# JUDGMENT SHEET
# IN THE ISLAMABAD HIGH COURT, ISLAMABAD
# JUDICIAL DEPARTMENT

**R.F.A.No.155/2017**
**Kartar Lal Pirwani**
**Versus**
**Muhammad Waqar Azeem and others**

**Date of Hearings:** 22.02.2018 & 31.05.2018
**Appellant by:** Rana Shahid Hussain Khan, Advocate
**Respondents by:** Mr. Mohammad Amin, Advocate for respondent No.3.
Mr. Usman Rasool, Advocate for C.D.A.

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**MIANGUL HASSAN AURANGZEB, J:-** Through the instant Regular First Appeal, the appellant, Kartar Lal Pirwani, impugns the order and decree dated 13.09.2017, passed by the Court of the learned Civil Judge, Islamabad, whereby respondent No.3's application under Order VII, Rule 11 of the Code of Civil Procedure, 1898, ("C.P.C.") was allowed and the plaint in the appellant's suit for specific performance and permanent injunction, was rejected on the ground of *res judicata*.

2. The facts, in brief, are that vide agreement to sell dated 04.06.2015, respondent No.3 agreed to sell plot No.104, measuring 272 square yards situated in Sector D-12/4, Islamabad ("the suit plot"), to respondents No.1 and 2. Rs.20,00,000/- was paid as earnest money, whereas the remaining amount of Rs.1,20,00,000/- was to be paid on or before four weeks with a grace period of one week. The terms of the said agreement authorized respondents No.1 and 2 to sell the suit plot to a third party. Vide agreement to sell dated 17.06.2015, respondents No.1 and 2 agreed to sell the suit plot to the appellant. Rs.35,00,000/- was paid as earnest money, whereas the remaining sale consideration of Rs.1,20,00,000/- was to be paid on or before 05.07.2015. The transactions under the said agreements were not completed.

3. The suit for specific performance of the agreement dated 04.06.2015 filed by respondent No.1 on 01.09.2015 against respondent No.3 was dismissed as withdrawn on 02.12.2015. Thereafter, respondent No.1 filed another suit for specific

**performance of the said agreement dated 04.06.2015 against respondent No.3. The plaint in this suit was rejected by the learned civil Court, vide order and decree dated 05.01.2017, on the ground that since respondent No.1 had withdrawn the earlier suit, a second suit on the same cause of action was not competent in terms of Order XXIII, Rule 1 C.P.C. The said order and decree has remained unchallenged.**

**4. On 31.01.2017, the appellant filed a suit for specific performance of the agreements dated 04.06.2015 and 17.06.2015 against the respondents. On respondent No.3's application under Order VII, Rule 11 C.P.C., the learned civil Court rejected the plaint on the ground that the suit was barred by the principle of *res judicata*. This was done, vide order and decree dated 13.09.2017, which has been assailed by the appellant in the instant appeal.**

**CONTENTIONS OF THE LEARNED COUNSEL FOR THE APPELLANT:**

**5. Learned counsel for the appellant submitted that the learned civil Court erred by rejecting the plaint in the appellant's suit on the ground of *res judicata*; that the learned civil Court did not appreciate that the appellant was not a party to the two suits for specific performance instituted by respondent No.1 against respondent No.3; that the appellant was unaware of the proceedings in the said suits; that respondent No.1 (i.e., the plaintiff in the said suits) was seeking specific performance of agreement dated 04.06.2015 only; that the appellant, in his suit, was seeking specific performance of agreement dated 04.06.2015 as well as agreement dated 17.06.2015; that in the said agreement dated 04.06.2015, respondent No.3 (the vendor) had empowered respondents No.1 and 2 (vendees) to sell the suit property to a third party; that it was on the basis of the said clause in the agreement dated 04.06.2015 that the appellant entered into agreement dated 17.06.2015 for the purchase of the suit plot; that the appellant gave an amount of Rs. 35,00,000/- as earnest money to respondents No.1 and 2; that in the suit instituted by the appellant, respondents No.1 and 2 gave a statement that they would have no objection if the said**

**suit was decreed; and that the appellant has suffered a grave loss due to the breach of the agreement dated 17.06.2015 by respondents No.1 and 2.**

