

ORDER SHEET  
THE HIGH COURT OF SINDH, KARACHI  
IInd Appeal No. 93 of 2023

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Dated: Order with signature of Judge(s)

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1. For orders on CMA NO. 2903 of 2023
2. For Hearing of CMA No. 2904 of 2023
2. For Hearing of Main Case.

Date of Hearing : 17 April 2023.

Petitioner : Raja Sher Baz Khan through Mr. Asif Ibrahim Memon, Advocate

Respondents : Raja Muhammad Ali

**J U D G M E N T**

**MOHAMMAD ABDUR RAHMAN, J.** - This Second Appeal has been preferred by the Appellant under Section 100 of the Code of Civil Procedure, 1908 as against the Judgement dated 28 February 2023 passed by the III<sup>rd</sup> Additional District Judge Karachi (South) in an appeal that was originally filed as Civil Revision Application No.74 of 2019 and which was, pursuant to an order dated 17 September 2021 passed by this Court in C.P No.D-1743 of 2019, converted into a first appeal, under Section 96 of the Code of Civil Procedure, 1908 and which after being heard as a First Appeal by the III<sup>rd</sup> Additional District Judge Karachi (South), upheld an Order dated 23 May 2019 passed by IV<sup>th</sup> Senior Civil Judge Karachi (South) in Civil Suit No.211 of 2019, granting an application under Order VII Rule 11 read with Section 151 of Code of Civil Procedure 1908 that had been maintained by the Respondent rejecting the Plaint of Civil Suit No.211 of 2019.

2. The Appellant claims to have purchased Plot No.139, Hazara Colony Kalapul Karachi (hereinafter referred to as the "Said Property") from one Haji Fazal Deen. Haji Fazal Deen was purportedly issued a

lease by the Sindh Katchi Abadi Authority and which was purportedly registered with the Sub-Registrar-I Clifton Karachi. The sequence of events that happen thereafter are as follows:

- (i) The lease of the Said Property was cancelled by the Sindh Katchi Abadi Authority through its Deputy Director by a letter dated 11 July 2012 compelling the Appellant to institute Civil Suit No. 206 of 2013 before the IV<sup>th</sup> Senior Civil Judge Karachi (South). It is to be noted that in Civil Suit No.206 of 2013 neither the Sindh Katchi Abadi Authority nor any officer of that Authority were impleaded as a party. The IV<sup>th</sup> Senior Civil Judge Karachi (South) by an Order dated 10 May 2018 was pleased to reject the Plaint of Suit No. 206 of 2013 under Order VII Rule 11 of the Code of Civil Procedure, 1908. No appeal was preferred by the Appellant as against the Order dated 10 May 2018.
- (ii) The Appellant thereafter chose to file Civil Suit No. 995 of 2018 before IV<sup>th</sup> Senior Civil Judge Karachi (South) being a Suit for Declaration, Restoration of Possession and for Restoration of the Lease of the Said Property, this time impleading the Deputy Director Sindh Katchi Abadi Authority as a Defendant. By an Order dated 14 December 2018 the IV<sup>th</sup> Senior Civil Judge Karachi (South) was pleased to reject the plaint of Civil Suit No. 995 of 2018 under Order VII Rule 11 of the Code of Civil Procedure, 1908 as being barred under Section 42 of the Specific Relief Act 1877, Section 96 of Sindh Katchi Abadi Act, 1987 and under the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908. Again no appeal was preferred against the Order dated 14 December 2018.

- (iii) Undeterred the appellant filed a third suit bearing Civil Suit No. 211 of 2019, this time only as against the Respondent without impleading the Sindh Katchi Abadi Authority, with the following prayer clauses:

“ ... *It is, therefore, prayed that this Honourable Court be pleased to pass Judgment & Decree in favour of the Plaintiff & against the Defendant as under:*

*1) To declare that the Plaintiff is the legal and lawful owner of immovable property i.e. Plot No. 139, Hazara Colony, Kalapul, Karachi, by virtue of registered lease deed bearing No. 1825, Sub-Registrar - I, Clifton, Karachi.*

