

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

Suit No. 1176 of 1997

BEFORE

Mr. Justice Arshad Hussain Khan

S.M. Yousuf and Others

Versus

The Secretary Government of Pakistan and Others.

Plaintiffs: Through Mr. Shahenshah Hussain, Advocate

Defendants: Through Mr. S. Irtaza Hussain Zaidi, Advocate for defendant No.4 and Mr. S.M. Raza, Advocate for defendant No.5.

Date of Hg: 27.09.2016

Date of judgment: 23.12.2016

**JUDGMENT**

**ARSHAD HUSSAIN KHAN, J.** The present suit was filed by the Plaintiffs against the Defendants for Declaration and Permanent Injunction with the following prayers:

- i) *Declaration that the plaintiff society is the lawful owner of amenity plot No.19, situated in Blocks 7 & 8, admeasuring 3040 Square yards in Darul Aman Cooperative Housing Society Limited, Karachi, and is entitled to use it for the benefit of its members.*
- ii) *Declaration that the union was not competent to allot the said plot to Mohammad Ashfaq or to any other person or to deal with the same in any manner prejudicial to the interest of the society.*
- iii) *Declaration that the allotment of the aforesaid amenity plot to Mohammad Ashfaq is illegal and void and for a direction that the Union and Mohammad Ashfaq should restore possession of the plot to the society and also refrain from using the same.*
- iv) *Cost of the suit and any other relief which this Hon'ble court may deem fit and proper in the circumstances of the case.*

2. The case of the plaintiffs as averred in the plaint is that the Plaintiffs are members of the Darul Aman Cooperative Housing Society Limited (defendant No.5) and are owners of their respective plots allotted

by the said Society. On 15.09.1958 an amenity plot bearing No.19, situated in Block 7 & 8 of the aforesaid Society admeasuring 3040 square yards (subject plot) was allotted to defendant No.5 by Karachi Cooperative Housing Society Union Limited (defendant No.2), however, when the Society, after due approval of building plan, started raising construction on the subject plot, one Mohammad Ashfaq (defendant No.4) intervened and demolished the construction, took away the goods/construction material of defendant No.5 lying on the subject plot and also forcibly occupied it. Subsequently, it transpired that the suit plot was unlawfully re-allotted by defendant No.2 to defendant No.4. It is also averred that in the year 1977 by virtue of promulgation of Martial Law Order No.34 all amenity plots including allotment of the subject plot in favour of defendant No.4 were cancelled. The detailed report in respect of cancellation was sent to Martial Law Authorities for confirmation. Subsequently, the decision dated 17.07.1979 taken with the approval of Government of Sindh/Martial Law Administrator Zone 'C' was communicated to the Secretary of defendant No. 3 (Al-Riaz Cooperative Housing Society) and Registrar Cooperative Housing Societies. In this regard, a deed of cancellation was also executed and registered on 20.01.1980 before the Sub-Registrar, Karachi. Thereafter, on 1.2.1984 the subject plot was leased out to defendant No.5 through a registered instrument. Despite cancellation of allotment, defendant No.4, continued to occupy subject plot, resulting which defendant No.5 has not been able to utilize the subject plot. The defendant No.5 filed a civil Suit bearing No. 3 of 1977 in this Court for declaration, possession and damages, inter alia, against defendant No.4, which was dismissed. The plaintiffs had no knowledge about the filing of the said suit or its dismissal prior to July 1996. Plaintiffs came to know the allotment of defendant No.4 in respect of suit plot in June 1996, when they saw the defendant using the same for commercial purposes. Thereafter, notice under Section 70 of Cooperative Housing Societies Act was given to Registrar Cooperative Housing Society and subsequently the present suit has been filed.

3. Upon service of notice of the present case, except defendants No.4 and 5, none has filed written statement in the matter. The defendants No.1 and 2 were declared *exparte*, whereas defendant No.3 was debarred from filing written statement.

4. The defendant No. 4, main contesting party in the present case, through his written statement while reiterating the contents and ground of his application under Section 11 read with Order 7 Rule 11 of CPC, filed

in the present case, as preliminary legal objections, has stated that the suit is hit by principle of *res-judicata* and also barred under the provision of Cooperative Society Act, 1925. It is also stated that the subject plot was allotted to defendant No.4 for amenity purposes. It is also averred that defendant No.4 after taking possession has constructed a school building and established a religious institution under the name of *Madarsa Madinatul Aloom Bagho-Bahar Islamia* and is imparting free religious education to the students whose number is continuously increasing. The defendant No.4 also established an Eye Hospital within the premises of *Darsgah*. It is also contended that Martial Law Regulation 34 does not apply in any manner to the subject plot as the said Regulation was applicable to the open and vacant plots, whereas the subject plot was neither open nor vacant and further the purported deed of cancellation is *ex-facie* not sustainable in law. Further argued that the subject plot, lawfully allotted to defendant No.4, cannot be cancelled or disturbed without issuing any show cause notice to the allottee (defendant No.4). The defendant No.4 in his written statement also prayed for dismissal of the present suit.

