

Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 25 OF 2021

Muhammad Azeem, etc.

Vs

Waqas Younas, etc.

PETITIONERS BY: Mr. Muhammad Nasir, Advocate.

RESPONDENTS BY: Raja Gul Nawaz, Advocate.

DATE OF HEARING: 02.04.2021.

=====

BABAR SATTAR, J.- The petitioners are aggrieved by rejection of their application under Order VII Rule 11 of the Code of Civil Procedure, 1908 ("**CPC**") dated 21.12.2020.

2. The facts briefly are that respondents No. 1 and 2 filed a suit for declaration, permanent and mandatory injunction titled "Waqas Younas and another v. Muhammad Azeem and another" claiming ownership and possession of property bearing khewat No. 257 to 300, khatooni No. 592 to 687, Qitta-261 and khewat No.340, Qitta 672 fractional share 134/1316 (4 kanal) which is partially constructed, in the revenue state Darkala, Islamabad. Respondents No. 1 and 2 asserted in the plaint that the petitioners are claiming ownership of portion of khasra No. 551 and 552 of khewat No. 340 of the revenue estate in the suit titled "Muhammad Azeem, etc. v. Muhammad Younas, etc.", which is also pending adjudication. The petitioners then filed an application under Order VII Rule 11 of CPC in the suit filed by

respondents No. 1 and 2 asserting that the suit was not maintainable and was liable to be dismissed. The said application was dismissed by the learned Civil Court through the impugned order dated 21.12.2020 leading to the instant petition.

3. Learned counsel for the petitioners stated that the petitioners filed a suit in 2009 in which the father of respondents No.1 & 2 was party; respondents No.1 & 2 filed an application under Order I Rule 10 CPC to be impleaded as party in the said suit, which was dismissed and the order of dismissal of said application was challenged through a revision petition, which was also dismissed by the learned appellate Court vide order dated 06.10.2017. The dismissal order attained finality as it was never challenged any further. However, subsequently, respondents No.1 & 2 filed a fresh suit in relation to the same subject matter, wherein the petitioners filed application under VII Rule 11 CPC on the ground that the suit is barred by law. This application was dismissed by the impugned order dated 21.12.2020. Learned counsel for the petitioners relied on the judgments reported as Mushtaq Ahmed Vs. Nasrullah Khan (2001 MLD 1062), M/S New Rahat Engineering Works Vs. National Bank of Pakistan & another (2003 CLD 382), I.C.I.C. Vs. Mian Rafique Saigal & others (PLD 1996 Lahore 528) and Abdul Majeed Vs. Abdul Ghafoor Khan (PLD 1982 SC 1946) and submitted that the Hon'ble Supreme Court has held that the principle of res judicata is attracted even where an interlocutory application is involved.

4. Learned counsel for the petitioners has made five main arguments in support of contention that the impugned order suffers from material illegality. He submitted that the suit is barred under section 11 of CPC as respondents No. 1 and 2 had filed an application under Order I Rule 10 of CPC to be impleaded as a party in the suit titled Muhammad Azeem, etc. v. Muhammad Younas, etc., which was dismissed by the learned Civil Court by order dated 18.05.2017 on the basis that respondents No. 1 and 2 were not a necessary or proper party. The respondents then filed a revision petition against order, dated 18.05.2017 which was also dismissed by the learned Additional District Judge (ADJ) by order dated 06.10.2017, which attained finality. The learned counsel for the petitioners asserted that as the learned Civil Court had determined that respondents No. 1 and 2 have no standing to be impleaded as parties in the suit in relation to the suit property which is also the suit property in the suit filed by respondents No.1 and 2, therefore, their suit is barred under section 11 of CPC under the doctrine of res judicata and constructive resjudicata. The second submission of the learned counsel for the petitioners was that the suit filed by respondents No. 1 and 2 is not maintainable in view of Order II Rule 2 of CPC as in the suit filed by the petitioners titled Muhammad Azeem v. Muhammad Younas, they claimed ownership to property falling under Khasra No. 551, over which respondents No. 1 and 2 have claimed ownership and possession through their subsequent suit. But that in the petitioner's suit the father of respondent No.1 is a party and to the extent that respondent No.1 claims ownership through his father, he cannot

