

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1414 of 2011

[Muhammad Shafi Parachav.....Muhammad Asmat Paracha & others]

Dates of Hearing : 08.10.2021
Plaintiff through : Plaintiff in person
Defendants through : Nemo

J U D G M E N T

Zulfiqar Ahmad Khan, J:- The plaintiff has filed the present action at law with the following prayers:-

“a). Order/direct the defendants to produce the Arbitration Award on which the defendant No.4 has pronounced the judgment and distributed all the properties and shares in the joint family business of the plaintiff and defendant No.1 to 3 and his late father of plaintiff according to their sharia shares.

b). Order the defendant No.1 to 3 to produce accounts of joint family business and the schedule of joint family real estate and cash amount.

c). Order the defendant No.1 to 4 to handover the full sharia shares of the plaintiff from the joint family business and the joint family real estate and cash amount according to Muhammadan Law.

d). To restrain the defendant No.1 to 4 by granting permanent injunction against them that they should not sell/transfer the joint family real estate and not to sell/alienate the title of joint family business not to transfer the cash amount or business from Karachi (Sindh).

e). To restrain the defendant No.1 to 13, their agents, representatives, relatives administrator, legal heirs, person or persons acting on their behalf, not to sell, transfer, alienate, amend part or to destroy the title physically or constructively of the suit properties, movable or immovable whatsoever, specially Gungalow No.B-2, Block No.9, Gulshan-e-Iqbal, Karachi, Awarni Tea Store, H. No.1279/1, Akbari Mandi, Lahore. Flat No. 4-E, Askari Apartment No.2 Mohallah Cantt., Karachi and Flat No.301, Hina Arcade Block-14, Gulshan-e-Iqbal, Karachi and also restrain them, that defendant No.1 to 3 should not sell or misappropriate the joint real properties estates or and joint family business and cash amount thereof as the plaintiff is a co-owner of the joint family business and joint family real estate/properties till the disposal of the suit.

f). Declare that the plaintiff is a joint owner of the joint family business and joint family estate.

g). Direct defendant No.1 to 4 to pay monthly expenditure immediately to plaintiff as per plaintiff's requirement till the disposal of suit.

h). Profit at the rate of 20% per annum from the date of decision 1992 till the realization of the aforesaid relief.

i). Direct defendant No.1 to 4 for the recovery of Rs.34,700,000/- from the defendants jointly or severally as compensation for damages caused to the plaintiff.

j). Cost of the suit may also be awarded.

k). Any other relief/relieves which this Hon'ble Court may think fit and proper in the circumstances of the case."

2. The instant case has chequered history. At hand is the third round of litigation being pursued by the plaintiff against the same defendants with the same prayer and cause of action too. It is thus considered illustrative to highlight the facts of action at law in hand. Having perused the pleadings of the plaintiff, it unfurls that the plaintiff has been claiming his share in the alleged joint property which as admitted by him was his father's property who died in November, 2006, however, prior to that and till 1992 the plaintiff has been trying to secure his alleged share in the joint property from his father and brothers. Plaintiff alleged that in November, 1992, the defendant No.4 gave an Award over a blank stamp paper which was previously signed by the plaintiff, his father and the defendant No.1 to 3. It is further alleged by the plaintiff that he was thrown out from a common place of living by his father and brothers and he had to shift firstly to some place belonging to his relative and on 19.12.1992 when he/plaintiff and his family tried to enter that common house, he was not allowed any ingress, therefore, he preferred this suit for

accounts, production of documents, declaration and permanent injunction against the defendants prayers of which have already been delineated in the operating part of this verdict.

3. In deference of summons/notices, defendants failed to contest the lis filed by the plaintiff. The diary of Assistant Registrar (O.S.) dated 17.02.2012 insinuates that in order to procure the attendance of defendants publication was effected in daily newspaper “Nawa-e-Waqt” 21.01.2012 but to no avail, thereafter, the service upon the defendants were held good and they were declared *ex parte* vide order dated 05.03.2012.

4. Upon scanning R&Ps, it unfurls that learned counsel for the defendants No.1 to 3 entreated to test the plaintiff to the test of cross-examination and such opportunity was accorded vide order dated 17.09.2013. It further reveals that examination-in-chief of the plaintiff was recorded on 15.11.2018 and on the same day he was cross-examined by the learned counsel for the defendant No.1 to 3.

5. Arguments of the plaintiff were extensively heard. Plaintiff in person reiterated the contents of his pleadings in his submissions. This matter proceeded *ex parte* against the defendants and this matter cannot be treated as a short cause reasoning that this is a third round of litigation between the parties with similar prayers. Though the defendants are *ex parte* and in a routine matter, the *ex parte* suits are decreed but the Courts are saddled with a sacred duty to take into consideration the overall effects of the plaintiff’s version and record & proceedings introduced on record.

