

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

C.P No. D-103 of 2016

PRESENT: Mr. Justice Muhammad Saleem Jessar
Mr. Justice Jawad Akbar Sarwana

Petitioner Ghulam Nabi : through Syed Osaf Ali, Advocate
Through his legal Heirs

Respondent No. 2 : Through M/s Abdul Karim Surahyo
& Arif Ali Kalhoro, Advocates

Respondent No. 14 to 16 : Through Mr. Abdul Hamid Bhurgri,
Official Respondents AAG Sindh a/w Mr. Anwar Ali
Khaskheli, Assistant Commissioner,
Dokri, Mr. Niaz Ali Khand,
Mukhtiarkar, Dokri & Mr. Deedar
Ali Abro, Tapedar, Dokri

None present for other
respondents

Dates of hearing : 28.02.2024 and 13.03.2024

Date of Judgment : 27.03.2024

JUDGMENT

Muhammad Saleem Jessar, J.- Through instant constitution petition, the petitioners have assailed the order dated 04.08.2015 passed by learned District Judge, Larkana in Civil Revision No. 05 of 2015 whereby he allowed the Revision Application and consequently passed order for rejection of plaint in F.C Suit No. 66 of 2015 instituted by the petitioner.

2. Brief facts giving rise to filing of instant Constitutional Petition are that deceased Ghulam Nabi through his legal heirs arrayed as Petitioners No.1 to 8 in instant petition, filed F. Civil Suit No. 69 of 2013 (New No.66 of 2015) stating therein that deceased Ghulam Nabi was the husband of Petitioner No.1 and father of Petitioners No.2 to 8, whereas deceased Ghulam Sarwar

Chano, arrayed as Respondent No.3 herein, was son-in-law of deceased Ghulam Hyder, who was brother of this deceased Ghulam Nabi, the husband and father of the Petitioners No.1 to 8. Ghulam Sarwar Chano was residing with Ghulam Hyder in his father's house which was joint property of the Petitioners and Ghulam Sarwar Chano by means of Survey No.268, measuring 1800 Sq. feet. It was further asserted that after death of father and brother of Ghulam Nabi, he claimed his share in his father's property. In turn, Ghulam Sarwar Chano, father of the Respondents No.1(B) to 6(B) herein, filed a Rent Case bearing No.02 of 1999 in the Court of IVth Senior Civil Judge / Rent Controller, Larkana on the basis of a Rent Agreement, which the plaintiffs / petitioners claimed to be forged/fake one, and mentioned therein that he had rented out the said property at the rate of Rs.1000/- per month. According to the petitioners, in the rent case, there was no mention about the number and the area of the said property. It was further asserted that the Rent Controller in absence of Affidavit-in-evidence having been filed and the cross-examination having been conducted, passed eviction order. The said ejection order was assailed by deceased Ghulam Nabi by filing First Rent Appeal which was dismissed in *limni*. Thereafter, he filed a Civil Suit which was also dismissed, so also the appeal. Thereafter, Ghulam Sarwar Chano, (since deceased) filed an Execution Application bearing No.03/2000 wherein Survey Number of the property was also not mentioned.

3. It was further averred that in said Rent Case, Ghulam Sarwar Chano had also produced a letter issued by the Town Officer, Dokri, Mr. Abdul Aziz Memon which, according to the plaintiffs / petitioners, was declared as forged. It was further stated in the plaint that during life time of Ghulam Nabi, he had installed Gas and Electricity Meters in his property with his own name.

4. The grievance of the plaintiffs / petitioners was that said Ghulam Sarwar Chano with the connivance of the bailiff and other officials, got evicted Ghulam Nabi from his property bearing Survey No. 263, situated at Dokri Town. It was stated in the plaint that on the basis of order passed in aforesaid Rent Case filed by Ghulam Sarwar Chano, the Mukhtiarkar Revenue, Respondent No.14 herein, also changed the record of rights by mutating fake entries No.613, 614 and 615. Thereafter, Rent Controller passed an order for issuance of writ of possession and consequently, the Bailiff of the Court with the help of police ejected the petitioners from their own property bearing

Survey No.263/204 and sealed the house of deceased Ghulam Nabi and also prepared an Inventory of 05 rooms along with Courtyard / Varanda.

