

**ORDER SHEET**

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

**Suit No.383 of 2010**

Muhammad Rafiq Qureshi  
vs.  
Muhammad Mubin Qureshi & others

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For orders on CMA No.7519 of 2018 (U/O. VII Rule 11 CPC) :

Plaintiff: Through Ms. Kajal Kumari, Advocate and Mr. Muhammad Aarsal Rahtali, Advocate

Defendant No.1: Through Mr. Khurram, Advocate .

Defendant No.3: Through Mr. Aamir Ali Advocate.

Date of hearing: 30 August 2023

Date of Order: 29 November 2023

**ORDER**

**MOHAMMAD ABDUR RAHMAN J.** This order will dispose of CMA No.7519 of 2018 being an application that has been maintained by the Defendant No.1 under Order 7 Rule 11 of the Code of Civil Procedure, 1908 seeking the rejection of the Plaint on the sole ground that this suit is barred under the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908.

2. Muhammad Rafiq Qureshi and Muhammad Mubin Qureshi were real brothers. A dispute has occurred as between them in respect of ownership as to Quarter No.30, Block No.10, Liaquatabad, Karachi, admeasuring 90 sq. yds. (hereinafter referred to as the "Said Property"). Muhammad Rafiq Qureshi contends that his father had transferred the Said Property into the name of Muhammad Mubin Qureshi on the understanding that after title to the Said Property was secured through a registered lease deed in the name of Muhammad Mubin Qureshi, the Said Property would be partitioned so that a

portion admeasuring 21.80 square yards would be carved out of the Said Property and transferred by Muhammad Mubin Qureshi into the name of Muhammad Rafiq Qureshi. This understanding as between Muhammad Mubin Qureshi and Muhammad Rafiq Qureshi was purportedly recorded in two agreements dated 29 April 1980 and 7 August 1983 whereby such a right was purportedly secured by Muhammad Rafiq Qureshi.

3. It is common ground that at that time a regular lease had not been executed as between the lessor of the Said Property and Muhammad Mubin Qureshi and hence the property had not been partitioned. It is alleged that in or around 2006 Muhammad Mubin Qureshi reneged on the two Agreements dated 29 April 1980 and 7 August 1983 and started construction on the entire Said Property. The construction compelled Muhammad Rafiq Qureshi to maintain various complaints before the Nazim UC-06, Liaquatabad Town, Karachi and which purportedly resolved the matter in his favour but which decision was not accepted or followed by Muhammad Mubin Qureshi. This compelled Muhammad Rafiq Qureshi to maintain a suit bearing Suit No. 96 of 2007 before the VIIIth Civil Judge Karachi (Central) and which was on 4 August 2007, unconditionally withdrawn by Muhammad Rafiq Qureshi by an application under Order XXIII Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908, and to which withdrawal Muhammad Mubin Qureshi had given his consent.

4. Thereafter Muhammad Rafiq Qureshi chose to maintain a Constitution Petition bearing C.P. No.D-1963 of 2007 before this Court and which was dismissed on 17 December 2009 on the ground that as a factual controversy was involved in the adjudication of the Petition rendering the Petition as not being maintainable and leaving Muhammad Rafiq Qureshi with his right to seek an alternate remedy if available to him under the law.

5. Mr. Khurram, has entered appearance on behalf of the Defendant No.1 and has contended that the suit is barred under the provisions of Order VII Rule 2 of the Code of Civil Procedure, 1908. He submits that having earlier withdrawn Civil Suit No. 96 of 2007 the Plaintiff cannot now maintain the subject *lis* which he contends is premised on the same cause of action as Civil Suit No. 96 of 2007 and as such any cause of action that existed at the time when Civil Suit No.96 of 2007 had been filed cannot now be pressed in the subject suit. He relied on the decision reported as **Syed Naushad Ali vs. Syed Amjad Ali**<sup>1</sup> wherein a dispute has been occurred between the two brothers as to the validity of declaration of oral gift and which had been assailed in a suit before the Civil Judge Karachi (South) and whereafter second Suit No.72 of 2012 was maintained before this Court for the cancellation of the gift. It was held that Suit No.72 of 2012 was barred under the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908 and the Plaint was rejected. Ms. Kajal Kumari has contended that each suit is based on distinct causes of action and CMA No.7519 of 2018 was liable to be rejected.

