

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Civil Revision Application No.114 of 2021

Applicant: Barkat Ali through Mr. Pir Bux Bhurguri,
Advocate.

Respondents: Abdul Aleem Khan & others through
Mr. Abdul Ghafoor Hakro, Advocate.

Date of hearing: 10.03.2025 & 14.03.2025
Date of decision: 21.03.2025

JUDGMENT

MUHAMMAD HASAN (AKBER), J.- Through this Civil Revision Application filed under section 115 of the Code of Civil Procedure (**CPC**), the Judgment dated 05.05.2021 passed in Civil Appeal No.323 of 2019 by the learned 8th Additional District Judge Hyderabad, and the Order dated 26.11.2019 passed by the learned 5th Senior Civil Judge Hyderabad have been assailed, whereby the plaint of Applicant's F.C. Suit No.23 of 2019 for declaration and specific performance was rejected under Order VII Rule 11 CPC.

2. Brief facts of the case are that the Applicant/Plaintiff filed F.C. Suit No.23 of 2019 against the Respondents/ Defendants for declaration and specific performance against Respondent No.1 to enforce the sale agreement dated 16-01-2017 with respect to property being plot bearing survey No.32, 33 admeasuring 87.03 square yards, Pathan Kapra Market, near Musarrat Hall, Unit No.2, Latifabad, Hyderabad (**subject property**). It was *inter alia* prayed in the plaint that the Defendant be directed to execute sale deed; and possession of the upper stories be handed over; and Injunctive reliefs with respect to third party interests were also sought.

3. The Respondents/ Defendants in their written statement contested the suit wherein the existence of the sale agreement and the transaction and the receipt of the payments were completely denied. It was averred *inter alia* that the plaint disclosed no cause of action; the suit was barred under section 42 and 54 of the Specific Reliefs Act and, the suit was frivolous; that brother of the Plaintiff was the tenant of the Defendant; and that the property was already sold to a third party through sale deed dated 08-02-2018. Rest of the

allegations in the plaint were also denied, and prayer for dismissal of the suit was made. The Respondents also filed an application under Order VII Rule 11 CPC., which was contested by the parties and after hearing, the same was allowed vide the impugned Order, which was upheld by the learned appellate Court as well, and which has been challenged in this Revision.

4. Mr. Pir Bux Bhurguri, the learned senior counsel for the applicant contended that the plaint was wrongly rejected, though the Applicant had a valid grievance to agitate before the Court of law; that such rejection was based upon considerations which were extraneous to the provision of Order VII, Rule 11 C.P.C.; that such facts were taken into consideration which were neither part of the plaint nor were admitted by the Applicant; that written statement was wrongly considered for determination of factual allegations which were required to be proved in evidence; and that the plaint clearly disclosed a valid and legal cause of action. The learned counsel further reiterated that evidence of head clerk was wrongly recorded at the stage of Order VII Rule 11 in illegal exercise of jurisdiction; that the license of notary public was not cancelled but only that of the Oath commissioner was cancelled; and that such fact would neither completely nullify the entire document, nor the payments made nor the deal itself; that the typographical mistake in the names between 'Abdul Haleem' and 'Abdul Aleem' in the Urdu typing of the sale agreement, is duly clarified and verified from the CNIC Number of Abdul Haleem on the same page; and that the payment of Rs.10100000/- has already been deposited in compliance of the Court Order. Reliance was placed upon PLD 2024 SC 1108, 2019 YLR 646, 2007 MLD 1622, 2006 MLD 775, 2024 CLC 509, 1996 MLD 1541, 2015 YLR 1260, 2019 MLD 173, 1987 MLD 511, 1985 CLC 671, 1990 SCMR 1630 and 2011 CLC 88.

5. Mr. Abdul Ghafoor Hakro, learned senior counsel for the Respondents supported the Order impugned and submitted that the suit itself was not maintainable, since even on the facts stated in the plaint, it was not shown that any cause of action existed; that Order V11 rule 11, C.P.C. is not exhaustive of all the cases in which a Court can reject a plaint and it does not limit the inherent powers of the Court to reject a plaint in other cases; that the rejection of the plaint was validly done by the learned Judge. He further pleaded that the sale agreement was fake since no transaction was conducted; that no payment was received by the Respondent; that the name typed in Urdu on the sale agreement is 'Abdul Aleem' and not 'Abdul Hakeem'; that the license of the oath commissioner was cancelled many years back in another proceeding; that evidence in another case was rightly

considered in this case at the stage of Order VII Rule 11 CPC; that the agreement was on plain paper and not on a stamp paper; and that the brother of the plaintiff was a tenant of the Respondent and possession was handed over to such brother long ago. He prayed for the dismissal of the Revision application.