5. It was further asserted in the plaint that in the year 2007 deceased Ghulam Nabi moved an application to the Secretary, Board of Revenue at Karachi which was sent to the District Officer (Revenue), Larkana for redressal of the grievances, who ultimately declared all three entries No.613, 614 and 615 as null and void vide his order dated 25.03.2009. It is the case of the petitioners that defendants No.1 to 7 in the suit viz. legal heirs of said Ghulam Sarwar Chano, with the connivance of Mukhtiarkar, respondent No.14 herein, sold out the said property on the basis of entry No.615, which had been declared null and void by the District Officer (Revenue), at the office of Sub-Registrar Properties at Dokri, on 05-05-2011 vide Registration No.501, Book No.2, M.F. Roll No.U-248/5748 dated 19-04-2011 and the Sub-Mukhitarkar the Subordinate of Defendant No.16 / Respondent No.14 herein, issued a Sale Certificate and mentioned on the basis of entry No.615 and accordingly, sale deed was executed in favor of Defendant No.8 / Respondent No.2 herein, and now he is enjoying the property and is also receiving monthly rent from defendants No.9 to 15 / Respondents No.7 to 13 herein.

6. It is specifically pointed out in the plaint that in said property 05 shops were constructed by deceased Ghulam Nabi, the husband of Plaintiff / Petitioner No.1 and father of the Plaintiffs / Petitioners No.2 to 8 and he was occupying said shops and was also receiving monthly rent from the tenants of the said shops and after his death his legal heirs used to receive the rent till May 2011. However, thereafter defendant No.8 / Respondent No.2 herein, started receiving the rent from the aforesaid tenants.

7. It was further asserted in the plaint that when Mst. Nazeeran, plaintiff / petitioner No.6 and attorney of the plaintiffs / petitioners No.1,2,3,4,5,7 and 8 visited the office of Mukhtiarkar, Doki Town, it came to her knowledge that all aforesaid three entries No.613, 614 and 615, which were declared null and void by the concerned District Officer (Revenue), were existing in the record of Mukhtiarkar and the order of District Officer (Revenue) was not available in the record. Thereafter, plaintiff / petitioner No.6 obtained true copies of all the entries relating to Survey Nos.263, 713, 714 and 715. It was further asserted

in the plaint that due to the alleged fraud and cheating on the part of the defendants / respondents, life of the plaintiffs' / petitioners' father became miserable and he was compelled to live in shrines and the plaintiffs / petitioners also had to stay on footpaths and their future was also ruined and their household articles worth Rs.5,00,000/- were also usurped by defendants No.1 to 7 and they also sold out the house to defendant No.8 / respondent No.2 herein and till date the plaintiffs / petitioners are living in the rented houses.

8. After institution of above suit, defendant No.8 / respondent No.2 herein namely, Mohammad Hafeez Soomro, filed an application under Order VII Rule 11 CPC for rejection of the plaint on certain grounds, including the ground that the suit was barred by the principle of *resjudicata*. The said Application was dismissed vide order dated 28.04.2015, hence defendant No.8 challenged said order before learned District Judge, Larkana by filing Civil Revision Application No.05 of 2015 which was allowed vide impugned order dated 4th August, 2015 in the following terms:

"In view of above, the impugned order of learned trial Judge could not be sustained, it is set-aside; consequently the plaint is rejected in pursuant to acceptance of instant revision application, with no order as to costs."

9. The said order of learned District Judge has been challenged by the petitioners, who were the plaintiffs in the suit, by means of instant Constitutional Petition.

10. We have heard the arguments advanced by learned counsel for the petitioners, learned counsel for the respondent No. 2 as well as AAG appearing for the Official respondents and have perused the material made available before us on the record.

11. Learned counsel for the petitioners submitted that Suit No 66 of 2015 was filed by the Petitioners, wherein defendant No.8, Mohammad Hafeez Soomro, who is Respondent No.2 in this petition, had filed an application under Order VII Rule 11 C.P.C., which was dismissed by the trial Court; however, learned District Judge, Larkana, had allowed the Revision Application and rejected the plaint in the Suit filed by the Petitioners. The application for rejection of plaint was filed by defendant No.8, Mohammad Hafeez Soomro, on certain grounds including the ground of *res*

judicata. According to learned counsel, said principle was not applicable as defendant No.8 Mohammad Hafeez Soomro, was not a party in the previous suits. In support of this contention he placed reliance upon the case of *Messrs Imam and Imam vs. The Karachi Municipal Corporation, Karachi*, (1981 CLC 744). He prayed that by allowing this petition, matter may be remanded to the trial Court with directions to re-settle the issues and after joining proper parties, their evidence may be recorded and then the fate of the case may be decided in the light of the evidence, in accordance with the law.

