Judgment Sheet

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Rev. Application No.S-39 of 2018
Civil Rev. Application No.S-40 of 2018

Applicant in both Revision applications	:	Abdul Qadir Pathan, through Mr. Jam Muhammad Jamshed, Advocate
Respondent No.1	:	Nabi Bux Pathan through LRs through Mr. Mian Abdul Salam, Arain, Advocate
Date of hearing	:	27.11.2023 & 15.01.2024
Date of Decision :	:	12.02.2024

J U D G M E N T

ARBAB ALI HAKRO, J: Through above captioned Revision Applications under Section 115, the Civil Procedure Code 1908 (**"the Code"**), the applicant has called into question the Orders dated 11.12.2017, passed by the Court of Additional District Judge, Ubauro (**"the appellate Court"**) whereby, Civil Appeals No.06 of 2017 and 07 of 2017, preferred by the applicants were dismissed, consequently the Orders dated 04.11.2016, passed in F.C Suit No.99/2014 and F.C Suit No.05 of 2015 by Senior Civil Judge, Ubauro (" **the trial Court")** rejecting the plaint under Order VII Rule 11 of the Code was maintained.

2. The applicant, being the plaintiff in both of the above suits filed against the same defendant/respondent, is seeking the same relief in each. However, the only difference is the property involved. The questions of law and facts involved in both suits are the same. Therefore, it would be appropriate to decide on both of the Revision Applications together.

3. Facts, in brief, are that the applicant has filed F.C Suit No.99 of 2014 for Declaration, Possession, Mesne Profit and Permanent Injunction in respect of property bearing No.T.C 735 and 736 measuring 4000 sq. Feet situated at Common/Motti/Shahi Bazar

Town and Taluka Ubauro District Ghotki, owned by him through Sale Deed No.207 dated 04.5.1989. Similarly, F.C Suit No.05 of 2015, for Declaration, Possession, Mesne Profit and Permanent Injunction in respect of property bearing No.TC& D-697 measuring 543 Sq. Feet is owned by the applicants through registered Sale Deed No.862 dated 18.12.1977. In both the suits, it was pleaded that in the year 1991, the defendant/respondent, who is the brother of the applicant, requested the applicant to hand over the possession of the suit property (shop and house) to him with the promise that he would pay the rent to the applicant. Therefore, applicant handed over him the possession of suit properties. However, the defendant/respondent failed to pay the rent as promised by him; therefore, applicant had filed F.C SuitsNo.477 &478of 1995 against the respondent, but the same were dismissed vide Judgments and Decrees dated 24.12.2003, with the observation that applicant may avail the remedy under the Sindh Rented Premises Ordinance, 1979. The applicant had challenged the above Judgments and Decrees before the appellate forum. However, the same were also dismissed vide Judgments and Decrees dated 03.02.2005& 08.02.2005,and then the applicant challenged both above decisions of lower Courts before this Court by filing Revision Applications, which were disposed of vide Order dated 22.11.2010, with the direction to the applicant to approach the Rent Controller for redressal of his grievance. Afterwards, the applicant filed Rent Applications No.02& 03 of 2010 against the respondents, which were finally allowed vide Orders dated 19.01.2012. Then, the respondent challenged the same by filing first rent appeals, which were allowed vide Orders dated 27.6.2012, advising the applicant to file suit for Declaration and Possession if he desires. Therefore, the applicant filed the suit.

4. Upon receiving the summons, the respondent filed his written statement in both the suits so, also applications under Order VII Rule 11 of the Code, by contending therein that plaint does not disclose the cause of action, earlier suits finally decided between the same

parties and suits are barred under Order II Rule 2 of the Code, under Section 42 of the Specific Relief Act and under Section 3 of the Limitation Act. The respondent/plaintiff contested these applications by filing his Counter Affidavits. After hearing both the learned counsel for the parties, the trial Court rejected the plaints of both the suits vide an Order dated 04.11.2016. Aggrieved by these orders, the respondents/plaintiff appealed to the appellate Court, but the same were dismissed vide Orders dated 11.12.2017.

