

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Muhammad Junaid Ghaffar, J.

Agha Faisal, J.

CP D 2132 of 2019 : Muhammad Khan vs.
Province of Sindh & Others

For the Petitioner : Mr. Hassan K. Hashmi, Advocate
Syed Khurram Nizam, Advocate

Date of hearing : 26.02.2021

Date of announcement : 26.02.2021

JUDGMENT

Agha Faisal, J. The present petition has been filed assailing an Order-in-Revision dated 17.11.2018, passed by the District Judge, Thatta in Civil Revision Application 11 of 2018 (“Revision Order”) and the earlier order, rendered in Suit 125 of 2017 (“Suit”), whereby an application under Order VII Rule 11 CPC was dismissed (“Original Order”).

2. Briefly stated, the Suit was filed before the Senior Civil Judge, Thatta, *inter alia*, seeking cancellation of registered documents and declaration of title in respect of immovable property. The defendant/s therein filed an application under Order VII Rule 11 CPC, which was dismissed vide the Original Order. It is considered illustrative to reproduce the pertinent findings herein:

“12. Now reverting back to the merits of application in hand I find that seen through the prism of above provisions of law the suit of plaintiff is not found to be hit by any one of them. As far as section 42 of Specific Relief Act is concerned, the right, title of ownership of plaintiff is denied by the defendant No.1 on the basis of sale deed and hence I find that the relief claimed for declaration by plaintiff squarely falls within the definition of section 42 of Specific Relief Act as it is only civil court which can decide the question of right, title or character of any one. As far as exclusion of jurisdiction of civil court under section 172 of Land Revenue Act 1967 is concerned I find that the plaint of suit is not hit by any of its provision as it is the only jurisdiction of civil court to decide as to the right, title or character of any one which is denied by other side. Moreover, the case of plaintiff is that he was the owner of suit property and fraudulently a sale deed has been managed in his name by defendant No.1 with collusion of revenue officials. So to me, it appears that it is the matter of trial and does not fall within the purview of section 172 of Land Revenue Act. As far as section 10 CPC is concerned it is very clear that it is about the stay of suit and not to the rejection of the plaint of suit and hence the reliance of defendant No.1 on this provision is irrelevant one. Lastly the defendant has relied upon section 11 of Sindh Revenue Jurisdiction Act which has been reproduced as above but from the perusal of said provision of law it does not ouster the jurisdiction of civil court in such cases where fraud has been pleaded by the party with regard to right, title and character. Furthermore, it has been held by Honourable Supreme Court in PLD 1996 SC 827, that where jurisdiction was confirmed upon Special Court, Civil Court being court of ultimate jurisdiction would be competent to examine act of such forum to see whether their acts werer in accordance with law or were even illegal, malafide. Moreover here in this case the plaintiff has pleaded fraud which is an issue of fact and can only be decided after trial and it does not fall within the jurisdiction of Revenue Court. As far as, the prayer of cancellation of sale deed by the plaintiff is concerned it has been held by Honorable High Court of Sindh, in PLD 2004 Karachi 391 that Revenue authorities in law could not examine authenticity of any instrument in exercise the power used under the provision of West Pakistan Land Revenue Act, 1967.

13. Furthermore, The suit of plaintiff is for declaration as to his rights title, cancellation of sale deed, mutation entries, permanent injunction and damages. I am of the mindful of settled principle of law that suit cannot be dismissed or plaint cannot be rejected on the ground that one of the remedy prayed for in the plaint cannot be granted while ignoring the others and also the matter of remedies has to be decided at the time of final disposal of suit as to which remedy has to be granted and to be refused. In case law enshrined in 2017 YLR 1492 it has been held that as under:-

“Suit could not be dismissed merely on the ground that one of the remedy prayed for in this plaint could not be granted while ignoring the others---Matter of remedies had to be resolved by the trial court at the time of final disposal of suit as to which of the remedy had to be granted or refused---Suit could not be dismissed while picking one of the remedies out of several, if others were permissible under law---Party aggrieved by the entries in the revenue record could file declaratory suit—Jurisdiction of Civil Court was bared in certain matters which were specifically enumerated in S.172 of Land Revenue, 1967---Suit for declaration with regard to adverse entries in the revenue record could competently be filed by an aggrieved person in a Court of competent civil jurisdiction.”

14. Furthermore, I am of the humble opinion that the plaintiff has prayed for declaration on the basis of transfer of grant from one Asmatullah and the fate of such prayers of plaintiff can only be decided after recording the evidence of the parties. Even otherwise law favours adjudication on merits and particularly after the insertion of article 10-A in the Constitution of Islamic Republic of Pakistan, 1973, it is mandatory to provide a fair right of trial to the parties. Reliance is placed on 2015 CLC 1423. Moreover, the case laws cited by learned counsel for defendant No.1 is distinguishable from the facts of circumstances from the suit in hand.

15. The crux of above discussion is that the application in hand is devoid of merits and is hereby dismissed. Let the fate of this case be decided after full dressed trial. Order accordingly.

16. Before parting this order it is made clear that the remarks made herein are tentative in nature and will not prejudice the case of either party at trial.”