5. The defendant No.5 in its written statement supported the stance of the plaintiffs and submitted that relief sought by the plaintiff is legal, proper and it has no objection to the relief sought by the plaintiffs.

6. It is imperative to mention here that defendant No.4 prior to filing the written statement in the present case filed an application under Section 11 CPC read with Order VII rule 11 CPC whereby he sought dismissal of the present suit on the ground that Defendant No.5 (Darul Aman Cooperative Society) in the year 1977 had filed a civil suit No.3 of 1977, before this Court, *inter alia*, against defendant No.4, for declaration, possession and damages in respect of the subject plot. The said suit, wherein subject property and parties, except the present plaintiffs, were the same, was dismissed after a full-dress trial. The plea of defendant No.4 in the said application was that since the plaintiffs in present case are claiming title over the subject plot through defendant No.5, being member of the society, therefore, present suit is hit by doctrine of *res judicata* and liable to be dismissed.

7. On 15.04.2004, this Court while disposing of the application under Section 11 of CPC read with under Order VII Rule 11 of CPC filed by defendant No.4, framed the following preliminary issue:-

**“Whether the suit is barred under Section 11 CPC?”**

8. Though the record of the case does not show that this court framed/settled other issues in the matter, yet the learned counsel for the parties admitted that proposed issues filed on behalf of the plaintiff on 07.12.2005 were adopted, which are as follows:

- “1. *Whether the suit is not maintainable?*
2. *Whether Plot No.19, situated in Blocks No.7 and 8 of Darul Aman Cooperative Housing Society, Karachi, is an amenity plot?*
3. *Whether defendant No.5 is the lessee of the aforesaid Plot No.19?*
4. *Whether the aforesaid Plot No.19 was lawfully allotted to defendant No.4?*
5. *What should the decree be?”*

9. The evidence of the parties in the present matter was recorded through the Commissioner for recording evidence, appointed by this court. The said commissioner after completion of evidence had submitted his report on 15.10.2008.

10. The plaintiffs in support of their stance has examined one witness namely, S.M. Yousuf as Exhibit – 5, who filed his affidavit-in-evidence, upon which he was cross-examined by the counsel for the defendants and thereafter the side of plaintiffs’ evidence was closed. The plaintiffs’ witness produced following documents:-

<b>Sr.#</b>	<b>Description of documents</b>	<b>Exhibit</b>
01	Original Certificate dated 10.07.1997	A
02	Photocopy of Lease Deed dated 10.11.1971	B
03	Photocopy of Deed of Cancellation dated 20.01.1980	C
04	Photocopy of Sub Lease dated 01.02.1984	D
05	Photocopy of Notice dated August 1996 with Postal Receipts	E to E-1
06	Original Copy of Notice dated 10.07.2006	F

11. Where after defendant No.4, M. Ashfaq in support of his stance in the case examined himself as Exhibit – 7. He filed his affidavit-in-evidence upon which he was cross-examined by the plaintiffs’ counsel. The defendant No.4, in his evidence produced following documents:-

<b>Sr.#</b>	<b>Description of documents</b>	<b>Exhibit</b>
01	Photocopy of written statement of defendant No.4	D/1
02	Photocopy of Allotment Certificate dated	D/2

	10.07.1975	
03	Photocopy of Sub Lease dated 15.07.1975	D/3
04	Photocopy of Letter dated 28.10.1995	D/4
05	Photocopy of Letter dated 01.02.1982	D/5-1
06	Photocopy of proposed plan	D/5
07	Original 07 photographs	D/6-1 to D/6-7
08	Photocopy of letter dated 07.11.1996	D/7

12. The defendant No.5-Darul Aman Cooperative Housing Society Ltd. has examined its Secretary- S. Anwar Noor as Exhibit- 9. Upon affidavit in evidence filed by the said witness he was cross-examined by the other side and thereafter side of defendants` evidence was closed. This witness also produced following documents:

<b>Sr.#</b>	<b>Description of documents</b>	<b>Exhibit</b>
01	Photocopy of attested copy of Resolution dated 15.09.1958	D/8
02	Photocopy of Allotment Order dated 08.11.1958 with Site Plan	D/9
08	Photocopy of Approval Letter dated 23.05.1970	D/10
09	Photocopy of Renewal Letter dated 13.11.1974	D/11
10	Photocopy of Permission Letter dated 30.04.1975	D/12
11	Photocopy of M.L.O. NO.34.	D/13
12	Photocopy of letter dated 13.12.1977	D/14
13	Photocopy of Notification dated 30.09.1979	D/15
14	Photocopy of M.L.O. No.89	D/16
15	Photocopy of attested copy of Deed of Cancellation	D/17
16	Photocopy of Lease Deed dated 01.02.1984	D/18
17	Photocopy of Invitation Cards.	D/19-1
18	Photocopy of Judgment and Decree in Suit No.3/1977.	D/20

13. At the time of arguments, in the present case, learned counsel for the parties have agreed upon that preliminary issue may be decided first; {in the event this court decides the preliminary issue in favour of defendant, the present suit will be dismissed, however, if same is decided in favour of the plaintiff, in that event the counsel for the parties will

address their submissions in respect of others issues and case will be decided on merit.