6. I have heard the counsel for the Defendant and Plaintiff and have perused the record. It would be advantageous to show the pleadings in both Civil Suit No. 96 of 2007 and in the subject *lis* that the same can be compared with another:

<b>Suit No.383 of 2010</b>	<b>Suit No. 96 of 2007</b>
<p>The case of Plaintiff above named is most humbly and respectfully do hereby submitted as under:</p> <p>1. That Plaintiff and the Defendant No: 01, are the real sons of Karim Ullah and hence are the real brother inter-se. Their said father has now expired but a Quarter bearing No. 30 ad-measuring 90 Sq. Yds, in Block-10 Liaquatabad, Karachi was allotted to their said father by the Rehabilitation Commissioner, Government</p>	<p>The Plaintiff above named most humbly and respectfully begs to submit as under:-</p> <p>1. That a Quarter bearing No.30, measuring 90 square yards, in Block 10, situated at Liaquatabad. Karachi, was allotted to the father of the Plaintiff and the Defendant above named, namely; Haji Karimullah, by the Rehabilitation Commissioner, Government of Pakistan,</p>

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<sup>1</sup> 2014 YLR 1620

<p>of Pakistan, at Karachi, for residential purposes in the year 1951.</p> <p>2. That the above said plot in question was wholly constructed by the Plaintiff from his own means and funds and remained in possession of the same till so many years but afterwards the deceased father of Plaintiff suggested, among all the children, that since there is no plot available with the Defendant No. 01, hence the above said Plot in question may be given to him and demanded to the Plaintiff to shrink his possession up to a portion of 21.80 Sq. Yds., (14' X 14') in suit property and directed/ bind the Defendant No. 01 that he shall transfer the title of the said portion of 21.80 Sq. Yds., in the name of Plaintiff just after preparation of lease in favour of the Defendant No. 01, however the said portion of property is in continuous possession of the Plaintiff, even since the life time of the deceased father of the Plaintiff.</p> <p>3. That in spite of the above it is an admitted position that after the death of above named father all the brothers of the Petitioner including the Defendant No: 01, have surrendered their any right or interest in favour of Plaintiff for the said portion of 21.80 Sq. Yds., (14' X 14') in suit property.</p> <p>4. That afterwards, since the title documents are not prepared till date, to substantiate the actual position Plaintiff and Defendant No: 01 entered into agreement, dated: 29-04-1980 and another agreement dated: 07.08.1983, also and according to these both the agreements it is agreed between the above named two brothers that the Defendant No: 01, shall surrender all the rights, title and interests of the above said portion of 21.80 Sq. Yds., of suit property in favour of Plaintiff and Defendant No: 01 agreed to retain remaining portion of the said plot in his own name.</p> <p>Photo copies of the said agreements, dated 29.04.1980 and 07.08.1983 are filed herewith and marked as Annexure "P/1" &amp; P/2".</p> <p>5. That afterwards, in spite of all the above said and blood relationship amongst the above named parties Defendant No: 01, without any sweet will and/ or consent of the Plaintiff started making illegal construction even upon the above said portion of 21.80 Sq. yds of Plaintiff, therefore the Plaintiff immediately approached to the Learned</p>	<p>Karachi, for residential purpose in the year 1951.</p> <p>2. That after the death of above named Haji Karimullah, the other legal heirs relinquished/ surrendered their rights in the said quarter, in favour of the Plaintiff.</p> <p>3. That the Plaintiff became owner of a portion of 21.80 square yards of the said inherited property, the rest portion is in possession of the Defendant above named.</p> <p>4. That after the death of their father, the Plaintiff and the Defendant entered into Agreements dated 29.4.1980 and 7.8.1983, wherein it was agreed mutually that the Defendant after regularization/ lease of the said quarter with extra K.M.C. land shall transfer/get registered the said portion of the quarter and extra land in favour of the Plaintiff, the copies of the said Agreements are annexed herewith and marked as Annexure "P" and "P/1 respectively.</p> <p>5. That after the above agreements, the Defendant applied for lease of the said quarter, violating spirit of agreements and shariat law, subsequently the Plaintiff moved an application to the Assistant Director, Land Department "D" Division, K.M.C., Karachi, on 14.1.1989, the copy of said Application is annexed herewith and marked as Annexure "P/2".</p> <p>6. That the Plaintiff again sent a notice through his lawyer to the Assistant Director, Land Department wherein he was requested and warned not to execute the lease of the above said property in the name of Defendant without referring the same either to the Plaintiff or to the legal heirs, the copy of the said notice is annexed herewith and marked as Annexure "P/3".</p> <p>7. That the Defendant started illegal construction upon the portion of the Plaintiff and the Plaintiff approached to the Nazim, U.C. 6. Liaquatabad Town. Karachi, through an application on 16.10.2006, the copy of the same is annexed herewith and marked as Annexure "P/4".</p> <p>8. That inspite of directives of Nazim, U.C. 6. the Defendant did not stop the illegal construction, therefore, the Plaintiff again moved an application to the U.C. Nazim on 18.12.2006, the U.C. Nazim was pleased to pen down a letter</p>
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Nazim of his Union Council 6, Liaquatabad Town, Karachi through his application dated. 16.10.2006, and after initial inquiry the said Learned Nazim directed the Defendant No: 01, to stop the illegal construction but no compliance is made from his side.

