IN THE HIGH COURT OF SINDH AT KARACHI

H.C.A. No. 117 of 2020

[Muhammad Ayaz & another V. Rasheedan Bibi & others]

H.C.A. No. 118 of 2020

[Muhammad Ayaz V. Military Estate Office & others]

H.C.A. No. 236 of 2020

[Muhammad Ayaz & another V. Rasheedan Bibi & others]

Present:
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Muhammad Osman Ali Hadi

Date of hearing	:	12.03.2025
Date of decision	:	08.04.2025
Appellants	:	Through Mr. Ayan Mustafa Memon, Advocate.
Respondent No.1	:	Mr. Shahenshah Hussain, Advocate.
Respondent - CMB	:	Through Mr. Zulfiqar Arain, Advocate.
Respondent (Official)	:	Mr. Muhammad Qasim Khan, D.A.G along with Mr. Fida Rehman, Dy. M.E.O. and Hassan Bin Atique, UDC, M.E.O.

JUDGMENT

Muhammad Osman Ali Hadi, J: These instant Appeals have been filed against Judgment dated 20.03.2020 and Decree dated 02.04.2020 passed by the learned Single Judge in Suit No.603/2005 (collectively referred to as **"the Impugned Judgment"**). In effect, the Impugned Judgement cancelled the Appellants' existing ownership / title documents of the Suit Property, and granted declaration and possession of the Suit Property in favour of Respondent No.1, against which the Appellants have approached this Forum. The prelude to the matter is as below:

2. The Appellants claim to be owners and in physical possession of immoveable property being Plot No.795/M-I, measuring approx. 550 sq. yards along with the construction, situated at Defence Officers Housing Society Phase-I, Malir Cantt, Karachi (**"the Property"**). The Appellants have claimed title of the Property from Respondent No. 2, who was allotted the Property in the year 1987.

Vide agreement of sale dated 10.11.1999, the Appellant No. 1 purchased the Property from Respondent No. 2, through Respondent No. 4 who was the authorized attorney of Respondent No. 2. The Appellants state that full sale consideration of Rs.1,550,000 (Pak Rupees One Million and Five Hundred and Fifty Thousand only) was paid by Appellant No.1 through various cheques and pay orders, after which Respondent No. 4 handed them possession of the said Property. The Appellants further submit that Respondent No.4 executed a Sub-Power of Attorney in favour of the Appellants, registered by the Sub-Registrar T Division III A Karachi vide registration No.834 dated 10.11.1999. The Appellants contend that Respondent No. 5 had also acknowledged the Property transaction, vide their letter dated 14.06.2002.

3. The Appellants state the Property was originally allotted by Respondent No.5 to Respondent No.2 in the year 1987, vide a Letter No.118/TP/MJ/LC/87/795/MI dated 28.12.1987. Respondent No.2 thereafter authorized Respondent No.4 as his special attorney, to execute the necessary lease deed, subsequent to which lease deed bearing registration No.544 Book-I Addl. and dated 27.02.1999 in Schedule IX-A of the Cantonment, was executed in favour of Respondent No.2, showing Respondent No.3 as attorney.

4. Then on 28.10.1999 Respondent No. 2 executed an Irrevocable General Power of Attorney in favour of Respondent No.4, vide Registration No.814 dated 28.10.1999. It was further contended that the said Irrevocable Power of Attorney authorized Respondent No.4 to act on behalf of Respondent No.2 in all aspects of the Property, including selling the Property.

5. The Appellant No.1 states that after purchasing the Property in 1999, they obtained an N.O.C. from Respondent No.5 dated 20.02.2002, subsequent to which a demarcation was carried out on the Property, in favour of Appellant No.1. The Appellants contend they submitted a building plan for a house to be constructed on the Property, which was approved by Respondent No.5 through Letter dated 09.05.2002. Pursuant to such approval, the Appellants constructed a house on the Property. The Appellants have remained in possession of the Property since purchasing the same in the year 1999.

6. It appears at this stage, in or around the year 2002, Respondent No.1 came forward with a claim towards ownership of the Property. Respondent No.1 has claimed her ownership through Mr. Muhammad Aslam Gondal, whom she states is also Respondent No. 2 in the instant Appeal.

7. Respondent No.1 states that Muhammad Aslam Gondal / Respondent No. 2, was allotted the Property, after which he entered into a sale agreement and issued a registered a general power of attorney in favour of Respondent No.3, namely Haji Noor Muhammad, dated 17.09.1990, at Islamabad. Against the same, (as per Respondent No.1) Respondent No.3 paid Mr. Gondal Rs.100,000/-, after which, original documents were handed over by Mr. Gondal to Respondent No. 3.

8. Respondent No.1 then alleges that Haji Noor Muhammad (Respondent No.3) executed a sub-power of attorney, construction agreement and a sale agreement in favour of Respondent No.1 on 12.11.1992, and handed over all original Property documents to Respondent No.1, for which he received payment of Rs.1,80,000/- against the same.

9. Respondent No. 1 then (belatedly) found out the Property had construction on it, and was occupied by the Appellants. She filed a Civil Suit No. 49 of 2002 (**"1st Initial Suit"**) before Senior Civil Judge, Malir at Karachi (at page 251 of the File), in which she prayed for declaration, possession, cancellation of documents and permanent injunction of the Property. The current Appellant No. 2 as well as Respondents No. 5 & 3 were also arrayed as Defendants in the said 1st Initial Suit.

