

# IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 230 of 2019

[**Raees Didar Hussain Rind** *versus* **Mr. Hashmat Ali and others**]

Date of hearing : 11.10.2024.

Date of decision : 31.01.2025.

Plaintiff : Raees Didar Hussain Rind, through Mr. S. Hassan Ali, Advocate.

Defendant No.1 : Hashmat Ali [through Legal Heir], through Mr. Tassawur Ali Hashmi, Advocate.

Defendant Nos.2-6 : *Nemo.*

Defendant No.7 : Saleem Patel, through Mr. S. Asam ul Haq, Advocate.

## **ORDER**

**Muhammad Faisal Kamal Alam, J:** Through this Order, an Application [C.M.A. No.19598 of 2023], filed under Order VII, Rule 11 of Civil Procedure Code, 1908 [“CPC”], is decided.

2. It is a post remand re-hearing.
3. Learned Counsel for Defendant has filed this Application under Order VII Rule 11 CPC, that plaint should be rejected as all the Issues involved in the Suit are directly and substantially decided in the earlier proceedings up to the Hon’ble Supreme Court. He has referred to the Order dated 14.04.2016 passed in Revision Application No.225 of 1990 by this Court (Page 15 of the Application), whereby Revision preferred by Raza Hussain through his legal heirs, was dismissed and upheld by the Hon’ble Supreme Court in C.P No.682-K of 2016 (Order is at page 27 of the Application).

4. Counsel in support of his above Application, has stated that Private Defendant has purchased the suit property being Agricultural Land admeasuring 69 Acres and 25 Ghuntas bearing Survey No.37(22-09), 38(23-01) and 44(24-15), situated in Deh Hub, Tappo Manghopir, Gadap Town, Karachi through registered Sale Deed entered into between Defendant No.1, 5, 6 and Danish Ahmed S/o Chaudhry Gulzar, Danish Ahmed S/o Muhammad Saleem Patel-Defendant No.7, Noman Ahmed S/o Muhammad Farooq, Muhammad Farooq S/o Ahmed Haji Wali Muhammad and Mrs. Tasneem W/o Hanif Haroon. Copies of the Sale Deed, so also earlier Sale Deed, are filed under the Statement dated 10.08.2024, [by the Advocate].

5. The above argument is supported by the Counsel for Defendant No.1, who has placed reliance on the following judgments:-

- (1) 1991 CLC 1313 (Lahore)  
*(Muhammad Ali v. Rehmat Ali); and*
- (2) 2008 CLC 809 (Karachi)  
*(Mehmooda Begum and others v. Pakistan Defence Officers' Cooperative Housing Society Ltd. and another).*

6. This Application is vehemently opposed by the Plaintiff through Counter Affidavit and his Counsel has argued that, the cause of action of the present *Lis* is different from the earlier Suit No.352 of 1986, hence, the earlier Decisions are not applicable, thus, rule of *Res judicata* as envisaged in Section 11 of CPC does not apply; since no Rejoinder is filed against the Counter Affidavit, hence, contents whereof are deemed to be admitted; contended that the above Revision is an outcome of Civil Appeal No.97 of 1987, in which no finding was given against Hashmat Ali, the predecessor-in-interest of present Defendant No.1, therefore, the present *Lis* is neither hit by Section 11 nor Order II Rule 2 of CPC; stated that physical possession of the suit property is still with the Plaintiff, which shows his

*bona fide* claim. He has cited the following case laws in support of his arguments:-

- (1) 2007 SCMR 729  
(*Rehmatullah and others. V. Saleh Khan and others*);
- (2) PLD 2005 SC 511  
(*Muhammad Saleemullah and others v. Additional District Judge, Gujranwala and others*) – *Saleemullah Case*; and
- (3) 2022 SCMR 1598  
(*President, Zarai Taraqiati Bank Limited, Head Office, Islamabad v. Kishwar Khan and others*) – *ZTBL Case*.

7. Arguments heard. Record perused.

8. For deciding an Application under Order VII Rule 11 of CPC, it is not necessary that Counter Affidavit and Rejoinder are filed, because the controversy is to be decided on legal Issue. However, perusal of the record shows that Rejoinder has been filed on behalf of one, Muhammad Ali, the Attorney of Defendant No.7.

