

ORDER SHEET  
**IN THE HIGH COURT OF SINDH,**  
CIRCUIT COURT, HYDERABAD.  
Ind Appeal No.25 of 2012

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<b>DATE</b>	<b>ORDER WITH SIGNATURE OF JUDGE</b>
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1. For orders on MA 511/2014.
2. For KatchaPeshi.
3. For hearing of MA 766/2012.

09.09.2014.

Mr. Abdul Jabbar Qureshi Advocate for the Appellant.  
Mr. Aghis us Salam Tahirzada Advocate for the respondent  
No.1  
Mr. Anwar Ansari State counsel for official respondents.

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**NAZAR AKBAR J:-** This second appeal has arisen out of the Judgment and Decree passed by District & Sessions Judge, Hyderabad in Civil Appeal No.223/2011 whereby the Judgment and Decree in F.C Suit No.21/2010 passed by the Vth Senior Civil Judge Hyderabad has been set aside on the ground that the suit was hit by Order II Rule 2 CPC.

2. Brief facts leading to this appeal are that the appellant filed F.C Suit No.21/2010 for Specific Performance of contract dated 26.12.2006 and permanent injunction against respondent No.1 in respect of agricultural land bearing S.No.26/B admeasuring 1-14 acres out of total 04-03 acres situated in Deh Molan Taluka and District Hyderabad (hereinafter referred to as the suit land), claiming that the grandfather of the appellant namely Abdullah son of Usman owned and possessed land bearing S.No.77, 78/AB, 25/A, 26/B total admeasuring 12-15 acres in Deh Mulan Taluka and District Hyderabad, who died in 1958 leaving behind Muhammad Rahim, Muhammad Hashim, Muhammad Usman and Mst.

Azeema as his legal heirs. Muhammad Hashim died leaving behind the appellant as his legal heir and Muhammad Usman son of Abdullah died leaving behind respondent No.1 and others as legal heirs.

3. The suit was proceeded ex parte against respondent No.1 while the official respondents pleaded no interest in the matter as per statement of the learned D.D.A. and after recording evidence of the appellant the trial court passed ex parte Judgment and Decree which were assailed by respondent No.1 in Civil Appeal No.223/2011. The appeal was allowed by Judgment and Decree dated 13.04.2012 and 20.04.2012 and suit of respondent No.1 was dismissed being barred under Order II Rule 2 CPC.

4. I have heard learned counsel for the parties and perused the material available on record.

5. Learned counsel for the appellant has contended that the earlier suit was withdrawn, therefore, order II Rule 2 CPC was not attracted and he has also raised a point that the respondent had filed Civil Appeal without court fee and the appellate court has entertained the appeal without appreciating that the court fee has not been paid. Learned counsel for appellant has relied on the following case law:-

- (i) PLD 1983 SC 344 (GhulamNabi& others v. Seth Muhammad Yakoob& others),
- (ii) PLD 1983 Kar 537 (Muhammad Suleman v. Ehsan Ali)
- (iii) PLD 1987 SC (AJ & K)5 (State Life Insurance of Pakistan v. Mst. Zainab Khatoon& others).

6. Learned counsel for the respondents in rebuttal claimed that the Suit No.21/2010 was barred U/O II Rule 2 CPC since the earlier Suit No.04/2009 filed by the same plaintiff against the same respondent was in respect of the same suit property and yet he has willfully and deliberately

omitted to include the claim of specific performance against the respondent on the basis of the agreement of sale dated 26.12.2006 which was available with him. He further contended that withdrawal of a suit is also a dismissal of the suit and subsequent suit cannot include the claim omitted to be included in the earlier suit. In reply to the ground of filing appeal without court fee, learned counsel has contended that no such objection was raised by the appellate court, therefore, it has gone unnoticed. The appellant herein too has not raised the issue of nonpayment of court fee before final Judgment by the appellate Court and therefore, appeal cannot be dismissed by second appellate court on the ground of nonpayment of court fee in the lower appellate Court. In support of his contentions, learned counsel for the respondent No.1 has relied on the following case law:-

- i. 1991 NLR Civil 269 (Manzoor Hussain Vs. Rasool Bukhsh).
- ii. 2004 SCMR 1798 (Qazi Shamas-ur-Rehman & another v. Mst. Chaman Dasta & oths)
- iii. PLD 1984 SC 289 (Siddique Khan and 2 others V. Abdul Shakur Khan and another)

7. To appreciate the findings of the learned first appellate court following facts are relevant:-

- i. The plaintiff on **23.06.2009** had filed earlier suit No.04/2009 against the sole defendant wherein he only sought declaration and permanent injunction in respect of the agricultural land bearing S.No.26/B admeasuring 04-03 acres situated in Deh Molan Taluka and District Hyderabad in the name of predecessor in interest of the sole respondent.