12. Learned Additional Advocate General, Sindh, appearing for official respondents, submitted that proper parties were not given chance to adduce their evidence, hence the Judgment passed by the trial Court is not sustainable, therefore, according to him, case may be remanded to the trial Court with directions to join the proper parties and after framing of fresh issues as well as making certain amendments in the plaint and its prayer clause(s), case may be decided on merits, as per law.

13. Learned counsel for Respondent No.2 submitted that the Petition in hand is not maintainable because the order of rejection of plaint is appealable. In support of his contentions, he placed reliance upon the case of *Ali Akhter Hussain Shah vs. Model Project (Pvt.) Limited through Chief Executive Officer and 6 others* (2022 YLR 310). He further submitted that order passed by the Revisional Court is just and proper as the litigation relating to subject matter has already been decided in previous suits filed by the petitioners, therefore, as per principle of *res judicata*, they were debarred from filing fresh suit in respect of the same subject matter. He lastly prayed that the petition may be dismissed.

14. Before touching the merits of the case, in the first instance, we deem it proper to deal with the legal objection raised on behalf of respondent No. 2 to the effect that as the order of rejection of plaint is deemed to be a Decree, thus the same is an appealable order, therefore, Constitution Petition is not maintainable. In support of this objection, learned counsel for the respondent No. 2 has placed reliance on the case of *Ali Akhter Hussain Shah (SUPRA)*. From perusal of the above-cited case, it appears that by means of a writ petition, the petitioner in that case had assailed an order passed by Additional District Judge, Islamabad-East, whereby an application under

Section 32 of the Arbitration Act, 1940 filed by respondent No. 4 in that case was allowed, consequently suit of the petitioner seeking decree for declaration and permanent injunction was **dismissed**. In the judgment operative portion from the order of ADJ, who dismissed the suit, was quoted which reads as under;_

"Section 32 bars a suit to challenge a decision upon the existence, effect or validity of an arbitration agreement or award and it further prohibits the setting aside or amendment of an arbitration agreement or an award otherwise than as provided in the Act, 1940. As the essence of sections 32 and 33 of the Arbitration Act, 1940 is to prevent any abuse of the said Act and to avoid delay in the enforcement of the arbitration and remedy by way of regular suit is barred. As the arbitration prevailing clause 20.3 in the JVA between the parties is in existence, therefore, no suit shall lie on any ground whatsoever for a decision upon the existing arbitration clause. Hence, application under section 32 of Arbitration Act, 1940 is accepted and suit is dismissed. No order as to costs."

(Emphasis supplied for sake of convenience)

15. From above it is clear that the cited case is distinguishable from the case in hand, inasmuch as; in that case, suit was **dismissed** and there was no order for rejection of plaint under Order VII Rule 11 CPC, whereas in present case the point involved is the rejection of plaint under the aforesaid provision of law. Even otherwise, in instant case the petitioners / plaintiffs have not invoked constitutional jurisdiction of this Court against an order of rejection of plaint having been passed by the trial Court. In fact, the trial Court had dismissed the application for rejection of plaint, moved by defendant No.8 / respondent No.2 herein, under Order VII Rule 11 CPC and it was in the civil revision that the learned District Judge, while allowing revision application, had passed order of rejection of plaint, thus instant constitution petition has been filed against the **revisional order**. Needless to emphasize that there is no bar against filing of constitutional petition against a revisional order. Besides, from perusal of the entire Court file, we have not been able to find out any **Decree** having been passed consequent upon the grant of revision application, nor even learned counsel for respondent No. 2 has placed on record copy of any such decree.

