IN THE HIGH COURT OF SINDH AT KARACHI

HCA No. 85 of 2019

Before: **Mr. Justice Irfan Saadat Khan**
Mr. Justice Fahim Ahmed Siddiqui

Muhammad Aijaz-ul-Islam. …. Appellant.

Versus

Muhammad Qamar-ul-Islam
& others. …. Respondents

Date of hearing : **28.01.2020**

Date of judgment : _____

Appellant Muhammad Aijaz-ul-Islam through Mr. Muhammad Aziz Khan, advocate.

Respondents Nos. 1 to 6 namely Muhammad Qamar-ul-Islam, Muhammad Raees-ul-Islam, Muhammad Nasir-ul-Islam, Miss Fouzia Islam, Mrs. Javeria Masrur and Muhammad Imtiaz Ilsam respectively through Mr. Ziaul Haq Makhdoom, advocate.

None present for respondent No. 7

J U D G M E N T

FAHIM AHMED SIDDIQUI, J:- This is an, appeal filed by the appellant, against an order dated 17-12-2018, passed by the learned Single Judge under Order VII Rule 11 of the Code of Civil Procedure 1908 (hereinafter referred to as 'CPC') in Suit No. 233 of 2018. Through the impugned order, the plaint of the aforesaid Suit, filed by the appellant, was rejected.

2. The laconic history of the appellant's case was that he has filed an earlier Suit i.e. Suit No. 344/2009 for declaration, partition and permanent injunction against his father and other siblings. The said Suit was

subsequently withdrawn by preferring a request to file a fresh Suit after the death of his father. The father of the appellant and respondents breathed his last on 23-10-2014. The appellant (plaintiff) presented the plaint of succeeding Suit of similar nature i.e. Suit No. 233/2018 on 31-01-2018, which met the fate of rejection through the impugned order. The backdrop of the case was that the appellant claims that he was entitled to one-fourth share in House No. D-51, Block-5, F.B. Area, Karachi being co-sharer. Allegedly, the said house was constructed by the appellant and other male respondents from their own funds. Purportedly, some of his siblings instigated his father (now deceased) to deprive the appellant of his legitimate right in the subject property as well as other assets. Allegedly, some of them succeeded in getting their ill-designed and has deprived the appellant even from his right of inheritance. For restoration and preservation of his rights, the appellant and respondent No. 2 filed the earlier Suit, which was withdrawn for the time being, as their father was alive at that time. However, after the death of their father, the appellant has brought the other Suit in which the impugned order was passed.

3. Mr. Muhammad Aziz Khan, the learned counsel for the appellant, in his arguments, has assailed the impugned order from every nook and corner. He submits that since the earlier Suit was withdrawn with permission to file a fresh suit; therefore, the subsequent Suit was properly filed. According to him, the appellant has approached the trial Court with clean hands; as such he could not be non-suited. He submits that the Suit of the appellant contained multiple prayers; hence it was not proper to reject the plaint on one cause when it was still maintainable on other causes. He further submits that after the death of the father of the parties, cause of action was distinguishable from the earlier Suit, as such it could not be said that both the Suits were identical in nature. According to him, the law is very much clear that the plaint cannot be rejected in piecemeal. He submits that since the property was a joint property; therefore, the

