IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Constitution Petition No.D-1634 of 2019

PRESENT
Mr. Justice Arshad Hussin Khan.
Mr. Justice Dr. Syed Fiaz ul Hassan Shah.

For Petitioner	:	NEMO.
For Respondent No.1	:	Mr. Shamsuddin Rajpar, Deputy Attorney General for Pakistan.
For Respondent No.2	:	Mr. Rajab Ali, Advocate, held brief for Mr. Aslam P. Sipio, who stated to be representing Cantonment Board Hyderabad called absent. Mr. Muhammad Saleh, Office Superintendent (Legal).

Date of Hearing: 16.04.2025.
Date of Judgment: 24.04.2025.

O R D E R

Dr. Syed Fiaz ul Hassan Shah, J: The petitioner has filed a Suit No.802 of 2017 for recovery of possession under section 9 of the Specific Relief Act before the 1st Senior Civil Judge Hyderabad against the respondents. The respondent No.2 filed an application under Order VII Rule 11 C.P.C while mentioning the following grounds:

> *"1. That the suit filed by the plaintiff is barred by the resjudicata as the plaintiff earlier filed suit 481 of 2015 and F.C Suit No.320 of 2017 which have the same cause of*

action and this Honourable Court rejected the both plaints.

2. *That the plaintiff challenged the suit 481 of 2015 by filing appeal NO.59 of 2017 u/s 96 CPC before the Honourable District Judge and the same was transferred in the court of learned VII ADJ Hyderabad and the said learned court dismissed his application for grant of stay order by order dated 11-03-2017 and the appeal has been argued and fixed for judgment.*

3. *That the plaint of FC Suit No.320 of 2017 was rejected on 03-07-2017 which has not been challenged by the plaintiff.*

4. *That the plaintiff is not entitled for restoration of possession as the plaintiff is trespasser and under law the suit for restoration of possession can be filed by the person who is lawfully put in possession of property in view of the law laid down in 1993 MLD 2419.*

5. *That no cause of action has accrued to the plaintiff for filing the suit."*

2. After hearing the parties, the learned 1st Senior Civil Judge vide order dated 06.01.2028 dismissed the application under Order VII Rule 11 C.P.C and decided to proceed with the case in accordance with law.

3. Being aggrieved with and dissatisfied by the said order the respondents preferred Civil Revision No.19 of 2018 the same was

allowed vide order dated 28.11.2018 which is impugned before us.

4. The learned Appellate Court has set-aside the order passed by the 1st Senior Civil Judge Hyderabad on the ground that the Suit is barred under section 11 C.P.C as it is hit by principles of Res-judicata. According to the Appellate Court previously two Suits No.481 of 2015 and 320 of 2017 were filed by the plaintiff / petitioner and the plaint of those Suits were rejected, hence the third Suit on the same cause of action is not maintainable.

5. We have perused the record with the assistance of learned DAG and scanned provisions of Order VII Rule 11 CPC and section 11 C.P.C which are reproduced hereunder:

> Order – VII 11. Rejection of Plaint: The plaint shall be rejected in the following cases:
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> (a) Where it does not disclose a cause of action;
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> (b) Where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, falls to do so;
>
> (c) Where the relief claimed is properly valued, but the plaintiff is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) Where the suit appears from the statement in the plaint to be barred by any law.

6. Order VII Rule 11 CPC refer only words the “rejection of plaint in suit” which ought to be applied by trial court having power and jurisdiction to adjudicate the ***lis*** and whenever any of the basic ingredients mentioned at (a) to (d) in Order VII Rule 11 CPC are available on examination of plaint including documents attached thereto. In contrast, the “dismissal of suit” connotes that it is a final determination of controversy between the parties. The power and jurisdiction to dismiss the suit can only apply by trial court when the parties have adduced evidence, produced documents on oath and undergone with the test of cross-examination by opposite party and finally fails to clear the test of “prove”.

7. Another key difference between the “rejection of plaint in suit” and “dismissal of suit” is that the former keep opens the door for the plaintiff to re-try or re-file or re-institute a fresh suit or, in other words, the plaintiff cannot be precluded to file afresh suit on same cause of action or joinder of new cause of actions, against same parties or include other parties or on same subject-matter or with addition or subtraction of subject-matter where it is possible for him according to situation. In contrast, the later strictly prohibit the plaintiff to institute fresh suit. The plaintiff cannot file fresh suit (case) against the same parties (including legitimate successor in interest or successor in office) or in respect of same subject-matter. The legal position is further tighten on the point of cause of action. In former case, the cause of action may be kept same

for the plaintiff or he may join more cause of action to re-agitate or institute suit whilst the later omit the point of cause of action and paved out another way to tackle the cases on examination of earlier subject matter decided either directly or indirectly in previous suit (case) and it can only be invoked when the evidence is recorded, the documents have produced on oath and such document could be read as admissible evidence by trial Court or otherwise while delivering the judgment. However, in both situations law provides statutory remedies against either Order of rejection of plaint in suit or dismissal of suit by way of Judgment.

8. The former does not preclude to re-institute a suit while the later is rule of conclusiveness which restrict plaintiff to re-agitate or institute fresh suit and is called as doctrine of res judicata emerged under section 11 Code of Civil Procedure, 1908. For the convenience, we refer provision, which provides:

> “S.11 CPC: No Court shall try 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.”
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> Explanation I.- The expression "former suit" shall denote a Suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.
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> Explanation II.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions

as a right of appeal from the decision of such Court.

Explanation III.-The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly, or impliedly by the other.

Explanation 1V.-Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.-Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.-Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the person so litigating."