10. The various Defendants in the 1st Initial Suit filed their replies / written-statement. The Plaintiff in the 1st Initial Suit (i.e. current Respondent No.1 in the instant Appeal) had also filed her affidavit-in-evidence, along with various documents.

11. However, the Defendants in the Suit also filed an application under Order VII Rule 11, Code of the Civil Procedure 1908 (**"CPC"**), vide which the learned Trial Judge through a speaking order dated 07.03.2005 (at page 287 of the File) rejected the plaint, on the basis that the Plaintiff (i.e. current Respondent No.1) based her claim on an unregistered sale agreement, under which declaration / injunction of the Property could not be granted (as a sale agreement in itself does not provide title to immoveable property). As such the Plaint was rejected for not having a cause of action. An observation was made by the learned Trial Judge that the Plaintiff / Respondent No. 1 could only file a claim for specific performance (against Respondents No. 2 & 3), as just a sale agreement would not give them any entitlement to the Property itself.

12. Subsequently, Respondent No.1 then filed Suit No. 603 of 2005 in the Original Jurisdiction of the High Court at Karachi (**"2nd Suit"**) seeking a

declaration, possession, cancellation of documents, damages and permanent injunction (at page 299 of the File). A prayer (at page 317) with a direction for specific performance against the legal heirs of Muhammad Aslam (i.e. Respondent No.2) and Respondent No. 3 was also included. The 2nd Suit further sought a declaration to void the power of attorney issued in favour of Respondent No.4 (i.e. Mr. Muhammad Akhtar Abid) executed by Respondent No.2 (i.e. Muhammad Aslam). Respondent No.1 also prayed that Respondent No. 6 demolish the construction raised on the Property by the Appellants.

13. The Appellants filed counter suit no.1713/2008 which was taken up and heard alongside Suit No.603/2005. The Impugned Judgement is consolidated for both suits, and hence this judgement in appeal shall prevail over both the mentioned suits.

14. Learned Counsel for the Appellants asserted that the Property which was being claimed by Respondent No.1 belongs to the Appellants, and that Respondent No.1 has provided false information and documents. He further averred that even the name of Respondent No.2, i.e. Muhammad Aslam, is different from the person under whom Respondent No. 1 is allegedly claiming her right. He contended Respondent No.1 is claiming the documents, i.e. the alleged sale agreement and power of attorney, are issued by a person named Muhammad Aslam Gondal, which as per learned Counsel for the Appellants, is a different person altogether. Learned Counsel for the Appellants emphasized this point of Muhammad Aslam Gondal not being the same person as Muhammad Aslam, who was the original allottee of the Property. Learned Counsel for the Respondent No.1 has expostulated this view by stating that Muhammad Aslam was the same person, as his complete name was Muhammad Aslam Gondal.

15. Counsel for the Appellants then referred to several documents, through which he stated that Respondent No.1 was never the owner or otherwise entitled to the Suit Property. He submitted that Respondent No. 1 only appeared and filed cases at a very belated stage, in order to try usurp the Property, which as per learned Counsel, belongs to the Appellants, who have been enjoying possession of the same.

16. Counsel next urged that the *mala fide* of Respondent No.1 was apparent, and can be observed by the fact she appeared and approached the official Respondents belatedly in the year 2002, more than 10 years after she claimed to have purchased the Property. Counsel submits the Appellants had purchased the Property and even completed their construction by this point in time. Counsel for

the Appellants stated the Property had been demarcated and constructed in accordance with law, and now Respondent No.1 was attempting to landgrab the same.

17. Learned Counsel then submitted that the Impugned Judgment is erroneous in nature, as the principles of *res judicata* were not properly considered by the learned Trial Court in the 2nd Suit. He submits the matter pertaining to the Property was previously filed by Respondent No. 1 in the 1st Initial Suit, and their plaint was rejected, and as such they could not be allowed to re-contend the same. As per learned Counsel for the Appellants, Respondent No.1 has simply added an additional prayer clause to their previous Suit which (as per Counsel) could not constitute a ground to file a new suit. Counsel has referred to the principle of constructive res-judicata, which he says clearly hit the instant matter. He has relied on case law in support of his contentions[1].

18. Learned Counsel for the Appellants next contended that Suit No.603/2005 would also be hit by the trappings of Order II Rule 2, Code of the Civil Procedure 1908 (CPC). He stated that under Order II Rule 2 CPC it was incumbent upon Respondent No.1 to have filed his complete claim in the 1st Initial Suit (i.e. No.49 of 2002), which she failed to do, and as such would be barred from filing any subsequent suit with regard to the same claim.

19. Counsel asserted that even otherwise, the said sale agreement vide which Respondent No.1 now seeks specific performance, was executed in November, 1992, over 10 years before they approached the Court, and as such the said 2nd Suit was hopelessly time barred. Counsel stated that no justification for condonation of delay was filed, and on this ground alone the 2nd Suit (i.e. No.603/2005) ought to have been dismissed.

20. Learned Counsel submitted that the Impugned Judgment was heavily reliant on evidence which was both inadmissible and unreliable. He made reference to an alleged Fact-Finding Report (at page 849); an Inquiry Report submitted by a Cantonment Executive Officer, Hyderabad Cantonment (available at Page 591 of the File) in which learned Counsel claims he was declined the right to cross-examine the author of the alleged Report. He further referred to his deposition (at Page 905 of the File) whereby the transcript shows that the Appellants' Counsel was indeed stopped from examining the said author of the

[1] 2009 SCMR 1079 + 2017 YLR 222 + 1991 SCMR 398 + 1997 SCMR 1976 + 2021 CLC 2031 + 2019 CLC 1623 + PLD 1972 SC 25 + PLD 2003 SC 494 + 2021 SCMR 686 + 2023 CLC 912 Lahore + PLD 2006 Karachi 511 + PLD 2004 SC 489 + PLD 2006 SC 457 & 1991 SCMR 2407.