14. The learned counsel of defendant No.4 in his argument has urged that the present suit is not maintainable as the same is hit by principle of *res judicata* as the issues involved in the present suit have already been adjudicated upon and determined finally by this court in Suit No.03 of 1997 through judgment and decree dated 04.06.1995. The learned counsel in support of his stand also relied upon the following case law:

- (i) **1999 SCMR 1633:** *Khusi Muhammad and 2 others v. The province of the Punjab through Secretary to Government of the Punjab and 2 others*
- (ii) **1997 SCMR 281:** *Nazir Ahmad and others v. Abdullah and others*
- (iii) **PLD 2004 SC 178:** *Mustafa Kamal and others v Daud Khan and others.*

15. On the other hand, learned counsel for the plaintiffs during the course of his arguments has contended that this Court in earlier Suit No. 03 of 1977, despite reaching the conclusion that suit was not maintainable as the Court does not have jurisdiction on the point that mandatory notice under Section 70 of the Societies Act was not served by the plaintiff, yet the learned Judge in Chamber had given findings on the other issues of facts. Learned counsel further contended that once the learned judge had come to the conclusion that the suit was not maintainable then he had no jurisdiction to decide any other issues involved and thus the decision on the other issue is not sustainable in law being *coram non judice* hence would not come in the way of the present suit under the principle of *res judicata*. The learned counsel in support of his arguments has placed reliance on the following case law:

- (i) AIR 1916 Oudh 6: Izzat Un-Nisa Begam and another v. Kaniz Fatima and others.
- (ii) AIR 1925 Cal 996: Sri Gopal Jew Thakur through Narendra Nath Mondal v. Radha Biode Mondal and others
- (iii) AIR 1974 SC 2089: P.Das Muni Reddy v. P Appa Rao
- (iv) AIR 1950 PC 80: Shankarlal Patwari v. Hiralal Murarka and others

Besides above the learned counsel also relied upon the definition of ‘Lack of jurisdiction’ given in the volume 16, Fourth Edition, of Halsbury’s Laws of England, for the sake of convenience the same is reproduced as under:

**“1554. Lack of jurisdiction.** In order that estoppel by record may arise out of a judgment the court which pronounced the judgment must have had jurisdiction to do so; the lack of jurisdiction

deprives the judgment of any effect, whether by estoppel or otherwise. This rule applies even where the party alleged to be stopped himself sought the assistance of the court whose jurisdiction is impugned. A magistrate hearing a summons for the expenses of making up a new street, or for trespass to land, and having jurisdiction for that purpose, may dismiss the summons on the express ground in the one case that the street was repairable by the inhabitants, or in the other that the defendant had established a title to the property; but although such a finding is embodied in the order as drawn up it creates no estoppel between the parties, for it relates to a matter which the magistrate had no jurisdiction directly and immediately to adjudicate upon, being at most incidentally cognizable, so far only as necessary to his decision on the actual question submitted. The absence of a condition necessary to found the jurisdiction to make an order or give a decision deprives the order or decision of any conclusive effect, but it is otherwise where the order is good on its face and the court adjudicating has jurisdiction to determine the existence or not of the condition, and the party denying its existence has neglected his opportunity of raising the objection at the hearing.

Under the old practice demurrers were frequently allowed to pleas of res judicata on the ground that the pleas did not show that the court adjudicating had jurisdiction to do so. The same principle has been applied where it has been sought to give effect whether as a cause of action or a ground of defence, to foreign judgments.”

16. Before dilating upon the pleas taken in the arguments by learned counsel for the parties in respect of preliminary issue, it would be advantageous to refer to the Section 11 of CPC, which reads as under:

**“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 this 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 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 persons so litigating.”

17. It is now well settled that in respect of doctrine of res judicata, no exhaustive test can be laid down for determining which matters are directly and substantially in issue in every case, rather it depends on the facts and circumstances of each case. The most important condition that needs to be satisfied is that the matter in issue in the subsequent suit was in issue, directly and substantially, in a former suit. The general and ordinary meaning of “suit” is a proceeding which is commenced by presentation of a plaint. Ordinarily, and in more specific terms, a “suit” is a civil proceeding that is instituted by the presentation of a plaint. The expression “former suit” denotes a suit that has been decided earlier in time than the suit in question, that is, the subsequent suit, regardless of whether such a suit which was decided earlier was instituted subsequently to the suit in question or not. If two suits are instituted one after the other, and both relate to the same question in controversy, the bar of res judicata will apply even in cases where the subsequently instituted suit is decided first.

