

HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Civil Revision Application No. 40 of 2021

[Muhammad Amin (deceased) through LRs vs. Abdul Rahim and others]

Applicants by : Mr.Imran Ali Borano, Advocate

Respondents No.1 : In person

Respondents No.3 to 8 by : Mr.Muhammad Ismail Bhutto, Addl. A.G

Date of hearing : **31.01.2025**

Date of Decision : **17.02.2025**

J U D G M E N T

ARBAB ALI HAKRO, J.- Through this Revision Application under Section 115 of the Civil Procedure Code, 1908 ("**C.P.C**"), the applicant impugns the Judgment and Decree dated 25.11.2020, passed by learned IV-Additional District Judge(MCAC), Shaheed Benazirabad ("**Appellate Court**"), whereby the applicants' appeal was dismissed. Consequently, the Order dated 17.02.2020, passed in F.C Suit No.55 of 2019 by Senior Civil Judge-III, Shaheed Benazirabad ("**the trial Court**") rejecting the plaint under Order VII R 11 C.P.C, was maintained.

2. The pertinent facts, concisely stated, are that the plaintiffs/applicants, as legal representatives of the deceased Muhammad Amin, had instituted F.C. Suit No. 55 of 2019, seeking a Declaration, Cancellation, and Mandatory Injunction concerning an agricultural property (hereinafter referred to as the "subject land")¹. According to them, the suit land was originally allotted to their father in the year 1967 under the Defence Quota in recognition of his service in the Pakistan Army as a Clerk Havaldar, and they seek the following reliefs: -

a) It be declared that plaintiff being legal and valid allottee/grantee bearing S.No.990/3, 4 (8-00) acres, 991/3 (4-00) acres, 992/2(4-00) acres, 993/2 (4-00) acres and 994/1 (4-00) acres, situated at Deh Akro No.7 Taluka Daur, District Shaheed Benazirabad then Taluka and District Nawabshah, and after his death his legal heirs and

¹ measuring 24-00 acres, identified by Revenue Survey Nos. 990/3, 4 (08-00 acres), 991/3 (04-00 acres), 992/2 (04-00 acres), 993/2 (04-00 acres), and 994/1 (04-00 acres), situated in Deh Akro No.7, Taluka Daur, District Shaheed Benazirabad (formerly Taluka District Nawabshah)

mentioned in title of memo of plaint as plaintiff No.(a) to (e) are legally entitled to its mutation in the relevant record of rights being legal and valid owner.

- b) Declared that the plaintiff original owner/grantee has never sold suit land bearing S. No.990/3, 4 (8-00) acres, 991/3 (4-00) acres, 992/2 (4-00) acres, 993/2 (4-00) acres and 994/1 (4-00) acres, situated Deh Akro No.7 Taluka Daur, District Shaheed Benazirabad then Taluka and District Nawabshah, in favour of defendant No.1 and 2 vide registered sale deed No.1182 dated 17.04.1999 is result of fraud and impersonation as the original owner/grantee has never executed the same, hence the same is liable to be cancelled.*
- c) That it be declared that the possession of the defendant No.1 & 2 over an agricultural land measuring 24 acres bearing Revenue S. No.990/3, 4 (8-00) acres, 991/3 (4-00) acres, 992/2 (4-00) acres, 993/2 (4-00) acres and 994/1 (4-00) acres, situated Deh Akro No.7 Taluka Daur, District Shaheed Benazirabad then Taluka and District Nawabshah, is illegal malafide capricious, hence are liable to handover its peaceful possession to plaintiff.*
- d) Permanent injunction be issued against the defendants No.1 and 2, restraining them from transferring or try to transfer, possession of suit agricultural land measuring 24 acres bearing Revenue S. No.990/3, 4 (8-00) acres, 991/3 (4-00) acres, 992/2 (4-00) acres, 993/2 (4-00) acres and 994/1 (4-00) acres, situated Deh Akro No.7 Taluka Daur, District Shaheed Benazirabad then Taluka and District Nawabshah, or changings its complexion in any manner and the defendant No.3 to 7 be restrained from accepting any document of alienation of encumbering the suit land either from the defendant No.1 and 2 or any person acting on their behalf directly or indirectly by themselves or through their men, agents, associates, assign or subordinate in any manner whatsoever.*
- e) Costs.*
- f) Any other relief.*

3. Upon receipt of the summons, Respondents No.1 and 2 appeared and submitted an application under Order VII Rule 11 C.P.C, seeking the rejection of the plaint. After consideration, the trial court rejected the plaint by Order dated 17.02.2020. Aggrieved by this Order, the applicants preferred an appeal before the appellate Court. Nevertheless, this appeal was also dismissed by the impugned Judgment and Decree dated 25.11.2020. The applicants are now contesting the concurrent findings of both the lowers through this instant revision application.