file an independent suit in view of order II Rule 2 of CPC and any claim that the respondents 1 and 2 had ought to have been made in the suit titled Muhammad Azeem, etc. v. Muhammad Younas, etc. Third submission of the learned counsel for the petitioner was that the suit of respondents No. 1 and 2 is barred by limitation as Muhammad Azeem v. Muhammad Younas has been pending since 2010 wherein father and uncle of respondents No.1 have filed their written statements. The claim of the petitioners to property in Khasra No. 551 and 552 has been in the knowledge of respondents No. 1 and 2 since 2010 and therefore the fresh suit filed by respondents No. 1 and 2 in 2017 is barred by time under Article 113 of the schedule to the Limitation Act, 1908. The fourth argument of the learned counsel for the petitioner was that in the event that two forums are available to a person to pursue a remedy and he elects to pursue his remedy at one forum, he exercises a choice and is then estopped from pursuing his remedy at the second forum in the event that he has not been granted relief by the first forum. The final argument of the learned counsel for the petitioner was that the relief sought in the suit is not admissible under law as the respondents No. 1 and 2 are seeking correction of entries in the revenue record which is not permitted under the West Pakistan Land Revenue Act, 1967. In support of his arguments he relied on Abdul Majid and other v. Abdul Ghafoor Khan and others (PLD 1982 S.C 146), Pir Bakhsh represented by his legal heirs v. The Chairman Allotment Committee (PLD 1987 SC 145), Nazir Ahmed and others v. Border area Committee (1988 CLC 2277), Messrs New Rahat Engineering Works v. National Bank of

Pakistan (2003 CLD 382), Haji Abdul Karim v. Messrs Florida Builders (Pvt.) Ltd. (PLD 2012 SC 247), Ghulam Akbar Lang v. Dewan Ashiq Hussain Bukharin and others (2012 SCMR 366), Pakistan International Airlines Corporation v. Aziz ur Rehman Chaudhry and another (2016 SCMR 14), Trading Corporation of Pakistan v. Devan Sugar Mills Limited and other (PLD 2018 SC 828), Government of Punjab through Secretary Communication and Works Department, Lahore v. Munir Ahmed Tariq (2019 SCMR 998) and Jubilee General Insurance Co. Ltd. Karachi v. Ravi Steel Company, Lahore (PLD 2020 SC 324).

5. Learned counsel for respondents No. 1 and 2 submitted that section 11 of CPC and principle of resjudicata and constructive resjudicata are not attracted in the instant case as key ingredients that must co-exist to attract the bar imposed by section 11 i.e. subject-matter in the previous suit be the same, the parties to the previous suit be same, the relief sought in the previous suit be the same and that the suit be decided on merits after a trial, are absent in the present case. He further submitted that Order II Rule 2 has no application in the present case as in the previous suit relied upon by the petitioners i.e. Muhammad Azeem v. Muhammad Younas, respondents No. 1 and 2 were not defendants and therefore they neither had any cause of action nor any occasion to press their claims against the petitioners. He further submitted that the suit of respondents No. 1 and 2 is not barred by limitation as no cause of action had arisen till such time that their right to ownership and possession of the suit property was denied, that time began to run when respondents 1 and 2 became aware that the petitioners denied their claim to

the suit property, and when that happened is a question of fact. He further submitted that claim of respondents No.1 and 2 to ownership and possession of the suit property is not on the basis of any right inherited from their father Muhammad Younas, who is a defendant in the suit filed by the petitioners but their right to ownership and possession emanates from purchase of the suit property by them in an independent transaction and it was when their legal character in the suit property was brought under challenge then they acquired a cause of action to file a suit for declaration and injunction. The learned counsel for respondents No.1 and 2 further submitted that the claim of respondents No.1 and 2 to ownership and possession to the suit property is backed by excerpts of mutation record which constitutes admissible evidence and it was only when they came to know that competing rights were asserted by the petitioners in the suit titled Muhammad Azeem v. Muhammad Younas that they sought to be impleaded as a party in the suit. And upon rejection of their application under Order I Rule 10 of CPC, respondents No.1 and 2 filed an independent suit against the petitioners. He submitted that respondents assert a right to the suit property on the basis of revenue record that is admissible per se, whereas the petitioners assert their right on the basis of a sale agreement the veracity which will need to be proved through evidence. He further submitted that there is no relinquishment of any relief against the petitioners as they are not a party in the suit titled Muhammad Azeem v. Muhammad Younas and respondents No.1 and 2 cannot be treated as a proxy of Muhammad Younas on the basis that Muhammad Younas is the father of respondents No.1

and 2. The learned counsel for respondents No. 1 and 2 lastly submitted that there is no bar under West Pakistan Land Revenue Act, 1967 to seek issuance of mandatory injunction in relation to the suit property that is under the ownership and possession of respondents No. 1 and 2. The learned counsel for respondents No. 1 and 2 relied on the judgments reported as Mst. Matlooban and another v. Mst. Shakila Begum and 4 others (1994 CLC 1712), Muhammad Azam Khan v. Fazal ur Rehman (2013 YLR 1888), Muhammad Aslam and another v. Province of Sindh through Secretary, Government of Sindh Revenue Department (2020 MLD 809), Chief Land Commissioner v. Syed Allo Din and 8 others (2013 YLR 1739), Amanat Ali v. Mst. Sardar Bibi (2003 MLD 299), Taslim Shah and another v. Hokhiar Shah and others (2016 CLC Note 75), Abdul Ghani and 5 others v. Ist Additional Sessions Judge and 18 others (2019 CLC 1721) and Saleem Malik v. Pakistan Cricket Board (PLD 2008 SC 650).

