

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD**

Ind Appeal No. 43 of 2017

Mst. Saba and others ----- Appellants

Versus

Mst. Fatima and others ----- Respondents

Mr. Jhamat Jethanand, advocate for appellants
Mr. Jagdesh R. Mullani, advocate for respondents

Date of hearing : 15.03.2019.
Date of announcement : 22.03.2019.

ORDER

ADNAN-UL-KARIM MEMON, J.- Through instant Second Appeal, the Appellants have assailed the order dated 10.07.2017 passed by learned Additional District Judge, Tando Allahyar, whereby he dismissed Civil Appeal No. 17 of 2017 and maintained the order dated 11.02.2017 passed by learned 1st Senior Civil Judge, Tando Allahyar, rejecting plaint of the Appellants in F.C. Suit No. Nil of 2017 under Order VII Rule 11 CPC.

2. Brief history of the case as per pleadings is that on 04.02.2017 Appellants filed Civil Suit No. Nil of 2017 before the Court of 1st Senior Civil Judge Tando Allahyar, for Declaration, Partition, Mesne profit and Permanent Injunction against the Respondents in respect of Suit property viz. residential house admeasuring 1752 sq. ft. in Khatri Para, Ward-C, Tando Allahyar and a Mango Garden admeasuring 11-30 acres situated in deh and Tapo Shaikh Mooso, Taluka and District Tando Allahyar. The parties were related interse, the suit property was owned by (late) Abdul Hamid Khan, father of Appellants and Respondents No. 2 to 6, husband of Respondent No. 1, grandfather of Respondent's No. 8 to 13 and 15 to 20 and father-in-law of Respondent's No. 7 and 14. The learned trial Court rejected the plaint of Appellants under order VII Rule 11 CPC vide impugned order dated 11.02.2017 on the premise that Respondent No.1, Mst. Fatima, is unsound mind person and sued by the Appellants without next friend or Guardian with further observation that Order 13 Rule 1 to 15 of CPC relates to the cases of minors and unsound mind persons and Rule 2 of Order 32 CPC to a suit instituted by or on behalf of the minor without next friend, the Respondents may apply to have the plaint taken off the file with cost paid by the pleader or other person by whom it was presented. The aforesaid Judgment & Decree were

challenged by the Appellants through Civil Appeal No. 17 of 2017 before the learned Additional District Judge, Tando Allahyar. The learned Appellate Court dismissed the Appeal vide order dated 10.07.2017. The Appellants being aggrieved by and dissatisfied with the aforesaid Judgments and Decree have impugned the same through instant Second Appeal.

3. Mr. Jhamat Jethanand learned Counsel for Appellants contended that the impugned Judgments and Decrees are contrary to law, facts and equity; that the order passed by learned Trial Court without issuing notice to the defendants and by applying the provisions of Order 32 and Order 13 CPC was illegal and improper; that the provision of Order 13 and Order 32 Rule 2 CPC are neither applicable to the facts of the case nor authorize the learned Trial Court to reject the plaint. The bare reading of order reflects that learned Trial Court has rejected the plaint without application of judicious mind and without lawful authority; that learned Appellate Court committed illegality in maintaining the illegal and void order; that in the plaint and in its title it is stated that defendant No.1 is parda nasheen, illiterate, old, sick, having unsound mind for last more than 10 years; that the application is supported with the affidavit of appellant No.1. The learned Trial Court committed error in holding that defendant No.1 was sued without any next friend /guardian. The decision of learned lower Court was a result of non-reading of plaint and application for appointment of Guardian ad litem and ought to have been reversed; that there was no application by the defendants to have the plaint taken off the file; the learned trial Court erroneously rejected the plaint on the ground which did not exist; that learned trial Court committed illegality in holding that the suit was not maintainable under Order 32 Rule 2 CPC and committed material irregularity in rejecting the plaint on the basis of erroneous observations; that learned Appellate Court failed to assign any valid reason and justification for dismissing the appeal; the decision of learned appellate Court is slipshod, nonspeaking, arbitrary, perverse and without application of judicial mind; that respondent No.3 had appeared on behalf of all the respondents on 11.03.2017 before the appellate forum. The respondent No.3 also filed power of attorney on behalf of Respondents No. 1, 2, 4 to 9 and 11 to 13. The learned Appellate Court committed illegality in not making any reference to the said fact and in absence of all the respondents except respondent No. 3 in spite of service of notice; that learned Appellate Court exercised jurisdiction not vested in it in dismissing the appeal upon the affidavit dated 01.7.2017 of respondent No.1. The order of learned Appellate Court is improper and unjustified; that it was not disputed that respondent No.1 was parda nasheen, illiterate, old and sick lady. Both the learned

