

ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Suit No.1329 of 2008

Date	Order with signature of Judge
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1. For hearing of maintainability of Suit.
2. For hearing of CMA No.9196/08 (U/O 39 Rule 1 & 2 CPC)

07.11.2017.

Mr. Muhammad Ishaque Khan, Advocate for Plaintiff.

Mr. Nabeel Kolachi, Advocate for Defendant.

Pursuant to Order dated 28.10.2011 passed in High Court Appeal No.03/2009, the matter has been heard on the question of jurisdiction and res judicata.

Learned Counsel for the Plaintiff submits that insofar as the question of res judicata is concerned, the same does not apply for the reason that the earlier Suit bearing No.B-37/2006 was filed by Defendant No.2, whereas, the present Plaintiff never signed the plaint or any other document and the signatures on the said plaint are forged. He submits that even otherwise the prayer made in this Suit is quite distinct and different from the prayer in Suit No.B-37/2006. He further submits that it only came in the knowledge of the present Plaintiff that earlier a Suit was filed in respect of the property of the Plaintiff when he received notices as a Respondent in CP No.2015/2002 and thereafter instant Suit has been filed. Per learned Counsel this Court is quite competent to even treat the present Suit as an application under Section 12(2) CPC in the earlier Suit as fraud was committed in that matter by the plaintiff. He finally submits that the Plaintiff never mortgaged the properties, whereas, on a bare perusal of the signatures it is clear that they are forged.

On the other hand, learned Counsel for the Defendant Bank submits that the stance of the Plaintiff is not correct as proper notices were issued to the Plaintiff at the time of selling the property under Section 15 of the Financial Institution (Recovery of Finances) Ordinance, 2001, whereas, the original title documents of the Plaintiff were mortgaged through a proper memorandum of deposit of title deed. He submits that in Suit No.B-37/2006 the injunction application as well as appeal against such dismissal was dismissed and thereafter the Suit was dismissed for Non Prosecution, therefore, no case is made out. In support he has relied upon **National Bank of Pakistan v Khalid Mahmood (2002 CLD 658)** and Order dated 28.03.2013 passed in HCA No.152/2012.

I have heard both the learned Counsel and perused the record. Very precisely the facts appear to be that earlier a Suit No.B-37/2006 was filed by present Defendant No.2 as a Plaintiff, wherein, the present Plaintiff was also Plaintiff No.3. Such suit was filed under the banking jurisdiction and the prayer made was to the extent that the public notice dated 08.05.2006, whereby, the Bank was selling the properties under Section 15 of the Financial Institutions (Recovery & Finances) Ordinance, 2001 ("**FIO 2001**") was unlawful. The property of the present Plaintiff was stated at Para-18 (ii),(x) & (ix). In the said Suit the injunction application was dismissed vide Order dated 15.9.2006 against which the appeal was also dismissed by Order dated 28.2.2007. Subsequently, the Suit stands dismissed through order dated 3.9.2008 for Non-prosecution. It appears that subsequently this Suit was filed and through Order dated 01.12.2008 the injunction application was allowed. The same was impugned in High Court Appeal No.03/2009 and vide Order dated 28.10.2011 a learned Division Bench of this Court was of the view that

since the properties in question i.e. Flat Nos.401 and 404 AL-Madina Arcade, Block No.5, Clifton, Karachi, were admittedly mortgaged by way of deposit of title deeds and the fact that these properties were given as security in a Banking transaction was admitted by the plaintiff in Paragraph No.5 of the plaint, it clearly appears that the controversy arises from a banking transaction and the learned Single Judge ought to have decided the question of jurisdiction as well as res judicata first before proceeding with the matter on merits. With such observation the order on the injunction application was set-aside and the matter was remanded to this Court to decide the question of jurisdiction and res judicata after hearing both the parties.

