

ORDER SHEET
HIGH COURT OF SINDH, CIRCUIT
COURT, HYDERABAD

C.P No.D-2724 of 2017

(Abdul Sattar Khanzada versus Government of Sindh & Others)

DATE	ORDER WITH SIGNATURE OF JUDGE
	Present:- <u>Mr. Justice Adnan-ul-Karim Memon</u> <u>Mr. Justice Adnan IqbalChaudhry</u>
Petitioner:	Through Syed Mujeeb Alam Shah advocate
Respondent -6:	None present
Respondent -7:	Through Mr. Abdul Malik Shaikh advocate Mr. Allah Bachayo Soomro Addl. A.G
Date of hearing:	02.11.2021
Date of decision:	02.11.2021

O R D E R

ADNAN-UL-KARIM MEMON, J: This petition has impugned the order dated 11.05.2017, passed by learned District Judge Hyderabad, whereby, order dated 02.08.2016 passed by learned IIIrd Senior Civil Judge Hyderabad, rejecting the plaint of the petitioner under Order VII Rule 11 CPC was upheld.

2. Facts of the case, giving rise to this petition, are that petitioner filed First Class Suit bearing No.542 of 2014 [**Re: Abdul Sattar Khanzada versus Government of Sindh & Others**] for declaration, cancellation, possession, mesne profits, and permanent injunction in respect of Survey Nos. 522/2 (3-13 acres), 523 (3-29 acres), 513/2 (2-28 acres), 513/2-A (10 ghuntaz), 514/5 (3-33 acres), and 513/3 (3-13 acres) total admeasuring 17.4 acres situated in Deh Mian, Taluka Hyderabad (**Suit property henceforth**), claiming himself to be the owner of said property, wherein private respondent filed an application under Order VII Rule 11 CPC, which was allowed vide order dated 02.08.2016 and the plaint was rejected. Being aggrieved by and dissatisfied by the said order the petitioner / plaintiff preferred Civil Revision Application No. 106 of 2016 before the Court

of learned District Judge Hyderabad; however, same was dismissed, through impugned order.

3. Learned counsel for the petitioner argued that the impugned orders are against the facts and law and have been passed arbitrarily. He next argued that both the Courts below have decided the matter on technicalities rather than on merits. He also argued that learned trial Court has not considered that respondent No.6 had sold out the suit property to respondent No.7 orally. He also argued that Section 13 CPC has no bar to file a fresh suit as also F.C Suit No. 46 of 2008 was not decided on merit as the advocate for the petitioner / plaintiff did not submit his arguments. He prayed for setting aside the impugned orders.

4. Learned counsel for respondent No.7 supports the impugned order being not against the law. He contends that learned Courts below have not decided the matter on technicalities but legal dictum, as previously Suit bearing No.46 of 2008 filed by the petitioner on same cause of action and prayers was dismissed vide judgment dated 30.01.2013. He next contends that learned trial Court has properly considered the issue of sale of property; as such petitioner has no locus standi or legal right to challenge the sale by respondent No.6 to respondent No.7. He prayed for dismissal of the instant petition.

5. Learned AAG also supports the impugned orders.

6. Heard the learned counsel for the parties and perused the material available on record.

7. The question involved in the present proceedings is whether FC Suit No.542/2014 (Re-Abdul Sattar Khanzada Vs. Government of Sindh & others) filed by the petitioner falls within the ambit of provision of Section 11 CPC (resjudicata) as well as under Order II Rule 2 CPC or otherwise?

8. The learned trial court, as well as revisional court, has non-suited the petitioner on the aforesaid analogy. The observation of learned Revisional Court vide order dated 11.5.2017 is as under:-