Furthermore, a ‘party’ is a person whose name appears on the record at the time of the decision. A party may be the plaintiff or defendant. The condition recognizes the general principle of law that judgments and decrees bind the parties. Once the matter is heard and decided in one suit, the same cannot be agitated again by the same parties, their legal representatives or successors-in-interest. Rule of res judicata applies to and binds in a subsequent suit, the same parties to the former suit, and their legal representatives or anyone claiming through such parties. Further, even if a subsequent suit is instituted in a different form or under a different guise, but seeking to agitate the same matter that was decided in the former suit, it will be hit by the rule of res judicata. For applying res judicata, it is necessary that the matter should have been heard and finally decided in the former suit.

18. Keeping the above test in mind, it is imperative to examine the record of earlier civil suit bearing No. 3 of 1977.

19. During the evidence of the present case the defendant’s witness produced the judgment and decree passed in suit No. 03 of 1977 on 04.06,1995 as Exh. D/20. The learned counsel for the plaintiffs during the



course of arguments also placed on record the certified copy of the plaint of suit No. 03 of 1977.

20. The perusal of the above documents transpire that the **suit No.03 of 1977**, herein after refer to as the '*earlier suit*' was filed by **Darul Aman Co-operative Housing Society** (present defendant No.5), before this court, for *declaration, possession and damages, against (i) The Secretary Government of Pakistan Ministry of Works & Rehabilitation Division* [present defendant No.1], *(ii) The Chairman/Administrator, Karachi Co-operative Housing Societies Union Limited* [present defendant No.2], *(iii) Al-Riaz Co-operative Housing Society* [present defendant No.3] and *(iv) Muhammad Ashfaq* [present defendant No.4], with the following prayers:

- "A) A judgment and decree against the Defendants for declaration that the cancellation of the allotment order in favour of the Plaintiff as well as the allotment and lease in favour of the Defendant No.4 is illegal, void and inoperative and that the allotment with possession in favour of the Plaintiff still subsists;*
- B) A Judgment and decree for the restoration of the possession of the said plot of land to the Plaintiff;*
- C) A judgment and decree for damages of Rs.25,000/- from the defendants jointly and severally along with 12% interest from the date of the filing suit till the realization of the decretal amount;*
- D) A judgment and decree against the Defendant No.4 as mesne profit at the rate of Rs.1000/- per month from the date of filing of the suit till vacant and peaceful possession of the said plot is handed over to the plaintiff along with 12% interest from the date of the filing of the suit till realization of decretal amount;*
- C) Cost of the suit;*
- D) Any other relief or reliefs that this Hon'ble Court may deem fit and proper in the facts and circumstances of the suit."*

21. Out of pleading following issues were framed in the earlier suit:-

- "1. Whether the plaintiff is entitled for the declaration that the cancellation of the allotment order in favour of the plaintiff as well as the allotment and lease in favour of the defendant No.4 is illegal, void and inoperative and the allotment with possession in favour of the plaintiff still subsists?*
- 2. Whether the plaintiff is entitled for the restoration of the possession of the plot of land in dispute?*

3. *Whether the defendants are liable jointly and severally to pay damages of Rs.25,000/- to the plaintiff?*
4. *Whether the defendant No.4 is liable to pay mesne profit at the rate of Rs.1000/- per month from the date of the suit till vacant and peaceful possession of the disputed plot is handed over to the plaintiff?*
5. *Whether the suit is bad for mis-joinder of parties and causes of action?*
6. *Whether the suit is under-valued?*
7. *Relief?"*

After recording of evidence and hearing the arguments of the parties, this Court on 04.6.1995 passed the judgment on merit, whereby the suit was dismissed with cost.

22. The findings on issues No. 1, 2, 3, 4, 6 and 7 on the judgment dated 04.06.1995 passed by this court in earlier suit are important for the decision of the present issue, hence the same are reproduced as under:

“ISSUE NO.1.

17. From the evidence on record it transpires that in the first instance an area of 3040 Sq. yards bearing survey number amenity plot 19 was allotted to the plaintiff Society along with a lay out plan by defendant No.2 Society. Plaintiffs had desired the conversion of this amenity plot into commercial plot which was referred and recommended by defendant No.2 to defendant No.1 who however, declined to accept the proposal vide letter Ex.5/10 dated 12.1.1973. It further appears that thereafter plaintiff Society expressed their inability to utilize this area as amenity and acquired an alternate site as amenity area in Block No.3 of defendant No.2 Society but consequent upon refusal by defendant No.1 to convert the plot in suit into commercial, allotment of the plot in favour of plaintiff Society was cancelled and the area stood reverted to defendant No.2. A letter to this effect dated 27<sup>th</sup> November, 1973 Ex.10/1 and its copy Ex.11/1 were produced in evidence. No doubt, plaintiffs have denied the receipt of this letter conveying the cancellation of allotment of plot in their favour there is satisfactory and sufficient evidence of Hamza Ali Mangrio who was serving as Chief Officer of defendant No.2 at the relevant period to show that the allotment in their favour was cancelled.