Insofar as the ground taken in respect of forgery of signatures is concerned, I am of the view that in view of the fact that original title documents of the property in question were mortgaged with the Bank as a security by way of deposit of title deeds, this appears to be a belated thought. Time and again I have confronted the Counsel for the Plaintiff as to why the Plaintiff is not in possession of his title documents, the learned Counsel replied that in good faith they were handed over to Defendant No.2, who in fact was the borrower and had obtained loan from the Bank. His case is that all this was done without consent of the plaintiff. It does not appeal to a prudent mind that why title documents of a property would be handed over in good faith and would be allowed to be mortgaged with a Bank and no efforts are made to get them back. This appears to be a belated thought insofar the present Plaintiff is concerned. Moreover, in this Suit the Plaintiff No.1 of Suit No.B-37/2006 was also arrayed as defendant No.2, however, the plaintiff did not pressed its Suit against the said defendant and by order dated 10.8.2010, the plaint was struck off, against which no further efforts were made by the plaintiff to have it restored. If at all the plaintiff had any case, it was against

defendant No.2 who according to the plaintiffs own version had committed fraud by allegedly using the property documents kept with him good faith, but surprisingly, the plaintiff got the plaint struck off against him for which there is no plausible justification on record.

Notwithstanding the above as soon as the Bank published a public notice for selling the property in terms of Section 15 of the FIO, 2001, it was a notice to public at large including the present Plaintiff. Even if, it is admitted that earlier the Suit i.e. B-37/2006 was not filed by the present Plaintiff as contended, the only remedy which was available with the Plaintiff was to challenge such notice and seek redemption of the mortgaged property, if permissible in law. Whether the plaintiff mortgaged the property or not would be a question which could only be decided under the Banking jurisdiction as provided in Section 15(11) of FIO, 2001. Mere change of words and prayer clauses would not substantiate the cause of action so as to confer jurisdiction on this Court when admittedly the matter pertains to the Banking jurisdiction. In fact the prayer ultimately in this Suit is to get the properties redeemed, which is not permissible in a Suit under Section 9 CPC. It further appears that the plaintiff had also filed an application under Order 1 Rule 10 CPC in Suit No.B-37/2006 on 13.5.2009 (much after its dismissal and after filing of instant Suit), and in that application it has been stated that it only came into knowledge of the plaintiff on 6.6.2008 when notice was received in CP No. 2015 of 2002. This again does not support the case of the plaintiff as on that date the Suit No.B-37/2006 was very much alive and a proper application could have been filed immediately, but this was not done and instant Suit has been filed on 22.9.2008

It is also a matter of record and plaintiffs own version that on 30.8.2007 (**See Pg:237**) a legal notice was issued by him addressing the concerned Sub-Registrar-II, Clifton, Karachi, wherein he was directed not

to effect transfer of the Suit Properties. Now it has not been stated as in whose name the property was being transferred and by whom,, but makes one thing clear that it was within the knowledge of the Plaintiff that his properties have been sold by Defendant No.1 under Section 15 of FIO, 2001. What prevented the plaintiff to approach the Court timely is not explained. Apparently at this point of time it was well within his knowledge and which is more explained in the legal notice dated 22.8.2008 (**See Pg:241**) addressed to defendant No.1 in which at Para No.15 it is stated that *“That I have already informed Sub-Registrar about your forgery for selling my clients said flats to you own dummy purchasers in a meager amount and the Registrar is advises not to make any registry of you such documents”*. This leaves nothing more to add to the fact that it was well within the knowledge of the plaintiff on 30.8.2007, when he addressed legal notice to the Sub-Registrar through his Counsel not to affect any transfer of the property being sold by the Bank. Therefore, he could have conveniently approached the Court by making an application in Suit No.B-37/2006. The other ground that this Court may treat this Suit as an application under Section 12(2) CPC is also not impressive for the reason that the earlier Suit was a Suit under the Banking jurisdiction which caters to such issue under the FIO, 2001, including Section 15(11) *ibid*, whereas, even otherwise Section 12(1) itself provides that where the plaintiff is precluded by rules from instituting a further Suit in respect of any particular cause of action, he shall not be entitled to institute a Suit in respect of such cause of action in any Court to which the Code applies and can only seek a remedy by way of moving an appropriate application under Section 12(2) in that very Suit. Here the plaintiff has filed instant Suit and has proceeded with it to the extent of obtaining an injunction which stands set-aside in Appeal, therefore, at this belated stage such request cannot be acceded to even otherwise.

In view of facts and circumstances of the case, I am of the considered view that instant Suit is not only barred by way of res judicata but so also for want to jurisdiction as the matter, if at all, pertains to the banking jurisdiction. Accordingly, the Suit being incompetent is hereby dismissed.

J U D G E

Ayazp