

# IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Muhammad Ali Mazhar** and **Agha Faisal, JJ.**

High Court Appeal No.165 of 2017

Imran Modi  
Versus  
Mizhar Uddin (Farooqui) & 2 others

For the Appellant : Mr. Aamir Nawaz  
Warraich, Advocate

For the Respondent No.1 : Mr. Ahmed Jawaid,  
Advocate

Date of Hearing : 21.05.2018

## **JUDGMENT**

**Agha Faisal, J:** This question sought to be addressed herein is whether in the present facts and circumstances a plaint could be rejected under Order VII Rule 11 CPC on the ratiocination that the cause of action was lost during the pendency of the proceedings.

2. The brief facts in respect hereof are delineated in chronological order herein below:

- i. The Appellant had filed a Suit No.111 of 2016 (“**Suit**”) seeking specific performance of an agreement of sale with respect to property, being House bearing No.A-1, Block-13, Gulshan-e-Iqbal, Karachi (“**Property**”).

- ii. The Appellant preferred an interlocutory application seeking to restrain the Respondent from *inter alia* dealing with the Property and the same was granted vide order dated 05.06.2015 (“**Interim Order**”). It may be pertinent to reproduce the relevant content of the aforesaid Interim Order:

“It is the case of the plaintiff that defendant No.1 entered into an agreement of sale dated 01.03.2015 with him, whereby he agreed to sell his property (the suit property) ; namely, House No.A-1, Block-13, Gulshan-e-Iqbal, Karachi, to the plaintiff in consideration of Rs.17,400,000.00, and the plaintiff agreed to purchase the same from defendant No.1 for the said price. As per clause 2 of the agreement, the balance sale consideration was to be paid by the plaintiff to defendant No.1 within 75 days from the date of signing of the agreement with a grace period of 15 days, the total whereof comes to 90 days from the date of agreement. The agreed period of 90 days was due to expire on 30.05.2015, but defendant No.1 sent a legal notice dated 19.05.2015 to the plaintiff claiming that the plaintiff was required to pay the entire balance sale consideration to him within 75 days. Through his legal notice, the sale agreement has been purportedly cancelled by defendant No.1 by alleging that the payment has not been made by the plaintiff within the agreed period. It is urged that the legal notice is misconceived and malafide as the same was issued by defendant No.1 before the expiration of the mutually agreed date. It is further urged that the plaintiff never refused to pay the balance sale consideration and he has always been and is still ready and willing to perform his agreed part of the contract. Learned counsel points out that defendant No.1 has admitted in his legal notice that a sum of Rs.18,00,000.00 has been received by him from the plaintiff in pursuance of the sale agreement. He states that the plaintiff is willing to deposit the entire balance sale consideration of Rs.15,600,000.00 with the Nazir of this Court within ten (10) days from today.

Issue notice to the defendants as well as to the learned Advocate General Sindh. Subject to deposit of the entire balance sale consideration of Rs.15,600,000.00 (Rupees fifteen million six hundred thousand only) by the plaintiff within the Nazir of this Court within ten (10) days from today, defendant No.1 is restrained till the next date of hearing from selling, transferring or alienating the suit property, and/or from creating any type of third party interest therein.”

- iii. The time granted to the Appellant to deposit the stipulated sale consideration (“**Sale Consideration**”) in Court, vide the Interim

Order, was extended, at the request of the Appellant, vide order dated 15.06.2015.

- iv. The Sale Consideration was never deposited by the Appellant and instead thereof the Appellant preferred an application to recall the Interim Order, being C.M.A. No.18582 of 2015 (“**Recall Application**”). In the said application it was submitted that the Appellant’s counsel had unauthorizedly stated before the Court that the Appellant was ready to deposit the Sale Consideration.
- v. The Recall Application was allowed by the Court, vide order dated 13.01.2016, and as a consequence thereof the interlocutory injunction application, filed by present Appellant with respect to the Property, was also recalled / dismissed.
- vi. The Respondent No.1 herein, being the defendant No.1 in the Suit, preferred an application under Order VII Rule 11 CPC and prayed as follows:

“For the facts and reasons disclosed in accompanying affidavit on behalf of the Defendant No.1 that this Honorable Court may be pleased to reject the plaint of the plaintiff, as after executing agreement to sell plaintiff has become dishonest and during entire period of the agreement to sell plaintiff brought so many parties for the purpose of sell out the said property to third party, as well as this Honorable Court was pleased to pass the order dated 15.06.2015, that the plaintiff may deposit the remaining balance before the Nazir of the Court, but the plaintiff with malafide intention and ulterior motives failed to do so, hence this application.”

