IN THE HIGH COURT OF SINDH
AT HYDERABAD

R.A 165 of 2010	:	Ali Mardan Shah & Others vs. Mushtaque & Others
For the Applicant/s	:	Mr. Parkash Kumar, Advocate
For the Respondent/s	:	Mr. Hakim Ali Siddiqui, Advocate.
For the Official Respondents:		Mr. Wali Muhammad Jamari, A.A.G.
Date/s of hearing	:	26.10.2023
Date of announcement	:	26.10.2023

JUDGMENT

Agha Faisal**, **J. The present *lis* pertains to 16 acres of land in deh Thar Sareji, Taluka and District Sanghar ("Property"). The claimants sought to enforce their rights, claimed by way of inheritance, and in respect whereof four successive suits were filed, each after the dismissal / termination of the prior. F.C. Suit 10 of 1999 was filed before the Court of Senior Civil Judge, Sanghar seeking to assert rights in respect to the Property. Vide order dated 21.10.2000, the said suit was dismissed as withdrawn. The memorandum of plaint filed in the said suit also refers to an earlier suit, between the same parties and pertaining to the same Property, having been filed on the subject, being F.C. Suit 107 of 1998, which was also stated to have been dismissed as withdrawn. Notwithstanding, the foregoing, yet another suit, being F.C. Suit 67 of 2001, was filed by the same plaintiff in respect of the same Property. Vide order dated 26.01.2002, the learned trial Court was pleased to reject the plaint under Order VII Rule 11 CPC and the operative part is reproduced herein below:

> "On date 21.10.2000 earlier Suit of the plaintiff (F.C. Suit 10/1999) was dismissed as withdrawn and it is crystal clear that Suit hit u/s 11 of C.P.C. and not maintainable. Plaintiff, has no cause of action to file fresh Suit as no permission were granted though the plaintiff had applied for the same but the same was not accorded, therefore, Suit of the plaintiff being not maintainable is rejected under Order 7 rule 11 sub section (d) of CPC being resjudicata with no order as to costs."

2. Thereafter, Civil Appeal 04 of 2002 was filed assailing rejection of plaint before the Court of District Judge, Sanghar and vide judgment dated 06.11.2002 the same was dismissed. The operative part of the said judgment is reproduced herein below:

> "The appellant by his suit is not seeking declaration in respect of his land which has been allotted to this contract by the barrage department. He has yet to fulfill the conditions and till then, there remains contract between appellant and barrage department. It is also admitted by the appellant that he has filed F.C. Suit no.10/99 on the same facts, but he then withdrew the suit with permission to file fresh suit and such prayer was allowed whereby his suit as dismissed as withdrawn, as prayed on 21-10-2000. Appellant then filed F.C.Suit No. 67/2001, wherein the plaint has been rejected by the trial court and the order is challenged in this appeal. In para No. 15 of the plaint, the appellant has stated that cause of action accrued to him in the year 1998 when he filed FC suit No.10/99 and it was withdrawn. There is no subsequent date by which the cause of action accrued to him to file F.C. suit NO. 67/2001 and therefore, he has no cause of action. Since the appellant didn't file subsequent suit but on the same cause of action he brought this suit 67/2001 and he wants to file suit No. 67/2001. It is hit by section 11 CPC, even otherwise, I have gone through the facts of the plaint, wherein no particular prayer is made by the appellant for any particulars declaration and there is no any order or thing for which he declaration is prayed. His prayer for declaration that in the year 1969-70 or that of 1979 has come time barred as the maximum period of limitation for filing the suit is twelve years. This is nothing but a frivolous suit, the fate whereof is to decide this initial stage to avoid fruitless limitation. It is however noted that while allowing the withdrawal of earlier suit, the permission was granted as prayed but the views taken by the trial court that the permission was not granted is incorrect view. However, the trial court has rightly rejected the plaint. I also dismiss the appeal with no order as to costs."

It is pertinent to mention that the appellate order was not assailed by the respondent and remains in the field.

