

IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANA

Civil Revision No.S-65 of 2016

Applicant : Faiz Muhammad s/o Rasool Bux
Through Mr.Ghulam Dastagir
Shahani, Advocate

Respondents : (1) Shakal Khan s/o Ameer Bux
(2) Adab Hussain s/o Shakal Khan
(3) Barkat Ali s/o Fouj Ali
(4) Hasman Khan s/o Daim
Nemo for Sr. No.1 to 4
(5) S.H.O PS Kashmore
(6) Mukhtiarkar (Rev.) Taluka Kashmore
(7) Assistant Commissioner, Kashmore
(8) Province of Sindh, through Secretary
Revenue, Department Shahbaz
Building, Hyderabad
Through Mr.Abdul Hamid Bhurgri, A.A.G

Date of hearing : **11.5.2023 & 15.5.2023**

Date of Decision : **06.6.2023**

J U D G M E N T

ARBAB ALI HAKRO, J.- Through this Revision Application u/Section 115, the Civil Procedure Code 1908 ("**the Code**"), the applicant has called in question the Order dated 26.9.2016, passed by the Court of Additional District Judge, Kashmore ("**the appellate Court**") whereby, an appeal preferred by the applicant was dismissed, consequently the Order dated 03.9.2015, passed in F.C Suit No.Nil/2015 by Senior Civil Judge, Kandhkot (" **the trial Court**") rejecting the plaint u/Order VII R 11 of the Code was maintained.

2. Facts in brief are that the applicant has filed a suit for Declaration, Mandatory and Permanent Injunction, claiming therein that a residential house/plot admeasuring 16050 Sq. Feet situated in Deh Pakko Taluka & District Kashmore ("**the suit property**") is ancestral his property and the same was mutated in his name vide

entry No.707, beside she is in possession of the same. It is further asserted that the respondent No.1 to 4 time and again approached to the applicant and forcing him to sale out the suit property to them, otherwise; they will dispossess him. Thereafter, the applicant approached to the respondent No.5 to 7, to take action against the respondent No.1 to 4, but they did not take any action against them, hence the applicant filed the F.C Suit No.30of 2015. However, during pendency of that suit, the respondent No.6 & 7, cancelled the entry of the applicant at the instance of respondent No.1 to 4, due to such reason the trial Court rejected the plaint of earlier suit, hence he has filed the fresh suit.

3. Suit was resisted by respondent No.1 & 2, who have submitted his Objections, by contending therein that the suit is time barred; i.e.u/Sections 42, 54 and 56 of the Specific Relief Act, 1877 as well as u/Section 172 of the Land Revenue Act 1967. They further contended in the Objections that prior to filing the present suit the applicant filed the suit in respect of the same property against them and plaint of the same was rejected u/Order VII Rule 11 of the Code by the trial Court on ground that it has no jurisdiction to adjudicate upon the matter, but the same is vested with Revenue hierarchy.

4. At the very outset, the learned counsel for the applicant contended that the earlier suit was not decided on merits, and the plaint was rejected u/Order VII Rule 11 of the Code. He further argued that Order II Rule 2 of the Code did not apply to the present suit as where cause of action accrued to plaintiff is recurring. He also contended that rejection of the plaint does not amount to adjudication of lis on merits and principle of res-judicata is inapplicable in the suit of the applicant. He has further contended that substantial prayer of the applicant is

ownership, while the plaint was rejected on the consequential relief. He also urged that while rejecting plaint of the suit the averments made in the plaint should be treated as true and correct. In support of his contention, he relied upon **1974 SCMR 356, PLD 1970 S.C 180, 2007 SCMR 945, 2010 SCMR 973, 2004 SCMR 604, 2001 SCMR 953 and 1994 SCMR 826.**

5. Learned A.A.G for the official respondents, while refuting the above contention argued that suit is barred u/Order II Rule 2 of the Code; that relief was available to the applicant at the time of filing earlier suit, but he relinquished the same. He finally urged that instant Revision against the concurrent findings is not maintainable under the law, hence same devoid of merits, liable to be dismissed.

6. The respondent No.1 to 4 failed to contest the current Revision Application despite being served via substituted service/publication in the Kawish daily newspaper dated 20.10.2018.

7. The contentions have been fastidiously scrutinized, and the accessible record has been carefully assessed.

8. To ascertain whether adequate and comprehensive dispensation of justice was achieved, it is imperative to undertake an analysis of the findings concurrently documented by the Courts below.