9. Earlier Decisions of the Courts are considered. Same Suit property was subject matter of the earlier dispute. In Paragraph-8, this Court while deciding the above Revision Application No.225 of 1990, has observed, that Didar Hussain Rind (present Plaintiff) has admitted in his cross-examination that he entered into the agreement of sale with Defendant No.1 [Hashmat Ali, since Deceased, is now represented by his son Muhammad Hafeez]. It is further held that *bona fide* sale of suit property in favour of Respondent Nos.1 to 6 of the above Revision, namely, (i) Hafeez S/o Ch. Hashmat Ali [**present Defendant No.1**], (ii) Muhammad Jameel S/o Hashmat Ali, (iii) Latif S/o Hashmat Ali, (iv) Muhammad Rafiq S/o Hashmat Ali, (v) Muhammad Saleem S/o Hashmat Ali and Mst. Bushra Begum W/o Nazeer Muhammad, [the Legal Heirs of Defendant No.1 of this Suit], was **established**. Similarly, the Hon'ble Supreme Court while

maintaining the Decision of this Court has again referred to the testimony of present Plaintiff and his admission in cross-examination.

10. Judgment [dated 14.07.1990] of Civil Appeal No.97 of 1987, is also taken into account to appreciate the arguments of Plaintiff's Counsel. The above Appeal was filed by the present Defendant No.1 and his siblings, being Legal Heirs of Chaudhry Hashmat Ali, to challenge the Judgment and Decree dated 30.07.1987, passed in Suit No.382 of 1986 filed by one Raza Hussain, seeking Specific Performance of the Contract in respect of the suit land against present Plaintiff [Deedar Hussain]. Above named Chaudhry Hashmat Ali [Late] was impleaded as Defendant No.2, in the said Suit, vide Order dated 20.07.1970. The Appellate Court after hearing the Parties and appraisal of the evidence, has Ruled in favour of present Defendant No.1 by setting aside the Judgment and Decree in favour of deceased Raza Hussain [through his Legal Heirs], who then preferred Civil Revision No.225 of 1990, but unsuccessfully till the Honourable Supreme Court [*as already discussed in the preceding paragraphs*]. The Appellate Court, *inter alia*, held, that since [Late] Raza Hussain did not seek cancellation of sale transaction between the present Plaintiff and Defendant No.1, as such entries, in the name of Chaudhry Hashmat Ali in the properties Register, were not challenged, while observing that the Specific Performance relief cannot be granted to one who has not come to the Court with clean hands. Thus, the argument of Plaintiff's Counsel is contrary to record, because, the Appellate Court has given the Decision in favour of the predecessor-in-interest of present Defendant No.1 [Chaudhry Hashmat Ali], as the Appeal itself was filed by present Defendant No.1 and his other siblings.

11. Summary of the Case Law cited on behalf of the Defendants is, that decision of a *lis* by the Supreme Court in any kind of proceeding would operate as *res judicata*; similar subject matter decided up to the Supreme Court in an earlier round of litigation, the principle of *res judicata* under Section 11 of CPC would be applicable to subsequent proceeding.

12. Précis of the Case Law cited by the Plaintiff's Counsel is, that entry in the mutation register itself is not a conclusive evidence of the fact which it purports to record, because it is settled law that any person, who is acquiring title through mutation, the burden of proof for proving transaction is upon him; mutation entry does not create title [this Judgment in Rehmatullah Case (*supra*) is cited by the Plaintiff's Counsel to support his argument that mutation entry in favour of private Defendants shall not preclude Plaintiff from filing the present *Lis*]. Section 11 CPC is to be strictly construed, but, the same cause should not be re-tried; a Decision on a disputed question of facts passed on no evidence, would not debar the judicial determination of such question in subsequent litigation. The Plaintiff cannot be rejected in piecemeal. Honourable Supreme Court in ZTBL Case [*ibid*] has maintained the judgments of the Courts below, for dismissal of application filed by ZTBL, for return and rejection of plaint, on the ground that the dismissal of respondents [of the reported case] from the employment, can be challenged through civil suits.

13. The above cited Decisions of Plaintiff's Counsel are distinguishable, because in the present case, the entire controversy about the sale transaction of the Subject Land, in favour of Defendant No.1 and their predecessor-in-interest was proven and decided up to the Hon'ble Supreme Court on the basis of evaluation of the evidence. Conversely, the Judgment of Saleemullah Case [*supra*] relied upon by the Plaintiff's Counsel, ruling that a decision on the question of fact on the basis of proved facts and evidence,

would be *res judicata* and parties would not be permitted to reopen the settled Issues, in fact goes against the claim of present Plaintiff.

**14.** Purpose of the present *Lis* is to reopen the decided issues, which is not permissible and thus Section 11 CPC fully applies.

**15.** Upshot of the above discussion is that the Application [C.M.A. No.19598 of 2023] is allowed and the Plaint of Suit No.230 of 2019 is rejected. Office to draw up the decree as per Rules.

**JUDGE**

Karachi.

Dated: 31.01.2025

B-K Soomro