lower courts committed illegality in rejecting the plaint and appeal on their erroneous assumptions of respondent No.1 being not of unsound mind; that the question of respondent No.1 of being unsound mind had no nexus with the prayers (a) to (g) sought in the plaint. The learned lower Courts had no jurisdiction to reject the plaint on their erroneous assumptions; that the plaint is not liable to be rejected on the basis of narration made therein; that the learned–lower courts exercised jurisdiction not vested in them in rejecting the plaint without assigning any valid grounds for its rejection; that the orders passed by the learned lower courts are based upon conjectures and surmises, misreading and non-reading of pleadings and documents on the Court record; hence are liable to be set-aside. In support of his case, he has relied upon the case of Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi (PLD 1990 Supreme Court 1), Janat Bibi v. Sikandar Ali and others (PLD 1990 Supreme Court 642), Muhammad Humayun Akhtar v. Pakistan Railway through Chairman, Pakistan Railway, Islamabad and 5 others (2007 YLR 1358(2)), Aziz Bibi and others v. Aijaz Ali and others (2007 YLR 21), Ebrahim Fikree and others v. Taufiq Fikree and others (1987 CLC 2224), Muhammad Sarwar v. Muhammad Saleem (1982 CLC 268), Shahzad and another v. IVth Additional District Judge, Karachi (West) and 5 others (PLD 2016 Sindh 26), Haji Ali Gohar and 10 others v. Province of Sindh, through Secretary Local Government and 6 others (PLD 2016 Sindh 292), Jeewan Shah v. Muhammad Shah and others (PLD 2006 Supreme Court 202)

4. Mr. Jagdesh R. Mullani, learned Counsel for the respondents have supported both the impugned orders and argued that learned trial Court has rightly rejected the plaint of appellant's being barred by law. In support of his contention he has relied upon the case of Amjad Sharif Qazi & 6 others v. Salimullah Faridi & 9 others (PLJ 2007 SC 63), Syed Ghulam Hyder Shah alias Umaz Shah and 4 others v. Mst. Bibi Amirunnissa and 4 others (PLD 2011 Karachi 183), Ahsin Arshad and others v. Advocate General, Punjab and others (PLD 2018 Lahore 9), Mst. Choto and others v. Muhammad Ashraf and others (PLD 2011 Lahore 548), Haji Sultan Ahmad through legal heirs v. Naeem Raza and 6 others (1996 SCMR 1729), Bashir Ahmed v. Mst. Taja Begum and others (PLD 2010 Supreme Court 906). He next submitted that the appellate Court rightly maintained the order passed by learned trial Court on the same premise.

5. I asked from the learned counsel for the respondents, how the plaint can be rejected under order 7 Rule 11 CPC without ascertaining/adjudging the fact that whether respondent No.1 was/is of unsound mind. The learned Counsel in his abortive attempt tried to justify the action of learned Courts below and argued that

respondent No.1 is not unsound mind; therefore, the plaint has rightly been rejected being barred under Mental Health Ordinance, 2001. He next submitted that when the main plaint was barred by law then the interlocutory application cannot be entertained. In support of his contention he relied upon various provisions Mental Health Ordinance, 2001. He lastly prayed for dismissal of instant Appeal.

6. I have heard the parties on the issue involved in the present proceedings and perused the material placed on record and case law cited at the bar.