6. Keeping in view the foregoing, this court proceeds ahead. A look at the substratum of the plaint demonstrates that the plaintiff in paragraph (c) of the plaint (at page 37) alleged to have introduced on record that before filing the lis at hand, he had litigated two more suits against the same defendants. During course of hearing, on 20.02.2019, it transpired that parties hereto have been entangled in a prolonged litigation, whereby, learned Additional Registrar (O.S.) was directed to prepare a separate file of pleadings of suit No.616/1999 (Muhammad Shafi Paracha v. Muhammad Ramzan Paracha) and Suit No.1215/2008 (Muhammad Shafi Paracha v. Muhammad Asmat Paracha). So as to reach at right and just conclusion of the lis at hand, it is considered illustrative to have a glance of prayer clause of the latter's suits which are delineated hereunder:-

Prayers of Suit No.616 of 1999

“a). Ordering directing the defendants to produce the stamp paper on which the defendant No.5 has pronounced the judgment and distributed all the properties and shares in the joint family business of the plaintiff and defendants No.1 to 4 according to their sharai shares.

b). Ordering the defendant No.1 to 4 to produce accounts of joint family business and the schedule of joint family real estate and cash amount.

c). Ordering the defendant No.1 to 4 to hand over the full shari shares of the plaintiff from the joint family business and the joint family real estate and cash amount according to Muhammadan Law.

d). Ordering to restrain the defendant No.1 to 4 by granting permanent injunction against them that they should not sell the joint family real estate and not to sell alienate the title of joint family business not to transfer the cash amount or business from Karachi (Sindh).

e). Declare that the plaintiff is a joint owner of the joint family business and joint family estate.

f). Ordering to restrain the defendant No.1 to 4 not to stop the plaintiff to carry on his personal commission business in the premises of Awami Motors as the plaintiff is one of the co-owner of the Awami Motors.

g). Any other relief/relieves which this Hon'ble Court may think fit and proper in the circumstances of the case.”

Prayers of Suit No.1215 of 2008

“a). Ordering directing the defendants to produce the Arbitration Award on which the defendant No.4 has pronounced the judgment and distributed all the properties and shares in the joint family business of the plaintiff and defendants No.1 to 3 and his late father of plaintiff according to their sharai shares.

b). Ordering the defendant No.1 to 3 to produce accounts of joint family business and the schedule of joint family real estate and cash amount.

c). Ordering the defendant No.1 to 4 to hand over the full shari shares of the plaintiff from the joint family business and the joint family real estate and cash amount according to Muhammadan Law.

d). Ordering to restrain the defendant No.1 to 4 by granting permanent injunction against them that they should not sell/transfer the joint family real estate and not to sell/alienate the title of joint family business not to transfer the cash amount or business from Karachi (Sindh).

e). Declare that the plaintiff is a joint owner of the joint family business and joint family estate.

f). Directing defendant No.1 to 4 to pay monthly expenditure immediately to plaintiff as per plaintiff's requirement till the disposal of suit.

g). Profit at the rate of 20% per annum from the date of decision 1992 till the realization of the aforesaid relief.

h). Cost of the suit may also be awarded.

i). Any other relief/relieves which this Hon'ble Court may think fit and proper in the circumstances of the case.

7. It is gleaned from the appraisal of the foregoing that the plaintiff has been litigating the defendants with same prayers and cause of action too since 1999. The prayer clauses of the lis at hand if be kept in juxtaposition to prayer clauses reproduced hereinabove (Suit No. 616/1999 & Suit No.1215/2008) it transpires that the present suit is barred by the principle of *res judicata* as mandated under Section 11 C.P.C. Suit No.616/1999 filed by the plaintiff against the same defendants was dismissed as withdrawn vide order dated 16.12.2003, however, no permission was sought by the plaintiff to file at later stage. As the time went by, plaintiff felt aggrieved himself and again knocked the door of this court by filing lis bearing suit No.1215/2008 against the same defendants with the same prayers and cause of action too. In that suit (suit No.1215/2008) plaintiff was extensively heard by another learned Single Judge and having heard both litigating parties, that suit was rejected vide order dated 13.08.2010. It would be pertinent to reproduce the relevant excerpt of order dated 13.08.2010 passed in suit No.1215/2008 which reads as follows:-

“The same story as narrated above was incorporated in the plaint of suit No.616/1999 which was allowed to proceed up to 16.03.2003 when the plaintiff voluntarily chose to withdraw that suit vide statement of even date duly signed by him which he admitted in Court. Consequently on 16.12.2003 suit No. 616/99 was allowed to be withdrawn and dismissed as such without any allowance of filing a fresh suit.”