- vii. The aforesaid application was heard and decided vide order dated 20.02.2017 (“**Impugned Order**”), whereby the learned Single Judge was pleased to allow the said application and dismiss the Suit while holding *inter alia* as follows:

“It appears that there is no cause of action left in this Suit, therefore, the Plaint is hereby rejected under Order VII Rule 11 CPC by allowing this Application.”

(Underline added for emphasis.)

3. Learned counsel for the Appellant submitted that the Impugned Order is contrary to the law as non-deposit of the Sale Consideration would at best disentitle the Appellant to interim relief and that the same could not be made the ground for dismissal of the entire Suit itself.

4. It was next contended that the Appellant had pay orders issued in the quantum of the requisite Sale Consideration and that the same belied the contention that the Appellant was unwilling to honor his part of the bargain. It was thus contended that the Impugned Order is without justification and not in conformity with the law and, therefore, liable to be set aside.

5. In response thereto, it was contended by the learned counsel for Respondent No.1 that the Impugned Order is in due consonance of law and in addition thereto falls squarely within the required parameters of administration of justice. Per learned counsel, the entire case of the Appellant was that while he was able and willing to perform his part of the agreement for sale in respect of the Property, and that he was being denied benefit of the agreement by the present Respondent.

6. It was contended that it is *prima facie* apparent that the Appellant was unable to deposit the Sale Consideration within the stipulated time or thereafter. It was submitted that this contention was duly demonstrated by the conduct of the present Appellant in the Suit proceedings and also by a perusal of the content of the

Recall Application. It was the contention of the learned counsel that the present appeal has been filed with *mala fide* intention of keeping the Property mired in controversy and unjustifiable litigation and that the same cannot be sanctioned by this Court.

7. This Court has considered the arguments of the respective learned counsel and reviewed the record available. It appears that the controversy to determine before this Court is whether the learned Single Judge was justified in rejecting the plaint in the Suit on the ground that the cause of action had been lost during the pendency of the proceedings, as the Appellant had admittedly failed to deposit the requisite Sale Consideration.

8. The premise of the Appellant, in the Suit, was that he was always ready and willing to pay the Sale Consideration in respect of the Property in the manner outlined in the agreement for sale and that the Suit was filed to compel the present Respondent to adhere to the requirements of the agreement for sale and convey the Property to the Appellant against receipt of the agreed Sale Consideration. The record of the Suit reflects that Sale Consideration was not deposited in Court by the Appellant despite the order of the Court and that the same was not done, even though the timeframe for the deposit was graciously extended by the Court.

9. The unwillingness of the Appellant to deposit Sale Consideration is compounded his expressed inability to pay the same, as was manifest from the narrative contained in the Recall Application. The purported copies of pay orders referred to by the Appellant, available at pages 79 till 89 of this Court's file,

demonstrate that the same are dated 22.05.2015 and it is also noted thereon that the same are valid for a period of six months from the date of issue. It is an admitted fact that no amount was ever deposited by the Appellant and even if these pay orders were genuine and in fact obtained by the Appellant to settle the requisite Sale Consideration, it is a matter of record that they were never delivered to either the Court or the Respondent herein.

10. The plea sought to be raised, by virtue of demonstrating the pay orders, is that the Appellant was perhaps able and willing to pay the Sale Consideration, however, the said contention is entirely contradicted by the Recall Application wherein it has been clearly stated that the Appellant is unwilling / unable to deposit requisite amount in the Court.

11. A perusal of the prayer clause of the plaint filed in the Suit demonstrates that the Appellant's claim seeks enforcement of an agreement for sale with respect to the Property and that there was also a disjunctive claim for compensation, for avoiding the completion of the agreement.

12. While it was the duty of the Court to safeguard the interests of all parties, including the Respondent No. 1 herein, it was to be considered whether the plaint could be rejected under Order VII Rule 11 CPC on account of the default of the Appellant to comply with the directives rendered by the Court while dealing with an interim injunction application, especially in view of the factum that the same directives stood recalled by the learned Single Judge as a consequence of allowing the Recall Application.

13. Order VII Rule 11 CPC *inter alia* provides for the rejection of a plaint where it does not disclose a cause of action. It is pertinent to highlight that the non-disclosure of a cause of action is required to be apparent from the plaint itself. In the present case it cannot be said that no cause of action was disclosed in the plaint and the disentitlement of the Appellant to perpetuate his claim for specific performance was adjudged by the learned Single Judge on the basis of events that transpired after presentation of the plaint.