16. In this view of the matter, aforesaid objection raised by learned counsel for the respondents is not sustainable.

17. It is also noteworthy that from perusal of the contents of the application under Order VII Rule 11 CPC for rejection of the plaint, filed by respondent No.2, who was defendant No.8 in the suit filed by the petitioners, so also from the contents of the affidavit filed by him in support of said application, it appears that he had taken following grounds for rejection of plaint:

- (i) That the suit is time- barred;
- (ii) That the suit is incompetent having been filed by Ghulam Nabi through his legal heirs, although he had expired before filing of the suit;
- (iii) That the plaintiffs have no cause of action against the defendants;
- (iv) That the suit is barred by the principle of *res judicata* as provided under Section 11 CPC.

18. The trial Court dismissed the application under Order VII Rule 11 CPC vide order dated 28.4.2015. The said order was challenged in Civil Revision which was allowed by learned District Judge, Larkana vide impugned order. From perusal of the revisional order, it transpires that said order revolves around only one ground viz. the suit is barred by the principle of *res judicata* as provided under Section 11 CPC. The plaintiffs / petitioners have challenged the revisional order through instant Constitution Petition; however, the defendants / respondents, particularly respondent No.2, have not assailed said order passed by learned District Judge on the ground that in the impugned order only one ground / point was discussed whereas rest of the grounds raised by defendant No.8 / respondent No.2 were not touched, thus we are of the opinion that those issues / points have attained finality. In this view of the matter, we would also confine ourselves to the solitary point of *res judicata* on which the civil revision was allowed by learned District Judge.

19. It seems that the stand taken by respondent No.2 / defendant No.8 in his application filed under Order VII Rule 11 CPC in support of his plea of *res judicata*, was to the effect, “...and the suit is come (sic) under S-11 C.P.C. as *res-judicata*, as the matter had already been (sic) on merits by the competent Court of law upto Honourable High Court,..” In para 6 of his affidavit, filed in support of the said application, it was mentioned, “*That the plaintiffs have full notice and knowledge of proceedings as well as my sale transaction,*

therefore suit is hopelessly time barred and hit by S-11 of CPC as Res-Judicata"

20. From above, it is apparent that a vague and sketchy statement has been made in support of the plea of *res judicata* and the ingredients of Section 11 CPC are lacking in the application. Before going ahead, it would be advantageous to reproduce hereunder the contents of Section 11 CPC:

"No Court shall try any 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."

21. From above, it appears that the ingredients for applying principle of *res judicata* are: firstly; the matter directly and substantially in issue in fresh suit has been directly and substantially in issue in the former suit, secondly; both the litigations should be between the **same parties**, thirdly; previous suit should have been decided by a Court which was **competent** to try such subsequent suit or the suit in which such issue has been subsequently raised, and fourthly; the suit has been heard and **finally decided**.

22. It may be added that, as per settled law, this principle can be pressed into service if cause of action in both the suits is one and the same, meaning thereby that if subsequent suit has been filed on accrual of **fresh** cause of action, then the principle of *res judicata* shall not be applicable.

23. In instant case, as stated above, respondent No.2 in his application under Order VII Rule 11 had made a vague and sketchy statement and even the copies of the previous suits were not filed in order to ascertain as to whether the provision of Section 11 CPC, would be attracted in the case or not.

24. For ascertaining as to whether principle of *res judicata* shall apply, it is necessary to scrutinize the background of the previous suits.

25. In fact, the case of the petitioners is that Ghulam Sarwar Chano in his life time filed a Rent Case bearing No.02 of 1999 in the Court of IVth Senior Civil Judge / Rent Controller, Larkana on the basis of a Rent Agreement, which the plaintiffs / petitioners claimed to be forged/fake one. It was further asserted that the Rent Controller in absence of Affidavit-in-evidence having