6. Heard arguments of the learned counsels and perused the record with their able assistance. During course of hearing of this Revision, it was also confirmed by the learned counsel for both the parties that, with respect to the subject property, the earlier Illegal Dispossession Application No.14 of 2019 under the Illegal Dispossession Act filed by the Respondent viz a viz the subject property against the Applicant, was withdrawn by the Respondent (pages 75 to 83 of the court file); that in the earlier round also when the application under VII Rule 1 was allowed, Injunction Order dated 13.09.2019 was also passed against the Respondent by the learned 8th Additional District Judge Hyderabad in Misc. Civil Appeal No.05 of 2019 (page 101 of court file); that the amount of Rs.1,01,00,000/- (one crore and one lac only) has already been deposited by the Applicant with the Nazir of the learned 5th Senior Civil Judge in compliance to the Order dated 19.03.2019 (at page 253 of the court file); that F.C Suit No.342 of 2020 was filed by the subsequent purchaser against the Applicant and others for seeking Possession of the subject property (page 205 of the court file) which was subsequently withdrawn on 08.09.2022; and that F.C Suit No.317 of 2021 (page 219 of the Court file) has been filed by the Applicant for cancellation of the subsequent sale deed dated 03.12.2019 executed by the Respondent in favour of Asghar Khan (at page 237) which is *sub judice*.

7. The moot questions in the present Revision would therefore be whether the plaint in Suit No.23 of 2019 disclosed a cause of action, or the same fell under the mischief of Rule 11 of Order VII CPC.? And whether the exercise of recording of evidence by the learned Judge while hearing application under Order VII Rule 11 CPC was permissible? For this purpose, the plaint is to be tested on the touchstone of Rule 11 CPC of Order VII. A quick survey on the scope and applicability of this provision provides the following guidelines, which are being enumerated herein, solely for the sake of convenience. Hence, for the purposes of considering an application under Order VII Rule 11 CPC, (i) the Court has to presume the facts stated in the plaint as correct; (ii) nothing more than the averments of the plaint have to be seen for the purposes of adjudicating whether the plaint unveiled any cause of action; (iii) that in case of any mixed questions of law and facts, the correct methodology and approach is to allow the suit to proceed to the written

statement and discovery phases and to determine the matter either by framing preliminary issues or through a regular trial; (iv) that the dearth or weakness of proof would not be a justification for coming to the conclusion that there is no cause of action disclosed in the plaint; (v) that for the rejection of a plaint, the Court cannot take into consideration pleas raised by the defendants in the suit, as at that stage, the pleas raised by the defendants are only contentions in the proceedings, unsupported by any evidence on record; that only in rare and exceptional cases, the Court can consider the legal objections in the light of averments of the written statement but the pleading as a whole cannot be taken into consideration for the rejection of plaint; (vi) that even where there is a joinder of multiple causes of action, and at least some of these causes could potentially lead to a decree, a plea of demurrer cannot be admitted to reject the plaint; (vii) that if there are several parties and the plaint discloses a cause of action against one or more of them then, too, the plaint cannot be rejected; and (viii) that the plaint is not to be read in fragments but it has to be read as a whole. Reliance is placed on '*Rehmat Begum V. Mehfooz Ahmed and others*'¹ and '*Media Max (Pvt) Ltd. through Chief Executive V. Ary Communication Pvt. Ltd. through Chief Executive and another*'² and '*Jehangir Akhter V. Inayat Ahmed*'³.