limitation did not run in the case of the appellant. He submits that even otherwise the Suit of the appellant is covered under Article 120 of the Limitation Act, 1908 for which limitation is six years. He points out that at the time of withdrawal of the earlier Suit, a request was made that fresh Suit would be filed after the death of their father, and the Suit was filed within six years of the death of the appellant's and respondents' father. He further submits that the learned Single Judge has to decide the pending applications in chronological order; as such his application under Order VI Rule 17 CPC had to be decided first but the same remained undecided. He also submits that the property was a jointly owned property, hence limitation will not run. He further submits that the learned Single Judge has considered some facts mentioned in the Written Statement, which he could not do while disposing of an application under Order VII Rule 11 of CPC. In the end, he submits that his appeal may be allowed by setting aside the impugned order. In support of his contentions, he relied upon the cases reported as **Muhammad Shafi vs Nawab and others {PLD 1957 (W.P) Lahore 648}, Ismail vs Fida Ali and others (PLD 1965 Supreme Court 648), Muhammad Shafiq vs Muhammad Hanif and another (1970 SCMR 141), Moula Baksh vs Muhammad Zahid and another (PLD 1990 Supreme Court 596), Ghulam Ali vs Asmatullah (1990 SCMR 1630), Hyderabad Municipal Corporation vs Messrs Fateh Jeans Ltd. (1991 MLD 284), Mst. Karim Bibi and others vs Zubair and others (1993 SCMR 2039), Muhammad Ibrahim vs Akhtar Iqbal (2008 CLC 622), Saleem Malik vs Pakistan Cricket Board (PCB) and 2 others (PLD 2008 Supreme Court 650), Muhammad Younis Arvi vs Muhammad Aslam and 16 others (2012 CLC 1445), Muhammad Afzal vs Muhammad Mansoor (2013 YLR 85), Fazal Din through LRs vs Mir Muhammad Jan and another (2015 CLC 536), Muhammad Saleh and 2 others vs Province of Sindh through DCO and 6 others (PLD 2015 Sindh 14), Muhammad Shehzad vs Abdul Hanan and 4 others (2016**

MLD 1654), Rehan and 4 others vs Bibi Jalo Shah alias Dada Sain and 6 others (2016 MLD 1730), Muhammad Jan and another vs Mst. Bacha Begum alias Begum Shahzad (PLD 2018 Peshawar 173), Muhammad Mushtaq vs Mst. Abida Nasreen (2008 CLC 1507), Rana Imran and another vs Fahad Noor Khan and 2 others (2011 YLR 1473), Zulfiqar and 11 others vs Fateh Sher and 4 others (2011 YLR 2725), Jewan and 7 others vs Federation of Pakistan and 2 others (1994 SCMR 826), Abdul Rahim and another vs Mrs. Jannatay Bibi and 13 others (2000 SCMR 346), Mst. Kulsoom Bibi and another vs Muhammad Arif and others (2005 SCMR 135) and Q.B.E. Insurance (International) Ltd vs Jaffar Flour and Oil Mills Ltd. (2008 SCMR 1037), Shahzad vs IV Additional District Judge, Karachi East and others (PLD 2016 Sindh 26) and **Abdul Ghani vs 1st Additional District Judge and others (2019 CLC 1721).**

4. Mr. Ziaul Haq Makhdoom, learned counsel for the respondent No. 1 to 6, before preferring his controversies, refers to the last para of the impugned order, wherein dismissal of all the pending applications is mentioned. He submits that it will be incorrect that the application under Order VI Rule 17 remained undecided. He draws our attention towards several documents and submits that the appellant himself has signed transfer form while mutation took place on 01-06-1988. He submits that the prayer clauses of earlier and subsequent Suits were identical, as such it cannot be said that both the Suits were distinguishable. According to him, not only the current but earlier Suit was also time-barred. He submits that the limitation would be reckoned as per Article 91 of the Limitation Act, according to which limitation for filing a Suit is three years. He submits that mutation took place in the year 1988, while the earlier Suit was filed in the year 2009, which is sufficient to show that the limitation period had already expired. So far as the subsequent Suit is concerned, his contention is that it was badly time-barred after the withdrawal of the

earlier Suit. According to him, if the limitation is calculated after the death of the father of the parties, i.e. 23-10-2014, the current Suit was filed on 31-01-2018, meaning that after more than three years. He submits that withdrawal of the earlier Suit was actually a withdrawal simpliciter, as no permission was granted for filing a fresh Suit and the order speaks about dismissal as withdrawn. According to him, in absence of clear cut and specific permission for filing a fresh Suit, it cannot be said that the appellant was allowed to file a fresh Suit, on the same course of action. He further submits that even if it is presumed that permission was granted, the withdrawal of earlier Suit cannot enlarge limitation for an indefinite period. In his arguments, the learned counsel admits that the plaint could not be rejected in piecemeal but he contends that it will be a misconception that other reliefs in the matter would survive. According to him, if the main relief is refused in a case, the ancillary relief cannot be granted. He submits that the Suit filed by the appellant was barred since the property in question was not only gifted by the appellant to the respondents in the year 2008 but also the possession was handed over to them. He relied upon case laws reported as **Dr. Muhammad Javaid Shafi vs Syed Rashid Arshad and others (PLD 2015 Supreme Court 212)** and **Ilyas Ahmed vs Muhammad Munir and 10 others (PLD 2012 Sindh 92).**