been filed and the cross-examination having been conducted, passed eviction order. Thereafter, Ghulam Sarwar Chano filed an Execution Application bearing No.03/2000 wherein Survey Number of the property was also not mentioned. According to the petitioners, on the basis of orders passed in rent proceedings, the Mukhtiarkar Revenue, Respondent No.14 herein, changed the record of rights and entered fake entries No.613, 614 and 615, although the orders passed in rent proceedings did not relate to the title / ownership of the property in question. Thereafter, on the orders passed by Rent Controller, the bailiff of the Court with the help of police ejected the petitioners from the property bearing Survey No.263/204 and sealed the house of deceased Ghulam Nabi and also prepared an Inventory of 05 rooms along with Courtyard / Varanda. Thereafter, in the year 2007 deceased Ghulam Nabi moved an application to the Secretary, Board of Revenue at Karachi which was sent to the District Officer (Revenue), Larkana, who ultimately declared all three entries No.613, 614, 615 recorded in favour of Ghulam Sarwar Chano as null and void vide his order dated 25.03.2009. However, defendants No.1 to 7 viz. legal heirs of deceased Ghulam Sarwar Chano, with the connivance of Mukhtiarkar, sold out the property to defendant No.8 / respondent No.2 herein, on 05-05-2011 on the basis of entry No.615, which had been declared null and void by the District Office (Revenue) and consequently, the Sub-Mukhitarkar who was the subordinate of Defendant No.16 / Respondent No.14 herein, issued a Sale Certificate and accordingly, sale deed was executed in favor of Defendant No.8 / Respondent No.2. According to the petitioners, when plaintiff / petitioner No.6, Mst.Nazeeran, visited the office of Defendant No. 16, Mukhtiarkar Dokri, then it was surfaced that all three entries No.613, 614, 615 were existing in the record of Mukhtar Dokri, Defendant No. 16 and the order of District Officer (Revenue) whereby he had declared said entries as null and void was not available in the record. Thereafter, when a fresh cause of action had accrued to the petitioners, that they filed instant suit.

26. During pendency of instant petition Comments were filed by Mukhtiarkar Dokri, respondent No.14, wherein he has annexed copies of entries showing mutation in favour of the Respondents. However, we find at page-171 of the Court file, which has been annexed by the petitioners as Annexure 'G-4' which is an order passed by District Officer (Revenue) whereby declared the three entries favourable to other defendants /

respondents, as null and void. According to the petitioners, although the said order of D.O. (Revenue) had been communicated to the then Mukhtiarkar Dokri, yet he did not affix / append any note in the revenue record with red-ink which created ambiguity. In order to get verified the genuineness or otherwise of the said order of D.O. (Revenue), directions were issued by us to the relevant authorities, in compliance whereof the Assistant Commissioner and Mukhtiarkar Dokri produced original Registers of Deh FORM-II (Part-I and II) pertaining to Deh, Tapo and Taluka Dokri, District Larkana, which showed existence of entry No.263 mutated in the name of Ghulam Nabi son of Abdul Karim Khan Memon, which contains a "Note" to the effect, "IV-Senior Civil Judge, Larkana and District Officer (Revenue) Larkana vide letter No. Rev. 1642, dated 04.6.07, is cancelled entry No.263, which is in the name of Ghulam Nabi son of Abdul Karim Khan Memon and valid entry in respect of Ghulam Sarwar Memon", and subsequently, the property in dispute was shown to have been transferred from the name of Ghulam Nabi to the name of Ghulam Sarwar vide Entry No.613, on the basis of a Decree allegedly passed in Suit No.03 of 2000. The record further revealed that thereafter the property in question was again shown to have been mutated in the name of Ghulam Sarwar vide Entry No. 614 on the basis of order passed by Civil Judge in F.C. Suit No.113 of 2000. Ultimately, vide Entry No.615 the property in dispute was mutated in the names of legal heirs of Ghulam Sarwar.

27. It appears that Entry No. 263 exists in Part-1 of the Register of Deh FORM-II, while Entries No.613, 614 and 615 exist in Part-II of the Register of Deh FORM-II. In these circumstances, in order to ascertain genuineness of Entry No.613, R & Ps of Rent Case No.02 of 1999 (Re-Ghulam Sarwar vs. Ghulam Nabi Memon) and Execution Application No.03 of 2000 were called from the Court of Rent Controller / IV-Senior Civil Judge, Larkana. From perusal of the R&Ps as well as Order passed by the Rent Controller in the aforesaid case, it reveals that the Rent Controller had exceeded from his jurisdiction by deciding issue of title of the disputed property, while adjudicating upon the Rent Application which, under the law, he was not competent to do.