7. The case of the appellants is that Abdul Hamid Khan was in exclusive possession of suit property till he died on 25.11.2006 and left behind Appellant/plaintiffs, Respondents/defendants No. 1 to 6, daughter Mst. Nasim Akhtar and son Muhammad Hassan. Subsequently, said daughter and son also died leaving behind Respondent/defendants Nos. 7 to 13 and 14 to 20 to inherit their share in the suit property. The Respondents/defendants No. 2 to 4 being male members were looking after the suit Garden and gave the said Garden on lease and paid share to the Appellant/plaintiffs and other co-owners. The appellants have been requesting the respondents/defendants No. 2 to 4 to get the suit property mutated, but they were kept on hopes. That in March 2016, respondents/defendants No. 2 to 4 got portion of the suit house mutated in favour of appellants, respondents/defendants and deceased Mst.Nasim Akhtar and Muhammad Hassan and in October 2016 respondents/ defendants No. 2 to 4 disclosed that the suit Garden was gifted by deceased Abdul Hamid Khan to respondent/defendant No.1 and subsequently respondent/defendant No.1 alienated the suit Garden in favour of respondents/ defendant's No.3 and 4 by way of sale deeds, appellant/plaintiffs, therefore, filed suit for the declaration, partition, mesne profit and permanent injunction; that appellants filed extracts from city survey record and they relied upon the revenue record; that along with plaint appellants filed an application under order 32 Rule-3, 4(4) and 15 read with Section 151 CPC. The application was supported with the affidavit of appellant/plaintiff No.1; that appellant/ plaintiffs also filed an application under order 39 rule 1 and 2 read with Section 151 CPC which was supported with the affidavit of appellant/plaintiff No.1; that learned Trial Court heard the Advocate of plaintiffs and without issuing any summon / notice to the defendants passed order dated 11.02.2017 rejecting the plaint under Order 7 Rule 11CPC; that plaintiffs filed Civil Appeal No. 17 of 2017. The Appeal was admitted and notices for 04.03.2017 were refused by Respondent No.2. That on 11.03.2017 Respondent No.3 appeared for himself and on behalf of all other Respondents and sought time for filing

objections; that on 25.03.2017 learned counsel filed vakalatnama on behalf of respondents No. 1 and 3 and sought time; on 01.04.2017 objections were filed by Respondent No.3. Notice on remaining respondents was ordered through publication in daily express dated 6.4.2017; that notice was served on all the Respondents through publication. The respondent No.3 claimed that Respondent No.13 was minor; therefore, Application under order 32 rules 3 CPC was filed;

8. The learned trial Court heavily relied upon the Rule 2 of Order XXXII CPC and formed opinion that suit is not maintainable. The aforesaid Rule explicitly provides that where a suit is instituted without next friend, plaint to be taken off the file and notice on such application shall be given to such person and after hearing, the Court may make such order in the matter. The pivotal question arises in the present proceedings is that whether the learned trial court before invoking the aforesaid Rule adopted the parameters as set forth in the law. For convenience sake an excerpt of the order dated 11.02.2017 is reproduced below:

“1. Plaintiff’s filed present suit against above named defendants for the declaration, partition, mesne profit and permanent injunction valued as 9,05,00,200/- and alleged that there is suit property consisting upon residential houses C.S No.1447, 1544, 1546, 1547 and 1548 admeasuring 1752 square feet and CS No.1442 admeasuring about 1020 square feet both situated in Ward C Khatri Para Tando Allahyar and mango garden bearing C.S No.812/1, 2, 4 admeasuring 11-30 acres situated in Deh and Tapo Shaikh Moso Taluka and District Tando Allahyar. It alleged that when plaintiff’s demanded their share from defendant No.2 to 4, on which they disclosed that the suit property mango garden gifted by their father Abdul Hamid Khan to defendant No.1 Mst. Fatima on 10.11.1976 and on 13.05.2013 the same gifted property through registered sale deed alienated by her (defendant No.1) to defendant No.2 & 3. It further reveals per plaint that defendant No.1 Mst.Fatima is unsound mind person and sued by plaintiffs without any next friend or guardian. Order 13 Rule 1 to 15 of CPC relates with the cases of minor and unsound mind persons & rule 2 of order 32 CPC deals with where a suit instituted by or on behalf of minor without next friend the defendant may apply to have the plaint taken off the file, with cost to be paid by pleader or other person by whom it was presented. Needless to say that rule 15 showing that the all rules of order 13 are applicable upon the unsound mind person also. In instant case the plaintiff filed the suit against unsound mind person Mst. Fatima wd/o Abdul Hamid Khan without next friend and only written that she is to be served through Nazir of Senior Civil Judge, Tando Allahyar. Thus in this position the suit of plaintiff’s is not maintainable under rule 2 of order 32, CPC accordingly its plaint rejected without no order as to costs.”