14. It has been held by the honorable Supreme Court, in the case of *Al Meezan Investment Management Company Limited & Others vs. WAPDA First Sukuk Company Limited & Others* reported as *PLD 2017 Supreme Court 1*, that the question of whether a suit was maintainable or not was moot with respect to whether or not the plaint was liable to be rejected. It was maintained that it could well be the case that a plaint could not have been rejected in terms of Order VII Rule 11 CPC but the suit was dismissed eventually for a host of reasons.

15. The development of the contemporary law with regard to Order VII Rule 11 CPC was discussed in progressive detail by the honorable Supreme Court of Pakistan, in the case of *Haji Abdul Karim & Others vs. Messrs Florida Builders (Private) Limited* reported as *PLD 2012 Supreme Court 247*, and the guiding principles gleaned through the exhaustive process were illuminated as follows:

“11. We now need to examine the grounds on the basis of which a plaint is to be rejected. There is a considerable amount of case-law on the point. This covers a wide spectrum with, on the one hand, emphasis being placed on the primacy

of the statements in the plaint to the exclusion of everything else and, on the other hand, to include a perusal not merely of the plaint but also the documents attached therewith and, stretching the point even further, the other clear and obvious material on the record. The following are some of the important judgments on the point:---

- (i) In the case of *Jewan and 7 others v. Federation of Pakistan* (1994 SCMR 826), it was held that the law permits consideration only of the contents of the plaint and the defence raised in the written statement is to be disregarded. However, it was also observed that in addition to the plaint if there is some other material also available before the court which is admitted by the plaintiff the same can also be looked at. It was further observed that the court would not be entitled to examine any other material unless it was brought on record in accordance with the rules of evidence.
- (ii) In the case of *Haji Allah Bakhsh v. Abdul Rehman and others* (1995 SCMR 459) it was observed that the averments contained in the plaint are presumed to be correct.
- (iii) In the case of *Anees Haider others v. Amir Haider and others* (2008 SCMR 236) the court reiterated the principle that no reliance could be placed on the written statement.
- (iv) The case of *Saleem Malik v. Pakistan Cricket Board* (PLD 2008 SC 650) is a little different to reconcile with the overwhelming weight of authority since that observation in this case was “that the court, may in exceptional circumstances, consider the legal objection in the light of averment of the written statement but the pleading as a whole cannot be taken into consideration for rejection of plaint under Order VII, Rule 11, C.P.C.”. It is a little difficult to construe what the above observation means and perhaps the dictum contained herein should be confined and limited to the facts of this case alone.
- (v) In the case, of *Siddique Khan and 2 others v. Abdul Shakoor Khan and another* (PLD 1984 SC 289) it was observed that Order VII, Rule 11 in a way is a penal provision to be strictly construed. However, this finding pertains to clause (c) of Order VII, Rule 11 alone which provides that a plaint is to be rejected only after the grant of the requisite time if the plaintiff has failed to pay the court fee. This case is thus not relevant or material for our purposes.
- (vi) In the case of *Muhammad Saleem and others v. Additional District Judge, Gujranwala* (PLD 2006 SC 511) it was observed that Order VII, Rule 11 contemplates the rejection of a plaint only on the basis of averments made in the plaint and the pleas raised in the written statement are not to be considered. It was



also observed that the court was entitled to rely on the documents annexed to the plaint.

- (vii) In the case of S.M. Shafi Ahmed Zaidi v. Malik Hasan Ali Khan (2002 SCMR 338) the following finding was rendered:  
“Besides, averments made in the plaint other material available on record which on its own strength is legally sufficient to completely refute the claim of the plaintiff, can also be looked into for the purpose of rejection of plaint. It does not necessarily mean that the other material shall be taken as conclusive proof of the facts stated therein, but it actually moderates that other material on its own intrinsic value be considered along with the averments made in the plaint. “It was further observed that “It is the requirement of law that incompetent suit shall be buried at its inception. It is in the interest of the litigation party and judicial system itself. The parties are saved their time and unnecessary expenses and the courts gets more time to devote it for the genuine causes.”
- (viii) In the case of Pakistan Agricultural Storage and Services Corporation Limited v. Mian Abdul Lateef and others PLD 2008 SC 371 it was held that the object of Order VII, Rule 11, C.P.C. was primarily to save the parties from the rigours of frivolous litigation at the very inception of the proceedings.
- (ix) In the case of Salamat Ali v. Khairuddin 2007 YLR 2453 it was observed that although the proposition that a court while rejecting the claim under Order VII, Rule 11, C.P.C. could only examine the contents of the plaint, was correct nevertheless, this rule should not be applied mechanically.
- (x) In the case of Arif Majeed Malik and others v. Board of Governors Karachi Grammar School (2004 CLC 1029) it was noted that the traditional view was that in order to reject a plaint under Order VII Rule 11 only the contents of the plaint were to be looked into. It was added, however, that this view had since been modified to the extent that an undisputed document placed on record could also be looked into for the aforesaid purposed.
- (xi) In the case of Halima Tahir and 5 others v. Naheed and others (2004 MLD 227) it was held that in deciding a case under Order VII, Rule 11 only the averments in the plaint are to be considered.
- (xii) In the case of Ghulam Dastagir and others v. Mariyum and others (1993 MLD 1005) the point was reiterated and it was added that the allegations in the plaint have to be accepted as correct.
- (xiii) Additional High Court judgments which do not add anything further to what has been contained hereinabove are contained in the cases reported in 1981 CLC 1009, 2006 CLC 919, 2006 CLC 303, 1981