4. At the outset, learned counsel for the applicants submits that both the Court below erred in law and committed material irregularity by rejecting the plaint without considering that an application under Section 12(2) of C.P.C, filed by the applicants in earlier F.C. Suit No. 300/2014, remains pending, wherein issues have been framed, and the matter is fixed for evidence. Counsel further submits that the courts below failed to consider that the applicants were not parties to the purported registered Sale Deed, and in any case, the question of limitation is a mixed question of law and fact. Counsel also contended that Respondents No.1 and 2 fraudulently obtained the exparte Judgment and Decree, and with an application under Section 12(2) C.P.C. pending and the issue yet undecided, the doctrine of res judicata is inapplicable. The courts below have thus misconstrued the provisions of Section 11 C.P.C. Lastly, he prays for the instant Revision Application to be allowed and the matter remanded to the trial court for a decision on merits after recording evidence. In support of his contentions, he relies on case law reported as **2013 SCMR 1493, PLD 1995 S.C. 629, and 2020 YLR 745.**

5. Conversely, Respondent No.1 in person contended that the trial court had rightly rejected the plaint

6. The learned Additional Advocate General (A.A.G.) contended that the dispute is primarily between private parties, and consequently, no government interest is involved.

7. The contentions have been meticulously scrutinized, and the accessible records have been assiduously evaluated. To ascertain whether an adequate and exhaustive dispensation of justice was accomplished, it is imperative to scrutinize the concurrent findings articulated by both the courts below.

8. Upon a meticulous examination of the impugned Judgment and Order rendered by both the lower Courts, it is evident that the plaint in the applicants' suit was predominantly rejected on the ground of being barred by the doctrine of Res Judicata, as enshrined in Section 11 C.P.C. This

conclusion was reached in light of the fact that Respondents No.1 and 2 had previously instituted F.C. Suit No.300/2014 in respect of the same suit property, in which the applicant, Muhammad Asghar, was arrayed as a defendant, and the said suit culminated in an *exparte* decree. However, it is a matter of record that the applicants have subsequently filed an application under Section 12(2) C.P.C in the aforementioned earlier suit. The trial Court has framed issues in this regard, and the matter is currently scheduled for the recording of evidence by the parties.

9. Section 11 of the C.P.C. embodies the principle of *Res Judicata*, which essentially means that a matter adjudicated by a competent court cannot be re-litigated between the same parties. The doctrine is premised on the idea that litigation must come to an end, and no one should be vexed twice for the same cause. The key elements of *Res Judicata* include that the matter in issue must be directly and substantially the same in both the former and subsequent suits, the parties must be the same or litigating under the same title, and the Court that decided the former suit must have had jurisdiction to try the subsequent suit. Most importantly, the matter must have been "**heard and finally decided**" by the Court in the former suit.

10. Conversely, Section 12(2) C.P.C provides a remedy for aggrieved persons to challenge the validity of a judgment, decree, or Order on grounds of fraud, misrepresentation, or lack of jurisdiction. This application, if admitted for full hearing, is treated akin to a suit. When an application under Section 12(2) C.P.C is admitted, and issues are framed, the decree against which it is filed is rendered non-final until the application is decided. This provision is crucial for ensuring that justice is not thwarted by technicalities and provides an avenue for redressal if the original decree is tainted by fraud or misrepresentation.

11. In the scenario, the lower courts rejected the plaint, citing that the suit was barred by *Res Judicata* because the matter had already been decided in a previous suit (F.C Suit No.300/2014) where an *exparte* decree was passed against the applicants. However, it is significant to note that the applicants have filed an application under Section 12(2) in the previous suit, which is pending for recording evidence. The phrase "**heard and finally decided**" in Section 11 is pivotal in this context. If the application under Section 12(2) is still pending and has been admitted for full hearing, the *exparte* decree obtained in an earlier suit cannot be considered "**finally decided**." The pendency of the Section 12(2) C.P.C application implies that the decree's finality is in question and subject to the outcome of the said application. Therefore, the doctrine of *Res*

Judicata would not be applicable until the Section 12(2) application is heard and decided. Therefore, both the lower Court's rejection of the plaint on the grounds of *Res Judicata* is deemed premature if the Section 12(2) application is still under consideration. The judicial approach mandates that until the Section 12(2) application is conclusively resolved, the matter cannot be said to have been "**finally decided**," and therefore, the bar of *Res Judicata* would not apply.