9. Upon examination of the case record, it is evident that the applicant had previously initiated legal proceedings by filing a declaratory suit against the respondents on **31.3.2015**. The trial court subsequently rejected the applicant's claim via an order issued on **20.5.2015**, on the grounds of Order VII Rule 11 of the Code. In order to facilitate ease of reference, the prayers included in each plaint are replicated below: -

PRAYERS OF EARLIER SUIT NO.30 OF 2015

- a) *To declare that the plaintiff is legal and lawful owner of the suit property viz: residential house/plot admeasuring 16050 Square Feet situated in Deh Pako Kashmore Taluka Kashmore and to further declare that the actions of defendants No.1 to 4, for dispossessing the plaintiff from suit property or null, void and against the provision of law.*
- b) *To declare that the actions of defendants No.6 and 7 are null, void and against the law.*
- c) *To grant permanent injunction thereby restraining the private defendants No.1 to 4 from dispossessing, the plaintiff from suit property and also to officials defendants No.6 and 7 from cancelling the Khata of plaintiff.*
- d) *Costs.*
- e) *Relief.*

PRAYERS OF SUBSEQUENT SUIT NO.NIL OF 2015

- a) *To declare that the plaintiff is legal and lawful owner of the suit property viz: residential house/plot admeasuring 16050 Square Feet situated in Deh Pakko Kashmore Taluka Kashmore and to further declare that the actions of defendants No.1 to 4 for dispossessing the plaintiff from suit property are null, void and against the provision of law.*
- b) *To declare that all actions of defendant No.6 and 7 for cancelling the entry No.707 of plaintiff are illegal, unlawful, null, void and against the natural justice.*
- c) *To direct the defendants No.6 and 7 by way of Mandatory Injunction to restore the entry No.707 of Deh Form No.VII-B Deh Pakko Kashmore Taluka Kashmore in its original position.*
- d) *To grant permanent injunction thereby restraining the private defendants No.1 to 4 from dispossessing the plaintiff from suit property and also defendant No.5 to 7 in supporting the private defendants in their illegal acts and dispossessing him from the suit property.*
- e) *Costs.*
- f) *Relief.*

10. Upon analyzing the aforementioned prayers featured in both suits, it is evident that the applicant asserts an additional claim under prayer clause (b) in the subsequent suit, specifically challenging action and an order of cancellation pertaining to his

entry made by respondent No. 6 and 7. The rejection of the plaint in the earlier suit cannot be categorized within the scope of Section 11 of the Code res-judicata. It follows that such a doctrine is not applicable in the case of the applicant.

11. Under Section 11 of the code, subsequent suit can only be barred if following necessary conditions are attracted: -

- i. The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit.
- ii. The former suit must have been a suit between the same parties or between parties under whom they or any one of them claim.
- iii. The parties as afore-said must have litigated under the same title in the former suit.
- iv. The court which decided the former suit must have been a Court competent to try the subsequent suit in which such issue is subsequently raised.
- v. The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit.

12. The principle of res-judicata can only be attracted in a case of the above-mentioned conditions are attracted to a *lis*. Nevertheless, the section does not attract in the cases where the case has not been decided on merits after recording of evidence and is disposed of on technicalities or any formal ground. In case of rejection of plaint in a former suit, the institution of subsequent suit will not attract res-judicata. In this regard the learned counsel for the applicant has rightly referred case of **ABDUL HAMID and another v. DILAWAR HUSSAIN alias BHALLI and others** reported as **2007 SCMR 945**. In this case it has been held that;

“It is also a settled law that rejection of plaint is not an adjudication on merits. It is a decree only by fiction, therefore, there is no bar to file fresh suit.”

13. The previous rejection of plaint of applicant's suit in an earlier suit does not preclude him from initiating a new

subsequent suit pursuant to Order VII Rule 13 of the Code. Though u/Order VII Rule 13 of the Code a fresh suit can be filed, in case of rejection of the plaint in a former suit, on the same subject matter, cause of action and the parties. However, it is incumbent upon the plaintiff to remove the lacunas and the defects on the basis of which the plaint of earlier suit has been rejected. From the above-mentioned prayer clauses of both the suits, it is clear that the earlier and later suits were on the same subject matter, but in the subsequent suit the cause of action was fresh and the applicant had not sought the same relief(s) which he had sought in the earlier suit. In this context, I am fortified with the case of **Haji Abdul Karim and others vs. Messrs Florida Builders (Pvt) Limited (PLD 2012 Supreme Court 247)**, wherein Apex Court has held 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."