9. I have gone through the order dated 10.07.2017 passed by the learned Appellate Court dismissing the Appeal on the premise that the respondent No.1 is not a unsound mind lady, therefore under Article 23 of Constitution of Pakistan, she was competent to dispose of her property, perhaps the learned appellate court did not comprehend the issue involved in the matter and concurred with the decision of the learned trial court, without looking into the fact that the entire matter required proper adjudication under the law. For the sake of ready reference, the operative para of the said order is being reproduced hereunder:

“Since it is crystal clear that respondent No. 1/defendant No. 1 is not unsound mind lady, therefore under Article 23 of Constitution of Pakistan, she was competent to dispose of her property. In the light of above, suit of appellants /plaintiffs was not maintainable under the law as it is proved that they have not come in Court with clean hands.

In the circumstances, I am of the opinion that the learned Trial Court has passed the order dated 11.02.2017 according to law, therefore point No. 1 is answered in the affirmative.”

10. To appreciate and elaborate on the issue involved in the present matter, it is noted that on 04.02.2017 the suit was filed with the following prayer(s):-

- “a. Declaration that parties are co-owner in the suit property.**
- b. Declare that gift deed dated 10.11.1976 by deceased Abdul Hamid Khan in favour of defendant No.1 and registered sale deeds 13.05.2013 by defendant No.1 in favour of defendants No.2 and 3 are illegal, void, without consideration and not binding on plaintiffs and may be ordered to be cancelled and delivered up.**
- c. That suit house be partitioned by metes and bounds and plaintiffs be put in separate possession of the suit house.**
- d. Defendants do pay yearly income of suit garden at Rs.5, 00,000/- per year or at the rate to be determined by this Honorable Court.”**

11. From perusal of Record, it appears that the appellants have not disclosed in the memo of plaint (paragraphs No.1 to 10) regarding the factum that respondent No.1 was/is of unsound mind, however, it is disclosed in the title of the plaint that respondent No.1 namely Mst. Fatima widow of Abdul Hamid Khan having unsound mind to be served through Nazir of Senior Civil Judge, Tando Allahyar. The aforesaid factum is supported by the application of the appellants under Order 32 Rule 3, 4(4) and 15 CPC with the prayer to appoint Nazir of the learned trial Court to be guardian ad-litem for the suit for defendant No.1. Perhaps this became the cause for the learned trial court to reject the Plaint under Order 7, Rule 11 CPC. Mr. Jhamat Jethanand learned counsel for the Appellants, who has done his homework extremely well, did persuade me to declare the procedure adopted by learned trial court in such eventualities by rejecting the plaint of the appellants without dilating upon the application of appellants for appointment of guardian ad-litem of respondent No.1 as her next friend as discussed supra is not in accordance with law. According to me, the answer to the question can be found from the following provisions of law:

- i) Order 7, Rule 1 CPC (particulars of the plaint)
- ii) Order 7, Rule 11 CPC (rejection of plaint).
- iii) Order 32 Rule 2 CPC (suit is to be instituted through next friend)

iv) Order 32, Rule 15 CPC (application of rules to persons of unsound mind).

12. To appreciate and elaborate further on the issue in hand, it is expedient to have a look at Order 7, Rule 1(d) CPC, which contemplates that the plaint shall contain among others, a statement as to whether the plaintiff is minor or a person of unsound mind. Rule 11 CPC, thereafter lays down the grounds on which the plaint can be rejected; and a finding entered on the averments made in accordance with Rule 1(d) is not made specifically a ground for such rejection. The grounds mentioned under Rule 11 CPC, arises at the pre-appearance stage of the defendant.