*2) To restrain the Defendants, their men, agents, servants, employees, attorneys, representatives, successors-in-interest, person or persons, working under them or for them from creating third party interest or handing over the possession of the said property or any of its portion to any one in any capacity. The Defendant No. 2 may be restrained from transferring the said property in the name of any other person.*

*3) To direct the Defendant No. 1 or any other person, in possession of the said property, to hand over the possession of the same to the Plaintiff.*

*4) To direct the Defendant No. 1 to pay the amount of Rs. 30,000/- as mesne profit to the Plaintiff for the last three years as well as at the same rate till handing over the possession of the same to the Plaintiff.*

*5) Any other relief or relieves, which this honourable Court deem fit and proper in the circumstances of the case, may also be granted.*

*6. Cost of the suit may also be awarded.”*

3. By an Order dated 23 May 2019 the IV<sup>th</sup> Senior Civil Judge Karachi (South) was pleased to reject the Plaint of Civil Suit No. 211 of 2019 under Order VII Rule 11 of the Code of Civil Procedure, 1908 as being barred under the provisions of Section 42 of the Specific Relief Act 1877, Section 39 of Sindh Katchi Abadi Act 1987 and under the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908.

4. Against the Order dated 23 May 2019 passed by the IV<sup>th</sup> Senior Civil Judge Karachi (South) rejecting the Plaint of Civil Suit No. 211 of 2019 the Appellant filed Civil Revision Application No. 74 of 2019 before

the III<sup>rd</sup> Additional District Judge Karachi (South) who had been pleaded to dismiss the same by an Order dated 17 September 2019. The Appellant preferred C.P No. D-1743 of 2019 before this Court and which was disposed of by an Order dated 17 September 2019, whereby the Order dated 17 September 2019 passed by III<sup>rd</sup> Additional District Judge Karachi (South) dismissing Civil Revision Application No. 74 of 2019, was set aside with directions that the same be treated as an appeal, subject to limitation.

5. Pursuant to orders passed by this Court in C.P No.D-1743 of 2019 the III<sup>rd</sup> Additional District Judge Karachi (South) was pleased to treat Civil Revision Application No.74 of 2019 as an appeal under Section 96 of the Code of Civil Procedure,1908 and after hearing the parties, was on 28 February 2023 pleased to dismiss the appeal and uphold the order passed by IV<sup>th</sup> Senior Civil Judge Karachi (South) rejecting the Plaint of Civil Suit No. 211 of 2019 under Order 7 Rule 11 of the Code of Civil Procedure, 1909 as being barred under Section 11 of the Code of Civil Procedure, 1908 and under Section 42 of the Specific Relief Act, 1877.

6. Mr. Asif Ibrahim Memon, Advocate for the Appellant has contended that the Appellant has preferred this Second Appeal as against the Order dated 28 February 2023 passed in Civil Revision Application No.74 of 2019 contending that there is no question of Suit No. 211 of 2019 being barred under the provisions of Section 11 of the Code of Civil Procedure, 1908 or under the provision of Order II Rule 2 of the Code of Civil Procedure, 1908 or under the provisions of Section 42 of the Specific Relief Act 1877. He requests that the Order dated 28 February 2023 of III<sup>rd</sup> Additional District Judge Karachi (South) passed in Civil Revision Application No.74 of 2019 as an appeal and the Order dated 23 May 2019 passed by IV<sup>th</sup> Senior Civil Judge Karachi (South) in Civil Suit No. 211 of

2019 may be set aside. He didn't not rely on any case law in support of his contentions at the time of hearing of the appeal.

7. I have heard the Counsel for the appellant and perused the record.

Order II Rule 2 of the Code of Civil Procedure, 1908 provides as under:

“ ... 2. *Suit to include the whole claim.*\_\_

*(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) Relinquishment of part of claim.* 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.

*(3) Omission to sue for one of several reliefs.* 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 he omits, except with the leave of the Court, to sue for all such reliefs, 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.