3. A fresh ground of litigation commenced two years later, vide F.C. Suit 19 of 2004, in respect of the same Property. However, now a co-claimant brother was added as a plaintiff, in addition to the earlier plaintiff, and a declaration of title was sought; a claim which was demonstrably eschewed / forgone in the earlier three suits. In this fourth successive suit, vide order dated 13.10.2009, the learned trial Court was once again pleased to reject the plaint under Order VII Rule 11, CPC vide a detailed order, operative constituents of the order is reproduced herein below:

> "On 5.10.2009 matter was fixed for Orders on Application U/O 7 R.11 CPC and Application U/O 47 R.1 CPC. There was no copy of the earlier plaint and order passed on it place on record. Therefore, undersigned issueddirection to the advocate for defendantMr. Ajmer Ali Laskani to provide copy of plaint and order passed thereon and he complied with the Court orders completely today.
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> Undersigned has compared the facts of present suit No.19/2004 with F.C.Suit No.67/2001. This pending suit has been filed by Mushtaque and Jani sons of Majno Rajar, whereas F.C.Suit No.67/2001 was filed by Jani s/o Majno only. In present suit the grounds taken by the plaintiffs that the land was granted to the plaintiffs on 22.10.1991 but it was un-surveyed land at the time of grant, therefore, U.A/1 was mentioned in Form-A. One Jiandal Shah was also granted about 72-0 acres land at different times in same Deh. Aman Shah the heir of Jiandal Shah sold the said 72-0 acres land to Ali Sher Shah and others, thereafter said All Sher Shah sold the said 72-0 acres land to defendants No.7 to 10. The heirs of Jiandal Shah, Talib Hussain Shah and Banday Ali Shah with the help of defendants No.7 to 10 tried forcibly to dispossess the plaintiffs, therefore he filed F.C.Suit No.107/1998 and F.C.Suits No.10/99 against the heirs of said Jiandal Shah, but it was misfortune of plaintiff No.1 that the plaintiff No.2 not properly guided by his advocates at that time and the plaintiff No.2 on the advice of his the then advocates withdrew both the suits. Thereafter plaintiff No.2 filed third suit bearing F.C.Suit No.57/2001 which was dismissed on 26.1.2002 U/s 11 C.P.C. His appeal No.04/2002 was also dismissed on 06.11.2002. Thereafter defendants No.7 to 10 jointly tried to dispossess the plaintiffs from S.Nos:58 to 69 of Deh Thar Sareji, therefore, plaintiffs filed the present suit.

Undersigned perused the copy of the plaint of F.C.Suit No.67/2001 which is also on the same facts which plaint rejected on 26-01-2002.

Undersigned also perused the order of Civil Appeal No.04/2002 Re-Jani VS.Ghulam Hyder Shah & others which has been decided by Honourable District Judge, Sanghar vide judgment dated 06.11.2002 holding therein as under:-

> "It is also admitted by the appellant that he had filed F.C.Suit No.10/99 on the same facts, but he then withdrew the suit with permission to file fresh suit and such prayer was allowed whereby his suit was dismissed as withdrawn, as prayed, on 21.10.2000. Appellant then filed F.C.Suit No.67/2001, wherein the plaint has been rejected by the trial Court and the order is challenged in this appeal. In Pam No.15 of the plaint, the appellant has stated that cause of action accrued to him to file F.C.Suit No.67/2001 and it was withdrawn. There is no subsequent date by which the cause of action accrued to him to tile FC. Suit No.67/2001 and therefore, he has no cause of action. Since the appellant did not file subsequent suit but on the same cause of action he brought this suit 67/2001 and he wants to file suit No.67/2001. it is hit by section 11 CPC. Even otherwise, I have gone through the facts of the plaint, wherein no particular prayer is made by the appellant for any particular declaration and there is no any order or thing for which the declaration is prayed. His prayer for declaration that in the year 1969-70 or that of 1979 has become time barred, as the maximum period of limitation for filing the suit is twelve years. This is nothing but a frivolous suit, the fate whereof is to be decided at its initial stage to avoid fruitless litigation. It is however, noted that while allowing the withdrawal of earlier suit, the permission was granted as prayed, but the views taken by the trial court that the permission was not granted, is incorrect view. However, the trial Court has rightly rejected the plaint. I also dismiss this appeal with no order as to costs."