Inquiry Report. He then referred to an affidavit filed by the alleged widow of Respondent No. 2 taken on record (available at page 893 of the File), though she was neither put in examination nor was Counsel for the Appellant allowed to cross-examine her. He states all these factors, despite being contrary to law, formed a major part of the basis for the Impugned Judgement.

21. The learned Counsel for the Appellants lastly contended that no specific performance was available to Respondent No.1, and has further referred to the provisions contained in section 27 (B) of the Specific Relief Act, 1877, in his defense.

22. The above are the primary arguments furnished by the Appellants, which are relevant for the instant purposes. Learned Counsel for Respondent No.1 remonstrated the submissions made by the Appellants, with the following contentions:

23. He firstly averred that Muhammad Aslam Gondal was the same Respondent No.2 (Muhammad Aslam), and that 'Gondal' was part of his complete legal name.

24. Learned Counsel for Respondent No.1 contended that the principles of *res judicata* would not be applicable to the matter-at-hand, as he stated that *res judicata* would only apply to matters where a suit is firstly accepted. As per learned Counsel for Respondent No.1, the 1st Initial Suit was void ab-initio and was never accepted, and therefore principles of *res judicata* would not be applicable. He conceded that as the 1st Initial Suit was based on an unregistered sale agreement, it was not maintainable. As such, learned Counsel for Respondent No.1 submitted that since the Suit itself never existed, and hence the issue of *res judicata* cannot apply. Learned Counsel for Respondent No.1 further stated, even otherwise the matter was not decided on merits at the initial stage, and therefore such bar of *res judicata* even in this regard would not apply.

25. Learned Counsel for Respondent No.1 next submitted, while expanding his arguments on the principles of *res judicata* (*ibid.*), that since the initial Suit never existed, Order II Rule 2 CPC would also not be applicable in this regard. He read Section 54 of the Transfer of the Property Act, 1882, as well as Order VII Rule 13 CPC, and stated that there is no bar on Respondent No.1 to having filed the 2nd Suit (i.e. 603/2005).

26. The final point controverted by the learned Counsel for Respondent No.1 was the issue of limitation raised by the Appellants. Learned Counsel for Respondent No.1 stated that there are two main grounds vide which limitation for seeking specific performance is initiated. He stated the first ground is when a date for performance is specified in the agreement itself, then from that point the law of limitation will become applicable. He submitted the second ground for the law of limitation would be when performance has been refused. Learned Counsel provided case law in support of his contentions.[2]

27. Learned D.A.G. appearing on behalf of Respondent No.5 has relied upon his Written Statement (filed in 2nd Suit No.603/2005 available at Page 345 of the File) in which he has taken us through the contents. Learned D.A.G. stated that Respondent No.1 did not have any *locus standi* to file the 2nd Suit, and Respondent No.1 could not have purchased the said Property without prior approval from the Federal Government (as it was government allotted land), which was not obtained by Respondent No.1. Learned D.A.G. also contended that the 2nd Suit was barred under law of limitation, and even on this ground the 2nd Suit ought to be have been dismissed. He lastly contended that Respondent No.1 has not shown any valid legal document in support of their claim, and in this regard the Impugned Judgment has erred.

28. We have heard all the learned Counsels and their exhaustive arguments, on which our opinion follows beneath.

29. After hearing the learned Counsels, we have limited our deep considerations in these Appeals to the following points:

i. Whether the principles of *res judicata* (and the effect of Order II Rule 2 CPC) were correctly applied in the Impugned Judgment?
ii. Whether the 2nd Suit was barred under the law of limitation?
iii. Whether there has been any misreading / misapplication of evidence relied upon in the Impugned Judgement?

30. The 1st Initial Suit was filed by Respondent No.1 on 10.06.2002 before the Court of Senior Civil Judge, Malir at Karachi (at Page 251 of the File). In the 1st Initial Suit, the Respondent No.1, *inter alia*, sought a declaration and cancellation of the Property, against the Appellants (and some current Respondents). Respondent No. 1 based her claim on an unregistered sale agreement and further sought

[2] PLD 1984 SC 4247 + 2000 SCMR 204 + PLD 1992 SC 256 + 1989 SCMR 58 + PLD 1995 SC 314 + 2007 SCMR 1792 + 2012 SCMR 84 + 1992 SCMR 618 + PLD 2017 SC 1 + 2012 SCMR 84 + 1989 CLC 2066 + 2017 CLC 800 + 2010 SCMR 1097 & PLD 2020 SC 338.

possession of said Property, as well as an injunction against the Appellants from interfering with the Property.