(ix) That with the aim of deciding whether the plaint discloses cause of action or not, the court has to perceive and grasp the averments made in the plaint and the accompanying documents; (x) that in case of any mix question of law and facts, the right methodology and approach is to let the suit proceed to written statement and discovery and determine the matter either on framing preliminary issues or regular trial; as held in '*President, Zarai Taraqati Bank Limited, Head Office, Islamabad V. Kishwar Khan and others*'⁴. (xi) Moreover, factual inquiry regarding averments in the plaint is not permissible '*Mst. Shabena Perveen V. M/S. Defence Officers, Housing Society Authority, Karachi*'⁵, '*Messrs Bengal Corporation V. D.D.G. Hansa and 3 others*'⁶, '*Hyderabad Municipal Corporation V. Messrs Fateh Jeans Ltd.*'⁷, '*Dost Muhammad V. Ghulam Nabi*'⁸ and '*Karachi Development Authority V. Evacuee Trust Board through Administrator*'⁹.

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1. 2024 CLD 1254
 2. PLD 2013 Sindh 555
 3. 1990 CLC 1053
 4. 2022 SCMR 1598
 5. 1993 CLC 2523
 6. PLD 1992 Karachi 75
 7. 1991 MLD 284
 8. 1990 MLD 164
 9. PLD 1984 Karachi 34

(xii) That where a cause of action is disclosed in the plaint, the plaintiff has a right to a fair trial and to produce evidence and a judicial decision on merits of his cause; (xiii) even in case of vague pleadings and lack of proper particulars and details, the Court shall ask for better particulars and the proper course is to order the party to remove the vagueness and not to reject the plaint, as enunciated in the case of '*Dost Muhammad V. Ghulam Nabi*'¹⁰, '*N. A, Shah Riyar V. Messrs Conforce Ltd., Lahore and another*'¹¹, and '*Seven Stars Goods Transport Co. (Regd.), Karachi V. The Administrator, Karachi Municipal Corporation, Karachi*'¹². (xiv) It has also been held that the Court cannot take into consideration pleas raised by the defendant in his defense, as at that stage the pleas raised by the defendants are only contentions in the proceedings unsupported by any evidence on record. However, if there is some other material before the Court apart from the plaint at that stage which is admitted by the plaintiff, the same can also be looked into and taken into consideration by the Court. Beyond that the Court would not be entitled to take into consideration any other material produced on record unless the same is brought on record in accordance with the rules of evidence. Such view was taken by the Supreme Court in the case of '*Jewan and 7 others V. Federation of Pakistan through Secretary, Revenue, Islamabad and 2 others*'¹³. It was also held that the rejection of plaint at a preliminary stage when the plaintiff has not led any evidence in support of his case, is possible only if the Court reaches this conclusion on consideration of the statements contained in the plaint and other material available on record before the Court which the plaintiff admits as correct.

(xvii) Lastly, in the case of '*Mushtaq Ahmad Khan and another V. Mercantile Cooperative Finance Corporation Ltd. and another*'¹⁴, it was held that to enable a Court to reject a plaint on the ground that it does not disclose a cause of action under Order VII rule 11(a) CPC, it should travel within the four corners of the plaint and nothing else. Neither the defense set up nor the documents annexed thereto could legitimately be looked into. For failing to

10. 1990 MLD 164
11. 1981 CLC 1009
12. PLD 1976 Karachi 21
13. 1994 SCMR 826
14. PLD 1989 Lahore 320

disclose cause of action, plaint can be rejected only, if the allegations given in the plaint, even if it is taken to be true in the manner and form, the plaintiff is not entitled to any relief whatsoever. If the contents of the plaint read as a whole, disclosed triable issues, then the dispute between the parties should not be resolved without proper trial i.e. settlement of proper issues and recording of evidence. It is important to observe here that the above principles primarily apply on the cases where lack of cause of action is alleged, and the same may not apply in the cases where the plaint is to be rejected being barred by law, as for instance, under the principles of *Res judicata*, or *estoppel* or Order II Rule 2 or any other law.

8. If the above discussed principles on the scope and applicability of Order VII Rule 11 CPC are applied to the facts of the case as pleaded in the plaint of F.C. Suit No.23 of 2019, it appears that it has been alleged in the plaint that sale agreement date 16-01-2017 was entered between the parties with respect to the subject property, in consequence whereof, certain payments were made, and possession was also handed over to the Applicant. Plaint further averred the attempts made by the Plaintiff including preparation of Call Deposit and pay order and balance sale consideration to conclude the transaction by execution of sale deed as also subsequent transaction with third party by the Respondent, creating factual controversies and triable issues of facts. The contents of the plaint therefore clearly disclose a triable cause of action. Whether the allegations levelled in the plaint are true or false; and whether the plaintiff will be able to succeed in their claim on the basis of the allegations levelled in the suit, are questions of fact, the burden to prove whereof lies on the Plaintiff, and without which the plaintiff would not be able to succeed. This can only be decided once issues are framed and opportunity of leading evidence is allowed to the Plaintiff. Without recording of evidence, it would not be appropriate to hold at this stage as to which of the versions is correct, whether the one set up in the plaint is true, or the other one as pleaded in the defense is the correct version of the events. The defendants have already filed their written statement and they will also be at liberty to lead their evidence.