In view of order of Honourable District Judge, Sanghar it has already discussed that plaintiff Jani son of Majno should have filed suit for declaration in the year 1979-70 or that of 1979 has become time barred as the maximum period of limitation for filing the suit is twelve years. This is nothing but a frivolous suit, the fate whereof is to be decided at its initial stage to avoid fruitless litigation. In the above circumstances it has already been decided by Honourable District Judge that plaintiff has filed the suit as time barred as he should have file the suit within twelve years for declaration but he and his brother has filed the suit in the year 2004 which is absolutely time barred, so also hit by section 11 C.P.0 and Order 2 Rule 2 C.P.C, as their suit was dismissed on same facts which was filed by one of the plaintiffs/up to appellate Court whereas on same facts and grounds the plaintiffs have filed the present suit bearing F.C.Suit No.19/2004 only with new change of including name of Mushtaque the brother of plaintiff Janis Hence the plaint of suit No.19/2004 is hereby rejected U/O 7 Rule 11 CPC being time barred and hit by sections 11 of CPC & Order 2 Rule 2 CPC. There is no order as to costs."

4. Civil Appeal 145 of 2009 was filed before the District Judge, Sanghar against the rejection and the same was allowed vide order dated 30.03.2010 ("Impugned Order'). The operative constituents of the said order is reproduced herein below:

"The appellant's previous plaint was rejected by the Learned Senior Civil Judge and such appeal was also rejected by the District Judge and thereafter no appeal or review was filed, but such orders do not bar the appellants to file fresh plaint U/0 VII Rule 13 C.P.C. The appellants' suit is not barred U/S 11 C.P.C and U/O 02 rule 2 C.P.C. The facts of appellant previous plaint and the relief claimed therein is different from the facts of their present plaint and the relief claimed therein and their present plaint shows new cause of action, therefore, it is not liable to be rejected. The cause of action has accrued to the appellant according to the plaint five months, hence their plaint/suit is not time barred and the question of limitation is mixed question of law and facts, which require evidence. The learned Senior Civil Judge has reproduced the impugned order, the observation of District Judge passed in the appeal. For deciding the plaint only averments of the plaint is to be considered and the Plaint does not show that it is barred by any law. Neither any issue was framed, nor any final Judgment was

> passed, nor any part of relief claimed by the appellant left earlier and taken now, therefore, the plaint of the above suit is not barred U/S 11and order 2 rule 2 CPC and is not liable to be rejected. From the perusal of contents of plaint of present suit and previous plaint of previous suit filed by the plaintiffs/appellants, it appears that they are different from each other and the present suit was filed on fresh cause of action, hence as per order 7 rule 13 C.P.C, the Plaint of fresh suit is not bar to be presented, hence the plaintiffs/appellants have rightly filed the present suit, in which they have claimed declaration to the effect that plaintiffs are owner of agriculture land bearing S. No: 58 to 69 measuring 32-00 acres Taluka and District Sanghar and in previous suit, the plaintiffs had sought declaration to the effect that Map of Deh Shareji prepared by defendant No: 07 in the year 1969-70 is correct and genuine and binding force, hence the prayer clause of both the suits are different, hence plaintiffs/appellants have fresh cause of action to file the present suit and only the Civil Court is competent to decide the declaration of suit Hence, the impugned order dated 13-10--2009 passed by learned senior civil judge Sanghar is hereby set aside and remanded back to lower Court with directions to decide the case after recording the evidence of both the parties on merits after framing the issue on the maintainability of the suit according to National Judicial Policy. The rulings cited by the respondent's advocate in support of their case are not applicable to this case, in these takes. I, therefore, hold this point accordingly. Consequently, appeal of appellant is allowed accordingly."

5. Per applicants' counsel, the Impugned Order could not be sustained as it has been rendered in misdirection of the law, therefore, it ought to be set aside on the anvil of Section 115, CPC. It was submitted that the first two suits were dismissed as withdrawn and the appellate order in respect of the first rejection of the plaint was never challenged. Under such circumstances any relief not claimed at the first instance stood vitiated. It was further added that order VII Rule 13 CPC contemplates fresh presentation of plaint provided the underlying defect, if curable, has been cured and the matter remains within the confines of the law in general and limitation in particular. Since the underlying defect was incurable, therefore, no cause ever arose to entertain a fresh suit.

6. Contrarily, the respondent's counsel supported the Impugned Order and submitted that it merited no interference in revision. It was argued that limitation could only be decided post evidence; *res judicata* could only be found as a bar in a final judgment and not at the onset; and devoid of any final adjudication, post recording of evidence, a rejection order could not be sustained, hence, the Impugned Order was rightly rendered.

7. Heard and perused. The ambit of a revision is circumscribed by section 115 CPC[1], hence, it is for this Court to determine whether the Impugned order could be sustained on the anvil thereof.

