

[Sindh]

Before Muhammad Shafi Siddiqui, J

ABDUL AZIZ---Plaintiff

Versus

SHAHID AHMED through Attorney and 3 others---Defendants

Suit No.1015 and C.Ms. Nos.9789 and 13119 of 2013,
decided on 24th January, 2014.

Civil Procedure Code (V of 1908)---

---O. VII, R. 11, O. II, R. 2 & O. XXIII, R. 1---Limitation Act (IX of 1908), Arts.91 & 113---Withdrawal of earlier suit---Filing of fresh suit---Rejection of plaint---Scope---Contention of defendants was that earlier suit was withdrawn unconditionally and plaintiff was precluded from filing fresh suit---Validity---Plaintiff had fresh cause of action to file the present suit---Earlier suit had been withdrawn under O.XXIII, Rule 1, C.P.C. but same would preclude the plaintiff to file fresh suit on the same cause of action---Cause of action to file the present suit commenced from the day when the alleged settlement between the parties was arrived at and compliance of same was denied---Plaintiff sought compliance of settlement arrived at between the parties at the time of withdrawal of earlier suit for which limitation period was three years---Article 91 of Limitation Act, 1908 would not apply in the present case as the facts entitling the plaintiff to file present suit commenced when public notice was issued---Present suit had been filed for enforcement of settlement arrived at in the earlier suit between the parties---Earlier suit was filed for declaration and cancellation of sale deed, however on account of settlement a fresh cause accrued to the plaintiff on denial of such settlement---Plaintiff had not relinquished any rights with regard to suit property---Application filed under O. VII, Rule 11, C.P.C. was dismissed accordingly.

Mst. Hamida Begum v. Mst. Murad Begum PLD 1975 SC 624 ref.

Nizar Ali v. Noorabad Cooperative Housing Society PLD 1987 Lah. 676
and Saeed Akhtar v. Lal Din and others PLD 1981 Lah. 623 rel.

Muhammad Ahsan for Plaintiff.

Muhammad Khalid for Defendant No.1.

Mushtaq A. Memon along with Ishtiaq Memon and Shahid Ali Ansari for
Defendant No.6.

ORDER

MUHAMMAD SHAFI SIDDIQUI, J.---The listed applications (C.M.A. No.9789 and 13119 of 2013) are filed by the plaintiff No.3 and defendants Nos. 6 to 9 under Order VII, Rule 11, C.P.C.

Although an application under Order VI, Rule 17, C.P.C. is pending however as it was fixed for non-prosecution and not fixed for hearing, both learned counsel agreed that by consent the two applications under Order VII Rule 11 C.P.C. be heard.

Before hearing the applications referred above learned counsel for the plaintiff gave a brief history-for assistance. He contended that during the pendency of above referred Suit No.11 of 2008 though in the presence of status quo order the defendant No.3 and his elder brother Abdul Rahman had transferred

the suit property. Such transfer was made in favour of defendant No.2 who is claimed to be servant of defendant No.3 and his brother Abdul Rahman who (defendant No.2) further upon advice and direction of defendant No.3 transferred the property in the name of defendant No.1 as benami. Learned counsel for the plaintiff submitted that on interruption and intervention of elders, the disputes were amicably resolved in presence of defendant No.2. It is alleged that the defendant No.2 agreed to surrender the sale-deed in favour of his brother Abdul Rahman or in the name of plaintiff for its distribution amongst three brothers and defendant No.1 was also informed of such facts who agreed to surrender his benami rights as agreed between brothers and hence the above referred suit was withdrawn under Order XXIII, Rule 1, C.P.C. Learned counsel stated that while the plaintiff was waiting for such transaction suddenly in June 2013 i.e. after about nine months of the withdrawal of the suit referred above and while the defendant No.3 was in Dubai, the elder brother Abdul Rahman was assassinated within the jurisdiction of Police Station Ferozabad and the entire family came under tremendous shock on account of the murder of their brother. The defendant No.1 was not in contact as he was permanently residing in United Kingdom, however the plaintiff was shocked and surprised to see the public notice appeared in daily Jang dated 29-7-2013 published on behalf of defendant No.1 inviting objections for sale of the subject property. Learned counsel for the plaintiff submitted that despite objections the defendant No.1 agreed to sale as he intended to usurp the valuable property which belongs to all three brothers including the plaintiff. Learned counsel submitted that despite pendency of the suit, the sale-deed in pursuance of the public notice referred above was executed between the defendant No.1 and defendants Nos.6 to 9 who have subsequently joined the proceedings.