6. During the course of arguments, the learned counsels for the petitioner and respondents No.1 and 2 took the Court through intricate factual details related to the suit pending adjudication before the learned Civil Court which this Court will neither reproduce nor delve upon as the said factual controversies are irrelevant for purposes of the adjudicating the lis before this Court and any observation by this Court in relation to facts and merits of the suit pending adjudication could prejudice the rights of the parties to fair trial and determination of issues by the learned Civil Court in accordance with the evidence adduced before it.

7. Section 11 of CPC states the following:

"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.

8. The august Supreme Court enumerated the concept of constructive res judicate in Muhammad Chiragh-ud-din Bhatti v. The Province of West Pakistan (1971 SCMR 447), wherein it was held that, *"the High Court had finally settled the issue between the parties by observing that the services of the petitioner had been competently terminated by the Government, and that the defect in the Commissioner's order was covered by the order subsequently made by the Provincial Government. Even if section 11 of the Civil Procedure Code may not in terms apply in support of the plea of res judicate, it can hardly be disputed that the general principles of res judicate were clearly attracted to debar the petitioner from re-agitating the matter afresh by a civil suit, which had been put at rest by a judgment of the High Court passed in writ jurisdiction. The civil court could not have by-passed or overridden the orders of the High Court competently made in another jurisdiction on the same subject between the same parties."*

9. The rationale behind the doctrine of res judicate and constructive res judicate was explained by the august Supreme Court in Amanul Mulk v. Ghafoor-ur-Rehman (1997 SCMR 1796) as follows:

"The aim of the doctrine is to compel both parties to the suit to raise before the court in support of their contentions as the grounds of attack and defense available to them. By force of this doctrine, the parties have to bring their whole case to the court and cannot reserve for the purpose of a second suit grounds available to them in support of their case. The rationale behind constructive res judicata is that if the parties have had an opportunity of asserting a ground in support of their claim or defense in a former suit and have not done so, they shall be deemed to have raised such grounds in the former suit and it shall be further deemed that these grounds had been heard and decided as if these matters had been actually in issue. As such, such parties shall be precluded from raising these grounds in a subsequent suit. Such matters will by virtue of this legal fiction be construed as res judicata..."

10. In Province of Punjab v. Malik Ibrahim and Sons (2000 SCMR 1172) the august Supreme Court listed the conditions that must be complied with to attract the principles of res judicata as follows:

- 1. The matter directly and substantively 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 any one 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.

11. It is an admitted fact that the application of respondents No. 1 and 2 to be impleaded as defendants in the suit titled Muhammad Azeem vs. Muhammad Younas was dismissed by the learned Civil Court and consequently, they are not party in the said suit which is still pending adjudication. Respondents No. 1 and 2 have been afforded no right to assert any claim in relation to the subject-matter of such suit. The doctrine of resjudicata serves the purposes of bringing an end to litigation. The rationale behind the principle, as explained by the Apex Court is that once a matter has been adjudicated between contesting parties after giving them an opportunity to adduce evidence and the matter having been decided on its merit and having attained finality, no party should be allowed to litigate the same matter afresh, and further that the mischief of piecemeal litigation is to be precluded. This is because without closing the door on re-litigation of matters already adjudicated on their merits, legal rights would not attain certainty and finality. In this case application under Order I Rule 10 CPC of respondents No. 1 and 2 was dismissed and they were thus never afforded an opportunity to assert their claim with regard to the ownership and possession of the suit property against the petitioners and adduce evidence in support of their claim to enable a court of competent jurisdiction to adjudicate the matter on its merit. As they were not party to any former suit adjudicated on its merits involving the suit property that forms the subject matter of the

suit in which the impugned order has been passed, the conditions laid down in Province of Punjab v. Malik Ibrahim and Sons are not satisfied and the principle of res judicata and constructive res judicata is not attracted. Respondents No. 1 and 2 have been granted the right to fair trial and due process under Article 10A of the Constitution and they cannot be non-suited and barred from asserting their claim to ownership and possession of the suit property on the technical basis that they were previously knocked out when their application under Order 10 Rule 1 of CPC in the suit Muhammad Azeem v. Muhammad Younas was dismissed.

12. Likewise, the provisions of Order II Rule 2 of CPC do not support the petitioners' case as the petitioners and respondents No. 1 and 2 were never party to any suit previously filed, the question of relinquishment of any relief that respondents No. 1 and 2 might have been able to assert against the petitioners simply does not arise. Respondents no. 1 and 2 had no previous occasion to claim any relief against the petitioners, except by seeking to be impleaded in the suit titled Muhammad Azeem v. Muhammad Younas as defendants, which they attempted to do but were not allowed. It can therefore not be concluded that they relinquished any relief against the petitioners that they were entitled to under law or even that they were indolent in seeking relief against the petitioners.