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[1] Sec. 115. Revision.(1) The High Court may call for record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears
(a) to have exercised a jurisdiction not vested in it by law, or
(b) to have failed to exercise a jurisdiction so vested, or
(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity.
the High Court may make such order in the case as it think fit…

8. The admitted facts are that the suit under reference was the fourth suit filed seeking to assert purported inheritance rights in the Property. The first three suits were filed by one brother, however, the in the fourth suit a co-claimant brother was impleaded as an additional plaintiff. The declaratory prayer was eschewed / abjured in the first three suits, however, supplemented in the fourth suit. The appellate order dismissing the appeal against the first order of rejection of plaint was never assailed.

9. The primary underlying order, and those rendered in earlier suits, is the rejection of plaint under Order VII rule 11 CPC. The evolution of law with respect to rejection of plaints was chronologically catalogued in the *Florida Builders case*[2] wherein the august Supreme Court demarcated the anvil upon which the decisions in such matters ought to be rested. The guidelines distilled by the Court in such regard are reproduced below:

> "Firstly, there can be little doubt that primacy, (but not necessarily exclusivity) is to be given to the contents of the plaint. However, this does not mean that the court is obligated to accept each and every averment contained therein as being true. Indeed, the language of Order VII, Rule 11 contains no such provision that the plaint must be deemed to contain the whole truth and nothing but the truth. On the contrary, it leaves the power of the court, which is inherent in every court of justice and equity to decide or not a suit is barred by any law for the time being in force completely intact. The only requirement is that the court must examine the statements in the plaint prior to taking a decision.
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> Secondly, it is also equally clear, by necessary inference, that the contents of the written statement are not to be examined and put in juxtaposition with the plaint in order to determine whether the averments of the plaint are correct or incorrect. In other words the court is not to decide whether the plaint is right or the written statement is right. That is an exercise which can only be carried out if a suit is to proceed in the normal course and after the recording of evidence. In Order VII, Rule 11 cases the question is not the credibility of the plaintiff versus the defendant. It is something completely different, namely, does the plaint appear to be barred by law.
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> Thirdly, and it is important to stress this point, in carrying out an analysis of the averments contained in the plaint the court is not denuded of its normal judicial power. It is not obligated to accept as correct any manifestly self-contradictory or wholly absurd statements. The court has been given wide powers under the relevant provisions of the Qanun-e-Shahadat. It has a judicial discretion and it is also entitled to make the presumptions set out, for example in Article 129 which enable it to presume the existence of certain facts. It follows from the above, therefore, that if an averment contained in the plaint is to be rejected, perhaps on the basis of the documents appended to the plaint, or the admitted documents, or the position which is beyond any doubt, this exercise has to be carried out not on the basis of the denials contained in the written statement which are not relevant, but in exercise of the judicial power of appraisal of the plaint."

10. It was never the respondents' case that rejection of a plaint could not have been actuated on the legal principles cited by the respective forums; the case was that such principles were not attracted in the relevant circumstances. Therefore, while appreciating that a rejection could take place on the cited provisions of law, it is for this court to deliberate whether the same were attracted in the circumstances.

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[2] Per *Saqib Nisar J* in *Haji Abdul Karim & Others vs. Florida Builders (Private) Limited* reported as *PLD 2012 Supreme Court 247*.

11. Section 11 C.P.C[3] deals with the time honored concept of *res judicata* and in the applicability thereof a court is precluded from trying a suit. It would follow that such a determination is ideally merited at the first instance and not when the suit has already been tried. The initial suit/s was dismissed as withdrawn and the order dated 21.10.2000 demonstrates that the withdrawal was unconditional. *Prima facie* a right to sue was exercised; thereafter, unequivocally abandoned.

12. The plaintiffs claim a right via inheritance, hence, common and conjoined *inter se* to the initial plaintiff, in the first three suits, and the plaintiff supplemented in the fourth suit. It is *prima facie* apparent that Explanation VI to section 11 C.P.C is attracted herein as persons litigating in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the person so litigating. Therefore, no case is made out to disregard section 11 C.P.C since an original co-claimant, not arrayed earlier, was impleaded in the fourth successive round of ostensibly the same claim.

