

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

C. P. No. D-6278 of 2016

Date	Order with signature of Judge
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1. For orders on Office Objection.
2. For hearing of Misc. No.30411/2016.
3. For hearing of main case.

Present

Mr. Justice Muhammad Ali Mazhar
Mr. Justice Yousuf Ali Sayeed.

Mamoon.....Petitioner

Versus

Province of Sindh & others.....Respondents

Date of hearing: 22.01.2020.

Mr. Muhammad Hashim Bajeer, Advocate for Petitioner.
Mr. Suresh Kumar, Advocate for Respondents No.7 to 14.
Mr. Jawwad Dero, Addl. A. G.

Muhammad Ali Mazhar, J: The case of the petitioner as pleaded in this constitution petition is that he had filed an application under Order VII Rule 11 CPC in F. C. Suit No.67/2014 (in which Suit the petitioner has been arrayed as defendant No.7). The said suit is pending in the court of learned Senior Civil Judge, Thatta. The learned trial Court dismissed the application under Order VII Rule 11 CPC vide order dated 14.01.2016 with the observation that the plaintiffs are claiming the suit land and also produced documents i.e. judgment and decree dated 22.02.1990 and 09.04.1990 passed in Civil Appeal No.19/1988 whereas learned counsel for the defendant No.7

(petitioner) has not produced any provision of law under which the suit of the plaintiffs is not maintainable at this stage and barred by any provision of law. After dismissal of the said application, the petitioner filed a Civil Revision Application bearing No.04/2016 in the Court of learned IInd Additional District Judge, Thatta and vide order dated 04.11.2016, it has been observed that learned counsel for the petitioner did not argue that the Suit was hit by the principle of res judicata. The Suit has been filed for declaration, cancellation of documents and permanent injunction with the prayer for cancellation of Mutation Entry No.75 dated 16.04.1998 and sale deed registered on 25.04.1998. It was further prayed for permanent injunction that the defendants No.7 to 14 may be restrained from interfering in the peaceful possession of the plaintiffs in the suit land.

2. It appears from the record that after dismissal of the application under Order VII Rule 11 CPC, the learned Revisional Court considered the entire controversy for the purposes of deciding the application and held as under:-

“16. In the present case no doubt that earlier suit in the Civil Appeal was decreed in favour of the Respondent No.7 and others, which has attained finality, but in the present suit neither applicant was party in the earlier suit nor plaintiff has filed present suit on the same cause of action, as earlier decided in the Civil Appeal No.19/1983. The respondent No.7 and others filed present suit for declaration, cancellation of documents of applicant and permanent injunction on survey No.246, which is fresh cause of action and it has not been decided in earlier suit, therefore, the contention raised by the learned counsel for applicant is not considerable and the case laws relied upon by the learned counsel also not germane with the facts of present case and the trial Court rightly passed the order and dismissed the application under order VII R. 11 CPC and no illegality and irregularity found in the impugned order, hence I do not find any merit in the

present revision and dismissed, with no order as to costs.”

3. It is well settled proposition of law that for deciding the application under Order VII Rule 11 CPC, only the averments of the plaint are to be looked into and so far the cause of action is concerned, it is a bundle of the facts. Both the courts below held for the purposes of deciding the application under Order VII Rule 11 CPC, that there was no question of res-judicata involved and the trial Court has rightly rejected the application under Order VII Rule 11 CPC as the controversy involved cannot be decided without allowing the parties to adduce their evidence. In the case of **Rana Imran & another v. Fahad Noor Khan & others (2011 YLR 1473)**, (authored by one of us **Muhammad Ali Mazhar-J**), it was held that the word "cause of action" means bundle of facts which if traversed, a suitor claiming relief is required to prove for obtaining judgment. Nevertheless, it does not mean that even if one such fact, a constituent of cause of action is in existence, the claim can succeed. The totality of the facts must co-exist and if anything is wanting the claim would be incompetent. A part is included in the whole but the whole can never be equal to the part. It is also well understood that not only the party seeking relief should have a cause of action when the transaction or the alleged act is done but also at the time of the institution of the claim. A suitor is required to show that not only a right has been infringed in a manner to entitle him to a relief but also that when he approached the Court the right to seek the relief was in existence. At this juncture, we would like to rely on a judgment in the case of "Ghulam Ali v. Asmatullah" reported in 1990 SCMR 1630, in which, the honourable Supreme Court has held that assertion made in the plaint had to be seen for the purposes of determining whether plaint disclosed any cause of action. Lack of proof or weakness of proof in circumstances

of the case did not furnish any justification for coming to conclusion that there was no cause of action shown in the plaint. In another judgment reported in case of *Jewan v. Federation of Pakistan*, 1994 SCMR 826, the honourable Supreme Court has held that while taking action for rejection of plaint under Order VII, Rule 11, C.P.C., the Court cannot take into consideration pleas raised by the defendants in the suit in his defence as at that stage the pleas raised by the defendants are only contentions in the proceedings unsupported by any evidence on record. However, if there is some other material before the Court apart from the plaint at that stage which is admitted by the plaintiff, the same can also be looked into and taken into consideration by the Court while rejecting the plaint. In the case reported in PLD 2008 Supreme Court 650 (*Saleem Malik v. Pakistan Cricket Board (PCB)*), it was held that the rejection of plaint on technical grounds would amount to deprive a person from his legitimate right of availing the legal remedy for undoing the wrong done in respect of his such rights, therefore, the Court may, in exceptional cases, consider the legal objection in the light of averments of the written statement but the pleading as a whole cannot be taken into consideration for rejection of plaint. Subject to the certain exception to the general principle, the plaint in the suit cannot be rejected on the basis of defence plea or material supplied by the opposite party with the written statement. This is settled law that in case of controversial questions of fact or law, the provision of Order VII, Rule 11, C.P.C., cannot be invoked rather the proper course for the court in such cases is to frame issues on such question and decide the same on merits in the light of evidence in accordance with law.

4. The trial Court is directed to frame the issues and the petitioner shall be given fair opportunity to adduce the evidence and if he wants to produce the documents of any previous litigation, the same may be produced in Court during evidence. The trial Court is also directed to expedite the process and decide the suit preferably within four months. The Petition is disposed of in the above terms. Pending application is also disposed of.

Judge

Judge