9. The provisions of Order II Rule 2 of the Code of Civil Procedure, 1908 has been interpreted by the Supreme Court of Pakistan in **Abdul Hakim and 2 others vs. Saadullah Khan and 2 others**<sup>1</sup>, wherein it was held that:

“ ... The expression "cause of action" in Order II, rule 2, C. P. C. means the cause of action for which a suit is brought. In order that the cause of action for the two suits may be the same, it is necessary not only that the facts which would entitle the plaintiff to the right claimed must be the same but also that the infringement of his right at the hands of the defendants B complained against in the two suits, must have arisen in substance out of the same transaction. In considering the application of this bar regard is to be had to the allegations in the two suits without reference to the defence that may be set up by the defendants. As laid down by their Lordships' of the Privy Council in Muhammad Khalil Khan and others v. Mahbub Ali Mian and others P L D 1948 PC 131 "the bar under Order II, rule 2 refers entirely to the grounds set out in the plaint as the cause of action or in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour". A rough test, although not a conclusive one is to see whether the same evidence will sustain both suits which would be the case if both the suits are founded on continuous and inseparable incidents in the same transaction. The question, however, is to be examined in substance and not merely on form as the cause of action in the two suits may be found to be the same, in spite of the facts alleged not being exactly identical in the two cases. It is not open to the plaintiff to up th parts really constituting the same cause of action file different suits in respect of them. In other words, a plaintiff must ask for all his reliefs

<sup>1</sup> PLD 1970 SC 12

which flow from the grievances caused to him by the infringement of his rights by defendant in the course of the same transaction

8. The various prayers of each of the Suits filed by the Appellant and the Defendant in each of the three Suits are, for the sake of convenience are reproduced hereinunder:

Civil Suit No. 206 of 2013	Civil Suit No.995 of 2018	Civil Suit No.211 of 2019
<p><b>Defendants:</b></p> <p><b>Raja Muhammad Ali</b></p>	<p><b>Defendants:</b></p> <p><b>Raja Muhammad Ali</b></p> <p><b>Deputy Director. Karachi Abadi Authority</b></p> <p><b>Sub-Registrar 1 T.Div Karachi</b></p>	<p><b>Defendants:</b></p> <p><b>Raja Muhammad Ali</b></p>
<p>It is therefore, therefore prayed that this Honourable Court be pleased to pass Judgment &amp; Decree in favour of the Plaintiff &amp; against the Defendant as under:</p> <p>1) To direct the defendant to vacate and hand over the vacant, peaceful possession of the shop and room situated on ground floor, portion of house occupied by on first floor and 3<sup>rd</sup> floor of property bearing <u>House bearing Plot 139, Hazara Colony, Kalapul, Karachi</u> to the plaintiff.</p> <p>2) To direct the defendant to pay mense profit from the month of January 2013 to onwards which comes Rs.60,000/- [Rupees Sixty thousand], and future mesn profit at the same rate till realization of the possession.</p> <p>3) Restrain the defendant to raise anyconstruction/modificati on/alteration in the premises occupied by him and further the defendant may be directed not to create third party interest in the property.</p> <p>4) Cost of the Suit.</p> <p>5) Any other relief or</p>	<p>It is, therefore, prayed that this Honourable Court be pleased to pass Judgment &amp; Decree in favour of the Plaintiff &amp; against the Defendant as under:</p> <p>a- To Declare plaintiff is lawful owner of property i.e <u>Plot 139, Hazara Colony, Kalapul, District (South) Karachi BY virtue of registered lease deed bearing No.1825, Sub-Registrar I, Clifton Town Karachi</u></p> <p>b- To direct the defendant to vacate and hand over peaceful possession of the <u>shop and room situated on ground floor, portion of house occupied by on first floor and 3<sup>rd</sup> floor of property bearing bearing Plot 139, Hazara Colony, Kalapul, Karachi</u> to the plaintiff.</p> <p>c- To declare that letter dated 11.07.2012 issued by Deputy Director in respect of property Plot 139, Hazara Colony, Kalapul, District (South) Karachi is null and void and cance, further be restore the lease deed bearing No.1828, Sub Registrar I Clifton Town Karachi on its original possession.</p>	<p>It is, therefore, prayed that this Honourable Court be pleased to pass Judgment &amp; Decree in favour of the Plaintiff &amp; against the Defendant as under:</p> <p>1) To declare that the Plaintiff is the legal and lawful owner of immovable property i.e. Plot No. 139, Hazara Colony, Kalapul, Karachi, by virtue of registered lease deed bearing No. 1825, Sub-Registrar - I, Clifton, Karachi.</p> <p>2) To restrain the Defendants, their men, agents, seroants, employees, attorneys, representatives, successors-in-interest, person or persons, working under them or for them from creating third party interest or handing over the possession of the said property or any of its portion to any one in any capacity. The Defendant No. 2 may be restrained from transferring the said property in the name of any other person.</p> <p>3) To direct the Defendant No. 1 or any other person, in possession of the said property, to hand over the possession of the same to the Plaintiff.</p>