9. On the contrary, the treatment given to the plaint by the learned Judge was way beyond the jurisdiction and parameters of Order VII Rule 11 CPC. The learned Judge wrongly entered into collecting material to consider the truth and falsity of and the possibility of success of Plaintiff's case, an exercise which was not permissible while hearing an application under Rule 11, and thus acted beyond the jurisdiction vested in it. The learned Judge

also wrongly considered whether the payments through pay orders and cash, as claimed by the Plaintiff, were actually paid or not; and also wrongly attempted to ascertain the actual date when possession was handed over to the Plaintiff, either by the Defendants or by Plaintiff's own brother, who according to the written statement was a tenant of the Defendant. The learned Judge also wrongly got influenced by the fact that subsequent to the (alleged) sale agreement, the property was transferred by the defendant to a third party through sale deed. Not only that, recording of evidence of the Head clerk of the learned District Judge Hyderabad and reading of evidence which was produced and recorded in another case, to establish the status of the notary public, by the learned trial Judge at the stage of hearing of application under Order VII Rule 11 CPC, is something even unheard of. Lastly, taking a decision about the genuineness or otherwise of the sale agreement (at page 5 of the Order) by the learned Court based upon the above referred exercise, was beyond the domain and parameters as provided under Order VII Rule 11 CPC. The learned Judge appeared to have got impressed by the defenses in the written statement which resulted into recording of evidence and considering extraneous factors at the stage of hearing of Order VII Rule 11 CPC. While making such observation, the learned Judge completely overlooked the plaint and its prayers in the present *lis*, which were for the claim of specific performance and which the Applicant was required to prove in evidence, yet such opportunity was never allowed to the Applicant. Certain observations on the merits of the case were also made, which may have prejudiced the rights of the parties, though such exercise was not permissible at this stage under the law.

10. In addition to the above, it was also informed by the learned counsel for both the parties that with respect to the same issue, that with respect to the same property and same issue, the earlier Illegal Dispossession Application No.14 of 2019 under the Illegal Dispossession Act filed by the Respondent against the Applicant, was withdrawn by the Respondent; that in the earlier round also when the application under VII Rule 1 was allowed, Injunction Order dated 13.09.2019 was also passed against the Respondent by the learned 8th Additional District Judge Hyderabad in Misc. Civil Appeal No.05 of 2019; that the amount of Rs.1,01,00,000/- (one crore and one lac only) has already been deposited by the Applicant with the Nazir of the learned 5th Senior Civil Judge in compliance to the Order dated 19.03.2019; that F.C Suit No.342 of 2020 was filed by the subsequent purchaser against the Applicant and others for seeking Possession of the subject property, which was subsequently withdrawn on 08.09.2022; and F.C Suit No.317 of 2021 has been filed by the Applicant for cancellation of the subsequent sale

deed dated 03.12.2019 executed by the Respondent in favour of Asghar Khan which is *sub judice*. Such facts further contradict the observations made and the conclusions drawn by the learned Judge while deciding the application under Order VII Rule 11 CPC.

11. The entire thrust of the Order passed by the learned appellate Court was also on the license of the notary public. It appears that the learned judges failed to realise that there was a marked distinction between a Notary Public and an Oath Commissioner, and that both are not the same and synonymous terms/ offices. The learned Judges failed to consider that a Notary is appointed under the Notaries Ordinance (XIX of 1961) and the power to appoint a Notary vests in the Provincial Government. Functions of the Notaries are laid down in section 8; the exercise of their powers conferred under section 15 of the Ordinance; and the West Pakistan Notaries Rules were framed in 1965. On the other hand, an Oath Commissioner is to be appointed by the High Court under section 139(b) of Civil Procedure Code 1908 and section 539 of the Code of Criminal Procedure, 1898. The object of appointing Oath Commissioner is to attest affidavits to be produced before a court to prove any particular fact(s). Therefore, "Oath Commissioner" and "Notary" are both different and distinct terms/offices and intermingling of both could result into legal complications. Reference to this effect can be made to '*Col. (R) Muhammad Shabir Awan v. Raja Saghir Ahmed and 4 Others*'¹⁵.