31. The Appellants filed their written statement, along with an application under Order VII Rule 11 CPC.

32. That vide Order dated 07.03.2005 (at Page 287 of the File) the learned Senior Civil Judge heard the application under Order VII Rule 11 CPC and rejected the plaint, in light of the fact that no cause of action had accrued to Respondent No. 1. The Order further held that reliefs of declaration and/or possession were also not available to Respondent No. 1, as the same could not be granted on the basis of an unregistered agreement to sell. The operative part of the Order (at Page 291 of the File) is reproduced hereunder:

> *"… I relied upon PLD 1997 Page 292 in which it was held that;*
> *"Transfer of property – Mere agreement to sell would not confer any right title or ownership in as much any transaction of sale in respect of immovable property worth Rs.100/0 or upward was required to be compulsory registered."*
> *Furthermore, it is settled law that agreement to sell does not create any right or title, interest in the purchaser, it only extends a right to the parties to maintain a suit for Specific Performance of the said contract. I relied upon 1989 SCMR Page 9490. I also relied upon PLD 1997 Karachi Page 202 in which the Honourable Justice Mr. Rana Bhagwan Das held as under:*
> *"S.42 – Civil Procedure Code (V of 1908), O. VII, Rul11 – Limitation Act (IX of 1908), Art. 142 – Suit for declaration on basis of agreement to sell – Prayer for mesne profits against defendants who were owners on basis of registered deed of sale – Such relief was misconceived and not warranted --- In absence of my right or title to property, plaintiff had no cause of action for relief of possession and on that score plaint was liable to be rejected --- Plaint being hit by provision of O. VII, R.11 CPC was rejected in circumstances."*
> *In view of above I am of opinion that since the plaintiff has no right or title to property plaintiff had no cause of action for relief of declaration and possession. I therefore reject the plaint under Order 7 Rule 11 C.P.C., with order as to costs." (emphasis supplied).*

33. A bare perusal of the said Order shows the learned Civil Judge clearly decided that no right or cause of action with regards to declaration or possession, was available to Respondent No.1, as her alleged claim premised entirely upon an unregistered sale agreement. The learned Civil Judge referred to precedents, as well as provisions of the Specific Relief Act, 1877, in support of the Order.

34. It is an accepted position by all parties, including Respondent No.1, that the said Order was never appealed, and therefore attained finality. It was also

observed in the Order, that the only right (if any) available to Respondent No.1, was to file a suit for specific performance.

35. Subsequently Respondent No.1 filed Civil Suit No.603/2005 (**"2nd Suit"**) (at Page 303 of the File) against the Appellants and other Respondents, in which she sought, *inter alia*, specific performance of an unregistered sale agreement dated 10.11.1992 (at Page 829 of the File) between Respondent No.1 and (Respondent No.2). A perusal of the remainder prayer clauses in the 2nd Suit (at Pages 149-153) would show that Respondent No.1 also sought declaration, cancellation and injunction against the Appellants regarding the Property.

36. The learned Counsel for the Appellants had vehemently contended the principles of *res judicata* would apply, which was strongly contested by the learned Counsel for Respondent No.1, as already discussed (*ibid*).

37. In the initial Order dated 07.03.2005 passed in the 1st Initial Suit, of which the operative portion was reproduced (*ibid*), it was clearly held that no suit for declaration, possession or injunction was available to Respondent No.1. The only option they would have, would be to first file a suit for specific performance, after which (and obviously subject to being successful) they may have a cause of action for declaration and possession.

38. While it is settled law that an application for rejection of plaint does not in all instances preclude a party from filing a new suit on the same cause of action (unless the subsequent suit still remained barred under law), evolving jurisprudence has also clarified that if a plaint is rejected for not having a cause of action, only *after* such defect is remedied, the party concerned would be allowed to file a new suit on the same cause. In *Muhd. Anwar v Essa*[3] the August Supreme Court held:

> "7. *"A perusal of rule 11 reveals that it envisages and records 4 categories where the Court could reject a plaint and the first 3 are where the deficiencies in the plaint could be redressed. For instance, under clause (a) where the plaint is rejected on the ground it does not disclose a cause of action, subject to the law of limitation, a fresh plaint could be presented by overcoming the defect and disclosing the cause of action" (emphasis supplied)."*

39. In the matter at hand, we have found the basic defect in the 1st Initial Suit filed by Respondent No.1, was still present at the time they filed the 2nd Suit. Furthermore, the intent of seeking a declaration and possession was present in the 2nd Suit, despite the initial Order expressly prohibiting the same. What cannot be

[3] PLD 2022 SC 716

done directly, cannot be done indirectly, and we find on this front Respondent No. 1 sought to seek the same reliefs vide the 2nd Suit, which would be legally impermissible.

40. The Respondent No.1 in essence had filed the same suit, and had simply inserted a new prayer clause seeking specific performance of the sale agreement. The spirit of the 2nd Suit otherwise remained unchanged from the 1st Initial Suit.

41. Respondent No.1 had neither cured the defect highlighted in the initial Order, nor had they appealed against the said initial Order. This clearly shows Respondent No.1's acceptance of the initial Order, which even the learned Counsel for Respondent No.1 fairly conceded to at the time of arguments.

42. Section 11 CPC, the definition of *Res Judicata* reads:

> "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." *(emphasis supplied).*

43. A perusal of the above, highlights that not just any suit, but any *'issue'* which has been decided also cannot be re-tried.

