

ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.725 of 2011

DATE	ORDER WITH SIGNATURE OF JUDGE
------	-------------------------------

1. For hearing of CMA No.6220/11 (U/O 39 Rule 1 & 2 CPC.)
2. For hearing of CMA No.7773/11 (U/O 39 Rule 1 & 2 CPC.)
3. For hearing of CMA No.8025/11 (U/O XL Rule 1)
4. For hearing of CMA No.8107/11 (U/S 3 & 4)
5. For hearing of CMA No.8307/11 (U/S 3 & 4)
6. For hearing of CMA No.2747/12 (U/R 159 SCCR)
7. For hearing of CMA No.7561/13 (U/S 3 & 4)
8. For hearing of Nazir's Report dated 25.7.2013.
9. For hearing of Nazir's Report dated 19.12.2013
10. For order on maintainability of Suit.

13.03.2017.

Mr. Ayaz Ali Ansari, Advocate for the plaintiff.

Mr. Muhammad Nazir Tanoli, Advocate for defendant No.1.

Mr. Sharafuddin Mangi, State Counsel.

On 07.04.2014 while hearing CMA No.8025/2011, the Court had directed the Counsel for Plaintiff to assist the Court as to maintainability of this Suit, in view of the fact that earlier, plaint was rejected in plaintiff's Suit No.1395 of 2010.

Learned Counsel for the plaintiff submits that though earlier a Suit bearing No.1395/2010 was filed before this Court, wherein, vide Order dated 16.05.2011, the plaint was rejected, but notwithstanding this, instant Suit and the plaint herein is competent in terms of Order VII Rule 13 CPC. Learned Counsel was confronted as to whether any appeal was preferred against such rejection of the plaint, the learned Counsel replied in negative. He further submits that the defendants in this Suit except one are different, whereas, the cause of action and the prayer is also somewhat different, hence instant Suit is maintainable. In support of his contention he has relied upon the cases reported as **PLD 1992 SC 256 (Sakhi Muhammad v. Munshi Khan)** and **PLD 1973 Lahore 495 (Mst. Kaniz Fatima and 3 others v. Member (Revenue), Board of Revenue, Punjab, Lahore and 5 others)**

On the other hand, learned Counsel for defendant No.1 submits that in this matter Order VII Rule 13 CPC is not applicable as earlier the plaint was rejected on the ground that the same plaintiff had filed another Suit before the Senior Civil Judge, which was withdrawn unconditionally and Suit No.1395/2010 was filed before this Court, hence the plaint was rejected. He further submits that the prayer clause is in pith and substance the same. Whereas, defendant No.1 in this matter is the Honorary Secretary of the Society and has been impleaded in his personal capacity, therefore, Suit is otherwise incompetent.

I have heard both the learned Counsel and perused the record. It appears to be an admitted position that before filing of this Suit, the plaintiff had earlier filed Suit No.1395/2010, wherein, the plaint was rejected vide Order dated 16.05.2011 by this Court, against which no appeal was preferred. The precise reason for rejection of the plaint was that the plaintiff had also filed a Suit bearing No.913/2010 before the Senior Civil Judge, Karachi East, and after failing to seek any interim orders, had filed a fresh Suit before this Court and during pendency, withdrew the Suit from the Court of Senior Civil Judge unconditionally. The plaint was thus rejected as being barred in law and so also by holding that plaintiff is precluded by rules from instituting a further Suit under Section 12 CPC. The Plaintiff now rests its case on the provisions of Order 7 Rule 13 CPC, which provides that "*the rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action*". It is to be noted that though Order VII Rule 13 CPC does not absolutely bars filing of a fresh Suit, if the plaint had been earlier rejected and does contemplate that rejection of a plaint shall not of its own force preclude the plaintiff from presenting a fresh plaint; however, the said provision is not absolute so as to undo or upset any order of rejection of plaint. For instance if the plaint has been rejected as the Suit being barred in law, then perhaps the said findings could operate as a bar upon the plaintiff to re-agitate the same question through a subsequent Suit upon the same cause of action and seeking the same relief.

In my view the appropriate remedy available with the plaintiff was to file an appeal against the rejection of the plaint in Suit No.1395/2010 as the plaint was rejected after proper adjudication by the Court regarding its maintainability in view of the provisions of

Section 12 CPC, whereas, in terms of Section 2(2) CPC, rejection of plaint amounts to passing of a decree and therefore, an appeal is maintainable. Even otherwise, the relief being sought in this matter is more or less similar though couched in a different manner, but effectively appears to be the same. In that situation a fresh Suit is also barred under Order II Rule 2 CPC. It is to be appreciated that in this matter it is not the case either of *res judicata* or of permissibility of a fresh Suit on the same cause of action in terms of Order 7 Rule 13 CPC, but is a case, wherein, Section 12 CPC squarely applies. The Suit before the learned Senior Civil Judge was withdrawn unconditionally and thereafter a Suit was filed before this Court, in which the plaint was rejected vide Order dated 16.05.2011 on this very ground. The permissibility of a fresh Suit in terms of Order 7 Rule 13 CPC is for a very limited purpose i.e. for a curable defect, like affixation of proper Court fee or of relief being properly valued, which is not the case here. The earlier plaint was rejected for being barred in terms of Section 12 CPC. Such rejection of plaint perhaps left no room for the plaintiff to file a fresh Suit before this Court for a similar relief. The only option available was to challenge the rejection of plaint in appeal and not by a fresh Suit. The Honorable Supreme Court in the case of ***Muhammad Ali and others v. Province of Punjab and others (2009 SCMR 1079)*** has been pleased to observe as follows;

7. 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 3 or otherwise would depend upon the nature of the order passed by the court in rejecting a plaint under Order VII, Rule 11. A somewhat similar view appears to have been taken by this Court in *Muhammad Saleemullah and others v. Additional District Judge, Gujranwala and others* PLD 2005 SC 511.

9. Be that as it may, even if it be assumed that the third suit was maintainable on grounds of its having been filed prior to withdrawal of the second one, the fact remains that the fourth one was filed on the same cause of action after the unconditional withdrawal of the second one and dismissal of the petitioners' appeal against the order rejecting the plaint in the third suit. Evidently both these factors were sufficient to render the suit not maintainable. Obviously when the petitioners had unconditionally withdrawn the second suit on 12-9-2003 the matter could not be reagitated through a fourth suit in 2006 because of the bar contained in Order II, Rule 2 and Order XXIII, Rule 1 as held by this Court, inter alia, in Hashim Khan v. National Bank of Pakistan, Head Office at I.I. Chundrigar Road, Karachi and Branch Office at M.A Jinnah Road, Quetta PLD 2001 SC 325 and Haji Muhammad Boota and others v. Member (Revenue), Board of Revenue, Punjab and others PLD 2003 SC 979. At the same time the decree of the Court of Additional District Judge upholding the rejection of the plaint in the third suit could not enable the petitioners to wipe out its effect through bringing a fourth suit before the Trial Court. We, therefore, find no substance in this petition and decline leave to appeal

In view of hereinabove facts and circumstances of the case, plaint being barred in the law in this matter, is accordingly rejected under Order VII Rule 11(d) CPC.

In view of the above order, all listed and pending applications having become infructuous and are hereby dismissed as infructuous.

J U D G E

Ayaz P.S.