28. It was in this background that the petitioners filed instant suit bearing No.66 of 2015. It is apparent that this suit has been filed consequent upon accrual of **fresh cause of action** i.e. declaring Entries No. 613, 614 and 615,

which were existing in favour of Ghulam Sarwar Chano to be null and void order dated 25.03.2009 passed by the District Officer (Revenue), and then despite issuance of said order by D.O. (Revenue) when said Ghulam Sarwar Chano sold out the house in question to defendant No. 8 / respondent No.2 herein, vide sale deed bearing registration number 501 dated 05.05.2011, MF Role number 248/5745, dated 19.07.2011, so also upon removal of the aforesaid order of D.O. (Revenue) from the relevant revenue record. Even in the plaint in para-22 the plaintiffs / petitioners have mentioned such cause of action in the words, *“That cause of action had accrued to the plaintiffs against the defendants firstly... .. and fourthly when the defendant No. 1 to 7 sold out the suit property to the defendant No. 8 and plaintiff No. 6 obtained certified true copy of entries No. 263 from the office of the defendant No. 16 which was on the name of husband / father plaintiff No. 1 to 8 and entries mentioned as 613, 614 and 615 which was entered in the year of 2007 and same were cancelled in the year 2009 and defendant No. 1 to 7 sold out the property in May 2011 and on 20.01.2014 and plaintiff No. 6 obtained certified true copies and lastly on 12.02.2014 the plaintiff through her counsel served legal notice upon the defendant No. 16 from not creating third party interest and from disturbing the possession and same is continued day to day till today,”* In this view of the matter, we are of the firm opinion that the principle of *res judicata* would not be attracted in instant case, because Suit No.66 of 2015 was filed upon accrual of fresh cause of action. In this connection, it would be advantageous to refer to a judgment pronounced by Lahore High Court in the case of **MUHAMMAD AKRAM Vs. ADDITIONAL DISTRICT JUDGE and others (PLD 2008 Lahore 560)**, wherein it was held as under:

“At the same time it can hardly be denied that the application of the principle inter se the earlier and fresh litigation cannot be applied indiscriminately without regard to the conditions precedent as laid down in section 11 of the. C.P.C. A matter will not be hit by the principle of res-judicata only because of the similarity of the subject matter, commonality of the parties and determination of the dispute through a judgment and decree. One of the most important ingredient of res-judicata is the commonality of cause of action as well. If in a subsequent suit the plaintiffs have a fresh cause of action different or a cause different from the one tried earlier it will not be barred as res-judicata because of the judgment in an earlier suit on the same subject.”

29. Likewise, in the case of *Mumtaz Ali Shah and 6 others vs. Sultan and 2 others by legal heirs (1994 SCMR 1725)*, it was held by Hon’ble Supreme Court that *subsequent suit for possession through partition was rested on*

altogether a different cause of action than the earlier suit wherein relief was for symbolic possession therefore, extension of rule of res judicata by Trial Court was wholly misconceived and the finding of the High Court and that of First Appellate Court to the contrary did not warrant interference therein. In may be noted that in this cited-case, although the subject matter was the same but because there was difference in the nature of reliefs sought by the plaintiff in that suit, it was held that principle of *res judicata* shall not apply.

30. In the case reported as *Muhammad Anwar & others Vs. Federation of Pakistan through Secretary Establishment Division & others* (PLJ 2009 SC 923) it was held by the Hon'ble Supreme Court that *as causes of action in the two petitions were entirely different, therefore the High Court erred in dismissing subsequent petition on the principle of res-judicata.*

31. Besides above, Suit No. 35 of 2003 was dismissed as **withdrawn**, meaning thereby that it was not **finally decided** on merits which is also an important ingredient for attracting the principle of *res judicata*. In this context, reference may be made to the case of *Mrs. Irene Wahab Vs. Lahore Diocesan Trust Association* (2002 SCMR 300), wherein Honourable Supreme Court held that *as the previous suit was dismissed for non-prosecution therefore the question of res judicata would not arise in such case because Section 11, CPC would be applicable only if previous suit had been decided on merits regarding same issues.*

32. Likewise, in Suit No. 33 of 2007, the plaint was rejected under Order VII Rule 11 CPC, thus the said suit also cannot be said to have been **decided finally** on merits. It is a settled law that in case of rejection of plaint fresh suit can be filed by the plaintiff, unlike dismissal of the suit on merits. In this connection, reference may be made to the case of *MUHAMMAD ANWAR and 27 others Vs. PROVINCE OF PUNJAB through District Officer (Revenue), Pakpattan and 3 others* (2016 CLC 1660 [Lahore]), wherein it was held as under:

"9. The question arose whether the suit can be dismissed, without recording the evidence or there is a difference between the dismissal of suit and rejection of plaint? Order VII, Rule 11, C.P.C. finds mentioned the words "the rejection of plaint", meaning thereby if the ingredients in Order VII, Rule 11, C.P.C. are available in the plaint, the court has the jurisdiction and powers to reject the plaint. The dismissal of suit connotes that it is a final determination of controversy between the parties meaning thereby the learned trial court can dismiss the suit

only after holding inquiry and recording the evidence. The rejection of plaint provides or opens the door for the petitioners for filing a fresh suit but in a case of dismissal of suit no fresh suit can be filed and only statutory remedy is available against dismissal order. It is a settled principle of law that doctrine of res judicata can only be invoked after recording the evidence and when the evidence is recorded the documents could be read and relied upon for delivering the judgment, in this case no evidence has been recorded nor any document has been exhibited on record."

33. In the case of *Abdul Majeed Vs. Board of Directors, Khyber Vegetable Ghee Mills (1984 CLC 2392 (Lahore))*, it was held by Lahore High Court that *principle of res judicata cannot be pressed in case of rejection of plaint and the plaintiff in such case is not barred from filing a fresh suit.*

34. In the case reported as *Abu Bakar Vs. Government of Sindh and 3 others (PLD 1977 Karachi 410)* it was held by this Court that *decision under Order VII Rule 11 CPC being not on merits and no adjudication was made in such case, therefore, principle of res judicata shall not be applicable.*

35. In view of above legal position, rejection of plaint in Suit No. 33 of 2007 also does not bar filing of fresh suit by the plaintiffs / petitioners and the principle of *res judicata* does not apply on this score too.

36. So far as rent proceedings which concluded in favour of Ghulam Sarwar Chano and against Ghulam Nabi and the present petitioners are concerned, the same also cannot be made the basis for attracting the principle of *res judicata* for the reasons, firstly; that Section 11 CPC speaks about **suits** and not the **rent case / application** and secondly; in the rent proceedings the Rent Controller had no jurisdiction to decide the ownership or title of property in question, thus he cannot be termed as a "**Court competent** to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard.." as provided in Section 11 CPC, so also these proceedings cannot be said to have **finally decided** the litigation, which is also one of the prerequisites for applying *res judicata*.

37. Apart from above, there is yet another significant point. Admittedly, the application under Order VII Rule 11 CPC was filed by defendant No.8, who has been arrayed as Respondent No.2 in instant petition namely, Mohammad Hafeez Soomro. In support of his prayer for rejection of plaint he had urged ground of *res judicata*. However, from perusal of the previous suits filed by the petitioners, as stated above, it transpires that in none of those

suits, the said Mohammad Hafeez Soomro was arrayed as a party. In such eventuality, he cannot invoke the principle of *res judicata*. In this connection, reference may be made to the case of *MESSRS IMAM & IMAM Vs. THE KARACHI MUNICIPAL CORPORATION, KARACHI (1981 CLC 744 Karachi)*, wherein this Court had held that *as the appellants were not party to earlier judgment, therefore he could not have benefit of res judicata since there can be no estoppel against law.*

38. We have also observed from the pleadings of the parties in rent proceedings before the Rent Controller that the property in dispute was basically owned by the Town Committee, Dokri, which had issued certificate in favour of the parties, therefore, in our view, said Town Committee was also a necessary party in order to decide the issues involved in the matter in a proper and effectual manner.

39. For the foregoing reasons, this Constitutional Petition is allowed and the matter is remanded to the trial Court i.e. IV-Senior Civil Judge, Larkana with the direction to frame issues in F.C Suit No.66 of 2015 (New) after joining / adding Town Committee, Dokri, as a defendant as well as making certain amendments in the plaint and its prayer clause(s), if necessary, record evidence of the parties and then decide the fate of the case in accordance with law. Petition stands disposed of in the above terms along with all pending Misc. Applications. Matter being an old one, it is expected that the suit shall be disposed of within shortest possible time preferably within six (6) months, under intimation to this Court.

JUDGE

JUDGE

Larkana
Dated. 27-03-2024