44. It is our opinion the *'issue'* of Respondent No.1's competence to institute legal proceedings for 'declaration' and/or 'possession' regarding the Property was deliberated and decided in the initial Order. The same reliefs of declaration, possession / injunction were already rejected in the 1st Initial Suit. Without Respondent No.1 making necessary remedies to change circumstances which highlighted serious defects in their 1st Initial Suit, they could not have validly filed the 2nd Suit. In *Thoday v Thoday*[4], Lord Diplock enlightened the doctrine of *'cause of action estoppel'*. 'Cause of action estoppel' applies to prevent a party from re-litigating the existence of a particular cause of action which has already been decided by a court.[5] The relevant excerpt reads:

> *" 'Cause of action estoppel' is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has*

[4] (1964) 1 All ER 341
[5] This dicta was further followed / explained in *Barber v Staffordshire County Council* (1996) 2 All ER 748

> *been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, that is, judgment was given on it, it is said to be merged in the judgment…If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam."*

45. The House of Lords further elaborated this principle by explaining (and distinguishing) between *'cause of action estoppel'* and *'issue estoppel'* in the case of *Arnold v National Westminster Bank Plc*[6], whereby in the former there is an absolute bar on all points already decided in a previous matter between the parties based on the same cause action; whereas in the latter parties are prevented from reagitating any *issue* between them which has been decided (regardless of whether stemming from the same cause of action or not).[7]

46. The Indian Supreme Court endorsed this concept, and in the case of *Hope Plantations Ltd. v Taluk Land Board*[8] opined:

> *"**17.** ... One important consideration of public policy is that the, decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities; and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fair play and justice."*
>
> *"**26.** It is settled law that principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstrated wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it.*
>
> *They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are 'cause of action estoppel' and 'issue estoppel'. These two terms are of common law origin. Again once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that issue was wrongly determined. Their only remedy is to approach the higher forum if available. The determination of the issue between the parties gives rise to, as noted above, an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operates in subsequent suits between the same parties in which the same issue arises. Section 11 of the CPC contains provisions of res judicata but these are not exhaustive of the general doctrine of res judicata. Legal principles of estoppel and res judicata are equally*

---

[6] (1991) 3 All ER 41

[7] 'issue estoppel' was also discussed by the Indian Supreme Court in AIR 2005 SC 626 *Bhanu Kumar Jain v Archana Kumar*

[8] (1999) 5 SCC 590

> *applicable in proceedings before administrative authorities as they are based on public policy and justice."*
>
> *"**31**. Law on res judicata and estoppel is well understood in India and there are ample authoritative pronouncements by various courts on these subjects. As noted above the plea of res judicata, though technical, is based on public policy in order to put an end to litigation."*

47. Even in our own jurisprudence it is clear that when an issue has been tried, and a plaint has been rejected, matters falling within clauses 'a, b or c' of Order VII Rule 11 CPC (*ibid.*) are remediable, but under certain circumstances[9]. Respondent No. 1 failed to make any amendment / correction regarding their lack of cause of action as was held in the 1st initial Order, and as such would be estopped from bringing the 2nd Suit against the Appellants. The claims made by Respondent No. 1 in the 2nd Suit would be hit by the principles of estoppel (both cause-of-action & issue) as enunciated above, as those *issues* (of declaration and possession of the Property) were already decided, and therefore a clear bar existed in re-raising those issues in the 2nd Suit.

48. In **2009 SCMR 1079**[10] our own Apex Court held:

> ***7.*** *No doubt Order VII, rule 13 does contemplate that rejection of a plaint shall not of its own force preclude the plaintiff from presenting a fresh plaint. Nevertheless, the underlined words are important and clearly indicate that other provisions relating to avoiding multiplicity of litigation and attributing finality to adjudications could not be ignored. For instance, if a plaint under Order VII, Rule 11 is rejected on the ground of the relief being undervalued or failure to affix proper court-fee stamps, a fresh plaint could always be presented upon rectifying the defects within the prescribed period of limitation. Nevertheless, if the plaint is rejected after proper adjudication as to the non-existence of cause of action or upon the suit being barred by law the findings could operate as res judicata and would not enable the plaintiff to re-agitate the same question through filing a subsequent suit upon the same cause of action and seeking the same relief." (emphasis supplied).*

49. While there is no cavil with the proposition that when a plaint is rejected under Order VII Rule 11 CPC, the same would not *per se* operate as a bar from institution of a fresh suit[11], but it would be subject to certain qualifications. We find those qualifications were not met by Respondent No. 1 when they instituted the 2nd Suit. As per dictum in the Order passed in the 1st Initial Suit, it was unequivocally held Respondent No. 1 had no cause of action to file a suit for declaration and / or possession of the Property. Yet in the 2nd Suit, Respondent No. 1 again sought both, in direct contravention to the 1st Initial Order. We find in

---

[9] The instant matter pertains to clause 'a' in Order VII Rule 11 CPC.
[10] *Muhd. Ali v Province of Punjab*
[11] Order VII Rule 13 CPC

this regard the Impugned Judgement (*particular reference to Para Nos. 20 – 22*) has erred, as it only discussed general principles of *res judicata*, and has not considered nor properly applied the aforementioned legal maxims to the matter at hand.

50. The 1st Initial Order correctly held that Respondent No. 1 had no title or cause of action towards the Property based on their (unregistered) sale agreement. Such view was recognised by judgement of the Supreme Court in *Muhd. Yousaf v Munawar Hussain*[12] which stated[13]:

> ***5.*** *… Judged in this background, it is obvious that the petitioner/plaintiff seeks a declaratory decree on the basis of an agreement to sell and in the same breath further declaration is sought that the sale of the disputed shop by the respondents Nos.1 to 5 in favour of the respondents Nos.6 to 10 was against his rights. In this view of the matter, the right course for the petitioner would have been to institute a suit for specific performance if at all such agreement was executed. The agreement to sell by itself cannot confer any title on the vendee because the same is not a title deed and such agreement does not confer any propriety right, and this, it is obvious that the declaratory decree as envisaged by section 42 of the Specific Relief Act, cannot be awarded because declaration can only be given in respect of a legal right or character. The only right arising out of an agreement to sell is to seek its specific performance and in case the vendee has been put in possession, the same is protected under section 53-A of the Act."*

