, it would be in the interest of both the parties to consolidate both the Suits. It is settled law that it is the inherent power of the court to consolidate suits and the purpose behind it is to avoid multiplicity of litigation and to prevent abuse of the process of law and court and to avoid conflicting judgments. No hard and fast rule forming the basis of consolidation can be definitive and it depends upon the facts and the points of law involved in each and every case, obviously where the court is persuaded that the interests of justice so demand, consolidation can be ordered, provided no prejudice is caused to any litigant and there is no bar in the way of the courts to consolidate the suits. Reverting to the proposition, there is no provision in the C.P.C. where the court is obliged to prepare a separate decree in the consolidated suits. Reference may be made to the Case of ***Zahid Zaman Khan and others v. Khan Afsar and others (PLD 2016 Supreme Court 409)***.

6. Under these circumstances, it would be in the interest of justice to consolidate the suit filed by present applicant alongwith Suit No. 458/2005 and decide the *lis* on merits; otherwise, if the applicant succeeded he will not get the same relief as it cannot be awarded in the *lis* filed by Respondent No.9. Accordingly, the impugned judgments recorded by both courts are hereby set-aside. Both Suits are remanded with directions that

both the Suits be consolidated by one and the same Court may be decided afresh on merits in accordance with law. A copy of this Order be communicated to the learned District Judge for compliance.

In view of above, instant revision application is allowed.

M.Zeeshan

JUDGE