“13. The above law relied upon by the Counsel for the applicant are not relevant to the facts of the above case in hand, as such, the applicant has agitated the alleged power of attorney in earlier Suit No.46/2008 and such issue was also framed and both parties have led their evidence and the same was decided on merits, therefore,

subsequently challenging the same power of attorney in a subsequent suit is hit U/S 11 CPC. The above revision application even if converted into appeal, the same is also barred U/A 120 of the Limitation Act. The applicant has applied for a certified true copy on 17.08.2016 and it was delivered on 23.08.2016. Thereby seven days consumed for obtaining certified true copy if, deleted then the appeal was to be preferred on 09.09.2016 within a period of thirty days as provided under Article 152 of the Limitation Act, but the applicant preferred the above revision application on 31.10.2016 with the delay of one month and twenty-two days. Accordingly, the above revision application even if converted into appeal, the same is barred U/A 120 of the Limitation Act. It is also held in 1986 SCMR-907 (Re-Ghulam Muhammad Vs. United States Agency for International Development (U.S. AID) Mission, Islamabad and another) that a revision shall not lie after when the plaint has been rejected. From a perusal of plaint, the applicant in FC Suit NO.542/2014 failed to mention as to whether he omitted to sue in respect of the relief relinquished in the earlier Suit, but only mentioned at para-11 that a new cause of action to file the suit arose as the applicant recently came to know that the defendants No.6 & 7 in collusion of each other have managed the signature of the plaintiff. Similar relief by challenging Power of Attorney in earlier Suit was sought and the question regarding authenticity or falsehood of the power of attorney in question, both parties have not only led their evidence but an application U/A 84 of Qanun-e-Shahadat Order, 1984 was moved by the defendants with a prayer to send the original irrevocable General Power of Attorney bearing No.774 dated 03.02.1991 and original Sale Deed along with three specimen signatures and thumb impression of the applicant (plaintiff) to the handwriting Expert, Karachi for his opinion about the genuineness and correctness of the signature/thumb impression of the applicant over Power of Attorney and Sale Deed to the Assistant Inspector General of Police Forensic Division, Sindh, Karachi for examination of questioned documents and the report of Hand Writing Expert proved that the registered General Power of Attorney bears signature as well as thumb impression of the applicant/plaintiff Abdul Sattar Khanzada.

14. The applicant failed to challenge the said Judgment and decree which attained its finality. Learned 03rd Senior Civil Judge, Hyderabad since rejected the plaint after proper adjudication as to the non-existence of cause of action as the Suit being barred by law of resjudicata, the applicant cannot re-agitate the same question through filing a subsequent Suit upon the same cause of action and seeking the same relief as he sought in earlier Suit No.46/2008. It is evident from the record that the power of attorney challenged in above FC Suit No.542/2014 for which the Court of IV-Senior Civil Judge, Hyderabad in earlier FC Suit No.46/2008 gave findings the same being executed by the applicant and such decree was also passed and the applicant admittedly failed to challenge the said decree passed in February 2013 and subsequently filed the above suit in August 2014 apparently barred U/S 11 CPC, therefore, the impugned order dated 02.08.2016 passed by learned 03rd Senior Civil Judge, Hyderabad requires no interference and the above Revision application being without merits is dismissed with no order as to the costs.”

9. The doctrine of res-judicata is a well-settled rule. In our civil jurisprudence, Section 11 of C.P.C. embodies this rule of conclusiveness of the judgment. It enacts that once a matter is finally decided by the competent court; no party can be permitted to reopen it in subsequent litigation. Under the provision of Section

11, C.P.C., an explanation is given thereunder, for res judicata, according to which the following ingredients should be present:-

- i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually (Explanation III of Section 11 of C.P.C.) or constructively (Explanation IV of Section 11 of C.P.C.) in the former suit (Explanations I and VII of Section 11 of C.P.C.);
- ii) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim. (Explanation VI of Section 11 of C.P.C.);
- iii) Such parties must have been litigating under the same title in the former suit;
- iv) The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised. (Explanation II and VIII of Section 11 of C.P.C.);
- v) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the former suit. (Explanation V of Section 11 of C.P.C.).

10. In the present case, the petitioner before filing of FC Suit No.542/2014 filed F.C Suit No.46 of 2008 on the same cause of action which was decided on merits, and no appeal was preferred against the Judgment and Decree, therefore, the same attained finality, and the above suit was / is hit under the provisions of Section 11 CPC as well as under Order II Rule 2 CPC. We are of the candid view that the petitioner cannot agitate any new plea regarding the same subject matter between the same parties in fresh suit, which has already been decided in an earlier suit.

11. With the above observations, the instant petition is dismissed with no order as to cost along with all the listed/pending application(s).

JUDGE

JUDGE