<p>relieves, which may deem, fit, think and proper by this Honourable Court</p>	<p>d- To direct the defendant to pay mense profit from the month of January 2013 to onwards and future mense profit at the same rate till realization of the possession.</p> <p>e- To restrain the Defendant(s), their agents, attorneys, representatives, person or persons, working under them or for them not to create third party interest over the suit property i.e <u>shop and room situated on ground floor, portion of house occupied by on first floor and 3<sup>rd</sup> floor of property bearing bearing Plot 139, Hazara Colony, Kalapul, Karachi</u> without process of law.</p> <p>f-Any other relief or relieves, which this honourable Court deem fit and proper in the circumstances of the case, may also be granted.</p> <p>g-. Cost of the suit may also be</p>	<p>4) To direct the Defendant No. 1 to pay the amount of Rs. 30,000/- as mesne profit to the Plaintiff for the last three years as well as at the same rate till handing over the possession of the same to the Plaintiff.</p> <p>5) Any other relief or relieves, which this honourable Court deem fit and proper in the circumstances of the case, may also be granted.</p> <p>6. Cost of the suit may also be awarded.</p>
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9. As held by the Supreme Court of Pakistan, a litigant at the time of filing a Suit must maintain the entire *lis* on the basis of all the causes of action that were in existence at the time of the institution of that Suit. It is therefore necessary to examine the pleadings of Civil Suit No. 211 of 2019 as to see whether any new cause of action has been pleaded in Civil Suit No. 211 of 2019 that was not in existence at the time of the filing of Civil Suit No. 206 of 2013 or Civil Suit No.995 of 2018.

10. It is noted that Civil Suit No. 206 of 2013 was filed by the Appellant as against the Respondent No. 1 claiming that the Respondent No. 1 was illegally in possession of the Said Property and seeking *mense profit* as against the Respondent No. 1. Civil No. 995 of 2018 was also filed by the Appellant *inter alia* as against the Respondent No. 1 claiming that the Respondent No. 1 was illegally in possession of the Said Property and seeking *mense profit* as against the Respondent No. 1. Finally Civil Suit No. 211 of 2019 has also been filed by the Appellant as against the

Respondent No. 1 claiming that the Respondent No. 1 was illegally in possession of the Said Property and seeking *mense profit* as against the Respondent No. 1. In addition, if one is to read the pleadings and the prayer clauses of each of the three suits, the facts that are narrated as to how the Respondent No. 1 has entered into possession of the Said Property are identical. I am therefore clear in my mind that no new cause of action has accrued to the Appellant to maintain Civil Suit No. 211 of 2019 before the IV<sup>th</sup> Senior Civil Judge Karachi (South) and in which the Appellant has once again claimed that the Respondent No. 1 is in illegal possession of the Said Property and seeks mense profits as against the Respondent No.1; which suit was barred under the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908 and which had on 23 May 2019 correctly been rejected by the IV<sup>th</sup> Senior Civil Judge Karachi (South).

11. I am therefore of the opinion that Civil Suit No. 211 of 2019 was clearly barred under the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908 and as such was correctly rejected under Order 7 Rule 11 of the Code of Civil Procedure, 1908 by the IV<sup>th</sup> Senior Civil Judge Karachi (South) by its Order dated 23 May 2019 and which order has rightly been upheld by III<sup>rd</sup> Additional District Judge Karachi (South) in its Judgment dated 28 February 2023 passed in Civil Revision Application No.74 of 2019 (which was treated as first appeal) and for which reasons I had dismissed this appeal on 17 April 2023 and the forgoing are the reasons of that order.

JUDGE

Dated: 17 July 2023