5. At the very outset, the learned counsel for the applicant contended that both the Courts below failed to consider the issue of ownership, which was not finally decided in previous suits, and the doctrine of Res Judicata is not applicable. He contends that the suit is not time-barred and the period confidently consumed in filling of the previous suit till filing of the present suit in terms of Section 14 of the Limitation Act, 1908. He next contended that title of the applicant was not denied in written statement filed by the respondent in earlier suits, and such denial in present suit is a malafide intention on the part of the respondent. He also contended that Order II Rule 2 is not applicable, and the appellate Court has misapplied the same. Lastly, he prayed that both the Orders of the Courts below may be set aside and Revision Applications may be allowed. In support of his contention, learned Counsel placed reliance upon the case law reported as 2020 SCMR 202, PLD 2004 SC 59 & 2007 CLC 680.

6. Conversely, learned counsel representing the respondent argued that suit is time-barred and hits the doctrine of constructive Res Judicata. The issue in the present suit has finally been decided in previous suits. He contends that the plaintiff has no cause of action to file the present suit on the issue, which has already been finalised. Lastly, he concluded that neither of the courts below had committed any illegality while passing the impugned orders. Therefore, Revision Applications may kindly be dismissed. In support of his contention, he placed reliance upon the case law reported as PLD 1993 Supreme

Court 147, PLD 2006 (Karachi) 621, PLD 2003 Supreme Court 484, 2012 SCMR 280, 2007 SCMR 1446, 2002 MLD 507, 1995 CLC 183, 2015 YLR 1569 and 2014 SCMR 513.

7. The contentions have been fastidiously scrutinised, and the accessible record has been carefully assessed.

8. To ascertain whether an adequate and comprehensive dispensation of justice was achieved, it is imperative to analyse the findings concurrently documented by the Courts below.

9. Upon examination of the case record, it is evident that the applicant previously filed F.C Suits Nos.477 of 1995 and 478 of 1995 for possession and mesne profit, with respect to the same property against the same defendant. Here, two main questions arise: whether, in the previous suit, the issue relating to the ownership of the applicant was tried and decided against the applicant, and whether, in case it was not finally decided against him, he was nevertheless precluded from taking this plea in the present litigation on account of the constructive res judicata. To initiate the discussion on the dispute, the doctrine of res judicata, explained under Section 11 of the Code, is significantly pertinent and is reiterated here for easy reference: -

> ***"11. Res judicata.---*** *No Court shall try 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 competenceof 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 1V.****----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 a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the person so litigating."*

10. The phrase "finally decided by such Court", in the context of the principle of res judicata used in above referred Section, is of significant importance. This principle prevents a Court from adjudicating a suit or an issue that has already been directly and substantially contested in a previous suit involving the same parties or their representatives litigating under the same title. The term "finally decided by such Court" implies that the matter in question has been conclusively resolved by a competent Court in the previous litigation. This final decision is binding and cannot be disputed in subsequent suits. Therefore, the principle of res judicata serves to prevent the re-litigation of the same issue, thereby ensuring judicial efficiency and consistency in legal decisions. It is a fundamental concept in the administration of justice, designed to prevent the endless continuation of legal disputes.

11. Upon a thorough examination of the judgments dated 24.12.2003, passed by the trial Court in the previous F.C Suit No.477 of 1995 and 478 of 1995, it is evident that the issue concerning the applicant's ownership was indeed framed as issue No.2 and tried.Hence, it would be beneficial to replicate the conclusions drawn by the trial Court on

issue No.2 as follows: -

> *"The plaintiffs are claiming their ownership over the suit property and have produced registered Sale deed at Ex.68 and its perusal would reveal that suit property was purchased by the father of plaintiffs namely Karim Bux in the names of plaintiffs while plaintiffs were minors. The defendant did not dispute such sale transaction but he has pleaded that suit property was purchased with join income of his father and himself and it was benami transaction. The defendant has also pleaded that in private settlement, suit property alongwith others situated in Obauro were given to him while properties situated at Daharki were given to the plaintiffs on this condition that the defendant would pay Rs.20000/- for each property to the plaintiff out of which Rs.50,000/- have already been paid to the plaintiffs. The defendant has also produced Iqrarnama at Ex.87 through which private settlement allegedly took place between the parties so also the defendant has produced acknowledgment receipt of Rs.50,000/- at Ex.88. Thus the defendant created dispute over the absolute ownership of the plaintiffs but even if that the plaintiffs did not seek further relief of declaration of their ownership particularly when registered sale deed was executed and sale consideration was paid by Karim Bux father of both parties while plaintiffs were minors and the plaintiff Abdul Qadir admitted in his evidence that the defendant and his father Karim Bux who is also father of the plaintiffs were running business jointly.* ***Since instant suit is only for possession and mesne profit as such it will not be appropriate to decide the sole ownership of plaintiffs or defendant.*** *This issue is answered accordingly."*
>
> *[Emphasis supplied]*

12. The above conclusion drawn by the trial Court makes it evident that the issue of ownership was not conclusively decided in the previous suits. As a result, the applicant's present suit, which seeks a declaration of his ownership, is not obstructed by the principle of res judicata. This principle, which prevents the re-litigation of issues that have been conclusively decided, does not apply in this case due to the lack of a final decision on the ownership issue in the previous suits. This could potentially open the door for the applicant to assert his claim of ownership in the present suit.