**6. Furthermore, it was submitted that the agreement dated 04.06.2015 provided that if respondents No.1 and 2 resale the suit plot then respondent No.3 would be responsible to execute documents in favour of the new purchaser without any delay; that respondent No.1 could not have filed a suit for specific performance against respondent No.3 without making the appellant a party to the suit; that the said suit for specific performance instituted by respondent No.1 against respondent No.3 was collusive and fraudulent and aimed at causing a loss to the appellant; that the appellant did not join the proceedings in the said suit in any capacity; and that the order of withdrawal of the said suit could not be termed as a "judgment and decree" so as to deprive the appellant of his valuable rights. Learned counsel for the appellant prayed for the appeal to be allowed and for the impugned judgment and decree dated 13.09.2017 to be set aside.**

**CONTENTIONS OF THE LEARNED COUNSEL FOR RESPONDENT NO.3:**

**7. On the other hand, learned counsel for respondent No.3 submitted that the impugned judgment and decree suffers from no infirmity; that the appellant was well aware of the suit for specific performance filed by respondent No.1 on 01.09.2015; that respondents No.1 and 2 had executed a special power of attorney in favour of the appellant authorizing the latter to engage counsel and to do all other things incidental to the proper conduct of the suit instituted on 01.09.2015, including the power to compromise the said suit; that the appellant was also well aware of the withdrawal of the said suit on 02.12.2015; that the withdrawal of the said suit precluded the appellant from filing a fresh suit; that there was no privity of contract between the appellant and respondent No.3; that the appellant was not a party to the agreement dated 04.06.2015; that the appellant could not seek specific performance of the agreement dated 04.06.2015 which was executed between respondent No.3 on the one hand and respondents No.1 and 2 on**

**the other; that respondent No.3 was not a party to the agreement dated 17.06.2015 which was executed between respondents No.1 and 2 on the one hand and the appellant on the other; that respondent No.3 had already sold the suit plot to a third party; and that the learned civil Court was correct in holding that the suit filed by the appellant for the specific performance of the agreements dated 04.06.2015 and 17.06.2015 was barred by the principle of *res judicata*. Learned counsel for respondent No.3 prayed for the appeal to be dismissed.**

**8. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.**

**FACTUAL BACKGROUND:**

**9. The record shows that on 04.06.2015, an agreement to sell was executed between respondent No.3 (Raja Muhammad Khalil) on the one hand and respondent No.1 (Muhammad Waqar Azeem) and respondent No.2 (Sultan Safdar) on the other, whereby respondent No.3 agreed to sell the suit plot to respondents No.1 and 2 for a total sale consideration of Rs.1,40,00,000/-. Respondents No.1 and 2 had paid Rs.20,00,000/- (i.e. Rs.19,50,000/- through pay order dated 04.06.2015, and Rs.50,000/- in cash) as earnest money, whereas the remaining amount of Rs.1,20,00,000/- was to be paid on or before four weeks from the date of the said agreement with a grace period of one week. The said remaining amount was to be paid within the said period at the time of the transfer of the suit plot in the office of the Capital Development Authority, Islamabad.**

**10. In the said agreement, it was provided that if respondent No.3 refused to go ahead with the deal or failed to get the suit plot transferred in favour of respondents No.1 and 2 or their nominees within the prescribed period, respondent No.3 would pay double the amount of the earnest money to the said respondents who would also be competent to complete the deal through a Court of law. It was also provided that if respondents No.1 and 2 backed out from the deal or failed to pay the remaining sale consideration within the prescribed period, the deal would be considered as cancelled and**

**the earnest money would be forfeited. The said agreement contains an unusual clause which is reproduced herein below:-**

> ***"And that the second party is allowed to re-sell the said Plot on any price to any body else, desired by him. In this respect the first party will have no objection. If the second party re-sells the said Plot before transfer, the first party will be responsible to execute fresh documents as [per] the requirement of the second party in favour of the new purchaser immediately with the written consents of the second party without any hesitation or any delay."***

**11. The four-week period from the date of the execution of the said agreement dated 04.06.2015 was to end on 04.07.2015, and the grace period on 11.07.2015. Prior to the expiry of the four-week period, another agreement to sell dated 17.06.2015 was executed between respondents No.1 and 2 on the one hand and the appellant on the other, whereby respondents No.1 and 2 agreed to sell the suit plot to the appellant for a total sale consideration of Rs.1,55,00,000/-. As per the contents of the said agreement dated 17.06.2015, the appellant had paid Rs.35,00,000/- as earnest money, whereas the remaining sale consideration of Rs.1,20,00,000/- was to be paid on or before 05.07.2015. It is an admitted position that the transactions contemplated under the abovementioned agreements dated 04.06.2015 and 17.06.2015 did not materialize.**