51. A reading of sections 17 & 49 Registration Act 1908 read with section 54 Transfer of Property Act 1882, would further substantiate that Respondent No. 1 does not (at this stage) hold any legal claim in title to the Property, and as such would not be entitled to approach the Court for a declaration or possession thereof. In *Muhd. Iqbal v Mst. Baseerat*[14] the Apex Court held:

> *"**3.** We have heard the learned counsel for the appellants and find that it is not a case pertaining to appreciation of evidence, rather about the correct application of law. The appellants claim that the property in issue was originally transferred in favour of one Barkat Ali by the Settlement Department who had entered into an agreement to sell with their grandfather, namely Allah Rakha who made a will in their favour by virtue whereof they have acquired the ownership in order to adjudicate if a valid sale had taken place in favour of Allah Rakha by Barkat Ali which could pass on a valid title to the former who thereafter could make a valid will in favour of the petitioners. Be that as it may, when questioned as to what is a sale and how a sale is made, though the provisions of section 54 of the Transfer of Property Act, 1882 (the Act) have been read, but learned counsel has not been able to establish if the property could at all be sold in favour of Allah Rakha through an unregistered agreement to sell. It is also mandated in the second part of section 54 of the Act that such an agreement would not confer any right*

[12] 2000 SCMR 204
[13] Only the relevant portion of Para 5 is reproduced for purposes of brevity.
[14] 2017 SCMR 367; also followed in 2023 CLC 1725

> *to the property. Moreover the provisions of section 49 of the Registration Act, 1908 read with section 17 of the Act also come in the way of the appellants as the agreement to sell of the property would not confer any title in favour of Allah Rakha allegedly executed by Barkat Ali which could further confer any rights in the immovable property unto the appellants. In light whereof, as these aspects were not considered by the first two courts, the learned High Court has rightly interfered and accepted the revision petition. No case for interference has been made out. Dismissed accordingly."*

52. The above citations and principles clearly establish Respondent No. 1 would be estopped from initiating the 2nd Suit on the same footing (without any change of circumstance). We find in this regard also the Impugned Judgement has erred (*reference to Para No. 23*), whereby the requirements for registered title documents established under law and precedent were misapplied / inaptly considered.

53. As the 1st initial Order established Respondent No. 1 did not hold any cause of action for seeking a declaration and/or possession, the same view would be sustained today. And it is settled law that without holding a valid cause of action, the court cannot hear such a case nor can they render any decision.[15] (NB: *we have discussed the effect of the remaining one prayer clause, i.e. specific performance of the agreement further down).*

54. However, we do hold that provisions of Order II Rule 2 CPC would not be applicable to the matter-at-hand. Since Respondent No. 1 currently does not hold any claim / cause of action against the Appellants or towards title of the Property, therefore requirements to include all her claims as per Order II Rule 2 CPC at this stage would not apply. Subsequently, if she is able to successfully demonstrate establishment of any legal claim of title towards the Property, she would in such circumstance be entitled (subject to all just legal exceptions) to bring a fresh suit on that cause of action (which is currently lacking). And hence as things stand, we feel the bar under Order II Rule 2 CPC inapplicable.

55. The next contention we will address is the vital issue of limitation. The 2nd Suit was filed on 16.04.2005. Para No. 22 of the 2nd Suit (at page 317) shows the cause of action accrued to Respondent No.1 on 10.11.1992. Respondent No.1 further states in the said Para that another cause of action accrued on 17.03.2003 when the 1st Initial (Civil) Suit was filed, and on 07.03.2005 when the plaint was rejected by the learned Civil Court in the 1st Initial Suit. Respondent No.1 has further claimed that a cause of action also accrued on 10.03.2005 when the

[15] 2022 SCMR 448

Respondent No. 1's son claims to have approached Respondent No. 3 for performance of the contract, which (as per Respondent No. 1) was then denied. Respondent No. 3 at such time also informed that Respondent No. 2 had expired.

56. First and foremost, it appears the only cause of action (if any) available to Respondent No.1 was stemming from their alleged unregistered sale agreement dated 10.11.1992 against Respondent No. 3 (who in turn had an alleged sale agreement & power of attorney with Respondent No. 2). Respondent No.1 has not provided any justification as to why she approached the trial court over ten (10) years after the alleged sale agreement with Respondent No.2 was executed? A perusal of her sale agreement would show that there was no fixed time stipulated for performance of the agreement, and therefore performance would run from the point of refusal to perform.[16]

57. A perusal of the 1st Initial Suit would also show Respondent No.1's cause of action dating from 10.11.1992. The instant 2nd Suit would fall under Article 113 of the Limitation Act 1908, which provides a period of three years from when performance is refused. In the instant matter, learned Counsel for Respondent No.1 had initially argued that as no specific period for performance is stipulated, and as such the limitation period would commence as and when performance was demanded by Respondent No.1, and expiration for limitation would be within three years from refusal of the same.

58. The present case appears quite unique in this regard. The sale agreement being relied upon by Respondent No. 1 dated 10.11.1992, does not have any time stipulated for performance, which means the instant matter would fall into the second category of article 113 of the Limitation Act 1908. On the record, there appears no evidence of any refusal by Respondent No. 2 or 3. If Respondent No. 1's plaint of the 1st Initial Suit is viewed[17] it shows the cause of action to have commenced on 10.11.1992. The only other dates given are against the Appellant's lease deed registered on 27.02.1999, and failure to give reply of legal notice by the Respondents. The said legal notice which is available on record[18] only shows Respondent No. 1 writing to the Military Estates Officer (Respondent No. 5) for finding Respondent No. 1's file / papers. It was not a request for the Respondents No. 2 or 3 to specifically perform the agreement, and hence the same cannot be considered a refusal of performance, as envisaged under article 113 of the Limitation Act.

