ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

RA No.47 of 1997
RA No.48 of 1997

Date	Order with signature of Judge

1. For order on letter dated 18.10.2010 received from MIT as flag 'A'.

2. For hearing of Main Case

29.03.2016

Applicants present in person.
Mr. Ashiq Hussain Mehar, advocate for Respondent.

Nazar Akbar.J.- These revision applications are directed against the consolidated judgment dated 26.11.1996 in civil appeals No.79/1993 & 80/1993 whereby the III-Additional Sessions Judge, Central, Karachi dismissed the said appeals on the basis of an application under Section 151 CPC filed by respondent and maintained the decree of dismissal of Applicants' suits No.1819/1980 and 483/1980 on remand by the court of XVII Civil Judge, Central, Karachi.

2. The background of these revisions is that the applicant filed suits No.1819/1980 & 483/1980 against the respondent and both the suits after full trial were decreed on merit in favour of the applicant by a consolidated judgment dated **22.2.1982**. However, after more than 3 years the respondent preferred **appeals No.163 & 164 of 1985** against the judgment dated **22.2.1982** and in his appeal he subsequently filed an application under **order XLI Rule 27 CPC** and got the said appeals allowed and the suits were remanded to the trial Court for fresh trial. On remand the applicant's suits were dismissed

by the judgment dated **27.5.1993**. This time applicant preferred **appeals No.79 and 80 of 1993**. In these appeals learned counsel for the respondent filed an application under Section 151 CPC claiming res judicata against the suit and the appellate court allowed respondent's application and dismissed the appeals by a consolidated judgment dated **26.11.1996**.

3. The respondent has applied the same short cut method in the appellate court during appeals No.79 and 80 of 1993 which he had applied in his own appeals No.163 & 164 of 1985 to get the appeal decided through miscellaneous application instead of merit. Thus he raise a factual issue before the appellate court through an application **under section 151 CPC** and got the appeal dismissed without recording evidence on the issue of fact which was not raised before the trial court. By now it is settled law that the powers of civil court under Section 151 CPC despite being inherent have certain restrictions in the application of the same. The civil courts are not supposed to resort to the inherent powers in presence of a specific provision available in the Code to deal with a particular situation. The powers of appellate courts cannot be equated with the powers of a court of original civil jurisdiction and, therefore, the provisions of Civil Procedure Code which empowers courts of original civil jurisdiction when dealings with civil suits like the provisions of **Section 10 & 11 CPC** are not available to the appellate court while exercising authority in terms of **Section 96 of CPC**. Therefore, while deciding the appeal under Section 96 of CPC, the appellate

court by resorting to the provisions of **Section 11 CPC** under the cover of inherent powers under **Section 151 CPC** has in fact committed two errors. Firstly; it abdicated its own power under **Section 96 CPC** as the impugned judgment has no reference to the findings of the trial court in the judgment impugned before the appellate court; and secondly, it has exercised powers of a court of original civil jurisdiction which were not vested in it by deciding an application under **Section 11 CPC** as a court of original civil jurisdiction. The perusal of impugned order reveals that the appellate court has not even touched the issues raised and decided by the trial court, and dismissed the appeal by exercising inherent powers under Section 151 CPC. Therefore, the exercise of power under Section 151 CPC by the appellate court was improper and uncalled for as it has resulted in miscarriage of justice instead of meeting the ends of justice.

4. On merit, the case of respondent was even more hopeless. The learned counsel for the respondent admits that the issue of res judicata was not raised before the trial court when the cases were re-tried on remand to the trial court in 1987 and even at the initial trial when the suits were decreed in favour of the applicant in 1982. In the order impugned before the first appellate court, the trial court has dismissed the suit of applicant as hit by **section 42** of the Specific Relief Act, 1877 and there was no discussion on the issue of res judicata in the judgment of trial Court. The issue which was not taken up and

decided by the trial court was not supposed to be examined by the appellate court in isolation without touching the merit of the impugned judgment. Even otherwise the issue of res judicata ought to have been raised first before trial court for its decision and not at the appellate stage for the first time. The question of res judicata is always a question of fact as the parties have to first alleged it and then prove it through evidence that same issue between the same parties was decided or not and it has been raised again despite earlier decision on the said issue by a competent court. Even bare reading of **Section 11 CPC** suggests that it is question of fact. Section 11 CPC reads as follows:-

> **Sec.11.---Res Judicata---**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.

The appellate court was not supposed to examine a new / fresh defense at appellate stage to dismiss the appeals on the application of respondent under Section 151 CPC by holding that the suits were barred under **Section 11 CPC**.