Photo copy of plaintiff's Application dated 16.10.2006 is annexed herewith and marked as Annexure "P/3".

6. That in view of the above said non-compliance Plaintiff became compelled to file another application dated: 18-12-2006, in the office of the above said Learned Nazim who forwarded the said application to his Town Nazim through his covering letter dated: 26-12-2006 and hence the matter is sent/put up in "Masalihati Committee" UC-6, Liaquatabad Town, Karachi.

Photo copies of Plaintiff's Application dated 18-12-2006, and Nazim's Covering Letter are filed herewith and marked as Annexure- "P/4" & "P/5".

7. That the said committee recorded the statements of marginal witnesses namely Saeed Ahmed and Abdul Hafeez Qureshi, of the above said agreements dated 29.04.1980 and 07.08.1983 (Annexure "P/1" & "P/2" above) and then given its decision wherein it is decided that the Defendant No: 01, is mala fide and his construction is illegal which should have been stopped but he instead of directions did not stop hence the Plaintiff is fully and lawfully entitled take any appropriate legal actions against the Defendant No: 01.

Photo copies of Statements of Witnesses and Decision of U.C. Masalihati Committee are filed herewith and marked as Annexure - "P/6" to "P/8".

8. That this whole of the above situation, created by the Defendant, caused severe mental torture and agony to the Plaintiff which cannot be calculated in terms of money however he definitely is entitled for a token compensation of a tone of Rs. 5,000,000/- (Rupees Five Million only).

9. That since the matter is not resolved, the Plaintiff as a first step filed a Civil Suit No. 96 of 2007 (Muhammad Rafiq Qureshi V/s. Muhammad Mobin Qureshi) in the Honourable Court of VIII Civil Judge & Judicial Magistrate, at

to the Naib Nazim, Liaquatabad Town, Karachi, on 26.12.2006, the copies of the same are annexed herewith and marked as Annexure "P/5" and "P/6" respectively.

9. That the Masalihati Committee. U.C. 6. Liaquatabad Town, Karachi, decided the matter in presence of witnesses, finding out the Defendant guilty, the copy of the said decision is annexed herewith and marked as Annexure "P/7".

10. That the witness, Mr. Abdul Hafeez Qureshi son of Ghous Muhammad Qureshi, filed an Affidavit, wherein he stated the facts which were in his knowledge, the copy of the said affidavit is annexed herewith and marked as Annexure "T 18".

11. That U.C. Nazim pronounced his decision in respect of property in question on 25.1.2007, wherein he (Nazim) has allowed the Plaintiff to approach the Court of law for legal proceedings, the copy of the same is annexed herewith and marked as Annexure "P/9".

12. That the cause of action accrued with the Plaintiff firstly on 29.4.1980, secondly on 7.8.1983, when the agreements were executed, and the Defendant violated the same, and still continued when the Defendant started construction on the portion of the Plaintiff without any justification and lawful authority.

13. That the property in question comes in the local limits of P.S. Liaquatabad, which is under the jurisdiction of this Honourable Court.

14. That the suit is valued to Rs.25,000/- for declaration and Rs.20,000/- for permanent injunction and no Court fee is required on it.

Karachi (Central), but later on it is came to his knowledge that he is not properly advised and the said suit was filed without seeking sufficient remedy to resolve the actual grievance of the Plaintiff.