- ii. It is an admitted position that the agreement of sale dated **26.12.2006** sought to be enforced through suit No.21/2010 was available with plaintiff on the date of filing of Suit No.04/2009, but the plaintiff/appellant herein has not even disclosed the very existence of sale agreement between the plaintiff and respondent No.1.
- iii. It is also an admitted position that the **cause of action** for filing earlier suit in **June 2009** was apprehension of dispossession and threats extended by the sole Respondent / defendant to sell the suit land to some unknown persons.(Para 3 to 6 of plaint in Suit No.04/2009).The **cause of action** in subsequent suit No.21 of 2010 filed in **February, 2010** is same threat of dispossession and sale of suit land by the same respondent to some other person.
- iv. The lower appellate Court during the proceeding directed the appellant herein to produce certified copy of order of withdrawal in suit No.4/2009 but the appellant Sikander failed to produce the same.
- v. In para 4 of earlier Suit No.4/2009 which was filed in **June, 2009**, the appellant has stated that the suit land was not in the name of respondent No.1 and through fresh suit, he claimed to have entered into a contract of sale in **December, 2006**, with him thus neither at the time of sale agreement nor in 2010 the respondent No.1 was exclusively entitle to enter into Sale agreement in respect of the suit land.
- vi. The appellant/ plaintiff in para No.5 of suit No.21/2010 has himself stated that defendant No.1 was not sole legal heir of Muhammad

Usman, thus admittedly the contract of sale of suit land was defective to the extent that the seller was not the absolute owner of the suit land mentioned in the agreement of sale dated 26.12.2006.

- vii.** The record further shows that the agreement of sale was executed in **December, 2006** between appellant and respondent No.1 namely Abdullah, but suit land was in the name of his father Muhammad Usman, who died in **April 2006**, therefore, both the parties to the very agreement on the date when it was executed were either under a mistaken belief as to the fact that the suit property belong to respondent No.1 or the said agreement was forbidden by law as it was injurious to the property of others i.e. the co-sharers of respondent No.1 and joint legal heirs of Muhammad Usman with respondent No.1, therefore, the contract was under clouds in terms of **Section 20 and 23** of the **Contract Act, 1872**.

8. The counsel for the appellant on the question of relevancy of Order II Rule 2 CPC invoked by the lower Appellate court to allow the appeal of respondent has relied on **PLD 1983 SC 344**. I am afraid that this case law is not relevant in the facts narrated in para 7(i) to (vii) above. The facts of the case reported in PLD 1983 SC 344 are quite distinguishable from the facts of the case in hand. In the reported judgment first suit of the party was still pending when second suit was filed and application for withdrawal of earlier suit was filed on the basis of having filed second suit to include the relief of specific performance. Therefore, since the earlier suit was withdrawn after the filing of second suit it cannot be said that the subsequent suit was hit by the provisions of Order II Rule 2 CPC. In the case in hand the appellant himself claims that he had withdrawn the earlier

suit before filing the subsequent suit and the cause of action is one and the same and the subject matter is also one and the same, therefore, despite the fact that he has not produced copy of the order of the withdrawal of earlier suit, since withdrawal of earlier suit was without permission to file a fresh suit, the plaintiff/appellant was precluded from filing another suit in terms of Order XXIII Rule 1(3)CPC which reads as follow:-

#### ORDER XXIII CPC

##### 1. Withdrawal of suit or abandonment of part of claim.

(1) .....

(2) .....

(3) Where the Plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule(2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh, suit in respect of such subject-matter or such part of the claim. (under lining is added)

The provisions of Sub-rule 3 of Rule 1 of Order XXIII are in fact reiteration of the intention of the law makers expressed in Order II Rule 2 CPC to control litigation after litigation between the same parties on the same subject matter. Order II Rule 2 & 3 CPC is reproduced as under;-

#### **2. Suit to include the whole claim.**

(1) í í .

(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.

The provisions of Order II Rule 2 CPC and Order XIII Rule 1 (3) are complementary to each other. Therefore, the contention of the learned

counsel for the appellant that Order II Rule 2 CPC is not attracted in his case on the ground that earlier suit was withdrawn lands him in even more serious legal issue that since the earlier suit was withdrawn by him without permission to file a fresh suit, he was precluded from filing a fresh suit on the same "cause of action" on the same "subject matter" against the same defendant. The contention that the earlier suit was withdrawn can only save the appellant from the consequences of the provisions of **Section 11 CPC** i.e the concept of resjudicata which is not the case here.