18. Learned counsel for the plaintiffs referred to para 8 of the plaint in which it was averred that plaintiff Society did not receive any notice for cancelling its allotment by defendant No.2 nor were they given any opportunity of hearing by defendants No.1 and 2 in respect of the cancellation of the allotment. He also attempted to rely on the contents of written statement filed by defendant No.2 in which it was stated that the plot in suit was allotted to defendant No.3 without cancellation of the allotment in favour of the plaintiffs. Be that as it may, mere statement in written statement by an Officer of a Cooperative Society would not by itself be sufficient to contradict the documentary evidence brought on record. In fact Mr. Hamza Ali Mangrio serving as Chief Officer in

Karachi Cooperative Housing Societies Union from 1973 to 1977 unequivocally stated that after the rejection of the request of the plaintiff Society for conversion of amenity plot into commercial by the Ministry of Works original allotment in favour of plaintiff Society was cancelled and the plot resumed by the Union. Later, it was allotted to defendant No.3 Society who subsequently allotted it to defendant No.4 and possession was handed over to him by defendant No.2 vide Certificate Ex.6/3 dated 29.5.1976 of handing over and taking over possession. He produced photocopy of letter Ex.10/1 addressed by the then Administrator to the Secretary of the plaintiff Society showing that original allotment in respect of the plot had been cancelled on account of refusal to allow commercialization of the plot.

19. It further transpires from the evidence that during pendency of the suit lease in respect of the plot in suit executed in favour of defendant No.4 was cancelled by defendant No.2 and a deed of cancellation Ex.5/23 was executed on 20.1.1980 before the Sub Registrar. Later, a lease deed Ex.5/24 in respect of the plot in suit was executed in favour of plaintiff Society on or 1.2.1984. It may be pertinent to observe here that despite these material developments indicting the cancellation of lease deed in favour defendant No.4 and execution of lease deed in favour of plaintiffs, none of the parties cared to amend their respective pleadings. I am of the view that after the change in circumstances prayer of the plaintiff Society to the extent of declaratory relief having been granted it was incumbent upon them to amend the plaint but for the reasons best known to the parties neither the plaintiff nor defendant No.4 came forward for amendment of pleadings.

20. A serious question of law at this stage would arise whether these transactions are not hit by the principle of 'lis pendens' as enshrined in section 52 of the Transfer of Property Act. This provision of law bars the transfer or encumbering a right to immovable property during the pendency of a suit or proceeding before a Court of law. "Lis pendens" literally has been defined as jurisdiction, power or control which a Court acquire over property involved in a suit, pending the continuance of the action and until final judgment therein. It denotes those principles of rules and laws which define and limit the operation of the Common Law Maxim to the effect that nothing relating to the subject matter of a suit can be changed while it is pending. One, who with actual or constructive notice of the pending action acquires from a party thereto an interest in the property, involved in litigation in a Court and of the person or the one from whom the interest is acquired, takes subject to the rights of the parties to the litigation as finally determined by the judgment, order or decree. It has been observed that the effect of "Lis pendens" is in its nature, the same as that of registration since it is only different example of the operation of the rule of constructive notice. Its net effect would be to maintain status quo. No interest which is created during the pendency of the suit can affect any decree passed in the suit.

21. In the case of United Bank Ltd. v. Azizunisa (PLD 1956 S.C. (Pak) 274) it was held that a plea of lis pendens will be allowed to be raised even though the point is not taken in the pleadings or raised as an issue.

22. However an strange argument was advanced on behalf of plaintiff Society that lease in favour of defendant No.4 had been

cancelled under the provisions of Martial Law Order 34 promulgated on 30.9.1977 by Martial Law Administrator Zone-C directing the cancellation of all allotments of plots reserved for roads, hospitals, schools or amenity purpose but were subsequently unauthorisedly or by political maneuvers converted into residential or commercial plots and on which no construction had been made. This M.L.O. was reconstituted as Martial Law Order 89 promulgated on 19.4.1979. In the reconstituted Order an aggrieved person was given a right of appeal to Government within 15 days of the promulgation of the Order. No doubt argument on the face of it is highly attractive, but there is hardly any evidence to show that lease in favour of defendant No.4 was cancelled under the provisions of M.L.O. 34 as assumed by the plaintiffs. In this connection, reliance was placed on notice dated 30.9.1979 purportedly published by defendant No.2 in the Sindh Government Gazette dated October, 4<sup>th</sup>, 1979 stating that defendant No.2 had already cancelled the allotment of amenity plots in pursuance of Martial Law Order 34 and had notified the same in daily 'Jang' and 'Dawan' in the month of January, 1979. It was further notified that Martial Law Administrator Zone-C and Governor of Sindh had confirmed the orders of cancellation.

