

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.451 of 2009

Present

Mrs. Justice Kausar Sultana Hussain

Mst. Shaheena Parveen and others.....Plaintiffs.

Versus

Faran Co-operative Housing Society Limited
and others.....Defendants.

Talha Asif Taufiq
son of S.M. Asif Taufiq (late).....Intervener/applicant.

For hearing of CMA No. 12462 of 2016 (Application U/O VII Rule 11
CPC).

Date of Hearing 22.1.2020

Date of Order .7.2020

Mr. Asif Ali, Advocate for the Plaintiff No.1.
Mr. Farhan Minhas, Advocate for the Plaintiff No.2(a).
Mr. Nayyar Ziaudin, Advocate for the Intervener/Plaintiffs No.2 to 4).
Mr. Abdur Rehman, Advocate for Defendants No.3 to 5.

ORDER

Kausar Sultana Hussain, J.:- Present Suit has been filed by the Plaintiffs for Declaration, Mandatory Injunction, Possession, Cancellation of documents & Recovery of Damages against the Defendants. After service of notice upon the Defendants, the Defendant No.3 has filed CMA No.12462 of 2016 under Order VII Rule 11,R/W Section 151 C.P.C alongwith supporting affidavit of the Defendant No.3 namely Muhammad Yahya for rejection of the plaint. Notice of the said application was issued to the Plaintiffs, but only plaintiff No.2(a) namely Talha Asif Taufiq has submitted his Counter Affidavit to this application. It is pertinent to mention here that at the initial stage of this case, the Defendant No.3 had filed an application under the same provision of law i.e. under Order VII Rule 11 CPC dated 27.03.2009. The said previous

application of the Defendant No.3 was dismissed vide order dated 30.03.2009 as not pressed.

2. It is the stance of the Defendant No.3 in this application under Order VII Rule 11 CPC that the Plaintiffs have instituted the subject suit *inter alia* with the prayer clause(A) **“to declare that Plaintiff 2(A) and other legal heirs of Syed Muhammad Taufiq by virtue of sale agreement dated 14.1.1958 against full and final payment, Power of Attorney dated 13.1.1958, letter to Society dated 30.12.1961 and compromise decree dated 16.11.1993 are lawful owners of the suit property i.e. Plot No. 17/34 situated in Block No.3, Faran Co-operative Housing Society, Karachi, measuring 1965 square yards”**, but the examination of the said sale agreement dated 14.01.1958 indicates that the above agreement in fact is for **Plot No. F-34**, which plot had been in the possession of one Aisha Bai Wd/O Ebrahim Maker by virtue of allotment No. 37 dated 20.7.1953 (Annexure P/1) issued by Defendant No.1, Faran Co-operative Housing Society, Karachi in her favour having membership No.89 of the said Society. It is further alleged by the learned counsel for defendant No.3 that Annexure P/1 (allotment No.37) shows that Mrs. Aysha Bai was neither allotted the suit property i.e. Plot No.17/34 nor Plot No. F-34, as indicated in the said agreement dated 14.1.1958. In fact Mrs. Ayesha Bai was allotted plot No.F-21, therefore, the Plaintiffs cannot claim title to the Defendant No.3's property on the basis of said allotment certificate of Plot No.F-21 (Annexure P/1). It is further alleged that the Compromise Decree has been passed in old Suit No. 763 of 1977 (New Suit No. 1943 of 1985) in respect of **Plot No.F-34**, Block-3, Faran Co-operative Housing Society, Karachi between Ayesha Bai and the Plaintiff's predecessors-in-interests which clearly shows that on the basis of

such Decree the Plaintiffs cannot claim title to an entirely separate property i.e. the suit property; the Plaintiffs' contentions in the plaint are cross referred within the annexures filed by the Plaintiffs themselves. It is further alleged that the Defendant No.3's predecessors-in-interests were admittedly issued a Lease Deed on 24.3.1971 and after a lapse of 38 years of the registration of the said lease the Plaintiffs have chosen to institute this Suit, which is clearly **barred under Section 3 of the Limitation Act, 1908**. The Defendant No.3 has raised further plea for rejection of the plaint that despite obtaining a Decree in old Suit No. 763 of 1977 (New Suit No.1943 of 1985) in respect of suit property, the Plaintiffs have failed to file an Execution Application within the limitation period of six years, on the contrary they once again are agitating their same plea in the present suit, which clearly barred under the principles of constructive **res judicata** as codified in Explanation 4 of Section 11 of C.P.C 1908, therefore, the Defendant No.3 prayed that the subject suit is liable to be dismissed and plaint may be rejected under Order VII Rule 11 CPC. In support of his arguments the learned counsel for the Defendant No.3 has relied upon the following case laws:

Sr.No	Citations	Parties Name
i.	2000 SCMR 204.	<i>Muhammad Yousaf v. Munawar Hussain & 5 ors.</i>
ii.	1985 CLC 7 (Lahore).	<i>Sh.Nazir Ahmad v. Haji Ghulam Hussain & others</i>
iii	2002 YLR 2571 (Lahore).	<i>Khuda Bakhsh v. Mst. Zainab Mai & another</i>
Iv	PLD 2007 Supreme Court 343.	<i>Fazal Mehdi& others v. Allah Ditta</i>
V	2014 SCMR 33.	<i>Muhammad Iqbal & others v. Khair Din</i>
Vi	2015 MLD 87 (Sindh)	<i>Roshan Ali Khan v. Airport Manager, JIAP, Karachi & 3 others</i>
Vii	1991 CLC 708 (Lahore)	<i>Ghulam Nabi v. Allah Ditta & 5 others</i>
Viii	1985 CLC 932 (Karachi)	<i>Haji Punhoon v. Province of Sindh & 3 others</i>
Ix	1986 MLD 265 (Karachi)	<i>Mst. Momin Bai v. Mst. Ayesha Bai & 3 others</i>
X	1994 CLC 1475 (Lahore)	<i>Fazal Din v. Muhammad Hussain</i>

Xi	2002 CLC 361 (Lahore)	<i>Jamal Din alias Muhammad Jamal v. Mst. Mahmooda Begum</i>
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3. The learned Counsel for the plaintiff No.1 and interveners who had been impleaded later as Plaintiffs No.2 to 4 vehemently opposed the arguments advanced by the learned Counsel for the Defendant No.3 and jointly submitted that earlier application of the Defendant No.3 filed under the same provision of law i.e. Order VII Rule 11 CPC (CMA No. 2824/2009) had already been dismissed by this Court, vide order dated 30.3.2009, hence the same is not maintainable. According to the learned counsel for the plaintiffs the Defendant No. 3 is misleading the Court, as the Defendants No.1, 3 and 4 did not raise any objection at the time of filing their respective written statements that the Plaintiffs have right over a different property. It is further stated that the Power of Attorney dated 13.1.1958 followed by sale agreement dated 14.01.1958 confirm the right of the Plaintiffs in the subject property. The original allottee of the subject property was Mst. Ayesha Bai Maker and the Plot No. 17/34 and F-34, Faran Co-operative Housing Society are not two plots but it is a one plot with different numbers changed by the Society time to time. The plaintiffs' counsel further argued that the lease granted by the Society to one Mst. Akhtar Ghazali was executed in a dubious manner as the original allottee Mst. Ayesha Bai Maker had already sold her rights in the subject property to S.M. Taufiq the father/grandfather of the Plaintiffs and admittedly received full consideration for it, therefore, the lease in question has no legal affect. The suit No.763/1977 (New No.1943/1985) for Specific Performance was filed by their predecessor-in-interest on 27.5.1977, which was decreed on 17.11.1993 and after obtaining the Decree the Plaintiffs once again approached the Society but they had again not only denied their rights to the ownership of the subject property but also informed

that they had transferred the suit property to Defendant No.3 and 4 through an agreement of sale dated 03.01.1976. The learned counsel for the Plaintiffs pointed out that a cash transaction of Rs. 95,000/- of sale agreement dated 3.1.1976 was signed by Defendant No.3, at the age of 14 years while the Defendant No.4 was 6 years of age unaccompanied by a Guardian. Learned counsel for the Plaintiffs has further argued that in the circumstances discussed above the fresh cause of action had been arisen to the Plaintiffs to file this Suit, therefore, this suit is not barred under the principal of constructive *res-judicata*. It is further submitted by the learned counsel for the Plaintiffs that until and unless the instant application is dismissed, as the case is at the final stage they shall be seriously prejudiced and the ends of justice will not meet.

4. After hearing arguments and perusal of the record, I am of the view that it is a well settled proposition of law that while deciding an application under Order VII Rule 11 CPC for rejection of the plaint, the averments made in the plaint alone have to be seen, however the documents enclosed alongwith the plaint in support of the arguments of the plaint being part of the plaint may also be looked into for the purpose of rejection of the plaint but rejection order cannot be based solely on those documents. The Court has to proceed on the assumption that averments made in the plaint are correct, therefore no factual enquiry is permissible regarding averments of the plaint. Besides this, written statement(s), affidavits and documents filed by the defendant(s) are not part of the plaint and cannot be considered while rejecting a plaint.

5. By keeping in my mind the settled principles of law regarding rejection of plaint under Order VII Rule 11 CPC, I have going through the contents of the instant plaint and documents annexed with the plaint, wherein the Plaintiffs claim that their predecessor-in-interest S. M. Taufique had purchased the plot in question from its allottee Aisha Bai through Power of Attorney dated 13.01.1958 and sale/agreement dated 14.01.1958 (Annexures C & D) but before transferring the said property in his name, S. M. Taufiq passed away on 03.02.1959. The allottee of the plot Aisha Bai in reply to Defendant No.1's letter dated 11.12.1961 informed them about such transaction. The legal heirs of the said S. M. Taufiq sent legal notice dated 23.09.1967 to the Secretary Faran Co-Operative Housing Society (Defendant No.1) for mutation/transfer of the plot who in reply of the said legal notice had requested them for submission of the relevant documents of the plot but due to delay in transferring the property by the said Aisha Bai, the Plaintiffs filed a suit for Specific Performance against her and finally the said suit was decreed in terms and conditions of the Compromise held between the plaintiffs and said Aisha Bai, however inspite of obtaining the compromise decree in their favour and repeatedly approaching to the concerned authorized officials of the Society as well as Secretary Co-Operative Housing Societies of Government of Sindh, the property in question could not be transferred in the names of the plaintiffs rather the Secretary of Faran Co-Operative Housing Society had mutated the plot in question in the names of Defendants No.3 and 4 on 28.12.2005, hence the Plaintiffs again approached to this Court for redressal of their grievances against the Society (Defendant No.1).