13. Learned counsel for the petitioners has failed to make out a case on the point of limitation. The learned counsel for respondents 1 and 2 relied on excerpts of mutation record to

support the claim of the said respondents to ownership and possession of the suit property and submitted that only when the legal character of respondents No. 1 and 2 was denied by the petitioners that the respondents had a cause of action to seek declaration and injunction against the petitioners. Merely because the father of respondents No. 1 and 2 was a party in a suit in which the petitioners are asserting a claim against the property that overlaps with the property over which respondents No. 1 and 2 claim rights, creates no basis in law to impute knowledge of the petitioners claim to respondents no. 1 and 2. Respondents no. 1 and 2 are adults and claiming legal rights in relation to suit property on the basis of a purchase transaction that does not involve their father and their claim is not based on any inheritance rights that they have acquired from their father. Consequently, whether or not they had knowledge of petitioners claim against the suit property such that their suit is barred by limitation is a question of fact that cannot be adjudicated without framing an issue and allowing parties to lead evidence in that regard. As the question of limitation cannot be decided as a matter of law in the facts and circumstances of this case, the argument that the suit is barred by limitation as a ground for acceptance of the application under Order VII Rule 11 also fails.

14. It is settled that a suit cannot be dismissed merely because one of the reliefs claimed in the suit is barred by law and in such case the principle of severance would come into play and the suit would proceed to the extent of the relief that can be pursued in accordance with law. Respondents No. 1 and 2 are seeking a declaration and mandatory injunction in relation to the

suit property and the learned counsel for the petitioner has been unable to make a convincing argument as to how such relief is barred by law. The argument of the learned counsel for the petitioners that where the party asserts his claim before one forum, he is barred from pursuing the same claim before another forum on the basis of doctrine of choice is also misconceived. This is not a case where respondents No. 1 and 2 were afforded different forums to pursue remedial measures under a special law and a general law or where they were obliged to chose one forum out of multiple forums available to them to assert their rights in relation to the suit property. The application under Order I Rule 10 of CPC filed in the suit titled Muhammad Azeem v. Muhammad Younas was also filed before the learned Civil Court and its dismissal does not disentitle respondents No.1 and 2 from bringing a fresh suit before the civil court and respondents No. 1 and 2 are not estopped from filing such suit on the basis of the doctrine of choice. This is not a case where two alternate remedies were available to respondents No. 1 and 2 before two independent forums and having chosen one and failed to convince such forum to grant them relief, they are barred to approach an alternate forum. The determination by a court that an applicant is not a necessary or proper party in a suit to which he seeks to be impleaded does not automatically mean that such applicant has no claim of his own. The rules that govern adjudication of an application under Order I Rule 10 are different from those that govern an application under Order VII Rule 11. Under Order I Rule 10 a court determines whether the applicant is a necessary or proper party in the suit pending

before it as framed by the plaintiff and if it is apprehended that the suit might be subjected to unrelated controversies due to inclusion of an applicant as a defendant, the application can be denied. Under Order VII Rule 11, a court looks at the plaint and determines whether the claim as stated can be made out in law without forming a tentative view on the veracity of such claim. Just because a party's application under Order I Rule 10 is dismissed in one suit is not automatically determinative of whether or not it has a legal claim against the parties to such suit. In the instant case, it is also apparent from the perusal of the order passed in the learned Additional Sessions Court dismissing the revision against the order dismissing Order I Rule 10 application of the petitioners, that such order does not discuss the grounds asserted in the appeal and instead held that the suit filed by the petitioners was itself not maintainable. Be that as it may, as held above, the dismissal of an application under Order I Rule 10 in one suit, does not create a bar under law prohibiting respondents no. 1 and 2 from bringing their claim before a civil court in an independent suit.

15. The subject-matter of the suit requires determination of questions of fact in accordance with law and cannot be decided in a summary manner. Respondents No. 1 and 2 have a right to press such claim and produce their evidence in support of their case and it is for the trial court to adjudicate the dispute between the parties in view of evidence led by the parties. Non-suiting respondents No. 1 and 2 on the basis that a learned Civil Court dismissed their application to be impleaded as a party to a suit brought by the petitioners would amount to undermining

their Article 10A rights to have civil rights determined after a fair trial and due process.

16. In view of the above, the petition is **dismissed** with a cost of Rs.25,000/- imposed under section 35(1)(iii) of CPC to be paid by the petitioners to respondents No.1 and 2.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 03.05.2021.

JUDGE

Saeed.