9. On the effect of nonpayment of Court fee in lower appellate Court, suffice is to say that it was the duty of ministerial staff of the court to point out non-payment of court fee and had it been done, the appellant could have paid the same to avoid dismissal of appeal on account of non-payment of court fee. Had he not paid the same once such objection had been raised by the lower appellate Court, only then he could have been penalized. The appellant herein has not disputed the fact that the jurisdiction of the appellate court to entertain the appeal and order passed thereon is not affected adversely on account of nonpayment of court fee. Therefore the impugned judgment and decree of lower appellate court, despite the fact that respondent had not paid court fee on his first appeal are protected by the provision of **Section 99 CPC**. The appellate Court has no powers to set aside the Judgment and Decree on the ground of mere error or irregularity which is not affecting the merit of the case or jurisdiction of the court. **Section 99 CPC** reads as follows:-

**99. No Decree to be reversed or modified for error or irregularity not affecting merits or justification.** No decree shall be reversed or substantially varied, nor shall any case be remanded,

in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.

Non-payment of court fee was mere irregularity which can be corrected at any time and such irregularity has not rendered the impugned order void or without jurisdiction. The case law reported in **2004 SCMR 1798** (Qazi Shamas-ur-Rehman & another v. Mst. Chaman Dasta & others) is perfect precedent to meet the solution arising from the facts of case in hand. In this case the Honourable Supreme Court has been pleased to hold as under:-

This Court in the case of Muhammad Swaleh PLD 1964 SC 97 has held that every irregularity or illegality in exercise of jurisdiction will not render the order of Court void and without jurisdiction. Any party aggrieved of such irregularity has to further show that there was such violation of statutory provision which rendered proceedings coram non iudice. It is a known principle of law that a procedural irregularity cannot be allowed to stand in the way of justice unless the irregularity has caused a serious miscarriage of justice.

10. Learned counsel for the appellant has placed reliance on **PLD 1983 Karachi 537** ( Muhammad Suleman ..vs.. Ehsan Ali) and **PLD 1987 SC (AJK) 5** (State Life Insurance of Pakistan Vs. Mst. Zainab Khatoon and 5 others) for setting aside the impugned Judgment of first Appellate Court on account of nonpayment of court fee by the Respondent No.1 on his first appeal before lower appellate Court . The dicta laid down in the two judgments relied upon by the learned counsel for the appellant is answered by the full bench of the Honøble Supreme Court in the case reported in **PLD 1984 SC 289** (Siddique Khan and 2 others vs. Abdul Shakur Khan and another). The full bench of five Judges of the Honøble Supreme Court in **PLD 1984 SC 289** held that without first granting time to the Plaintiff to supply court fee, it is not lawful to reject the plaint under Order VII

Rule 11(c) of CPC being a penal provisions to be construed strictly and further held that once deficiency in Court fee payable at trial stage is discovered during appeal, the party to be allowed time to supply deficiency even at appeal stage. In this case the Honourable Supreme Court has thoroughly examined the provisions of **Sections 4, 9, 10, 12 & 28 of the Court Fee Act, 1870** as well as **Section 148 & 149 CPC** read with **Order VII Rule 11 (c) of CPC** and the relevant part of the judgment delivered by five members Full Bench of Supreme Court is as follows:-

There is no water-tight compartlisation that it is the duty only of he litigant to look into the what is proper fee or proper stamp and not of the public functionaries concerned. Where one's duty ends the other's starts. It is also not difficult to visualise that the `obligation' and `function' are complementary to each other. It is in that sense that the phrases "proper fee" and "proper stamp" are to be construed. If the Court has enough time ; it would perform the function immediately on presentation of the document. But the Legislature would be deemed to have known the difficulties and shortcomings. Hence sections 9 and 10 were enacted to help the litigant in some types of cases through an investigation about the proper court-fee. It would in these as also in other cases take time. And in many cases the period of limitation would pass. But notwithstanding the same there is no provision in the entire Act that the litigant is to be penalised for delay by way of dismissing the case as time. barred. Instead section 12 (1) shows that the matter is one of purely fiscal nature and must end as soon as possible. **And under section 12 (ii) the revenue in case of deficiency can be collected even by the appellate Court without resort to the (retrospective) dismissal of the plaint as time-barred.** When the deficiency regarding the court-fee payable at the trial stage, is discovered during the appeal, the party is to be allowed time to supply the deficiency even at that stage, It is only on his contumacy at that stage also that the consequence like that of non-prosecution as provided under section 10(ii), shall ensue. Then and then only the plaint shall be dismissed on account of such non-compliance with the order of the appellate Court. If, however, he pays, no such consequence would follow regarding any earlier stage -say of the trial proceedings, notwithstanding the fact that they were conducted throughout (according to the finding under section 12(ii), without payment of the proper court-fee. **If time would have been the essence of the consideration of the consequence of non-payment of "proper fee" the dismissal of suit for non-prosecution at the earlier stage, would have been accomplished through the appellate forum without affording opportunity of deposit. But that is not visualized by section 12 (ii) when read with section 10 (ii)-the latter also providing that the proceedings shall be stayed till the payment of the proper fee.** If it is paid within the fixed time, no injurious consequence shall ensue and the matter would end. If, however, it is not paid within the time allowed it shall be dismissed for non-prosecution subject to the further extension of time under the law e.g. under section 148, C. P. C. The application of section 10 as already noted is confined