5. Learned counsel for the Respondent was unable to assist the court that how the provisions of Section 151 CPC were applicable before the appellate court for obtaining an order in terms of **Section 11 CPC** for declaring on already dismissed

suit as also dismissed by operation of the principle of res judicata. Learned counsel for the respondent was very reluctant to even read impugned order or cite any case law in support of the impugned order; he only said the case law mentioned in the impugned order is sufficient. However, the examination of the impugned order on merit suggests that even before the appellate court the respondent has not filed any judgment and decree with his application under Section 151 CPC which could be treated as a decision on the same issues for which the applicant has filed suit No.1819/1980 and suit No.483/1980 against the Respondent, Haji Abdul Latif and others.

6. The record shows that the learned Appellate Court has treated a decision dated **30.6.1985** in civil **suit No.4742/1981** between the same parties as res judicata. The year of institution of suit No.4742 is 1981. Therefore, it cannot be said that the said suit was prior in time to the suits filed in 1980 and unfortunately its findings have been treated as res judicata to the issues in suit No.1819/1980 & 483/1980 which were even decided by judgment dated 22.2.1982. In fact, since the suit No.4742/1981 was subsequent in time, the trial court was under statutory obligation to apply the provisions of **section 10 CPC.** Section 10 reads as follows:-

> "**10. Stay of suit.** –No Court shall proceed with the trial of any suit in which the matter in issue is also directly and subsequently in issue in a previously instituted suit between same parties, or between parties under whom they or any of them claim litigating

> under the same title where such suit is pending in the same or any other Court in [Pakistan] having jurisdiction to grant the relief claimed, or in any Court beyond the limits of [Pakistan] established or continued by the Central Government and having like jurisdiction, or before [the Supreme Court]."

The subsequent suit **No.4742/1981** should to have been stayed pending suit No.1819/1980 and 483/1980 instead of applying its judgment dated **30.6.1985** as res judicata. Therefore, if at all there was a case of res judicata between the parties the earlier decision dated **22.2.1982** in the two suits which are subject matter of present revision should have been a case of res judicata against the subsequent suit No.4742/1981. The Suit No.4742/1981, therefore, should have been decided on the basis of judgment dated **22.2.1982** between the same parties and on same subject matter.

7. While examining the file, I noticed that earlier civil **appeal No.163/1985** and **164/1985** against the first judgment and decree in the suit No.1819/1980 and 483/1980 dated **22.02.1982** on the face were barred by three years. The respondent managed to get the two suits remanded by filing an application under **Section XLI Rule 27 CPC read with Section 151 CPC** in his own aforesaid appeals. He has neither raised nor pressed the provision of **Section 11 CPC** for dismissal of these suits in his earlier appeals and even before trial court after the remand. The learned appellate court while remanding the case has failed to appreciate that how the said **appeals No.163 and 164 of 1985** were entertained after three years of

judgment and decree dated **22.2.1982** without even any application for condonation of delay in filing the said appeal.

8. The parties are same and the subject matter of the suit is also same. The consolidated judgment of said appeals No.163 and 164 of 1985 is also on record and for exercise of power under **Section 115 CPC,** this Court has suo moto jurisdiction to examine the correctness, legality and propriety of an order by subordinate court at any time. And in case it is found that the subordinate court has improperly exercised its jurisdiction and/or exercised jurisdiction not vest in the subordinate Court, it can be set aside. It appears that learned counsel for the respondent was aware of it, and therefore he was reluctant to give even full facts of the case. Therefore, if the appeals (No.163 & 164 of 1985) filed by respondent against the first judgment dated **22.2.1982** in the suits No1819/1980 & 483/1980 were time barred, the appellate Court had no jurisdiction to entertain the same after the period of limitation and remand the suits. In such an eventuality it was a case of exercise of jurisdiction not vested in the Court. However, the appellate court has not examined the question of limitation. It was the statutory duty of the first appellate court and no higher forum is supposed to examine it unless it was examined and decided by lower forum first. Therefore I would not like to give any findings on the point of limitation.

9. In view of the above facts and law, the impugned consolidated judgment in these revision applications and the

consolidated judgment in Civil Appeal No.163/1985 and 164/1985 dated **31.3.1987** (available at page 115 both originating from same proceedings) are set aside and both sets of appeals are remanded to the District & Sessions Judge Central, Karachi with directions to hear and decide both the sets of appeals of **1985** and **1993** afresh. The District & Sessions Judge should first deal with and must examine the question of limitation for filing of the first set of appeals (Appeal No.163 & 164 of 1985) before proceeding further and re-hearing subsequent appeals No.79/1993 and 80/1993 on merits. In case earlier appeals of 1985 were time barred then obviously the subsequent appeals arising out of decision of remand in the said earlier appeals would have its implications.

10. Learned District & Sessions Judge Central, Karachi preferably hear these appeals by himself and after notice to the parties should decide the same within a period of two months since the parties are in Court since 1980 and report compliance through MIT-II.

11. With the above observations these revision applications stand disposed of.

JUDGE

MAK/PS