12. In this context, it is imperative to judicially interpret Section 10 C.P.C, which stipulates the stay of subsequent suits when the matter in issue is directly and substantially the same as in a previously instituted suit. Section 10 C.P.C asserts that no court shall proceed with the trial of a suit wherein the matter in issue is also directly and substantially in issue in a prior suit pending adjudication between the same parties or their representatives. In the given situation, the lower Court's rejection of the plaint under Order VII Rule 11 C.P.C, citing the bar of *Res Judicata* under Section 11 C.P.C, is premature due to the pendency of the application under Section 12(2) C.P.C in the former suit (F.C Suit No.300/2014). Instead, judicial prudence dictates recourse to Section 10 C.P.C to stay the proceedings of the subsequent suit until the resolution of the pending application under Section 12(2) in the prior suit. This approach aligns with the principles of judicial consistency and finality, preventing contradictory outcomes and ensuring that the issues are conclusively determined in the earlier suit before proceeding with the trial of the subsequent suit. By invoking Section 10 C.P.C, the Court effectively prioritizes the resolution of the pending application under Section 12(2), thereby safeguarding the integrity of the judicial process and ensuring that no party is subjected to multiple litigations for the same cause of action. Thus, the judicially sound approach in such circumstances is to stay the subsequent suit under Section 10 C.P.C rather than summarily rejecting the plaint under Order VII Rule 11 C.P.C.

13. In the context of assessing whether the applicants' suit is time-barred, it is imperative to judicially interpret Articles 91 and 120 of the Limitation Act, 1908. Article 91 prescribes a limitation period of three years for filing a suit to cancel an instrument, commencing from the date on which the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him. This necessitates a judicial examination of when the plaintiffs acquired knowledge of the facts that would entitle them to seek cancellation. In the given case, the applicants were informed of the registered Sale Deed through a letter dated 12.12.2018, and consequently, their suit filed on 17.4.2019 falls within the three-year

limitation period prescribed by Article 91. Concurrently, Article 120 of the Limitation Act stipulates a six-year limitation period for a suit seeking a declaration, which begins to run from the date when the right to sue accrues. Here, it is argued that the right to sue for a declaration and possession accrued in 2014 when the applicants discovered the illegal occupation of the suit land by Respondents No.1 and 2. Therefore, the suit filed on 17.4.2019 is within the six-year limitation period provided by Article 120, as it was instituted within five years from the discovery of the illegal occupation.

14. It is further essential to note that, as established law dictates, while deciding an application under Order VII Rule 11 of the C.P.C, only the averments made in the plaint can be considered to determine whether the plaintiff has any cause of action. No extrinsic material can be examined at this stage, and the averments in the plaint must be taken as true. Moreover, the question of limitation is inherently a mixed question of law and fact, necessitating the resolution of the limitation issue by recording evidence supporting the plaint. In this context, the words used in Article 91, particularly "when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him," are crucial in determining the commencement of the limitation period.

15. The trial Court had held that the plaintiffs did not specify the date they became aware of the registered Sale Deed, while the appellate Court noted that the applicants became aware of the illegal occupation in 2014, suggesting that they should have known about the Sale Deed at that time. However, considering the applicants' claim that they were only informed of the Sale Deed through the letter dated 12.12.2018, the suit is timely under Article 91, as it was filed within three years from the date of knowledge. Additionally, the suit for declaration under Article 120 is also timely, as it was filed within six years from the accrual of the right to sue in 2014. Consequently, the plaintiff's knowledge of the registered Sale Deed in December 2018 and their discovery of the illegal occupation in the year 2014 both serve to affirm that their suit is maintainable and within the prescribed limitation periods, thus rendering the rejection of the plaint under Order VII Rule 11 C.P.C, on grounds of limitation as unwarranted.

16. For the foregoing reasons, this Revision Application is **allowed**. Consequently, the impugned Judgment, Decree, and Order are hereby set aside, tainted with illegalities and material irregularities. The case is remanded to the trial court with directions that the present suit shall be deemed stayed under Section 10 C.P.C until the final adjudication of the application under Section 12(2) C.P.C, filed by the applicants in the earlier

suit (F.C Suit No.300/2014). The proper trial of the present suit is contingent upon the resolution of the application under Section 12(2) C.P.C. The records indicate that the present suit was pending before the Court of Senior Civil Judge-III, Shaheed Benazirabad, whereas the application under Section 12(2) C.P.C. is pending before the Court of Senior Civil Judge-I, Shaheed Benazirabad. In these circumstances, the District and Sessions Judge, Shaheed Benazirabad, is directed to assign or transfer both the suits, including the proceedings under Section 12(2), to the same Court to avoid conflicting decisions.

Sajjad Ali Jessar

JUDGE