14. In the case of **Punjab Board of Revenue, Employees Cooperative Housing Society Limited vs. Additional District Judge, Lahore and others (2003 SCMR 1284)**, the Apex Court held as under:-

"Apart from this, the judgments passed by the Courts below in this case are perfectly in accordance with law for rejection of the plaint was sought on the ground that the matter was barred by res judicata and it has been rightly held that same could be decided after framing regular issue and leading of evidence."

15. The trial court has determined that the suit is barred, as the applicant has neglected or waived the opportunity to contest the previous cancellation order of his entry and the actions taken by the Revenue Authorities in an earlier suit. The Court is obligated to assume the truth and accuracy of the averments contained within the plaint, while rejecting the plaint u/Order VII Rule 11 of the Code. Both the Courts below misread the contents of the plaintiff's plaint, in which it had explicitly alleged that the cancellation of the applicant's entry had been tampered with and predicated on past dates, and that the applicant thereby disputes the validity of the Revenue Authorities' actions on the grounds of being void and contrary to the principles of natural justice. The applicant contended that he did not receive a fair hearing and further alleged that the order cancelling his entry was made in his absence. Both the Courts below exhibited a lack of consideration towards the factual pleadings in the plaint and unlawfully upheld

Section 42 of the Specific Relief Act, 1877, Section II Rule 2 of the Code, and Section 172 of the Sindh Land Revenue Act 1967. Furthermore, it is noteworthy to highlight that the applicant's request for possession relief is not the sole basis for his suit. In fact, the declaratory suit against the cancellation of entry can be pursued in accordance with the provisions outlined in Section 53 of the Sindh Land Revenue Act. For convenience the Section 53 of the West Pakistan Land Revenue Act, 1967, is reproduced hereunder: -

“53. Suit for declaratory decrees by persons aggrieved by an entry in a record. If any person considers himself aggrieved any an entry in a record of rights or in a periodical record as to any right of which he is in possession, he may institute a suit for a declaration of his right under Chapter VI of the Specific Relief Act, 1877 (Act I of 1877).

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In the said Act, in section 53, the words ‘or in a periodical record’ shall be omitted.”

16. The Revenue authorities could only pass an order for correction of revenue record. Section 172 of Land Revenue Act, 1967 did not exclude jurisdiction of Civil Court from exercising the jurisdiction for settlement of rights of the parties which have been affected or when right had not been settled completely or in those cases where right in rem and personam had to be determined. In the case of **Ali Nawaz vs. Azizullah through Legal Heirs (PLD 2007 Karachi 347)**, it was held that:--

"The cause of action means giving rise for a claim or right of the plaintiff against the defendant, enable a Court to give its decision. The question as to whether the applicant will be able to prove the case at the trial is irrelevant and cannot be considered for rejecting the plaint.

In the case of **Abdul Razzak Khamosh vs. Abbas Ali and others (PLD 2004 Karachi 269)** a Division Bench of this Court held as under:--

"Section 42 of the Specific Relief Act on the other hand, does not require existence of title in favour of the plaintiff but a declaration with respect to any right as to any property could be sought. It could not, therefore, be urged that unless the appellant's title had been perfected Suit No.607 of 1998 could not have been filed."

Another Division Bench of this Court in the case of **Ahsan Ali through L.Rs and others vs. Province of Sindh through District Coordination Officer Thatta and 4 others (2007 MLD 884)**, it has been held as under:--

"Even under section 53 of the Land Revenue Act, 1967 it has been provided that in case any person considers himself aggrieved by any entry in the record-of-rights or in any periodical record as to any right which he possesses, he may institute a declaratory suit for this purpose under Chapter VI, Specific Relief Act, 1877."

17. For the foregoing reasons, I have come to the conclusion that the applicant has been able to make out prima facie case in his favour, and both the Courts below have committed material irregularity and illegality while rejecting the plaint of the applicant u/Order VII Rule 11 of the Code, thus, this civil revision application is allowed. Consequently, the impugned Orders passed by both the Courts below are set aside and the case/ suit is remanded back to the trial Court with the direction to dispose of suit on merit after recording evidence of the parties in accordance with law. Parties are left to bear their own costs.

J U D G E