10. That actually the suit property is of very old construction and has become dangerous where upon Defendant No: 01, is making his illegal construction which may demolish whole of the building and life hazards and risks is definitely involved there and for this matter remedy in said Civil suit may be availed to the Plaintiff. Therefore Plaintiff preferred to withdraw his Civil suit with permission to re-file.

Photo copy of Order passed by the Court of VIII Civil Judge on withdrawal application is filed herewith and marked as Annexure- "P/9".

11. That before filing the above said civil suit the Plaintiff had made a complaint to the Defendant No: 02, also, who have decided the matter in favour of the Plaintiff and passed orders to take demolition action for un-authorized construction and issued letter to Police authorities, but due to non-availability of required police force or non-cooperation of concerned authorities the construction become more and more dangerous.

Photo copies of Letters issued by the Defendant No: 03 and the Photographs of the property in question upon which illegal construction is made are filed herewith and marked as Annexure- "P/10" to "P/16".

12. That in the circumstances on 03.09.2007 the Plaintiff filed a Constitutional Petition No. 1963 of 2007 against the above named Defendant No. 01, 02 and Liaquatabad police station, in the Honourable High Court of Sindh at Karachi, alongwith the Affidavits of Abdul Waheed Qureshi and Muhammad Usman. This Petition was duly noticed to the Respondents on 04-10-2007 and a Commissioner was appointed for physical verification of position of suit property.

Photo copy of Memo of C. P. No: 1963 of 2007 alongwith Affidavit of Abdul Waheed Qureshi and Muhammad Usman is filed herewith and marked as Annexure "P/17" to "P/19".

13. That the Learned Commissioner inspected the suit property on 10-11-2007 and re-inspected on 22-11-2007 and

submitted his detailed report dated: 28-11-2007 wherein it is clearly mentioned that whole of the suit property is admittedly in possession of Defendant No: 01 except the portion of 14' x 14' on ground floor which is in possession of Plaintiff. The Learned Commissioner also mentioned the details of the whole building. It is not out of point to mentioned here that the said report was prepared in presence of Defendant No: 01 and the representatives of Defendant No: 02 but the same is remained unchallenged till date.

Photo copy of Report of Commissioner dated: 28-11-2007 submitted in C. P. No: 1963 of 2007 is filed herewith and marked as Annexure- "P/20.

14. That in the meantime present Defendant No: 01 and 02 appeared in the above said Constitutional Petition and present Defendant No: 02 filed Counter Affidavit through their representative namely Fazal Karim (who on 10-11-2007 was present at the time of Inspection of suit property by the above said Learned Commissioner), wherein they corroborated the version of Learned Commissioner and declared the 1 and 2nd Floor construction, upon the suit property, illegal and they sought time to demolish the same, which is granted accordingly. The Defendant No: 01 never ever filed any counter affidavit to the said Constitutional Petition, at any point of time.

Photo copy of Counter Affidavit filed by KBCA in C. P. No: 1963 of 2007 is filed herewith and marked as Annexure - "P/21.

15. That later on the above named Defendant No: 02 has been appearing in the above said Constitutional Petition time to time and sought time for demolition of illegal construction which is graciously been granted by the Honourable High Court, and the Defendant No: 02 has been filing their Compliance Reports.

Photo copy of Compliance Report filed by KBCA in C. P. No: 1963 of 2007 are filed herewith and marked as Annexure - "P/22".

16. That on 02-04-2009 the Defendant No: 02 reached to suit property for demolition of suit property but the Defendant locked it and went away for which photographs were prepared but

demolition on that day also is not happened.

Photographs prepared on 02-04-2009 are filed herewith and marked as Annexure "P/23".

17. That however on 28-04-2009 another order, in the above said Constitutional Petition, is passed that the Town Controller of Buildings, Liaquatabad Town, may be directed to ascertain whether the construction on first and second floor was raised before 1979 or after 1979 and in this regard he can associate any technical person and if requires, may send the sample of the construction to the concerned laboratory for analysis. Further directed that the Learned commissioner may allow the parties to be present at the time of inspection.

Photo copy of Order dated: 28-04-2009 is filed herewith and marked as Annexure - "P/24".