5. We have heard the arguments advanced by them and have gone through the relevant record as well as cited case laws.

6. In the instant matter, the core issue is whether the subsequent Suit filed was competent on the ground of permission sought in the earlier Suit as well as extension of limitation due to such permission. So far as the order of withdrawal of earlier Suit is concerned, the same was passed on an application, in which a request was made to withdraw the Suit with permission to file a fresh Suit after happening of a future incident i.e. the

death of the father of appellant and respondents. Mr. Zia Makhdoom, advocate emphasized that since there was no clear-cut and specific permission for filing the fresh Suit; therefore, it was a withdrawal simpliciter and fresh Suit could not be filed. We do not agree with such a contention of Mr. Makhdoom. If the Suit was withdrawn by filing an application under Order XXIII Rule 1 of CPC, and the order speaks only 'dismissed as withdrawn', the same impliedly amounts to withdrawal of Suit with permission to file a fresh Suit. Such order cannot be considered as an order of 'withdrawal simpliciter unless it is specifically mentioned in the withdrawal order that the permission for filing fresh Suit is refused or the terms and conditions mentioned in the application do not cover the provisions of Order XXIII Rule 1(2) of CPC. We are of the view that in the present case, the second situation convers the entire scenario and the term or condition, if any, the same should be mentioned in the withdrawal order. In his withdrawal application of earlier Suit, the appellant meant to say that he would file the subsequent Suit after the death of his father. We consider that even if it is impliedly considered that the appellant was allowed to file fresh Suit, it cannot be presumed that he was allowed to file the same after an indefinite period of time. There may be no harm if the appellant had filed the fresh Suit within a reasonable time but he in his own imagination extended the period of limitation on the ground of happening of an uncertain fact, mentioned in his application, which is definitely not correct. The condition mentioned in his application cannot be considered as impliedly granted; as such future uncertain incident usually not entertained in such type of judicial orders. We are of the view that the condition mentioned in the application for withdrawal will not be helpful for the appellant, as it will not amount to extending the limitation indefinitely.

7. Nevertheless, we are of the view that withdrawal of Suit with the liberty or permission to file fresh Suit does not extend the limitation indefinitely because of such condition, as laid down in the application

under Order XXIII Rule1 of CPC. We are of the considered view, that fresh Suit had to be filed within the shortest possible time after the withdrawal of the earlier Suit. If the plaintiff chooses to slumber deep, he will suffer as the limitation cannot be stopped just because of seeking permission for the withdrawal of the previous Suit. Order XXIII Rule 2 of CPC lays down that if the permission granted under Order XXIII Rule 1 of CPC, the plaintiff shall be bound by the law of limitation in the same manner as the first Suit had not been instituted. The CPC does not deal anywhere in the entire Code with the consequence of accepting the request of withdrawal of a Suit under Order XXIII Rule 1 of CPC. We are confident in holding that Order XXIII Rule 1 of CPC does not specifically lay down that if a Suit is withdrawn with a liberty / permission to file a fresh Suit, the fresh Suit will not be competent unless the terms on which the earlier Suit was allowed to be withdrawn are performed before filing of the fresh Suit. We are of the view that since the order of withdrawal of the earlier Suit was passed on an application under Order XXIII Rule 1 CPC, it impliedly amounts to permission for filing fresh Suit but it will not amount to granting a permission to file a second Suit after an undefined time because of an uncertain future upon happening of something i.e. death of the father of the parties. It is quite obvious that such a situation could not have been provided in the statute because the terms need not necessarily lay down any condition precedent which must be fulfilled before the fresh Suit can be filed. It is quite clear from the wordings of Order XXIII Rule 1(2) of CPC that the terms on which the plaintiff was allowed to withdraw the Suit must be complied with on which the Suit was allowed to be withdrawn and the said term should be mentioned in the order specifically. Hence, we are of the view that the only mentioning by the appellant in his first Suit that he did not want to proceed with the Suit in the lifetime of his father was not sufficient for filing a fresh Suit after his death and the same was not impliedly covered that such permission was granted to him.

