

**IN THE HIGH COURT OF SINDH AT  
KARACHI**

**Suit No. 675 of 2017**

Plaintiff : Rao Noor Ahmed, through Mr. Shaukat Ali Shaikh, Advocate.

Defendants : Shabbir Hussain Kapasi and  
Nos 1 & 2. Another, through Mr. Jaffer Raza, Advocate.

Defendant No.6 : Sindh Building Control Authority through Mr. Anwar Ali Shah, Advocate.

Date of hearing : 25.04.2019

**ORDER**

**YOUSUF ALI SAYEED, J.** – The Plaintiff has filed the Suit claiming to be the owner of 39 ghuntas and 92 sq. yds of land in Survey No.470, Deh Mehran, Tapo Malir, Model Colony, Karachi, (old Survey No.37, 41, Deh Mehran Tapo Malir) (the “**Survey No.470**”), said to have been purchased by him through a Registered Sale Deed dated 17.11.2003 (the “**Sale Deed**”), and contends that he was wrongly ousted from possession thereof by the Defendants No.1 and 2, hence, by way of final relief, has prayed *inter alia* that this Court be pleased to:

- “A. Declare that Plaintiff is lawful owner of the suit property i.e. Survey No.470, old Survey No.37, 41, admeasuring 39 ghuntaz and 92 sq. yds situated in Deh Mehran, Tapo Malir, Model Colony, Karachi (Suit Property) and lawful possession holder of the suit property.
- B. Direct the Defendants to restore the possession of the suit property to the Plaintiff which Defendants No.1 and 2 have illegally occupied/taken over the possession from the Plaintiff.
- C. Restrain the Defendants, their agents, servants, attorneys, or any person acting on their behalf from raising any type of construction over the suit property or de-sealing of the suit property or grant master plan or approval of flat site of the same or change physical status of the same and create their party interest, till disposal of the suit.

D. Money decree of Rs.2 crores as damages against the Defendants No.1 and 2 in favour of the Plaintiff and cost of suit.”

2. In terms of CMA 17260/18 filed under Order 7, Rule 11 CPC, the Defendants Nos. 1 and 2 have sought rejection of the Plaint on the ground that the Suit is barred by virtue of Section 11 CPC, which reads as follows:

“11. *Res judicata.* -- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

*Explanation I.* -- The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

*Explanation II.* -- For the purposes of the section, the competence of a court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

*Explanation III.* -- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly, by the other.

*Explanation IV.* -- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

*Explanation V.* -- Any Relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

*Explanation VI.* -- Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the person so litigating.”

3. Whilst pressing the said Application, it was pointed out by learned counsel for the Defendant that as per the case set up in the plaint, the Plaintiff claimed ownership of Survey No.470 by virtue of the Sale Deed, which had been executed by one Ghulam Sarwar Jokhio (“**GSJ**”) in his capacity as attorney for Mehboob Jokhio (“**MJ**”) and various other persons, several of whom were the heirs and successors-in-interest of one Dost Mohammad (“**DM**”). In that context, with reference to the Written Statement and documents filed therewith, it was submitted as follows:

- (a) That one Hussain Malik (“**HM**”) had apparently filed Suit No. 2218 of 1985 in relation to Survey No.470 in the Court of the VIIIth Civil and Family Judge, Karachi, East (“**Suit 2218**”), wherein three persons, including DM, were originally arrayed as defendants, and upon the demise of DM, MJ and eight other persons were joined in his stead in their capacity as his legal heirs.
- (b) That in terms of the Judgment rendered in Suit 2218 on 18.04.1994, HM had been declared to be the owner of Survey No.470, with it being held that the defendants in that suit were not the owners thereof.
- (c) That Civil Appeal No.123 of 1994 had been filed by MJ and others which was then dismissed vide order dated 15.05.1996, following which Civil Revision No.203 of 1996 was filed before this Court, which was also dismissed vide order dated 04.03.2016.

(d) That in the year 2012, MJ and other persons reflected as vendors in the Sale Deed had filed a suit in relation to Survey No.470 against the Defendants Nos. 1 and 2 and their predecessor-in-interest before the Court of the IXth Senior Civil Judge, Karachi, bearing Suit No.1083 of 2012 (“**Suit 1083**”), through GSJ acting as their attorney, which culminated in the rejection of the plaint under Order 7 Rule 11 CPC vide Order dated 12.02.2014, it being held that the suit was barred under Section 11 CPC by virtue of the Judgment in Suit 2218.

4. It was submitted that as it had been held in the earlier litigation that DM (and by extension his successors-in-interest who had executed the Sale Deed in favour of the Plaintiff had no title to Survey No. 470) the Plaintiff could not espouse any better claim and the instant Suit was hit by the principle of *res judicata* and was barred under Section 11 CPC, hence the Plaint ought to be rejected. It was submitted it was for this very reason that such earlier litigation and decisions in respect of Survey No. 470 had deliberately been suppressed in the Plaint.
5. It was contended that the Defendants Nos. 1 and 2 were the owners of Survey Nos. 43 and 44 Deh Mehran Tapo Malir, Karachi, and whilst it was land comprising those survey numbers which was in their possession, whereas Survey No.470 was at an altogether different location, the Plaintiff was seeking to usurp the same under the garb of his claim to Survey No. 470 and had deliberately framed the instant Suit as one of overlapping for such ulterior motive.