On the basis of the above facts which are also mentioned in the plaint the defendants have filed applications under Order VII, Rule 11, C.P.C. substantially on the ground that the plaintiff has no cause of action as the earlier suit was withdrawn unconditionally and the plaintiff is precluded from filing fresh suit apparently on the same cause of action.

It is the case of defendants Nos.3 and Nos.6 to 9 that identical reliefs were sought by the plaintiff in the earlier suit challenging the defendant's pretention and proprietary rights in respect of the bungalow which is subject-matter of this suit and on account of the withdrawal of the earlier suit the plaintiff relinquished all his rights in the subject property and as such the jurisdiction is also barred under Order II Rule 2 C.P.C. Learned counsel for the defendants submitted that the plaintiff has not approached the Court for declaration of his right to the property or his right to the legal character but has challenged the plaintiff's pretention to a legal character and hence hit by section 42 of the Specific Relief Act. Learned counsel for the defendants added that the suit is barred under Article 91 of the Limitation Act which prescribes three years' time for cancellation of an instrument. Learned counsel without prejudice to the above, added that the relief obtained in this suit were available in the earlier suit filed on the basis of same cause of action, however he preferred to withdraw suit unconditionally hence hit by provision of Order II, Rule 2, C.P.C.

On the other hand learned counsel for the plaintiff submitted that Article 91 of the Limitation Act would not apply to the present proceedings as the cancellation of instrument is only ancillary relief as compare to substantial relief claimed by the plaintiff i.e. compliance of amicable settlement and that they are co-owners of the property regarding which an application for amendment in the pleadings has been filed. He added that this suit is based on fresh cause of action hence neither Order II, Rule 2, C.P.C. nor provisions of Order XXIII, Rule 1, C.P.C. would apply. He submitted that facts enabling him to file the instant suit have been mentioned in the plaint. He relied upon the case of Mst. Hamida Begum v. Mst. Murad Begum (PLD 1975 SC 624).

In order to resolve the question regarding maintainability of the suit on the grounds raised by the learned counsel for the defendants apparently it seems

necessary to go through the history and facts of the case which, are to be traced through earlier, round of litigation which commences by filing Suit No.11 of 2008. It appears that during the pendency of the said suit the property changed two hands i.e. elder brother Abdul Rahman transferred the property in the name of defendant No.2 which was subsequently transferred in favour of defendant No.1 and all this happened during the pendency of above referred suit when the order of status quo was in field. It is the case of the plaintiff that on account of interruption and pursuance of the well-wishers the dispute involved in earlier suit was resolved amicably, what was resolved though not highlighted in the application for withdrawal of the suit but mentioned in the instant suit that the transaction in the name of defendants Nos.1 and 2 are to be restored in any form and the subject sale deeds were to be surrendered in favour of elder brother or in the name of the plaintiff. It is the matter of fact that after withdrawal of the suit on 5-9-2012 the elder brother Abdul Rahman was murdered on 5-6-2013 i.e. after nine months of the withdrawal of the suit. The other defendants i.e. defendants Nos.1 and 2 per counsel were untraceable for an amicable settlement arrived between them at the time of withdrawal of the suit. While they were still searching for the defendants as contended in the plaint, they realized a public notice published in daily Jang dated 29-7-2013 for the sale of the property which entailed them not only to issue notices to the concerned parties but also to approach this court.

In terms of the contention of the parties two questions are apparent, which need to be addressed. The first question is whether the withdrawal of earlier suit consumed and/or extinguished all cause of actions for the plaintiff to file the instant suit even if it is on account of breach of an amicable settlement; and secondly as to whether the relief sought i.e. compliance of an amicable settlement, is barred under Article 91 of the Limitation Act.

Perusal of Para 13, which pertains to cause of action, provides that the ultimate cause of action was shown to be of 29-7-2013 though it was initially accrued in the year 2008 which cause of action was consumed when Suit No.11 of 2008 was filed. However, to determine the existence of any cause of action in the present suit, not only para in relation to the cause of action is to be read but entire body of plaint is to be seen and only after perusal of the entire contents of plaint it could be ascertained as to whether any cause of action for filing instant suit is or is not available to the plaintiff.