---

[16] Article 113 Limitation Act, 1908
[17] At page 251 relevant pg. 259 of the File
[18] At page 455 of the File

59. Next, we place in juxtaposition, the cause of action(s) stated in the plaint of the 2nd Suit[19] with the cause of action(s) of the 1st Initial Suit. Respondent No. 1 claims their right of action accrued on 10.11.1992. Respondent No. 1 then states a next cause of action was created on 17.03.2003 when the 1st Initial Suit was filed, followed by a subsequent cause of action after the Initial Order dated 07.03.2005 was passed, rejecting Respondent No. 1's plaint. We find this to be a serious stretch by Respondent No. 1. She has changed her stance from the earlier suit, and has tried to create a justification in order to overcome the seriously belated action initiated by her. Moreover, filing of a suit and/or passing of an order by the Court cannot in itself create any cause of action, and hence we find this position to be unattainable.

60. Until the 2nd Suit, Respondent No. 1 had never even mentioned approaching Respondent No. 2. In the 2nd Suit the Respondent No. 1 has now claimed she approached Respondent No. 3 for performance, but was refused on 28.03.2005. This demonstrates an admission by Respondent No. 1 that she did not have any proper cause of action when she first approached the Civil Court in the 1st Initial Suit (which was filed 3 years prior to the 2nd Suit). Furthermore, there was no evidence provided to support Respondent No. 1's claim in having approached Respondent No. 3 on the said date, and nor was the same stated with her affidavit-in-evidence filed in the 2nd Suit.[20] In fact, in Para 6 of her affidavit, Respondent No. 1 has asserted a contradictory view by stating Respondent No. 3 is ready and willing to sign and execute all documents in favour of Respondent No. 1[21]. This would nullify the cause of action date urged by Respondent No. 1 in her plaint. It is our opinion this contradictory approach by Respondent No. 1 negates her attempts in creating a justification for her belated actions.

61. We have gone through the entire pleadings / documents and have not found any ground under which Respondent No.1 realistically approached Respondent No.3 for performance. In the case of *Abdul Ghani v Muhammad Shafi*[22] the Supreme Court observed that the normal time for filing a suit seeking specific performance of an agreement (when time was not specified and without specific refusal) was three years from date of execution of the agreement. In such circumstance, Respondent No. 1's period of limitation being three years would have expired on 09.11.1995 (taking into account Respondent No.1's own statement at Para 20 of her plaint).

---

[19] At page 317 of the File
[20] Available at page 375 of the File
[21] At page 385
[22] 2007 SCMR 1186 @ Para 8

62. The legal maxim *"vigilantibus et non dormientibus jura subveniunt"* meaning the law assists those who are vigilant, not those who sleep on their rights would be attracted. An objective viewing of Respondent No. 1's actions, clearly show she had remained (inexplicably) absent from the Property she alleges to have purchased in the year 1992, until 2002. In a recent matter, the Supreme Court cited the above principle while holding that delay cannot be considered lightly and the law of limitation is not just a matter of technicality[23]. The Court further went on to elaborate that persons who are negligent in asserting their rights, effectively forfeit their ability to challenge matters which could've been addressed much earlier.[24] Additionally, no rationale was provided by Respondent No. 1 for being exempted from the laws of limitation.[25] It is settled law that it remains incumbent upon a court to take notice of limitation, regardless of whether or not it was raised by a party[26]. With respect, we find the Trial Court failed to adequately address this matter, and in this regard we also hold the Impugned Judgement is erred.

63. Another point which ought to have been considered by the Trial Court, was the prior sale agreement for the same Property between Respondent No. 2 and Respondent No. 3[27] which has also still not been performed. This would first require to be deliberated, and only after / if Respondent No. 3 successfully obtains the property title from Respondent No. 2, could Respondent No. 1 claim specific performance from Respondent No. 3; as currently (per the pleadings), Respondent No. 3 does not appear to have the property title documents in his own name.

64. Even if Respondent No. 1 desired to pursue a sole claim just for specific performance, the said prayer could not have survived in the 2nd Suit. To enforce specific performance, the first hurdle would be for Respondent No. 3 to first make and be successful in a claim against Respondent No. 2 (the original allottee / owner), as Respondent No. 3 (admittedly) also only had a sale agreement and power of attorney in his favour, but he did not hold any title documents to the Property. Secondly, Respondent No. 1 (presuming Respondent No. 3 is successful) would then have to file a claim against Respondent No. 3 to secure her rights to the Property. It is only after the aforementioned two acts, and subject to the Respondents No. 3 & 4 being respectively successful, that Respondent No. 1 would be able to potentially have a claim against the Appellants or towards title of the Property. This matter would no doubt be further complicated by the fact that

---

[23] PLD 2024 SC 1268
[24] *Ibid.* @ Para 12
[25] Also required under Order VII Rule 6 CPC
[26] 2015 SCMR 380 + PLD 2024 Sindh 121 + 2023 CLC 1725
[27] At page 821 of the File

Respondent No. 2 has passed away (as stated by Respondent No. 1), and as such his legal heirs would have to be pursued. These steps in the process would be *sine qua non*, before Respondent No. 1 is even able to bring forth a claim for specific performance. Even otherwise, the remedy (if any) for Respondent No. 1 would only be against Respondents No. 2 & 3. Under the wisdom of our legislation,[28] supported by jurisprudence[29], where a property was subsequently purchased by a third party, in certain circumstances the remedy to any injured person would only be against the person enabling the loss caused. In the instant matter, such enablers would only be Respondent Nos. 2 & 3, and it would at such point have to be seen whether a suit for specific performance could even be maintained now, or whether the correct remedy for Respondent No. 1 would be to seek damages? However, as that issue is not before us, therefore we do not deem it prudent to pass findings on the same (due to the risk of creating a possible prejudice in any future legal proceeding) and leave that matter for Respondent No. 1 to pursue before an appropriate forum, should she so desire.