23. A serious reservation was taken to this action taken by defendant No.2 during the pendency of the suit for a number of reasons, firstly; that MLO 34 or MLO 89 did not confer jurisdiction to cancel allotment of amenity plots on defendant No.2, secondly; that both the Martial Law Orders covered the cases of allotment whereas there was a valid registered lease deed in favour of defendant No.4, thirdly; that the notice published by defendant No.2 in daily 'Jang' Karachi dated 27.1.1979 did not incorporate the plot in suit or the name of defendant No.4 and lastly there is no evidence to show that the plot in suit had been used for commercial or residential purposes or obtained by political manoeuvres. The argument advanced questioning the validity of action purported to have been taken under the two M.L.Os. is not without force and has much substance in it. Defendant No.2 being a party to the suit could not in law change the situation by effecting transfer of the property in suit in favour of plaintiffs after cancellation of lease in favour of defendant No.4 and certainly the action would be hit by the doctrine of 'lis pendens'. There is absolutely no evidence to show that defendant No.2 were authorized to exercise the powers vested in Martial Law Administrator Zone C.

24. Taking a strict view of the matter, I am of the view that subsequent events affecting the rights of the parties may be of no significance. The fact however remains that the plaintiff Society has failed to establish its entitlement to the plot in suit or a declaration to the effect that allotment and lease in favour of defendant No.4 was illegal, void and inoperative.

#### ISSUE NO.2.

25. It is admitted position that defendant No.4 is in possession of the plot in suit. For the purpose of deciding this issue, it is not necessary to dilate upon the circumstances under which he obtained the possession of the plot in suit. As a necessary corollary of the finding in Issue No.1, I hold that the plaintiff Society is not entitled to possession of the plot in suit.

ISSUES NO.3&4.

26. Plaintiffs having failed to establish their right, and title to the property in suit, both the issues must fail and are answered in negative.

ISSUE NO.6.

27. Learned counsel for defendant No.4 has not pressed this issue which is rendered redundant.

ISSUE NO.7.

28. In view of the aforesaid discussion and findings on the foregoing issues, there is no merit in the suit which is accordingly dismissed with costs.”

23. Darul Aman Co-operative Housing Society Ltd. [present Defendant No.5], did not prefer any appeal against the said judgment, thus the judgment passed by this court on 04.06.1995 in suit No.03 of 1977 has attained finality.

24. The above undisputed facts clearly reflects that issue of the present suit is directly and substantially the same issue which has been finally heard and decided in the earlier suit between the same parties. The present plaintiffs though were not parties in the earlier suit however, since the present plaintiffs are claiming their right over the property in question being members of Darul Aman Co-operative Society Ltd. (the plaintiff in the earlier suit) therefore, decision of the earlier suit is binding on the present plaintiffs as well. Further more, since the issue relating to ownership and title in respect of the property in question in the present suit was finally heard and decided by this court and as such issues raised in present suit would be hit by principle of res judicata within contemplation of Section 11, C.P.C.

25. Now it would be necessary to decide the contention of the learned counsel for the plaintiffs that this Court in earlier Suit No. 03 of 1977, despite reaching the conclusion that suit was not maintainable as the court does not have jurisdiction on the point that mandatory notice under Section 70 of Societies Act was not served by the plaintiff, yet the court gave its findings on the other issues of facts, which rendered the judgment passed in the said suit No.03 of 1997 *coram non judice*, and as such the present suit is not hit by the principle of res judicata. At first place the determination of this Court in earlier suit on the issue of maintainability has to be examined, for the sake of ready reference the

finding/determination on Issue No.5 in above Suit No.3 of 1977 is reproduced as under:

“ISSUE NO.5.

This issue was raised by defendant No.4. Mr. Mubarak Hussain Siddiqui, learned counsel for defendant No.4 contended with vehemence that the prayer of the plaintiff society was directed against the defendants No.2 to 4 whereas defendant No.1 has been joined unnecessarily because Government of Pakistan is neither a necessary nor proper party to the suit. It appears that no cause of action arose to the plaintiff Society against the Federal Government and undoubtedly no relief has been sought against the said defendant, I am however of the view that the suit shall not fail for misjoinder of this defendant who have advisedly not contested the suit.

10. However in the context of this issue, a legal question has been raised as to the non-maintainability of the suit for want of statutory notice under section 70 of the Cooperative Societies Act which is mandatory in nature. This provision of law renders it absolutely necessary on the plaintiff to serve a notice on the Registrar before filing a suit relating to a dispute touching the business of the Society which can only be referred to Registrar for arbitration under section 54 of the Act.

11. This provision of law reads as under:-

“70. Notice necessary in suit. No suit shall be instituted against a society or any of its officers in respect of any act touching the business of the society until the expiration of two months next after notice in writing has been delivered to the Registrar, or left at his office stating the cause of action, the name, description and place of residence of the plaintiff and relief which he claims and the plaint shall contain a statement that such notice has been so delivered or left.”