6. Conversely, learned counsel for the Plaintiff pointed out that all of the persons arrayed as vendors in the Sale Deed were not parties to Suit 2218, hence any finding as may have been rendered in that proceeding was not conclusive as to the matter of title, and that the Sale Deed had already been executed in favour of the Plaintiff by the time that Suit 1083 was filed through GSJ, hence the rejection of the plaint could not have any bearing on the present Suit.
  
7. It was submitted that it was the Defendants who had encroached upon Survey No.470 claiming the same to be Survey Nos. 43 and 44, when in fact the location of those survey numbers was altogether different. In this regard, attention was invited to the Order of 02.10.2018, whereby the Nazir had been tasked with carrying out an inspection of the Suit Property with the assistance of the concerned Mukhtiarkar, City Surveyor and the concerned Deputy Director of the Sindh Building Control Authority so as to report, inter alia, as to whether Survey No. 470, as claimed by the Plaintiff, and Survey Nos. 43 and 44, as claimed by the Defendants Nos. 1 and 2, were one and the same property or different and at separate locations.
  
8. With reference to the Report dated 10.11.2018 submitted by the Nazir in compliance of the Order of 02.10.2018, it was pointed out that on 09.11.2018, a layout sketch had been submitted by the Survey Department regarding Survey Nos. 470, 43 and 44 under cover of a letter dated 07.11.2018, and it was stated in the sketch that at the time of inspection construction work was going on Survey No. 470 and the sketch reflected that Survey Nos. 43 and 44 were at a different location, with Survey No. 43 being on the opposite side of the railway tracks.

9. It was submitted that the result of the inspection showed that the Defendants Nos. 1 and 2 were actually in possession of Survey No. 470, and had therefore filed CMA 17260/18 in an endeavor to thwart final adjudication on merits.
  
10. Having considered the arguments advanced at the bar, it is apparent that the points raised in support of CMA 17260/18 as to the litigation said to have ensued earlier in respect of the Suit Property are not discernible from the Plaint and are mentioned only in the Written Statement of the Defendants Nos. 1 and 2 and the only available documents in relation thereto are those that have been filed therewith by such Defendants, and reliance cannot completely be placed at this stage on the pleadings of the Defendants or material filed therewith so as to reject the Plaint.
  
11. In this regard, in the case reported as Haji Abdul Karim and others v. Messrs Florida Builders (Pvt) Limited PLD 2012 SC 247, it was held by the Honourable Supreme Court as follows”

“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 whether 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.

12. Indeed, in the case reported as Muhammad Saleem Ullah and others v. Additional District Judge, Gujranwala and others PLD 2005 Supreme Court 511, in the same vein and on the very point of rejection of a plaint on the ground of res judicata, it had earlier been held by the Apex Court as follows:

The proposition involved in the present case, was discussed in detail in Pir Bakhsh v. Chairman, Allotment Committee (PLD 1987 SC 145). The ratio of the above judgment is that in certain circumstances, Court shall not try a

suit or issue involving a matter no longer open to contest either on a question of law or fact by reason of an earlier decision if the matter in issue in the subsequent suit directly and substantially is the same which was involved in the earlier litigation. The plaint in the subsequent suit can certainly be rejected under Order VII, Rule 11, C.P.C. on the basis of principle of res judicata without framing issues and recording evidence but Order VII, Rule 11, C.P.C. contemplates rejection of plaint only on the basis of averments made in the plaint to consider whether there is failure of cause of action or the suit is barred under some provision of law but the plaint cannot be rejected under Order VII, Rule 11, C.P.C. on the basis of pleas raised by the defendant in the written statement in his defence as at this stage, the pleas are only contentions which are not based on the evidence. This is settled law that Order VII, Rule 11 C.P.C. becomes operative only when the plaint is liable to be rejected on the basis of its contents taken to be true and correct but the Court can also rely upon the documents annexed to the plaint and brought on record with written statement to consider the question of applications of Order VII, Rule 11, C.P.C. In the present case, the applications for rejection of plaints under Order VII, Rule 11, C.P.C. were moved after filing of the written statements wherein the respondents raised the plea of res judicata in defence and the averments of the plaints would not, prima facie, suggest the application of the provisions of Order VII, Rule 11, C.P.C.

13. Under the circumstances, it is not necessary to presently embark on a discourse on whether Section 11 is attracted, as a determination thereof would take place at the appropriate stage. CMA 17260/18 stands dismissed.

JUDGE

Karachi  
Dated \_\_\_\_\_