The plaintiff states that since he has incorporated para No.46 *ibid* in instant suit therefore he is entitled to maintain the present suit as apparent from the foregoing. It would appear that the

matter was resolved according to the plaintiff with mutual consent “properly and in good faith” on 4.11.2003 and that after about more than 4 years there from and upon death of the plaintiff’s father the defendant No.1, 2 & 3 the plaintiff’s brother allegedly failed to fulfill their commitments.

If we can go by the alleged award which is not in existence as apparent from the pleadings the plaintiff cannot maintain the present suit in respect of the same whereby allegedly he was bestowed upon some uncertain benefits in 1992 or thereabout and if we go by the provisions of order 23 CPC the plaintiff cannot maintain the instant suit after he had withdrawn suit No. 616/99 without having been granted permission in terms of for filing a fresh suit and finally if we go along the merits of the allegations made in the plaint we may find that probably the plaintiff may file an appropriate proceedings under the Succession Act for grant of probate if there was a will as stated or for succession to the alleged joint properties which according to the plaintiff were owned by his father. Looking from any angle one may choose upon the plaint the same as such would be found barred by law. No useful purpose would be achieved by proceeding further with this suit and burdening the parties to lead their evidence.

The plaintiff states that he has to marry his unmarried daughters and he cannot afford their marriage expenses. The learned counsel for the defendant No.1, 2 & 3 has candidly conceded to undertake and incur all marriage expenses of the plaintiff’s unmarried daughters. According to Mr. Muhammad Sadiq two unmarried daughters who have already come under the care of the defendant No.1 shall be married and all reasonable marriage expenses shall be incurred. The plaintiff should be happy with such undertaking given on behalf of the defendant No.1, 2 & 3 and leniency shown to him in not imposing special compensatory costs under section 35-A CPC upon him. He has no case. The plaint is rejected suo moto after having granted patient hearing to plaintiff on two consecutive days.

[underline added for emphasis]

8. It is gleaned from appraisal of the foregoing that the plaintiff prior litigating the lis at hand, had already filed two different suits

against the same defendants and cause of action too, one of which was withdrawn by him (suit No.616/1999) while suit No.1215/2008 was disposed of on 13.08.2010 excerpt of which has been delineated in para-7 supra. The present lis appears to be barred by the maxim i.e. *Res judicata* as mandated in Section 11 CPC. In order to press the provisions of section 11, C.P.C. five conditions have to be spelled out:-

(i) the matter directly and substantially in issue in the subsequent suit must be the same matter, which was directly and substantially in issue actually or constructively in former suit,

(ii) the former suit must have been a suit between the same parties or between the parties under whom they or any of them claim,

(iii) the parties as aforesaid must have litigated under the same title in the former suit,

(iv) the Court which decided the former suit must have been a Court competent to try the subsequent suit in which such issue is subsequently raised, and

(v) the matter directly or substantially in issue in subsequent suit must have been heard and finally decided by the Court in the first suit.

9. In the instant suit all conditions are, no doubt, available. Furthermore, a glance over the evidence file manifests that the plaintiff was put to the test of cross-examination and during the course of cross-examination, the plaintiff went on to admit the suggestions that prior filing of the present suit, he has already filed

two suits. It is imperative to reproduce the pertinent excerpt of the cross-examination which reads as follows:-

“It is correct to suggest that I have earlier filed suit No.616/1999. It is correct to suggest that there after another suit bearing No.1215/2008 was filed. Voluntarily states that the said case was dismissed after framing of issues as to res judicata.”

[underline added for emphasis]

10. It is crystal clear that prior filing of the instant lis, the plaintiff had litigated two suits against the same defendants with the same prayers and cause of action too, therefore, the lis at hand is hit by the principle of *res-judicata* as mandated under Section 11 CPC. This court has time and again held that a still-born suit should be properly buried at its inception so that no further time is consumed on a fruitless litigation and the present cause is pending in our docket since 2011 which has already been heard and decided previously between the plaintiff and the defendants.

11. In view of hereinabove discussion and the facts and circumstances of this case, this court is of the view that the present suit filed by the plaintiff is hit by the principle of *res-judicata* as mandated under Section 11 CPC, therefore, suit is dismissed, however, keeping in view the advance age of the plaintiff, I am not inclined to impose a compensatory costs under Section 35-A CPC upon the plaintiff.

Karachi
Dated: 29.06.2022

J U D G E