18. That the above said Commissioner Report was firstly submitted on 03-07-2009 by Deputy Controller Buildings, Liaquatabad Town, KBCA, upon which the Plaintiff filed his objections on 28-07-2009 and also photographs through an statement filed on 06-08-2009, after which the Defendant No: 02 once again filed report through Town Building Controller Officer, Liaquatabad Town, Karachi wherein the report of structure engineer Mr. Arif Kasam was also annexed.

Photo copy of Commissioner Report dated 03-07-2009 Plaintiff's Objections, Statement dated 06.08.2009 dated: alongwith Photographs and next Commissioner Report dated: 24-09-2009 are filed herewith and marked as Annexure - "P/25" to "P/29".

19. That after submission of the above said Commissioner reports the matter is fixed in court on 17/12/2009, wherein it is ordered that the Petitioner, who is Plaintiff in the above suit, cannot seek his relief in Constitutional Jurisdiction of the Honourable High Court of Sindh at Karachi, and he may approach to any other appropriate forum, for seeking relief, and the Constitutional Petition No: D-1963 of 2007 was disposed off.

Photo copy of Order dated: 17/12/2009 passed by the Honourable High Court in C.P. No: D - 1963 of 2007 is filed herewith

<p>and marked as Annexure-"P/30".</p> <p>20. That in view of the above circumstances the Plaintiff is left with no alternative but to knock the doors of justice through this Honourable Court, hence this suit</p> <p>21. That the cause of action firstly accrued to Plaintiff against the Defendants that when the Defendant No: 03 is not preparing required Lease in favour of Plaintiff and in December 2006 the Defendant No: 01 started illegal construction on 1<sup>st</sup> floor and onward of the suit property and Plaintiff made his complaints to concerned Union Council and Town Nazim and nothing happened, hence the Plaintiff filed a C. S. No: 96 of 2007 (Muhammad Rafiq Qureshi-V/s.- Muhammad Mobin Qureshi) in the Honourable Court of VIII Civil Judge &amp; Judicial Magistrate, at Karachi (Central), which was in sufficient and incompetent suit hence Plaintiff withdrawn the same with permission to refile and when in presence of the above submitted facts, the Constitutional Petition is disposed off in terms of Order dated 17.12.2009 and the cause of action is still continuing day to day until and unless the above suit is Decreed in favour of Plaintiff.</p> <p>22. That the above suit, for the purpose of Court fee and jurisdiction is valued at Rs. 500,000/- for prayer clause (a) and valued at Rs. 500,000/- for prayer clause (b) and valued at Rs. 288,000/- for prayer clause (c) and valued at Rs. 5,000/- each for prayer clause (d), (e), (g) and valued at Rs. 5,000,000/- for prayer clause (f) hence maximum Court Fee of a sum of Rs. 15,000/- is affixed upon the memo of Plaint.</p>	
<p style="text-align: center;"><b><u>PRAYER</u></b></p> <p>It is therefore prayed that this Honourable Court may be pleased to pass a Judgment and Decree against the Defendants and in favour of the Plaintiff as under:</p> <p>(a) Declare that the Plaintiff is the sole, absolute and lawful owner in possession of a portion of 21.80 Sq. Yds., (14' X 14') including its roof, in suit property i.e; Quarter bearing No: 30, ad-measuring 90 Sq. Yds., in Block-10, Liaquatabad, Karachi, and is fully and duly entitled to legally use and enjoy</p>	<p style="text-align: center;"><b><u>PRAYER</u></b></p> <p>It is most humbly and respectfully prayed by the Plaintiff above named that this Honourable Court may be pleased to pass judgment and decree in favour of the Plaintiff and against the Defendant as under :-</p> <p>i. To declare the construction raised by the Defendant on portion of the Plaintiff illegal and liable to be demolished.</p> <p>ii. To grant perpetual, mandatory and Permanent injunction for</p>