3. A revision application was preferred assailing the Original Order and the same as dismissed vide the Revision Order, operative constituents whereof are reproduced herein below:

“10. The perusal of record would itself show that application under order VII Rule 11 CPC was not properly drafted as learned counsel for applicant/defendant No.01 has mixed two separate provisions of law in one and same application, without realizing that merits of rejection of plaint and “Respondent-subjudis” are altogether different. There is no force in the arguments of learned counsel for applicant/defendant No.01 that court has confined itself to provisions of Order VII Rule 11 CPC as for rejecting of plaint court has to confine itself to the averments of plaint, which use for the first instance be treated as true, and if court comes to the conclusion, that even after treating all the para of plaint, court would not be able to grant any relief asked for, only then plaint can be rejected for want of cause of action. The perusal of record would also itself show that no previous suit by same parties, on same cause of action is pending in any court, as such there was no question of stay for present suit. The perusal of plaint would itself show that, plaintiff has attributed malafide on the part of revenue authorities, as such it was within the domain of Civil Court to examine the propriety of orders passed by revenue authorities being the court of ultimate civil jurisdiction by virtue of section 9 CPC and bar of section 172 West Pakistan Land Revenue Act 1967 will not oust the jurisdiction of civil court in such case, if any authority on this point is needed reliance can be placed on the case of Hassan Ali through legal heirs Versus Province of Sindh through DCO Thatta and 4 others reported in 2007 MLD 884 (Karachi). So far the point of limitation is concerned, it is by now well established law that point of limitation is point of law only at the time of scrutiny of plaint at the time of presentation and if suit is admitted, it automatic become point of law and fact and cannot be decided without evidence. The perusal of plaint would also itself show that plaint not only disclosing cause of action, not barred by law but also disclosing triable issues as such could not have been rejected in unceremonious way under Order VII Rule 11 CPC. In these circumstances order dated 16.12.2017 passed by the learned trial is very much proper, well discussed, from all the corners and need not any interference in this revision application, which is hereby maintained and this point is answered in negative.

11. In view of my discussion on point No. 01 above I have come to the conclusion that while passing order dated 16.12.2017 learned Senior Civil Judge, Thatta has not exercised jurisdiction not vested in it by law neither has failed to exercise jurisdiction so vested nor has acted in the exercise of its jurisdiction illegally or with material irregularity. I therefore see no merits in this revisions application which is hereby dismissed, however there is no order as to cost.”

4. At the very onset petitioner's counsel was required to identify any infirmity in respect of the impugned orders under consideration. Per learned counsel, the subordinate fora had not appreciated the law in its proper perspective, hence, it would be just and proper for this Court to allow the rejection of the plaint in its writ jurisdiction.

5. In so far as the consideration merited to an Order VII rule 11 CPC application is concerned, it is settled law that the question of whether a suit was likely to succeed or not was irrespective of whether or not the plaint ought to have been rejected¹. It is often seen that while a plaint could not have been rejected, however, a suit was dismissed eventually for a variety of reasons. The evolution of law with respect to rejection of plaints was chronologically catalogued in the *Florida Builders case*² wherein *Saqib Nisar J.* illumined 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

¹ *Al Meezan Investment Management Company Limited & Others vs. WAPDA First Sukuk Company Limited & Others* reported as *PLD 2017 Supreme Court 1*.

² *Haji Abdul Karim & Others vs. Florida Builders (Private) Limited* reported as *PLD 2012 Supreme Court 247*.

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.”

6. It merits mention at this juncture that the aforesaid observations are required to be paramount considerations before a learned Judge, seized of an application seeking rejection of a plaint. It is demonstrated from the Original Order that learned Judge has adequately addressed each of the averments of the petitioner, applicant / defendant there before, and concluded that the suit was not barred, hence, the plaint could not be rejected. The arguments advanced before us, by the learned counsel for the petitioners, have been unable to dispel the reasoned conclusions arrived at by the learned Judge, while determining the O.VII r.11 CPC application.

7. The Original Order was assailed in revision and a reasoned order was delivered, upholding the conclusion arrived at by the learned Trial Court. The ambit of a revisionary court is circumscribed to the mandate of Section 115 CPC and perusal of the Revision Order demonstrates that the same has been rendered within the four corners of the provision enabling such jurisdiction.

8. It is trite law³ that exercise of constitutional jurisdiction in such matters was only warranted in rare circumstances; if the findings recorded in the orders under scrutiny were without jurisdiction, arbitrary and / or were predicated upon misreading / non-reading of evidence. In this matter the findings placed before us suffer from no such infirmity and the petitioner has failed to plead any rare circumstance, which would attract the exercise of writ jurisdiction by this Court.

³ *Asif Rafique vs. Mst. Quratullain & Others*, reported as 2016 MLD 425.

9. In view of the reasoning and rationale herein contained, we are of the considered view that the petitioner's counsel have failed to set forth a case for the exercise of extra ordinary Constitutional jurisdiction by this Court, hence, this petition, along with listed applications, is hereby dismissed *in limine*.

10. The office is instructed to directly communicate copies hereof to the District Judge Thatta and the Senior Civil Judge Thatta for reference and record.

JUDGE

JUDGE

Khuhro/PA