to a limited field while sections 12 and 28 are of wider application. But the consequences of payment or nonpayment within the time fixed/extended (though in different language and context) are as discussed above of similar import regarding the advantage of saving the process or losing it for non-prosecution, sections 149 and 148, C. P. C. would apply to them as provisos and savings in addition to the ones inherent in themselves as explained above. **The position of Order VII, Rule 11 (c), C. P. C. however is different. Nothing in the Court Fees Act derogates from the obligatory character thereof. Therefore, as already held, section 28 of the Court Fees Act or for that matter the other relevant provisions would remain subject to Order VII, Rule 11 (c) as understood and applied in the mandatory sense discussed earlier.** It further needs to be observed that in this context what is not permissible when done directly, cannot be permitted to be done indirectly. Therefore, it would not be possible to avoid this consequence by the device that the suit may not be considered at all under Order VII, Rule 11 CPC for rejection of the plaint and thus avoid the obligatory function under clauses (b) and (c) thereof. It is not possible because the very purview of rule 11 which reads that "The plaint shall be rejected . . . . .", makes it mandatory for the Court to do this exercise in all cases where the court-fee is deficient. **In other words, on this relevant discovery the Court shall, as an obligation, direct the party concerned to supply the deficiency within the time to be specified and on its failure to do so, of course subject to the other provisions of the law in this behalf, it shall have to reject the plaint or appeal, as the case may be.**

11. The learned counsel for the respondent has also relied on **NLR 1991 Civil (Lahore) 269** Manzoor Hussain Vs. Rasool Bukhsh. In this case, the Honourable Lahore High Court while relying on the above mentioned case law has further clarified the issue of nonpayment of Court fee at lower forum and its legal implication in the following language:-

õRule laid down in Siddique Khan and 2 others V. Abdul Shakur Khan and another (**P.L.D 1984 SC 289**) impels for a reasonable opportunity allowable to the respondents for paying the discovered deficit court-fee before invocation of a punitive action. Even otherwise, court-fee is primarily a question between the suitor (plaintiff) and the State. The Court-Fees Act was enacted merely to collect revenues for the benefit of the State and it is not intended to arm a contesting party with the weapon of defence to obstruct the trial of an actioní í í í í í í .í í í í í í í (page 286).

The appellate court has ample power under section 12(ii) of the Court-Fees Act 1870 to call upon a party to make good the deficient court-fee chargeable in the lower Court for it is its duty to see that proper court-fees are paid not only in regard to proceedings before it but also with regard to the proceedings in the lower Courtö (page 287)

12. Respondent No.1, who was appellant before the first appellate court, even today is ready and willing to pay the court fee, therefore, had the objection of non-payment of court fee been taken by the appellate court before passing the impugned order on merits, the respondent could have complied with the objection forthwith. I do not think that respondent No.1 could have for any reason refused the payment of court fee. Nor this Court in second appeal can non-suit the respondent on the ground of filing first appeal without Court fee. The Supreme Court in the above cited case-law has clearly laid down that without recourse to the provision of Order VII Rule 11 CPC, no punitive action can be taken against the Respondent and even this Court can call upon the respondent to pay the Court fee.

13. Therefore in view of the law laid down by the Honourable Supreme Court and the facts and circumstances discussed above, respondent No.1 is hereby directed to deposit/pay the requisite court fee in this court within one week to rectify the irregularity occurred on account of non-payment of court fee before the first appellate Court.

14. The upshot of the above discussion is that the second appeal is dismissed with no order as to costs. However, this dismissal is subject to payment of court fee by respondent No.1 within seven days and in case of failure of respondent No.1 to pay the court fee, this second appeal shall be deemed to have been allowed and the judgment and decree in F.C. Suit No.21 of 2010 shall be restored.

JUDGE.