9. Development of Res Judicata: The doctrine of res judicata is based on the following three maxims: i. 'Nemo debet bis vaxari pro una et eadem cansa' which means none should be vexed twice for the same cause. ii. 'Interest reipublicae ut sit finis litium' which means that it is in the interest of the state that there should be an end to litigation. iii. 'Res judicata pro veritate accipitur' which means that a judicial decision must be accepted as correct.

10. Res Judicata— Originally, this theoretical mode "res judicata" has its roots in Latin. The word "res" means "thing" and

"judicata" means "already decided". Initially, the concept of "Res judicata pro veritate accipitur" which means, a decision of a judicial authority must be duly accepted as correct, is the full maxim which has, over the years, diminished to not more than "res judicata". This notion is called "res judicata" which is widely recognized in legal systems across the continent.

11. Prior to the present Suit No.802 of 2017, admittedly the previous two suits have not been dismissed after settlement of issues and recording of evidence, on the contrary, the plaint of those Suits were rejected and it is settled law that rejection of plaint cannot bar the petitioner / plaintiff to re-institute a Suit.

12. We have asked the Counsel for Respondent and DAG to assist and point out any of the Explanation of Section 11 CPC under which the impugned Order passed by the Court below is squarely falls. The learned DAG conceded that the suit of petitioner/plaintiff does not fall under the provision of Section 11 CPC and res-judicata or principles of res-judicata are not attracted. However, he urged that the petitioner's suit is barred against the Respondents as provided under section 9 of the Specific Relief Act, 1877. It is well settled principle of law that rejection of the plaint under Order VII Rule 11, C.P.C. does not preclude the petitioner/Plaintiff from re-institution of a fresh Suit which is permissible under Order VII Rule 13, C.P.C. provided the earlier Suit was neither expressly nor impliedly barred by any law. Reliance can be placed on the Case of ***"Muhammad Ali and others v. Province of Punjab and others" (2009 SCMR 1079)***, the Supreme Court held :

> "No doubt Order VII, rule 13 does contemplate that rejection of a plaint shall not of its own force preclude the plaintiff from presenting a fresh plaint. Nevertheless, the underlined words are important and clearly indicate that other provisions relating to avoiding multiplicity of litigation and attributing finality to adjudications could not be ignored. For instance, if a plaint under Order VII, Rule 11 is rejected on the ground of the relief being undervalued or failure to affix proper court-fee stamps, a fresh plaint could always be presented upon rectifying the defects within the prescribed period of limitation. Nevertheless, if the plaint is rejected after proper adjudication as to the non-existence of cause of action or upon the suit being barred by law the findings could operate as res judicata and would not enable the plaintiff to re-agitate the same question through filing a subsequent suit upon the same cause of action and seeking the same relief. In our humble view, therefore, the question whether a fresh plaint could be presented under Order VII, Rule 13 or otherwise would depend upon the nature of the order passed by the court in rejecting a plaint under Order VII, Rule 11"

13. We are in agreement with the learned DAG that under Section 9 of the Specific Relief Act, 1877, the proviso provides that the suit filed against "Federal Government" or "Provincial Government" shall be barred under Section 9 of the ibid Act but we are not persuaded with the contention of the learned DAG that the suit is liable to be rejected on this ground for the reason that the Respondent No.2 is a statutory authority and not a federal government. Although no relief has sought against the Respondent No.1, however, at best the suit of the petitioner/plaintiff can hit under section 9 of the Specific Relief Act,

1877 to the extent of Respondent No.1 but the suit is maintainable against the Respondent No.2 who is also the contesting party. It is settled law that each case has to be decided on its own facts. The Court cannot force or knock out someone's suit having variegated style and nature of lis. Reliance can be placed on case ***"Muhammad Hanif Abbasi v. Imran Khan Niazi and others" (PLD 2018 SC 189).*** The Honorable Supreme Court laid down the principle as follows: "It is settled law that where the law requires something to be done in a particular manner, it must be done in that manner. Another important canon of law is that what cannot be done directly cannot be done indirectly."

14. We have not inspired with the arguments of learned Deputy Attorney General that the impugned Order though does not cover any of the essential ingredients of section 11 CPC but can be sustained under section 9 of the Specific Relief Act, 1877. We have examined the record and noticed that the main ***lis*** and the relief has been sought against the Respondent No.2 and the petitioner has not sought any relief against the Respondent No.1 which is a Performa party. On the other hand, the reading of counter-affidavit filed by the petitioner available at pages-61 to 65 of the file, it may be observed that the Respondent No.2 has also lodged FIR No.21 of 2017 against the petitioner and the petitioner has filed C.P. No. D-576 of 2017 which was disposed of with direction to the Respondent No.2 not to harass the petitioner / plaintiff. The petitioner is also depositing rent in Rent Case No.74 of 2015, ledger No.112/2016 pending before the 4th Senior Civil Judge / Rent Controller Hyderabad.

15. In view of above, the impugned Order dated 28.11.2018 passed by the IVth Additional District Judge, Hyderabad in Civil Revision Application No.19 of 2018 (Federation of Pakistan & another v. Muhammad Amjad) is set aside with modification that the FC Suit No.320 of 2017 filed against the Respondent No.1 is rejected being barred under the proviso of Section 9 of the Specific Relief Act, 1877 while the said suit is maintainable against the Respondent No.2. Consequently, the petitioner / plaintiff shall file an amended title plaint expelling the name of Respondent No.1 (Federal Government). Accordingly, the trial Court is directed to proceed with the said suit after notice to parties and decide the same in accordance with law.

JUDGE

JUDGE

Muhammad Danish*