Form No: HCJD/C-121

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

Writ Petition No.290 of 2013

Muhammad Yasin

Versus

Additional District Judge-VII, West, Islamabad, etc.

Petitioner By	:	Mr. Zulfiqar Ali Abbasi, Advocate.
Respondents By	:	Mr. Shahid Munir, Advocate for respondent No.5. Mr. Zaheer Bashir Ansari, Advocate for respondents No. 6-A to 6-C. Mr. Muhammad Nazir Jawad, Advocate for respondent No. 7. Respondents No. 2 to 4, proceeded ex-parte.
Date of Hearing	:	25.01.2021

AAMER FAROOQ, J. – The parties are litigating with respect to plot No.22, street No.95, Sector G-13/1, Islamabad (**the property**). The referred property was allotted by the Federal Government Employees Housing Authority (**FGEHA)** to one Altaf Hussain, the predecessor in interest of respondents No.2 to 4. An agreement was made for transfer of property to respondent No. 6, namely Dr. Ali Shahryar, now represented by respondents No. 6-A to 6-C, on 04.03.2002. It seems that original allottee also entered into an agreement with the petitioner on 31.12.2012. Respondents No. 6-A to 6-C filed a suit for specific performance of the agreement against respondents No. 2 to 4; in the referred suit, the petitioner made an application for impleadment as defendant on the basis that he also has an agreement to sell in his favour. The referred application was dismissed by the learned Trial Court and was challenged before the Revisoinal Court, which also dismissed the plea. The petitioner then filed a suit for specific performance against

respondents No.2 to 4, in which respondents No. 6-A to 6-C moved an application to be impleaded as defendant, which was allowed; subsequently, he filed an application under Order VII Rule 11 CPC on the basis that the suit filed by the petitioner is barred by *res judicata* under section 11 of the Code of Civil Procedure, 1908 (**CPC**), as his application for impleadment in another suit stood dismissed on merit viz. that he has no *locus standi* in the matter; the referred application was dismissed by the learned Trial Court vide order dated 02.12.2010. The matter was challenged by way of civil revision before the learned Additional District Judge (West), Islamabad and was allowed vide impugned order dated 03.01.2013.

2. Learned counsel for the petitioner, *inter alia,* contended that *res judicata* shall not apply to the suit filed by the petitioner inasmuch as in the suit, filed by respondent No.6, application was only decided regarding the plea for impleadment as a party. It was contended that even otherwise, the matter can be decided after framing of issues and leading the evidence. Reliance was placed on *Punjab Board of Revenue Employees Cooperative Housing Society Limited versus Additional District Judge, Lahore and others (2003 CLJ 824)* and *Haji Mir Alam Shah, etc. versus Adam Khan, etc. (2004 CLJ 640).*

3. Learned counsel for respondents No. 6-A to 6-C, *inter alia,* contended that as the matter had been decided on merit regarding *locus standi* of the petitioner in the transaction with respect to the property, hence *res judicata* will apply and the Revisional Court rightly dismissed the suit of the petitioner.

4. Arguments advanced by the learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

5. Before embarking upon rendering findings on the pleas raised before the Court, it is pertinent to observe that respondents No.2 to 4 were ordered to be proceeded ex parte. The facts leading to filing of the instant petition have been mentioned hereinabove, which as such are not controverted by the learned counsel for the parties. The sole question involved before the Court is whether dismissal of

the application under Order 1 Rule 10 CPC in the suit filed by respondent No.6 against respondents No. 2 to 4 constitutes *res judicata* in the suit filed by the petitioner against respondents No. 2 to 4 as well as respondent No. 6. For the ease of convenience, the principle of *res judicata,* as enshrined in section 11 CPC, is reproduced and is as follow:-

> *"11. Res Judicata. -- No Court shall try any 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.*
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> *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.*
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> *Explanation II.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.*
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> *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.*
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> *Explanation IV.- 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.*
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> *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.*
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> *Explanation VI- Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."*

On the basis of above concept of *res judicata,* including explanations in section 11 C.P.C., the Hon'ble Supreme Court of Pakistan in *Fecto Belarus Tractor Ltd. versus Government of Pakistan through Finance Economic Affairs and others (PLD 2005 SC 605),* deduced the following principles, which are as follows:-

> *"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 or constructively in the former suit.*
>
> *2. The former suit must have been a suit between the same parties or between parties under whom they or anyone of them claim.*
>
> *3. The parties as aforesaid 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.*
> 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."*

Section 11 CPC as such is not applicable to the applications, however, in light of the judgment of the august Supreme Court of Pakistan in case reported as *Gulistan Textile Mills Ltd. and another versus Soneri Bank Ltd. and another (PLD 2018 Supreme Court 322)*, the principles, as such, were held to apply to the applications as well. It was observed in paragraph 7 at page 334 of the judgment as follow:-