65. The second major obstacle is that appears evident is that a suit for specific performance would also appear to be time-barred (based upon the pleadings and documents exhibited in the 2nd Suit). As no specific time for performance was stipulated in Respondent No. 1's agreement, nor was any time shown in which refusal for performance could be observed, it would be reasonable to calculate limitation period from the date of execution of the agreement, which would have expired in the year 1995. These are the reasons as to why we are of the tentative opinion that even a lone claim for specific performance would also not be able to survive in the 2nd Suit.

66. The final point which we will adjudicate upon is the misreading / misapplication of the evidence. The contention raised by Counsel for the Appellants was that a woman who was allegedly claiming to be widow of Respondent No.2 has filed an affidavit which was taken on record, but the Appellants were not allowed to cross examine her. The second major contention raised concerned a Fact-Finding Report which was considered by the Trial Court, without examination or input from the Appellants. A third contention was admissibility of an Inquiry Report without the Appellants being included in its compilation, nor were they permitted to cross-examine the author (i.e. Executive Officer) who compiled the Inquiry Report.[30] A perusal of the record would *prima facie* support stance of the Appellants, as the affidavit of the alleged widow of

[28] Transfer of Property Act 1882, ss. 27-B & 41
[29] 2021 SCMR 686 & PLD 1983 SC 53
[30] These have been referred / relied upon in Para Nos. 24, 25, 26, 27 & 28 of the Impugned Judgement.

Respondent No.2 is available (at page 843), and a perusal of the Appellants request (at Page 905) would show a refusal for permission to cross examine author of the Inquiry Report. It is trite law that the author of any document is liable for cross-examination without which their document should not be considered for purposes of evidence.[31] We find in this regard also the Impugned Judgement is erred, as it has considered and relied upon unsubstantiated evidence / documents. Even otherwise, the Impugned Judgement has incorrectly repeatedly shifted the burden of proof on the Appellants (Defendant in the Suit), whereas the onus for establishing proof must always remain on the person alleging (i.e. Respondent No. 1 in the instant matter).[32]

67. To summarize the above, for reasons aforementioned, we hold that in the 2nd Suit being Civil Suit No.603/2005, Respondent No. 1 was estopped from claiming the relief of declaration and possession (and the consequential relief of injunction). As the Initial Suit (49/2002) before Senior Civil Judge had passed a complete order on the said matter, which attained finality and therefore could not be reopened. In essence, the issues of declaration and possession were already decided by the Senior Civil Judge in the Order dated 07.03.2005 and therefore could not have been re-agitated in the 2nd Suit.

68. Even prior to filing a suit solely for specific performance against Respondents No. 2 & 3, Respondent No. 1 would first have to overcome certain hurdles. Firstly, we find the claim to be time barred, as her sale agreement is dated 12.11.1992, which is over thirty years ago. She has also not provided any grounds for condonation. The restraints of article 113 Limitation Act 1908, which provide a three (3) year limitation period, would be applicable. In our opinion, without any condonation sought or shown, the three (3) year period has long expired.

69. Secondly, as we have opined, even for specific performance, first Respondent No. 3 would have to complete his process against legal heirs of Respondent No. 2, for specific performance of an alleged sale agreement dated September 1990, and transfer of Property documents / title. It is only after successful conclusion of such process, would Respondent No. 1 be able to even consider bringing forward an arguable claim towards the Property.

---

[31] 2023 CLD 912

[32] Legal Maxim *ei incumbit probatio qui dicit* meaning 'the burden of proof lies on him who asserts'. Relevant pages of the Impugned Judgement are page nos. 87, 89, 101, 93, 97, 99, 103, & 107 of the File.

70. For reasons already elaborated *ibid.*, and as we have found the 2nd Suit itself to be hit by principles of limitation, therefore, the said claim of Respondent No. 1 for specific performance would also stand time-barred alongside.

71. The Impugned Judgement also shows misreading / misapplication of due process, by exhibiting evidence not corroborated by the author and shifting the onus of providing proof from the Plaintiff (Respondent No.1) to the Defendants (Appellants).

72. Another anomaly we have observed, is that in the 2nd Suit Respondent No.1 specifically prayed (prayer clause 'vi') for demolition of construction raised on the said Property, whereas the Impugned Judgment has granted Respondent No.1 the Property *with construction* as compensation. We find the same to be contrary to Respondent No.1's prayer clause, and hence in this regard we also feel the Impugned Judgement has travelled beyond the scope of the Suit.

73. In light of the foregoing for reasons above-mentioned, we find the Impugned Judgement to be erroneous in law. We therefore allow the instant Appeal and set-aside the Impugned Judgment dated 20.03.2020 and Decree dated 02.04.2020[33].

JUDGE

JUDGE

M. Khan

[33] We would also like to acknowledge the valuable assistance provided to us by the SHC Legal Research Team.