12. Lastly, the focus of both the learned Judges was upon the Notary public (and that too, while considering Order VII Rule 11 CPC.) without realising the settled legal position that an agreement to sell need not be signed by parties and witnesses in presence of oath commissioner or notary public or any other officer or authority, as held in the case of '*Sahib Khan through legal heirs v. Muhammad Panah*'¹⁶. It was also not considered that a sale agreement is not mandatorily required to be attested by a notary public, as held in '*Zafar Iqbal v. Sher Muhammad & 3 others*'¹⁷. Based upon the above principle, it was further held in the case of '*Sikandar Ali v. Badruddin*'¹⁸ that, a notary public could not be said to be an attesting witness to an agreement. Finally, evidence of Notary public was not relevant for proof of execution of contract of sale as the same was not required by law to be verified by a Notary public, as declared in the case of '*Ghazi Khan v. Muhammad Yousaf*'¹⁹.

15. PLD 2023 Lahore 458

16. PLD 1994 SC 162

17. 2003 YLR 673

18. 2019 CLC 1046

19. 2023 CLC 2098

13. While analyzing the above position, I am also mindful of the fact that the instant Revision Application has been filed under section 115 CPC. against concurrent findings by two Courts below, for which the basic rule is that the scope of revisional jurisdiction is limited to the extent of jurisdictional error or an illegality of the nature in the judgment which may have material effect on the result of the case, or if the conclusion drawn therein is perverse or conflicting to the law. The High Court has limited jurisdiction to interfere in the concurrent conclusions arrived at by the courts below while exercising powers under section 115, C.P.C. The provisions of section 115, C.P.C under which a High Court exercises its revisional jurisdiction, confers an exceptional and necessary power intended to secure effective exercise of its superintendence and visitorial powers of correction, unhindered by technicalities. Such is the ratio laid down by the Supreme Court in the case of '*Ikhtlaq Ahmed*'²⁰. But at the same time, while exercising jurisdiction conferred by section 115, CPC., the Court could interfere when the concurrent findings of fact recorded, are based on erroneous assumptions of fact or patent errors of law or reveal arbitrary exercise of power or abuse of jurisdiction or where the view taken is demonstrably unreasonable. The cases of "*Asmatullah v. Amanat Ullah through Legal Representatives*"²¹, "*Abdul Sattar v. Mst. Anar Bibi and others*"²² and "*Mst. Naziran Begum through Legal Heirs v. Mst. Khurshid Begum through Legal Heirs*"²³ can be referred to support this. As already discussed in detail in the preceding paragraphs, by recording evidence at such stage and by entering into the question of truth or falsity of the claim of the Plaintiff, the learned trial Court materially erred by acting beyond its jurisdiction and the parameters under Order VII Rule 11 CPC., whereas the learned appellate Judge also followed the lead and failed to apply the correct judicial approach in light of the dictum discussed above, hence exercise of revisional jurisdiction under section 115 CPC is called for.

20. 2014 SCMR 161
21. PLD 2008 SC 155
22. PLD 2007 SC 609
23. 1999 SCMR 1171

14. Concluding the foregoing legal and factual analysis, I am of the humble view that the plaint in the F.C. Suit No.23 of 2019 was wrongly rejected under VII Rule 11 CPC. And the exercise of recording of evidence at the stage of hearing of application under Order VII Rule 11 CPC. was beyond the scope of such provision. Consequently, the instant Revision Application is allowed; the impugned Judgment dated 05.05.2021 passed in Civil Appeal No.323 of 2019 by the learned 8th Additional District Judge Hyderabad, and the impugned Order dated 26.11.2019 passed by the learned 5th Senior Civil Judge Hyderabad in Suit No.23 of 2019, are set-aside; and the case is remanded back to the learned 5th Senior Civil Judge Hyderabad, with direction to expeditiously decide the same, after framing proper issues and allowing opportunity to the parties to produce evidence in accordance with law. There will be no order as to costs, in the circumstances of the case.

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