> *"However, the said section specifically refers to 'suits' and therefore restricts the application of the principle thereto. Interlocutory applications cannot be regarded as 'suits'; hence, strictly speaking Section 11 of the C.P.C. would not be attracted to such applications. Nevertheless, the general legal principles of res judicata would most certainly apply. Therefore an order passed pursuant to any interlocutory application at one stage of the proceedings would operate as a bar upon similar interlocutory applications made at a subsequent stage of the proceedings based on the general principles of res judicata. However this general rule will not apply where the order on such interlocutory application does not involve any adjudication. Examples of such instances are:- where there is no decision on merits, but a mere expression of opinion not necessary for the disposal of the application; where a matter, though in issue has, as a fact, not been heard and decided, either actually or constructively; where a matter in issue has been expressly left open and undecided; where the suit is not pressed; or where the suit is withdrawn."*

The facts, in the instant case, leading to legal question involved are peculiar and the instant case is of first impression as such, however, in answering the same, guidance may be obtained from *Kala Chand Banerjee versus Jagannath Marwari and another (A.I.R. 1927 Privy Council 108),* wherein it was observed that a person who applied to be made a party but was refused is not bound by the decision in the suit. It was further observed that the decree, which is pleaded as constituting *res judicata,* on the face of it bears that it was pronounced in a suit to which the appellant was not a party and therefore does not come within the rule as to *res judicata* in section 11 CPC. However, somewhat different proposition was laid down in *Kailash Chandra Poddar versus Gopal Chandra Poddar (A.I.R. 1915 Calcutta*

161(1) and it was observed that a party whose application for review of a compromise decree on the ground that he had not consented was dismissed, cannot sue to set aside that decree on the same ground. In *Taj Begam versus Sarvi Begam (A.I.R. 1917 Allahabad 21)*, it was observed that rejection of an application for review of a preliminary order does not give it any finality or make it *res judicata* in a subsequent proceeding. In *G.H. Hook versus Administrator General of Bengal and others (A.I.R. 1921 Privy Council 11)*, it was observed that the plea of *res judicata* still remains apart from the limited provisions of the Code. The principle of *res judicata* was further elucidated by the Hon'ble Sindh High Court in case reported as *Mst. Rukhsana Tabassum Shaikh versus Kazim Imam Jan and others (2003 CLC 189)* by citing with approval the dictum in *Arjum Singh versus Mohindra Kumar and others (AIR 1964 SC 993)*. It was observed as follows:-

> *"(10) That the question of fact which arose in the two proceeding was identical would not be in doubt. Of course, they were not in successive suits so as to make the provisions of S.11 of the Civil Procedure Code applicable in terms. That the scope of the principle of res judicata is not confined to what is contained in section 11 but is of more general application is also not in dispute. Again, res judicta could be as much applicable t different stages of the same suit as to findings on issues in different suits. In this connection we were referred to what this Court said in Satydhan Ghosal v. Sm. Deorajin Debi, (1960) SCR 950: AIR 1960 SC 941 where Das Gupta, J. speaking for the Court expressed himself thus:*
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> *"The principle of res judicata is based on the need of giving finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter--whether on a question of fact or on a question of law---has been decided between two parties in one suit or proceeding and the decision is final, either because the appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suite or proceeding between the same parties to canvass the matter again..,..The principle of res judicata applies also as between the two stages in the same litigation to this extent that a Court, whether the trial Court or a higher Court having at an earlier stage decided a mater in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the proceedings"*
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> *Mr. Pathak laid great stress on this passage as supporting him in the two submissions that he made: (1) that an issue of fact or law decided even in an interlocutory proceeding could operate as res judicata in a later proceeding, and next (2) that in order.to attract the principle of res judicata the order or decision*

first rendered and which is pleaded as res judicata need not be capable of being appealed against."

"(13) It is needless to point out that interlocutory orders are of various kinds; some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the Court usually take. They do not in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief though normally only on proof of new facts or new situations" which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of res judicata does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of the Court would be justified in rejecting the same as an, abuse of the process of Court. "

The dictum laid down in the case of Arjun Singh (supra) by Indian Supreme Court is that (interlocutory) orders are certainly capable of being altered or varied by subsequent applications for the same relief, sough normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation. The principle of res judicata does not apply to the finding on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of the Court would be justified in rejecting the same as an abuse of the process of Court."

It can safely be deduced by the above principles of law as cited in various judgments that the judgment and decree passed in the suit filed by respondents No. 6-A to 6-C against respondents No. 2 to 4 shall not be binding upon the petitioner. It is only the application for impleadment by the petitioner in the referred suit that was dismissed and the conclusion was based on the documents appended with the application. In the suit out of which the instant petition has arisen, the petitioner is seeking specific performance of the agreement in his favour; no evidence as such has yet been recorded on which the Court is to render its findings on the merit and demerit of the case of the petitioner. The finding given on the application based on the documents, appended in related suit, would not constitute *res judicata,* barring the petitioner to file the instant suit.

6. In view of the above discussion of law and facts, the decision rendered by respondent No.1 is not legally correct, hence not tenable.

7. For what has been stated above, the instant petition is **allowed** and impugned decision dated 03.01.2013 is **set-aside** and the one handed down by the learned Trial Court vide order dated 02.12.2010 is upheld; consequently, application of respondents No. 6-A to 6-C under Order VII Rule 11 CPC stands **dismissed.**

(AAMER FAROOQ)
JUDGE

Announced in open Court this 22nd day of April, 2021.

JUDGE

M.Shah/.

Approved For Reporting