13. Now appreciating the Order 32, Rule 4(2) CPC, the finding on the said statement, may at best only invite the further stage of appointing an appropriate guardian for the disabled defendant to defend the suit, as such, even if the Court finds that the plaint is properly presented this will not preclude the right of the defendant to agitate this aspect as discussed supra. This is clear when I advert to Order 32 CPC which deals with the institution of proceedings by or against the minor/mentally incapable defendant. For the sake of ready reference, Order 32, Rule 2(1) CPC, thereof states as under:-

“2. Where suit is instituted without next friend plaint to be taken off the file: - (1) Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to us paid by the pleader or other person by whom it was presented.

(2) Notice of such application shall be given to such person and the Court after hearing his objections (if any) may make such order in the matter as it thinks fit.”

14. Perusal of the aforesaid Rules, prima-facie show that, the defendants' right to contest the status of guardian to represent him/her arises even at later stage after the summon is issued to him/her after preliminary inquiry in the matter by the trial court.

15. In the instant case, the learned trial Court, no doubt had not conducted a preliminary inquiry when the plaint was presented, only counsel was heard without adopting the legal course as discussed supra. The aforesaid enquiry may be imperative as it can be seen from the provision of Order 32 of the CPC. Because, even if the defendant is not properly represented in the case, be he/she a minor or mentally unsound person. In my view under Order 32, Rule 4, it is incumbent on the learned trial Court to make an inquiry and appoint a guardian or next friend if such situation arises. Such a defect may cloth the Court with the power either to appoint a Court Guardian to represent the

defendant under Order 32, Rule 4(2) CPC, when, the defendant is not properly represented, however, it is not mandatory for the court that the suit should be thrown out. Sub-rule (2) of Rule 3 of Order 32 CPC contemplates appointment of guardian or declaration by a competent authority of a guardian to the disabled defendant. In my view, the effect of the rule is that it suggests a stage when the Court has initially to ascertain whether the plaint is validly presented, or the defendant is properly represented by a guardian, in case he is in any way disabled. In the case of the minor, on proof of minority, while in the case of a person of unsound mind, on proof of such disability, a guardian may be appointed by the Court, or it can approve the authority of the person who represents the defendant and acts as his guardian/next friend.

16. In my view in a judicial process, a stage obviously before Order 7, Rule 11 CPC stage is reached and when that stage is crossed, the plaint cannot be rejected under Order 7, Rule 11 CPC. Therefore, that is the first stage. And later, a right is conferred on the parties to contest this status of the defendant as envisaged in Order 32, Rule 2. Perhaps, the right conferred thereunder is akin to the right of a defendant under Order 33, Rule 9 of the CPC. Order 32, Rule 3 of the Code of Civil Procedure provides that where the defendant was an unsound mind the Court on being satisfied with regard to the fact of his aforesaid factum shall appoint a proper person to be guardian in suit for such unsound mind. By virtue of the provisions of Rule 15 CPC, the provisions of Rules 1 to 14 of Order 32 CPC, relating to them are made applicable, so far as may be, "to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on enquiry, by reasons of unsoundness of mind or mental infirmity to be incapable of protecting their interests when suing or being sued". The provisions contained in Order 32 not only empower the Court to take appropriate steps where a party to the proceedings is a minor or a person who is incapable of protecting his/her interest whether by reason of unsoundness of mind or mental infirmity, but also cast a mandatory duty on the Court to take steps to ensure proper representation for such persons so as to ensure that their interest in relation to the proceedings are fully protected. These provisions are a legislative recognition of the well-known principle that the State, as indeed the Court, which is part of the judicial wing of the State is in *locus parentis* (a place where something happens) to its citizens, who are either minors or are incapable of protecting their interests in judicial proceedings by reasons of unsoundness of mind or mental infirmity. There can, therefore, be no doubt that before the Court proceeds with a suit or other proceedings, in which one of the parties is either a minor or otherwise incapable of

protecting his/her interests, the Court is bound to hold a preliminary enquiry and, if satisfied that the conditions of the relevant rules are attracted, to make appropriate directions with regard to the proper representation of such persons. In such a case it would not be open to the Court to consider the suit or the other proceedings before complying with these mandatory requirements.