6. The main contention of the learned counsel for the Defendant No.3 is that the sale agreement dated 14.01.1958 was

for the purchase of plot No.34 while the number of suit plot is 17/34. He further pointed out that Annexure P/1 (Allotment Certificate) enclosed by the Plaintiffs alongwith their plaint reflects **allotted** plot number as F/21, therefore the plaint of the plaintiffs is not maintainable and liable to be rejected. On the contrary the contention of the learned counsel for the plaintiffs is that the subject plot is same but the Society has changed its numbers. In my view it is not a point of law but point of fact, therefore it does not fall within the ambit of Order VII Rule 11 CPC as without leading evidence and producing relevant documents no one can prove it as claimed. The learned counsel also raised objections that the Defendant No.3 during pendency of the present suit sell out the plot in question bearing No.17/34 to the Defendant No.5 (Intervener) namely Naveed through registered Conveyance deed dated 30.12.2014, therefore he is no more owner of the plot, hence he has no *locus standi* to claim rejection of plaint, therefore in this circumstances the instant application under Order VII Rule 11 CPC itself is not maintainable. It is a matter of record that admittedly the Defendant No.3 is no more owner of the suit property as he sold it out to the Defendant No.5 during pendency of this suit but it does not mean that he lost his *locus standi* in the matter owing to the reason that the result of the instant suit in either way would make direct effect on his title to the property in question and in case of cancellation of the lease deed in question the lease deed executed by Defendants No.3&4 later on in favour of Defendant No.5 would also be affected. Since the pleas raised by the learned counsel for the parties against each other are related with the factual controversies, hence in my view require ocular as well as documentary evidence for disposal of the matter on merits. Record shows that evidence part has already been completed through Commissioner and now matter is fixed for final

arguments, therefore I do not want to discuss here any point(s) on merits related with the factual as well as legal controversies as it should be decided on its own merits. This Court has already framed legal issues No.1 & 2 in regard of maintainability of the suit under the law and whether it is barred by law.

6. Besides above, the learned counsel for the Defendant No.3 raised legal plea of the Doctrine of *Resjudicata* for rejection of the plaint on the ground of disposal of former suit filed by the Plaintiffs against the allottee of the subject plot namely Aisha Bai in respect of the same property having same cause of action. While perusing the case file it reveals that admittedly as per contents of the plaint of earlier suit of the plaintiffs for Specific Performance of sale agreement of suit plot was decreed as a result of compromise held between the parties of that suit. The present suit has been filed by the Plaintiffs against the present Defendants who were not the parties of former suit of the Plaintiffs. The cause of action of former suit to the plaintiffs was related with the Specific Performance of the sale agreement dated 14.1.1958 against the owner of the suit plot but the present suit is for Declaration, Mandatory Injunction, Possession, Cancellation of documents and Recovery of Damages as the Society (Defendant No.1) inspite of having knowledge of the transaction made between the Plaintiffs' Predecessor-in-interest and the owner/allottee of the plot, transferred the suit plot in the name of one Mrs. Akhtar Ghazali through lease deed signed by the Section Officer Rehabilitation & Works Division, Islamabad on behalf of the lessor, representative of the Union and lessee Mrs. Akhtar Ghazali. The Plaintiffs through filing the present suit seek Declaration in respect of their ownership of the plot in question on the basis of sale agreement dated 14.01.1958, Power of Attorney dated 13.01.1958, letter of

the society dated 30.12.1961 and Compromise Decree dated 16.11.1993, they also sought Mandatory Injunction against the Society (Defendant No.1) to hand over the possession of the suit plot to the Plaintiffs, cancel the lease deed/sale deed/transfer/mutation of the plot No.17/34 in the name of anybody else other than plaintiffs. After having gone through the contents of the plaint as well as prayer clause of the suit, I am of the view that the nature of the case, cause of action, parties of the case and relief(s) claimed by the plaintiffs in the present suit are quite distinguishable from the relief(s) claim in former suit of the plaintiffs, hence the *Doctrine of Res-judicata* is not applicable in these circumstances. So where the issues in two suits are different from each other, decision in one of them does not operate as *Res-judicata* in the subsequent suit. No doubt in the instant suit and in the former suit, the subject matter i.e. plot is same but the issues related with this subject matter even the parties are not same, therefore it would not warrant the application of Section 11 CPC. Accordingly the requisite conditions, not being present in both suits, rule of *res-judicata* cannot be invoked.

7. The nutshell of the above discussion is that the application of the Applicant (Defendant No.3) does not have enough merits to be considered, therefore, I am not inclined to decide it in his favour, therefore, it is dismissed having no merits with no order as to costs.

J U D G E