<p>the said portion of suit plot, according to his own whims and wishes;</p> <p>(b) Direct the Defendant No: 01, to hand over vacant peaceful physical possession of the roof to the Plaintiff of a portion of 21.80 Sq. Yds., (14' X 14'), under which on ground floor the Plaintiff is continuously in possession, in suit property i.e; Quarter bearing No: 30, ad-measuring 90 Sq. Yds., in 10, Liaquatabad, Karachi and let him legally use and enjoy the said portion of suit property according to his own whims and wishes;</p> <p>(c) Direct the Defendant No: 01 to pay Mense profit at the rate of a sum of Rs. 4,000/- per month for 1st and 2nd floor each w.e.f. December 2006, till the date on which the physical possession is handed over to Plaintiff of roof of a portion of 21.80 Sq. Yds., (14' X 14'), under which on ground floor the Plaintiff is continuously in possession, in suit property i.e; Quarter bearing No: 30, ad - measuring 90 Sq. Yds., in Block 10, Liaquatabad, Karachi;</p> <p>(d) Direct the Defendant No: 02, its legal representative, successors, administrator, assigns, nominee, subordinates, workers, and/or any body who works or claim to work on their behalf through a Mandatory Injunction to demolish the illegal construction made by the Defendant No: 02 upon the roof of the Plaintiff's portion of 21.80 Sq. Yds., (14' X 14'), under which on ground floor the Plaintiff is continuously in possession, in suit property i.e; Quarter bearing No: 30, ad - measuring 90 Sq. Yds., in Block 10, Liaquatabad, Karachi;</p> <p>(e) Direct the Defendant No: 03, its legal representative, successors, administrator, assigns, nominee, subordinates, workers, and/or any body who works or claim to work on their behalf through a Mandatory Injunction to prepare and execute lease and/or any other required title deed in favour of the Plaintiff for Plaintiff's portion of 21.80 Sq. Yds., (14' X 14') including its roof, in suit property i.e; Quarter bearing No: 30, ad - measuring 90 Sq. Yds., in Block - 10, Liaquatabad, Karachi;</p>	<p>restraining the Defendant, his men, agents. servants, attorneys or any person or persons claiming through or under him, and they may be restrained from constructing the structure on portion of Plaintiff measuring 21 square yards of Quarter bearing No.30, measuring 90 square yards, in Block 10. situated at Liaquatabad, Karachi.</p> <p>iii. Any other or further relief/reliefs which this Honourable Court may deem fit and proper under the circumstances of the case; and</p> <p>iv. Cost of the Suit.</p>
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<p>(f) Decree of a sum of Rs. 5,000,000/- for compensation against the Defendant to the said amount to the Plaintiff ;</p> <p>(g) Restraining the Defendants No: 01 and 03 the legal heirs, representatives, successors, administrator, assigns, nominee, subordinates, workers, and/or any body who works or claim to work on their behalf through a Permanent Injunction selling, mortgaging, making gift, alienating, and/or creating any third party interest in any manner whatsoever in Plaintiff's portion of 21.80 Sq. Yds., (14' X 14') including its roof, in suit property i.e; Quarter bearing No: 30, ad - measuring 90 Sq. Yds., in Block 10, Liaquatabad, Karachi;</p> <p>(h) Award the costs of the suit;</p> <p>(i) Grant any other relief or further relief which this Honourable Court in the prevailing circumstances of the case deems fit and proper."</p>	
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7. The provisions of Order II Rule 2 of the Code of Civil Procedure, 1908 read as under:

- " ...
2. (1) *Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.*
- (2) *Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished claim.*
- (3) *A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such relief; but if he omits, except with the leave of the Court, to sue for all such relief, he shall not afterwards sue for any relief so omitted."*

The Provisions of Order II Rule 2 of the Code of Civil Procedure, 1908 have been elaborated on by the Supreme Court of Pakistan in the decision reported

as **Abdul Hakim And 2 Others vs. Saadullah Khan and 2 Others**<sup>2</sup> wherein it was held that:

“ ... The expression "cause of action" in Order II, rule 2, C. P. C. means the cause of action for which a suit is brought. In order that the cause of action for the two suits may be the same, it is necessary not only that the facts which would entitle the plaintiff to the right claimed must be the same but also that the infringement of his right at the hands of the defendants complained against in the two suits, must have arisen in substance out of the same transaction. In considering the application of this bar regard is to be had to the allegations in the two suits without reference to the defence that may be set up by the defendants. As laid down by their Lordships of the Privy Council in Muhammad Khalil Khan and others v. Mahbub Ali Mlan and others P L D 1948 PC 131 "the bar under Order II, rule 2 refers entirely to the grounds set out in the plaint as the cause of action or in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour". A rough test, although not a conclusive one is to see whether the same evidence will sustain both suits which would be the case if both the suits are founded on continuous and inseparable incidents in the same transaction. The question, however, is to be examined in substance and not merely on form as the cause of action in the two suits may be found to be the same, in spite of the facts alleged not being exactly identical in the two cases. It is not open to the plaintiff to up the parts really constituting the same cause of action file different suits in respect of them. In other words, a plaintiff must ask for all his reliefs which flow from the grievances caused to him by the infringement of his rights by defendant in the course of the same transaction, but he cannot and is under no obligation to add to his grievances that did not occur in that transaction. If two trespasses are against a defendant, both in the course of the same transaction, a plaintiff must seek his remedy in one suit against and he cannot split up his cause of action to sue for trespass in one suit and for the other in a subsequent. But where the two trespasses allegedly have taken place different occasions and the second was not in existence the time of, the first suit, as in this case, there was neither occasion nor any necessity for the plaintiff to seek his remedy for the second trespass in the first suit.”