12. In the present suit, plaintiff Society was conscious of this legal position and fully aware of the legal consequences emanating from non-service of statutory notice. In fact it had served notice dated 27<sup>th</sup> July, 1976 on all the defendants intimating them that the proposed suit shall be filed in Court of law for the reliefs claimed in the suit after the expiry of statutory period. It is however strange to note that no care was taken to see that notice was given to the Registrar, Cooperative Societies which was absolutely necessary within the meaning of the provision of law referred to above. It is admitted that the plaintiff Society as well as defendants No.2 and 3 are Societies registered under the provisions of the Act and the plaintiff Society is seeking to enforce its claim not only against defendant No.4 but also against both the Societies in relation to an act of defendants No.2 and 3. This act certainly touches the business of the Society and no suit can be filed until the expiration of two months after delivery of notice to the Registrar stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims. The language of law not only insists upon the mandatory service of statutory notice on Registrar but also

envisages that the plaint shall contain a statement that such notice has been so delivered or left at the office of the Registrar. There is no dispute as regards the status of plaintiff Society and defendants No.2 and 3 although defendant No.4 is not a member of the plaintiff Society. In these circumstances it was imperative on the plaintiffs to serve the statutory notice on the Registrar, which was not actually served, therefore the suit cannot be maintained. Had this point been raised at initial stage of the suit, proper course for the Court would have been to reject the plaint under Order VII rule 11 CPC but after the conclusion of evidence and hearing arguments on all issues only course open to this Court would be to dismiss the suit for want of statutory notice and I hold accordingly.

13. I am fortified in this view by the judgments in the case of Muhammad Ali Memorial Cooperative Housing Society Ltd. Karachi v. Syed Sibtey Hasan Kazmi (PLD 1975 Karachi 328) and Sajjad Hussain Khan & 126 others v. Muhammad Hanif Siddiqui & 3 others (1989 M.L.D. 4250).
14. In the case at serial No.1, the view taken was that the provisions of section 70 are mandatory and failure to comply with the requirements of that section that notice must be given would render the suit not maintainable.
15. In the case at serial No.2, a similar view was taken and the plaint was rejected by reason of bar of jurisdiction under section 54 and 70-A of the Act.
16. Learned counsel for the plaintiffs was not in a position to controvert the aforesaid position in law emerging from the facts of the suit except saying that the Registrar or his nominee would not have been able to adjudicate upon the dispute between the parties. There is no merit in the stand taken on behalf of the plaintiffs who have not been able to cite any law to the contrary though sufficient time and opportunity was allowed to them for this purpose.”

26. It is also imperative to mention that pleadings of the parties have to be examined to arrive at a conclusion as to which issues were directly and substantially in issue in the earlier proceedings and which ones were merely incidentally or collaterally in issue. However, every single issue framed is not a matter which is directly and substantially in issue. Furthermore, it is well settled that where there are findings on several issues or where the court rests its decision on more than one point, the findings on all the issues or points will be res judicata.

27. The judgment passed in the earlier suit reflects that several Issues were framed by this Court, which prima facie cover all the disputes, raised in the present suit, between the parties, were dealt with in detail in the light of the evidence adduced by the parties. Furthermore, this Court in the present suit cannot sit as an appellate court and gives a decision on the

judgment passed by this Court in the afore referred earlier suit that the same is *coram non iudice*.

28. The Hon'ble Supreme Court while discussing the scope of Section 70 and 54 of the Co-operative Society Act in the case of DEFENCE HOUSING AUTHORITY LAHORE v. Messrs BUILDERS AND DEVELOPERS (PVT.) LTD. and another (2015 S C M R 1799) has held as follows:

“Section 70 of the Act cannot be read in isolation. The delivery of notice to the Registrar by a person intending to file a suit against a Society and waiting for two months before he does so cannot be taken as a mere formality. To say so would render the provision meaningless. To find out its purpose one has to refer to section 54 of the Act of 1925, which contains the same phrase 'touching the business of a society'. The said provision provides for arbitration and reads:

**"54. Arbitration.---**If any dispute touching the business of a society (other than a dispute regarding disciplinary action taken by the society or its committee against a paid servant of the society) arises:-

(a) between members or past members of the society or persons claiming through a member or past member or

(b) between members or past members or persons so claiming and any past or present officer, agent or servant of the society, or

(c) between the society or its committee, and any past or present member of the society, or

(d) between the society or its committee, and any past or present officer, agent or servant of the society, or a surety of such officer, agent or servant, whether such surety is or is not a member of the society, or

(e) between a financing bank authorized under subsection (1) of section 34 and a person who is not a member of a society,

it shall be referred to the Registrar for decision by himself or his nominee, or if either of the parties so desire, to arbitration of nominee, or if either of the parties so desire, to arbitration of three arbitrators who shall be the Registrar or his nominee and two persons of whom one shall be nominated by each of the parties concerned.