CLC 533, PLD 1981 Karachi 604, PLD 1978 Karachi 267 and therefore need not be examined any further.

**12.** After considering the ratio decidendi in the above cases, and bearing in mind the importance of Order VII, Rule 11, we think it may be helpful to formulate the guidelines for the interpretation thereof so as to facilitate the task of courts in construing the same.

Firstly, there can be little doubt that primacy, (but not necessarily exclusivity) is to be given to the contents of the plaint. However, this does not mean that the court is obligated to accept each and every averment contained therein as being true. Indeed, the language of Order VII, Rule 11 contains no such provision that the plaint must be deemed to contain the whole truth and nothing but the truth. On the contrary, it leaves the power of the court, which is inherent in every court of justice and equity to decide or not a suit is barred by any law for the time being in force completely intact. The only requirement is that the court must examine the statements in the plaint prior to taking a decision.

Secondly, it is also equally clear, by necessary inference, that the contents of the written statement are not to be examined and put in juxtaposition with the plaint in order to determine whether the averments of the plaint are correct or incorrect. In other words the court is not to decide whether the plaint is right or the written statement is right. That is an exercise which can only be carried out if a suit is to proceed in the normal course and after the recording of evidence. In Order VII, Rule 11 cases the question is not the credibility of the plaintiff versus the defendant. It is something completely different, namely, does the plaint appear to be barred by law.

Thirdly, and it is important to stress this point, in carrying out an analysis of the averments contained in the plaint the court is not denuded of its normal judicial power. It is not obligated to accept as correct any manifestly self-contradictory or wholly absurd statements. The court has been given wide powers under the relevant provisions of the Qanun-e-Shahadat. It has a judicial discretion and it is also entitled to make the presumptions set out, for example in Article 129 which enable it to presume the existence of certain facts. It follows from the above, therefore, that if an averment contained in the plaint is to be rejected, perhaps on the basis of the documents appended to the plaint, or the admitted documents, or the position which is beyond any doubt, this exercise has to be carried out not on the basis of the denials contained in the written statement which are not relevant, but in exercise of the judicial power of appraisal of the plaint.”

16. Upon examination of the plaint filed in the Suit upon the anvil of the principles laid down by the honorable Supreme Court it is

found that the same could not be deemed to have failed to disclose a cause of action.

17. With utmost respect, we are also unable to concur with the finding of the learned Single Judge that failure of the Appellant to honor the Interim Order would lead to the rejection of the plaint, especially when the same order stood recalled by the Court, as when hearing an injunction application all the material available on record may be evaluated but in the determination of whether a plaint was liable to be rejected only the plaint and its accompaniments were required to be examined. Reliance is placed in such regard on the judgment in the case of *Jewan & Others vs. Federation of Pakistan & Others* reported as 1994 SCMR 826.

18. It is the considered view of this Court that where the plaint disclosed a cause of action when the suit was filed, the same could not be returned solely on the grounds that the same cause of action was lost during the pendency of the proceedings. A similar view was taken by the honorable Lahore High Court in the case of *Khan Muhammad & Others vs. Ghulam Rasool & Others* reported as PLD 1987 Lahore 71.

19. Even if the learned Single Judge was of the opinion that the Appellant had forgone his claim to seek enforcement of the agreement with respect to the Property, the Appellant remained at liberty to agitate his claim for compensation, which claim was required to be determined by leading evidence in accordance with the law.

20. In view of the rationale and reasoning herein contained the present High Court Appeal is hereby disposed of in terms delineated herein below:

- i. The Impugned Order for the rejection of the plaint is set aside with the direction to the learned Single Judge to decide the Suit on merit.
- ii. It is clarified that no interim injunctive orders, with regards to the Property or otherwise, are in the field in the Suit as the injunction application was dismissed by the learned Single Judge with the directions for issuance of summons, vide the Order dated 13.01.2016, while allowing the Recall Application preferred by the Appellant, and the said position remains intact as of date.

**JUDGE**

**JUDGE**