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ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
Civil Revision Appln. No.S-24 of 2010

Applicants : Akbar Aziz and others, through Mr. Ghulam Dastagir A. Shahani, Advocate.

Respondent : Province of Sindh & others.
Mr. Ameer Ahmed Narejo, State Counsel.

Date of hearing : 11.11.2016.

Date of order : 11.11.2016.

ORDER

ZAFAR AHMED RAJPUT, J.- The applicants herein filed a Civil Suit bearing No.38/2009, seeking declaration, permanent injunction and making entries in record of rights in their favour in respect of shop bearing C.S. No.239/1, situated in Ward No.4, Jacobabad, the plaint whereof was rejected by the learned 1st Senior Civil Judge, Jacobabad under Order VII, Rule 11, CPC, on the motion of learned DDA, vide order dated 13.01.2010, which was assailed by the applicants in Civil Appeal No.02/2010 and the same was also dismissed by the learned District Judge, Jacobabad vide order dated 12.03.2010. It is against this order that the instant civil revision application under Section 115, CPC has been preferred by the applicants.

Mr. Ghulam Dastagir A. Shahani, learned Counsel for the applicants, submitted that the learned Courts below have erred both on law as well as on facts and decisions thereof are not in accordance with law as the same are result of misreading and non-reading of the memo of plaint. He has further contended that the learned Courts below only held that earlier suit bearing No.41/1987 was not between the same



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parties and for similar relief, hence the bar as contemplated under Section 11 of CPC is not applicable in this case.

On the other hand, Mr. Ameer Ahmed Narejo, learned State Counsel, conceding the arguments of learned Counsel for the applicants, has not supported the impugned orders passed by the learned Courts below.

I have heard the learned Counsel for the parties and perused the material available on record.

It appears that one Haji Abdul Sattar son of Ameer Ali was allegedly owner of two shops bearing C.S. No.239/4A and 239/4B, situated in Shahi Bazar, Jacobabad, out of which he allegedly gifted out shop No.239/4A vide Affidavit dated 23.5.1971 to his grandsons, namely, 1. Akbar Aziz, 2. Ghazanfar Aziz, 3. Muzaffar Aziz, and 4. Nasir Aziz, all sons of Abdul Aziz, and shop No.239/4B to his granddaughters, namely, 1. Tanveer Kousar, 2. Tasneem Kousar, 3. Shamim Kousar, and 4. Naseem Kousar, all daughters of Abdul Aziz. It further appears that thereafter Mst. Tanveer Kousar and others filed F.C. Suit No.41/1987 against M/s Murghazani and company, for declaration, mesne profits and possession, with the following prayers:

- 1) *That the Plaintiffs are exclusive & absolute owner of the shop bearing C.S. No.239/4B situated at Shahi Bazar Jacobabad by virtue of valid gift deed executed on 28.6.1971 in their favour by late Haji Abdul Sattar & further reaffirmed by his two notices dated 23.2.1980 & 27.1.1982 & written statement filed by Abdul Aziz in suit No.166/1980 collectively.*
- 2) *That the alleged sale deed subsequent to the entailment of gift is null & void ab initio inoperative & ineffective as against the right, title & interests of the Plaintiffs as repudiated by the Abdul Aziz himself.*
- 3) *To order the ejectment of the Defendant by causing the delivery of possession of the shop in question as consequential relief.*
- 4) *To award the mesne profit at the rate of 1000/- P.M. or as permissible at law.*

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The said suit of Mst. Tanveer Kousar and others was decreed in their favour vide judgment dated 11.12.1991 by the learned 1st Senior Civil Judge, Jacobabad and the same was allegedly maintained upto the stage of High Court of Sindh. Subsequently, the present civil suit was filed by Akbar Aziz and others with the following prayers:

- a) *This Honourable Court may be pleased to declare that the plaintiff are legal, lawful absolute owner of the property shop CS No.239/1, Ward No.4 on the basis of valid gift deed dated 23.6.1971 by their grandfather and on the decision of Honourable High Court Sukkur Bench and 1st Senior Civil Judge, Jacobabad and the plaintiffs are entitled to get mutation of the shop in question in their names in Record of Rights and defendants No.2 and 3 are bound to make entry in City survey Record in favour of plaintiffs regarding CS No.239/1, Ward No.4.*

As stated above, the learned trial Court rejected the plaint under Order VII, Rule 11, CPC by holding that Section 11 of CPC puts bar on a fresh suit which is already decided in Suit No.41/1987. It may be examined that earlier suit was filed by Mst. Tanveer Kousar and others in respect of shop bearing No.239/4B against their tenants M/s Murghazani & company, for declaration, mesne profits and possession, while the applicants have filed the suit bearing No.38/2009 in respect of Shop No.239/4A, for declaration, permanent injunction and mutation entry in the record of rights (perhaps the shop number has been mis-described by the applicants in memo of plaint, as C.S. No.293/1, which has been described in affidavit of gift as 239/4A).

Section 11 of the Code of Civil Procedure codifies insofar as suits are concerned, the doctrine of *res judicata*. Where there is a judgment inter-parties, it will prevent a fresh suit between them regarding the same matters. For the application of provisions of Section 11, CPC following five conditions must be fulfilled:

- (1) *The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually*




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(Explanation III), or constructively (Explanation IV), in the former suit.

- (2) The former suit must have been a suit between the same parties or between parties under whom they or any one of them claim. (Explanation IV).
- (3) The parties as afore-said must have litigated under the same title in the former suit.
- (4) 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 (Explanation II).
- (5) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit (Explanation V).

With reference to the present suit it may be observed that the matter in hand was neither directly nor substantially in issue in the earlier suit nor the present suit is between same parties, nor parties in the present suit have litigated under the same title in any former suit; hence under the circumstances where matter in issue is different, then the one in earlier suit so also the parties, the doctrine of *res judicata* has no application.

I am, therefore, of the view that the learned Courts below have acted in exercise of their jurisdiction illegally and with material irregularity. Hence, instant civil revision application is allowed, the impugned orders are set aside and the matter is remanded to the trial Court for it's adjudication in accordance with law.


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