13. So far, the Order passed by the appellate Court, which further relies on Order II Rule 2 of the Code for rejecting the plaint, is concerned. It holds that the bar provided by Order II Rule 2 CPC will come into play as the applicant, despite the fact that the relief of

Declaration was available to him, did not seek the same in previous suits. The provisions contained in Order II Rule 2 of the Code, insofar as they are relevant, read as follows: -

> *"2. Suit to include the whole claim.-- (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) Relinquishment of part of claim. 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.*
> *(3) Omission to sue for one of several reliefs. A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."*

14. A quick examination of the above provision reveals three key elements:

> *a) Every suit should encompass the entirety of the claim that a plaintiff has the right to make concerning a cause of action. However, the plaintiff has the option to forgo any part of his claim.*
>
> *b) If a plaintiff neglects to sue or deliberately forgoes any part of the claim he has the right to make, he will not be allowed to sue for the part of the claim that has been overlooked or given up in the future.*
>
> *c) If a plaintiff has the right to more than one relief for a specific cause of action, he can sue for all or any of these reliefs. Failing to sue for all such reliefs, unless with the Court's permission, will prevent him from filing a subsequent suit to claim the relief that was omitted.*

15. The appellate Court has not considered the fact that the applicant had previously filed suits for Possession and Mesne profit, both of which were dismissed up to the High Court solely on jurisdictional grounds. The Court directed the applicant to seek possession of the suit properties under the Sindh Rented Premises Ordinance, 1979, rather than filing a civil suit. When the applicant adhered to this advice and filed a Rent Application under the Sindh Rented Premises Ordinance, 1979, the Court once again advised the applicant to file civil suits to seek a declaration of his title, partition, and separate possession of the suit properties. In this context, I am of

the opinion that the provisions of Order II Rule 2 of the Code, which generally prevent a plaintiff from suing for a portion of the claim that has been omitted or relinquished in previous suits, are not applicable in the present suits. This is because the applicant followed the specific advice/directions of the courts in each instance, and the nature of the claims in the previous and current suits are distinct. Therefore, the applicant's present suits are not barred under Order II Rule 2 of the Code.

16. The Appellate Court has also determined that the applicant's suits are barred under Section 3 of the Limitation Act, 1908, and made the following observation: -

> *"Suit also appears barred under section 3 of the Limitation Act for the reason that the title of the appellant was denied in the written statement filed in F.C Suit No.62/1990 and appellant could have sought declaration, within six years, but it has been done after about 24-years in the suit subject matter of instant appeal."*
>
> *[Emphasis supplied]*

17. As per the case records, it is evident that the applicant had previously filed suits against the defendant/respondent in 1995. Since then, the courts have treated his case like a rolling stone without considering its merits. A review of the orders passed in previous suits and rent applications by the trial court, appellate Court, this Court, the Rent Controller, and finally, the Rent Appellate Tribunal reveals that the applicant's claim has been consistently dismissed on jurisdictional grounds. Presently, the appellate Court overlooked the crucial fact that the applicant had acted in good faith by adhering to the Court's orders. Undoubtedly, the applicant could have appealed against the last orders dated 27.6.2012, passed in F.R.A No.01 of 2012 and 02 of 2012. However, he chose to follow the Court's directions instead of challenging the Order. The key issue that this Court needs to consider is whether the applicant, by initially filing his claim in the civil Court, then before the Rent Controller, and again in the civil Court, has not acted in good faith and with due diligence.