A dispute shall include the question whether a person is or was a member of a society and also claims by a society for debts or demands due to it from a member, past member or non-members or the heirs or assets of a past member or non-member whether such debts or demands be admitted or not:

Provided that if the question at issue between a society and a claimant, or between different claimant, is one involving complicated questions of law and fact, the Registrar may, if he thinks fit, suspend proceedings in the matter until the question has been tried by a regular suits instituted by one of the parties or by the society. If no such suit is instituted within six months of the Registrar's order suspending proceedings the Registrar shall take action as laid down in



paragraph 1 of this section"

10. The above provision provides for resolution of dispute 'touching business of a society' by the Registrar by himself or through arbitration if the parties so desire. The nature of disputes covered by section 54 of the Act of 1925 has been specified in Clauses (a) to (e). They all relate to disputes regarding internal affairs of a Society in between its members or of members with the society or its committees. Both sections 54 and 70 of the Act of 1925 are limited to disputes regarding 'business of the society'. As the phrase appears in different provisions of the same statute as a rule it is to be assigned the same meaning. Though section 70 does not make reference to section 54 of the Act of 1925 but without relating it to the latter the issuance of notice would be meaningless. The two months wait period provided under section 70 is to enable the Registrar to resolve the dispute. The only provision in the Act of 1925 empowering the Registrar to resolve disputes is section 54. The proviso to the Section provides for suspension of the proceedings if the Registrar is of the opinion that the dispute involves complicated question of law and facts, which can be decided only through a regular suit. That is precisely what the Registrar did in the present case. After the notice was delivered by the respondent to the Registrar, the latter sought reply of the appellant and filed the same when he found that the matter was one which could only be decided through a civil suit. Restricting the provision of section 70 to only those disputes covered by section 54 is consistent with the scheme of the Act of 1925, providing for regulating registration, working and business of the cooperative societies. The Registrar has been conferred a pivotal role in implementing the obligations cast upon the Society and its members including hearing complaints and implementing his decisions. Section 70 of the Act of 1925 does not apply to all suits instituted against the Society or any of its officers. It is restricted to suits in respect of any act 'touching the business of the society'. If, as held in some of the judgments of the High Court and canvassed by the learned counsel for the appellant, the 'business of the society' should be given an expanded meaning so as to include any business dealing by an outsider with the Society is accepted, then perhaps barely any suit filed against the society would be excluded from the application of section 70 of the Act of 1925. The only reasonable construction consistent with the scheme and purpose of the Cooperative Societies Act would be to limit the application of section 70 to matters falling under section 54 of the Act."

**[Underling to add emphasis]**

29. Now reverting back to the issue in hand, the perusal of the record of the earlier suit reveals that the suit was filed by Darul Aman Co-operative Society, inter alia, against Muhammad Ashfaq (present defendant No.4), a private person and not a member of said Society, for declaration, possession and damages in respect of the amenity plot No.19,

Block 7 and 8 Karachi Co-operative Housing Societies Union, admeasuring 3040 Sq. yards (subject matter of the present suit as well) and sought declaration that cancellation of allotment in its favour and the allotment and lease in favour of Muhammad Ashfaq (defendant No.4) be declared as illegal, void and inoperative. Besides, also sought restoration of possession, damages and Mesne profits against defendant No.4. The above said reliefs claimed by Darual Aman Society in the said suit clearly reflects that the nature of dispute raised in the earlier suit was a dispute relating to determination of a right and interest of Daraul Aman Society (present Defendant No.5) vis-à-vis the above amenity plot and thus, inter alia, involved complicated question of law and facts, which required to be established through evidence that too by filing a suit in a Civil Court. The said complicated question of law and facts, in my humble opinion, could not be effectively and satisfactorily adjudicated upon by the Registrar under Co-operative Societies Act, 1925.

30. The case law cited by the learned counsel for the plaintiffs in my humble opinion are distinguishable and not applicable to the peculiar facts of instant case, as the same are related to the cases wherein the decisions were passed by a Court not competent to pass such order/decision. Furthermore, all the cited decisions by the plaintiffs' side are of appellate courts which declared that since trial/subordinate courts did not have the jurisdiction to proceed with the matter, hence, its/their decisions suffered from material irregularity, whereas, in the present case admittedly no appeal has been preferred by Daural Aman Co-operative Society against the judgment and decree passed by this Court in earlier Suit No. 03 of 1977, therefore, the said decision can not be declared as *coram non judice* in the present proceeding, while exercising the Original civil jurisdiction vested in the Court.

31. The upshot of the above discussion is that the present suit is not maintainable being hit by the principle of res judicata within contemplation of Section 11, C.P.C. and as such the same is dismissed on this account with no order as to cost.

JUDGE