13. Order II rule 2 C.P.C[4] requires a suit to include the whole claim and any portion abjured may be considered relinquished. The Property remained common to all four suits; the rights sought asserted were consistent and by way of inheritance; however, the declaratory prayer was included only for the first time in the fourth suit. The respondent's counsel remained unable to dispel the preponderance of law stipulating that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such relief; but if no omits, except with the leave of the Court, to sue for all such relief, he shall not afterwards sue for any relief so omitted. There is absolutely so suggestion that any leave of

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[3] 11. No Court shall try suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. Explanation I.- The expression "former suit" shall denote a Suit which has been decided prior to the suit in question whether or not it was instituted prior thereto. Explanation II.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court. Explanation III.-The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly, or impliedly by the other. Explanation IV.-Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue -in such suit. Explanation V.-Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused. Explanation VI.- Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the person so litigating.

[4] 2. (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. (2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished claim. (3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such relief; but if no omits, except with the leave of the Court, to sue for all such relief, he shall not afterwards sue for any relief so omitted. Explanation: For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

court was ever sought or obtained in respect of the additional relief sought that had earlier been omitted.

14. Order VII rule 13 C.P.C[5] states that rejection of a plaint does not precluded presentation of a fresh plaint, however, emphasis has to be laid on the verbiage of the provision. It is imperative to consider the import of the phrase *shall not of its own force*. It is apparent that mere rejection does not preclude presentation of a fresh plaint, provided the underlying defect remains uncured or is incapable of being cured. It is settled law that rejection on account of limitation and / or *res judicata*, being *prima facie* incurable defects, would preclude *de novo* agitation if the infirmity subsisted[6]. The Impugned Order addresses the glaring defects in the plaintiffs' case in a perfunctory manner and then proceeds to allow the appeal in the absence of the defects having been justifiably dis-applied, cured or distinguished.

15. There is yet another aspect to consider and that is the issue of limitation. The rejection of the plaint, in the fourth successive suit, was also rested on limitation. The order rejecting the plaint exhaustively dealt with the issue of limitation and found the relevant suit to be time barred. The Impugned Order pays no heed to the limitation issue and proceeds to unjustifiably brush it aside. The law requires Courts to first determine whether the proceedings filed there before are within time and the Courts are mandated to conduct such an exercise regardless of whether or not an objection has been taken in such regard[7]. The Superior Courts have held that proceedings barred by even a day could be dismissed[8]; once time begins to run, it runs continuously[9]; a bar of limitation creates vested rights in favour of the other party[10]; if a matter was time barred then it is to be dismissed without touching upon merits[11]; and once limitation has lapsed the door of adjudication is closed irrespective of pleas of hardship, injustice or ignorance[12]. It is settled law that provisions of Order VII rule 13 CPC do not merit relief in the presence of a bar of limitation[13].

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[5] 13. The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.
[6] 2009 SCMR 1079; 2007 SCMR 945; 2016 CLC 663; 2010 CLC 1393; 2014 YLR 1082; 2013 YLR 407.
[7] *Awan Apparels (Private) Limited & Others vs. United Bank Limited & Others* reported as *2004 CLD 732.*
[8] *2001 PLC 272*; *2001 PLC 143*; *2001 PLC 156*; *2020 PLC 82.*
[9] *Shafaatullah Qureshi vs. Pakistan* reported as *PLD 2001 SC 142*; *Khizar Hayat vs. Pakistan Railways* reported as *1993 PLC 106.*
[10] *Dr. Anwar Ali Sahito vs. Pakistan* reported as *2002 PLC CS 526*; *DPO vs. Punjab Labour Tribunal* reported as *NLR 1987 Labour 212.*
[11] *Muhammad Tufail Danish vs. Deputy Director FIA* reported as *1991 SCMR 1841*; *Mirza Muhammad Saeed vs. Shahabudin* reported as *PLD 1983 SC 385*; *Ch Muhammad Sharif vs. Muhammad Ali Khan* reported as *1975 SCMR 259.*
[12] *WAPDA vs. Aurangzeb* reported as *1988 SCMR 1354.*
[13] *2006 CLC 303; PLD 1980 Peshawar 87; PLD 1973 Lahore 495.*

16. It is observed, with utmost respect, that the Appellate Court appears to have disregarded the underlying facts and overriding interpretation of the law, while rendering the Impugned Order, hence has exercised its jurisdiction with manifest material irregularity. In view of the foregoing, this revision is allowed with costs and the Impugned Order dated 30.03.2010 rendered by the Court of District Judge Sanghar in Civil Appeal 145 of 2009 is hereby set aside.

Judge