It is demonstrated that the earlier suit was withdrawn on account of amicable settlement between the parties on intervention of elders and it has also been shown that the two defendants i.e. defendant No.1 and defendant No.2 were also aware of the fact that an amicable settlement was arrived at and that they were/are under obligation to respond to that amicable settlement. The correctness of such fact is not to be ascertained in the instant applications. At this stage I am only inclined to see whether such facts, as highlighted in the plaint, provide a cause of action to the plaintiff or not. Perusal of entire plaint demonstrates that there is a fresh cause of action to the plaintiff i.e. compliance of amicable settlement despite the fact that earlier suit had been withdrawn under Order XXIII, Rule 1, C.P.C., but such precludes the plaintiff to file fresh suit on the same cause of action which is not the case here. To me cause of action for the plaintiff to file instant suit commences from the day when the alleged amicable settlement between the parties including defendants Nos.1 and 2 was arrived and compliance of which was subsequently denied when the public notice for sale in that regard was issued.

The application of Article 91 of the Limitation Act would also be immaterial as the plaintiff is seeking compliance of an amicable settlement arrived at between the parties at the time of withdrawal of earlier suit for which limitation period is three years under Article 113 of the Limitation Act. In addition the application of Article 91 of the Limitation Act would not come into play as the facts entitling the plaintiff to file suit for such relief, as claimed for, commences in the year 2012 when public notice was issued. It is the case of the

plaintiff that the parties i.e. defendants Nos.1 and 2 agreed to surrender the leases executed in their favour in any prescribed manner as they deem fit. When such agreement in pursuance of amicable settlement, if arrived at all, is not barred by any law, the parties may enter into such agreement and it is only for enforcement of such agreement that the instant suit has been filed. Had it (agreement entered into between the parties) been barred by any law then perhaps the provisions of Order VII, Rule 11, C.P.C. could be invoked that the plaintiff has no cause of action or that the relief claimed is barred by any law but that is not the case here.

In addition to the above, the legislature in its wisdom has purposely used language in Article 91 of the Limitation Act as "facts entitling the plaintiff to have the instrument cancelled or set aside become known to him" which constitutes the beginning of the period of limitation. Unlike many other Articles of the Limitation Act which prescribes the starting time from the date of knowledge or when facts are known to the plaintiff or rights were denied, the language used in Article 91 carries different meaning and starting point of limitation under Article 91 of the Limitation Act is quite different and distinguishable from other articles which provides the starting point from the date of knowledge.

In case of Mst. Hamida Begum (Supra) the Hon'ble Supreme Court dealt with this issue and observed that the limitation under Article 91 commences not when the plaintiff acquires knowledge of fact which render the instrument voidable but the facts entitling the plaintiff to have the instrument cancelled or set aside. The earlier suit was filed for declaration and cancellation of the sale-deeds however on account of amicable settlement a fresh cause accrued to the plaintiff when denial of such settlement enabled the plaintiff to file the instant suit. Plaintiff specifically has never relinquished any rights in respect of the subject property and the rights in respect of the property in question are being claimed as the plaintiff has filed an application for amendments so as to enable him to amend his claim after including the requisite prayer to cover his rights and entitlement in respect of the property in question. Such application would be decided on its own merit without being influenced by this order.

It could have been the case of the defendant that no such amicable settlement arrived at between the plaintiff and defendant as alleged in the plaint, however such could only be done after framing of issues and deciding them in view of evidence led by the parties. Reliance is placed on the case of Nizar Ali v. Noorabad Cooperative Housing Society (PLD 1987 Karachi 676). In the case of Saeed Akhtar v. Lal Din and others (PLD 1981 Lahore 623) the Division Bench of Lahore High Court held that the cause of action of the earlier suit was different than the present one and the proceedings under Order II, Rule 2, C.P.C. are not attracted as both the suits were based on different cause of actions. In the instant suit also the previous suit apparently was filed as the share of the plaintiff was denied by the defendant and at the time of withdrawal of the suit it is alleged that the parties agreed to restore the original status of the property and it is the performance of this amicable settlement that the present proceedings are initiated hence on apparent different fresh footings in cause of actions.

Thus, in view of facts and circumstances of the case there is no substance in the applications, which are accordingly dismissed. The application under Order VI, Rule 17, C.P.C. shall be heard and decided subsequently and in case the amendments, as claimed therein, are declined/refused, the defendants would be at liberty to file fresh applications as they deem fit and proper and it is on this account that the reasoning in relation to section 42 of the Specific Relief Act is not given.

AG/A-16/Sindh
dismissed.

Applications