18. The perusal of the entire record would make it clear that the applicant, seeking his remedy, acted in good faith and pursued his case with due diligence. When this is the situation, the applicant cannot be refused the benefit of Section 14 of the Limitation Act, 1908. The object behind the provision of Section 14 ibid is to protect a litigant against the bar of limitation who is pursuing his case bona fide and in good faith but was unable to get his case decided on merits on account of defect in jurisdiction of the Court or any other cause of a similar nature. Reference in this regard could be made to the case of Mst. Anwar Bibi v. Abdul Hamid (2002 SCMR 144). To attract the provisions of Section 14 of the Limitation Act, following five conditions have to co-exist:-

(1) *Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;*

(2) *The prior proceeding had been prosecuted with due diligence and in good faith;*

(3) *The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;*

(4) *The earlier proceeding and the latter proceeding must relate to the same matter in issue and;*

(5) *Both the proceedings are in a court.*

19. There is no manner of doubt that the section deserves to be construed liberally. Due diligence and caution are essentially pre-requisites for attracting Section 14. Due diligence cannot be measured by any absolute standards. Due diligence is a measure of prudence or activity expected from and ordinarily exercised by a reasonable and prudent person under the particular circumstances. The time during which a Court holds up a case while it is discovering that it ought to have been presented in another court, must be excluded, as the delay of the court cannot affect the due diligence of the party. Section 14 requires that the prior proceeding should have been prosecuted in good faith and with due diligence. The definition of good faith as found in Section 2(7) of the Limitation Act, 1908 would indicate that

nothing shall be deemed to be in good faith which is not done with due care and attention. It is true that Section 14 will not help a party who is guilty of negligence, lapse or inaction. However, there can be no hard and fast rule as to what amounts to good faith. It is a matter to be decided on the facts of each case. It will, in almost every case be more or less a question of degree. The mere filing of an application/suit in wrong court would not prima facie show want of good faith. There must be no pretended mistake intentionally made with a view to delaying the proceedings or harassing the opposite party. In the light of these principles, the question will have to be considered whether the appellant had prosecuted the matter in other courts with due diligence and in good faith.

20. In Case of Kiramat Khan v. IG, Frontier Corps and others (2023 SCMR 866), it was held by the Apex Court that:

> *"In order to avail the benefit of section 14 of the Limitation Act, 1908 it is imperative that a litigant seeking benefit of the said provision must show that he was prosecuting his remedy with due diligence and in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it. The material words are, "due diligence and good faith" in prosecuting a remedy before a wrong forum. The term "due diligence" entails that a person takes such care as a reasonable person would take in deciding on a forum to approach".*

The applicant deserves the benefit of condonation of delay in the circumstances of the case, especially when the properly instituted suits of the applicants were kept pending before the civil Court and then the Rent Controller. Such a delay in no terms can be attributed to the applicant. He complied with the Court's orders. The findings of the appellate Court that the applicant filed the suit with delay would have no substance.

21. Notwithstanding the existing disagreements, the dispute between the parties cannot be settled without presenting evidence, as the issue at hand is a mixed question of law and fact. This necessitates that both parties be given the opportunity to present

evidence and establish whether the previous suits and rent applications were filed due to a bona fide mistake or as a result of the Court's direction or advice. It is crucial to determine whether these actions will not be considered a continuation of proceedings and whether the limitation for filing suits will be considered or treated from the date of the first previous suits. This controversy necessitates the presentation of evidence. To separate the truth from falsehood, it would be in the interest of justice for the Court to frame a specific issue that covers the current controversy. This approach ensures that all parties are given a fair chance to present their case, leading to a just and equitable resolution.

22. With the utmost respect, it is necessary to point out that the impugned orders passed by the Courts below, in this case, have demonstrated a level of perversity that necessitates intervention at this revisional jurisdiction. This is not a statement made lightly but rather one that is compelled by the severity of the situation. The concurrent findings against the applicant are not based on factual discrepancies but rather on legal interpretations. This distinction is crucial, as it underscores the fact that the issue at hand is not one of differing perspectives on the facts of the case but rather a fundamental disagreement on the application and interpretation of the law. This disagreement is not trivial; it is of such magnitude that it warrants the attention and intervention of the revisional jurisdiction. The applicant's rights and interests are at stake, and it is the duty of the revisional Court to ensure that justice is served, not just in letter but in spirit as well. Therefore, despite the concurrent findings against the applicant, it is imperative to intervene and rectify the situation, ensuring that the law is applied correctly and justice is duly served.

23. For the foregoing reasons, the instant Revision Applications are allowed, the impugned Orders of the Courts below are hereby set aside, and the case is remanded to the trial Court, with the direction that suits of the applicant/plaintiff be decided on merits in accordance

with law as early as possible, but not later than four months as the parties are in litigation since 1995. No orders as to costs.

J U D G E

Faisal Mumtaz/PS