8. Now, we turn towards another argument of Mr. Aziz Khan, learned counsel for the appellant, that the plaint of a Suit cannot be rejected in piecemeal. According to him, there are multiple prayers in the Suit of the appellant and if the Suit could be adjudicated on any one of the prayers, its plaint could not be rejected. In this respect, he relied upon the teaming number of case laws. No doubt, the legal proposition is the same as mentioned by the counsel for the appellant. But it is only for a situation when from several prayers some are barred under the law but rest are not. However, if the entire Suit is barred under the law of limitation, then it will make no difference that any or all of the prayer clauses can be adjudicated. It is also contended by the learned counsel for the appellant that the property was jointly owned property. It may be so but the factual position was that the appellant was not the co-owner of the property, as such this plea will not employ to secure the limitation in his favour. It is contended by the learned counsel for the appellant, that his application under Order VI Rule 17 CPC was filed earlier and the same should be decided first, as the applications are required to be decided in chronological order and the said application remained undecided. We are of the view that in judicial proceedings, there is no rule of first come first out or last come first out. The court is at liberty to defer or decide any matter or any of the pending application therein. It is well settled that when a plaint is rejected, all the pending applications become infructuous and we see no such observation of the learned Single Judge in the impugned order. It is also emphatically argued on behalf of the appellant that the learned Single Judge has considered some facts from Written Statement while rejecting the plaint. According to him, the learned Single Judge has to consider the plaint of the Suit only by considering the averments of the plaint as true. No doubt at the time of dealing with an application under Order VII Rule 11 of CPC, the contents of the plaint are to be considered and a deeper appreciation of the Written Statement is not permissible.

However, the admitted documents, annexed with the Written Statement, may be considered at the time of deciding the fate of a plaint under Order VII Rule 11 CPC. In this respect reliance may be taken from the cases **Nazeer Ahmed and others v. Ghulam Mehdi and others (1988 SCMR 824), S.M. Sham Ahmad Zaidi through Legal Heirs v. Malik Hassan Ali Khan (Moin) through Legal Heirs (2002 SCMR 338)** and **Ilyas Ahmed v. Muhammad Munir and 10 others (PLD 2012 Sindh 92)**. Hence, it is now well settled that the admitted documents, annexed with Written Statement, could be considered at the time of rejection of plaint under Order VII Rule 11 of CPC. The respondents in their Written Statement in the Suit have relied upon the certified copies pertaining to the earlier Suit bearing No. 344/2009, filed by the appellant, against them. These were the admitted documents of judicial record, as such there will be no harm if the same were considered by the learned Single Judge at the time of impugned order.

9. So far as the contention of learned counsel for the appellant regarding applicability of Article 120 of the Limitation Act is concerned, the same also does not bear weight. By taking this plea, the learned counsel is trying to cover the period of limitation by considering that the period of limitation is inflexibly extended and the same started running from the death of his father, which happened in 2014. However, such contention of the learned counsel for the appellant has already been refuted in the foregoing paras. The period of limitation will be subject to Article 91, which is three years and not six years, as contended by the learned counsel for the appellant. It has already been elaborately explained that the period of limitation will not stop due to filing and granting of an application for withdrawal with permission to file a fresh Suit. The limitation will continue to run irrespective of the filing of earlier Suit from the cause of action already mentioned in the earlier Suit.

10. The ultimate outcome of the above discussion is that we do not find any deficiency or infirmity in the impugned order, as such the instant appeal merits no consideration, hence the same is dismissed with no order as to cost.

JUDGE

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