17. Apparently no attempt was made by learned trial court for adjudication as to whether the respondent No.1 was of unsound mind. It is not in dispute that there was no previous declaration or finding of any court that the respondent No.1 was of unsound mind. The appellate court has observed that respondent No.1 is not unsound mind lady, therefore under Article 23 of Constitution; she was competent to dispose of her property. If this was the position of the case, learned appellate court ought to have remitted the case for adjudication of the matter.

18. I am of the view; the learned trial court ought to have seen the prayer clauses of the memo of suit where certain other claims have been made which should have been adjudicated by recording the evidence of the parties. This paramount duty cannot be overridden by the Court invoking Rule 11 of Order 7 CPC.

19. I am cognizant of the fact with regard the powers of the court to either reject the plaint or dismiss the suit at any stage of the matter. At this juncture it would be appropriate to carry out an analysis of Order VII Rule 11 of the Code of Civil Procedure 1908; the said provision is reproduced below:

a) Where it does not disclose a cause of action;

b) Where the relief claimed is under-valued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

c) Where the relief claimed is property valued; but the plaint 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”.

20. I have noticed that the Court is bound by the use of the mandatory word “shall” to reject a plaint if it “appears” from the statement in the plaint to be barred by any law. It is expedient to refer Section 9 of the Civil Procedure Code, which confers general jurisdiction upon courts to try all suits of a civil nature. In order to appreciate the scope of Section 9 of CPC, the same is reproduced as under:-

“(9) Courts to try all Civil Suits unless barred. ----the courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. Explanation: A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.”

21. In the light of the preceding paragraph, I am of the considered view that Civil Courts are Courts of ultimate jurisdiction with regard to a Civil right, duty or obligation, unless the jurisdiction is either expressly or impliedly barred. Section 9 of the Civil Procedure Code only confers jurisdiction upon courts and does not grant a substantive right of action. The right of action is to be established by reference to the substantive law.

22. The development of the contemporary law with regard to Order VII Rule 11 CPC has been deliberated upon 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 (“Haji Abdul Karim”), and the guiding principles determined therein have been illumined as follows:

“12. After considering the ratio decided 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.”

23. It is apparent from the foregoing that for consideration of an application under Order VII Rule 11 CPC it is the content of the plaint that is to be given primacy. The determination required to be undertaken is to fall squarely within the parameters of whether the suit appears from the statement in the plaint to be barred by any law, the learned trial Judge has rejected the plaint, in the presence of grounds and prayers contained in the plaint, on the unsustainable grounds. Therefore, the rejection of a plaint could not be sustained in law. I am fortified in this regard by a Division Bench judgment of this Court dated 01st September 2010 in HCA 203 of 2009 titled Muhammad Amin Lasania vs. M/s. Ilyas Marine & Associates (Pvt.) Limited (“Amin Lasania”), wherein it was held as follows:

“a plaint cannot be rejected in part. Therefore, even if the main or primary cause of action is barred, and it is only a secondary (and clearly less important) cause of action that is not, the plaint cannot be rejected in respect of that part which relates to the primary cause of action.”

24. Amin Lasania was followed by another Division Bench judgment of this Court in Nishat, wherein it was held as follows:

“It is also well-accepted principle for deciding an application under Order VII, Rule 11; CPC that plaint in a suit cannot be rejected in piecemeal.”

25. The judgment of honorable Supreme Court titled Jewan & Others vs. Federation of Pakistan & Others (reported as 1994 SCMR 826), discussed in Haji Abdul Karim, articulated the principle that when hearing an interim application all material available on record may be evaluated but in determination of whether a plaint was liable to be rejected only the plaint and its accompaniments were required to be examined.

26. It is the considered opinion of this Court, that in the present facts and circumstances, applying the ratio of judgments cited supra, rejection of plaint under Order VII Rule 11, CPC, 1908, was not warranted, hence the Impugned Orders dated 11.02.2017 passed by the learned trial Judge and order dated 10.07.2017 passed by learned Appellate Court are hereby set aside.

27. In view of the reasoning and rationale contained herein, the present second appeal is allowed; matter is remitted to trial court for further proceedings in the Suit in accordance with law and in terms of, and subject to, this decision, within a period of three months from the date of decision of this order.

J U D G E