8. Each of the Suits filed are in respect of the Said Property. The contention of Muhammad Rafiq Qureshi in each of the Suits is identical in as much as he premises his right to the portion of 21.80 Square yards on the basis of that portion of the Said Property having been relinquished in his favour after his father demise and on the basis of the two agreements dated 29 April 1980 and 7 August 1983. The Plaintiff further pleads his cause of action in Suit No. 96 of 2007 before the VIIIth Civil Judge Karachi (Central) as being when Muhammad Mubin Qureshi commenced construction on the Said Property and seeks the relief of declaration that the construction is illegal and injunctive relief to restrain such construction in that suit. **It is admitted that Suit No. 96 of 2007 was withdrawn by Muhammad Rafiq Qureshi by an application under Order XXIII Rules 1 and 2 read with Section 151 of the Code of Civil**

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<sup>2</sup> PLD 1970 SC 63

**Procedure, 1908 and while the prayer in the application requested for Muhammad Rafiq Qureshi to retain the right to refile the suit, no such right was conferred by the order passed on that application and which simply dismissed the suit as withdrawn.** That being the case Muhammad

Rafiq Qureshi clearly did not have a right conferred on him under the cover of the order passed on that application to refile a suit on the same cause of action that he had premised Suit No. 96 of 2007 on.

9. Having come to the conclusion that Muhammad Rafiq Qureshi did not have the right to refile a suit for the same cause of action, the only questions that remain to be adjudicated is as to whether or not the cause of action that comprises the basis for maintaining this suit existed at the time of the institution of Suit No. 96 of 2007 and as to whether the reliefs that could be claimed by Muhammad Rafiq Qureshi in this Suit could have been claimed by him at the time of the institution of Suit No. 96 of 2007 and he having not claimed such relief in that suit as to whether he had waived such claims. In this regard I am clear that the cause of action that was the basis of Suit No. 96 of 2007 and this suit are identical. Each of the Suits filed are in respect of the Said Property and in each suit Muhammad Rafiq Qureshi maintains his right to the portion of 21.80 Square yards on the basis that the portion of the Said Property had been relinquished in his favour after his fathers demise and on the basis of the two agreements dated 29 April 1980 and 7 August 1983. In addition, each of the reliefs sought in this Suit namely:

- (i) a declaration as to Muhammad Rafiq Qureshi ownership as to the portion of the Said Property that was claimed by him,
- (ii) a mandatory injunction to be handed over possession of a portion of the Said Property that was claimed by him;

- (iii) payment of Menes profits;
- (iv) an injunction restraining Muhammad Mubin Qureshi and his agents from construction on the Said Property;
- (v) directions to the KMC to execute a lease in favour Muhammad Rafiq Qureshi;
- (vi) damages as against Muhammad Mubin Qureshi;
- (vii) restraining the creation of third party interests in respect of the portion of the Said Property that was being claimed by Muhammad Rafiq Qureshi

could each have been claimed by the Muhammad Rafiq Qureshi in Suit No. 96 of 2007 and which having not been claimed by him in that suit must be deemed to have been waived by him. This Suit is as such clearly barred under the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908 and is liable to be rejected.

10. For the foregoing reasons this Suit clearly being barred under the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908, CMA No. 7519 of 2018 being an application under Order 7 Rule 11 of the Code of Civil Procedure, 1908 is granted and the Plaint is rejected with costs.

**J U D G E**

**Karachi dated 28 November 2023**

**ANNOUNCED ON 29 NOVEMBER 2023**

**BY**

**SANA AKRAM MINHAS, J.**