**THE FIRST SUIT:**

**12. On 01.09.2015, respondent No.1 instituted a suit for specific performance and permanent injunction against respondent No.3 before the Court of the learned Civil Judge, Islamabad, praying for *inter-alia* the specific performance of the agreement dated 04.06.2015. Neither was the appellant impleaded as a party in the said suit, nor is there any mention of the agreement dated 17.06.2015 in the said suit. On 18.02.2016, respondent No.3 filed a written statement in which he admitted the execution of the agreement dated 04.06.2015. Furthermore, it was pleaded that respondent No.3 had applied to the Capital Development Authority for the transfer of the suit plot but despite reminders by respondent No.3, respondent No.1 did not pay the balance sale consideration; that respondent No.1 was a property dealer and he had said that he**

**would pay respondent No.3 the balance sale consideration after selling the suit plot to some one else; that since the balance sale consideration was not paid within the agreed period, respondent No.1 breached the terms of the agreement dated 04.06.2015 and consequently, the earnest money stood forfeited; and that the suit plot had been sold by respondent No.3 to one Muhammad Sulaiman. Be that as it may, on 02.12.2015, the said suit was dismissed as withdrawn after the learned civil Court recorded the statement of the learned counsel for respondent No.1 that respondent No.1 does not want to pursue the case due to a settlement arrived at between the parties. There is no record of any compromise or settlement arrived at between the parties to the said suit.**

**THE SECOND SUIT:**

**13. On 29.12.2015, respondent No.1 instituted another suit for specific performance and permanent injunction against respondent No.3 praying for *inter-alia* the specific performance of the agreement dated 04.06.2015 before the Court of the learned Civil Judge, Islamabad. In this suit also, there was no mention of the agreement dated 17.06.2015. The appellant was also not impleaded as a party in this suit. Instead of filing a written statement, respondent No.3 filed an application under Order VII, Rule 11 C.P.C. for the rejection of the plaint on the ground that suit was barred under Order XXIII, Rule 1 C.P.C. Vide order and decree dated 05.01.2017, the learned civil Court allowed the said application and rejected the plaint. In the said order, it was held that since respondent No.1 had withdrawn the earlier suit without permission for filing a fresh one, the new suit was barred by law in terms of Order XXIII, Rule 1, C.P.C. The record is silent as to whether the said order and decree dated 05.01.2017 was assailed any further.**

**THE THIRD SUIT:**

**14. On 13.02.2016, respondents No.1 and 2 filed a suit for declaration, cancellation of agreement and permanent injunction against the appellant before the Court of Civil Judge, Islamabad. In the said suit, respondents No.1 and 2 prayed for a declaration to the effect that they are entitled to forfeit the amount paid by the**

**appellant as earnest money under the agreement dated 17.06.2015. Respondents No.1 and 2 also prayed for a decree for cancellation of the said agreement and a decree for permanent injunction restraining the appellant from using the said agreement to sell in any manner. Vide order dated 09.06.2016, the said suit was dismissed as withdrawn after the learned counsel for respondents No.1 and 2 recorded her statement to the effect that a compromise had been effected between the parties. There is no document on the record reflecting the terms and conditions of the compromise between the parties to the said suit.**

**THE FOURTH SUIT:**

**15. On 31.01.2017, the appellant filed a suit for specific performance of the agreements dated 04.06.2015 and 17.06.2015 against the respondents. Respondents No.1 and 2 put in appearance before the learned civil Court and on 20.03.2017 recorded their statements to the effect that they had purchased the suit plot, vide agreement dated 04.06.2015, from respondent No.3; that under the terms of the said agreement, respondents No.1 and 2 could sell the suit plot to a third party; that respondents No.1 and 2 sold the suit plot to the appellant, vide agreement dated 17.06.2015; and that respondents No.1 and 2 would have no objection if the suit instituted by the appellant was decreed.**

**16. On 04.05.2017, respondent No.3 filed an application under section 11 read with Order VII, Rule 11 C.P.C. praying for the rejection of the plaint. The plea taken by respondent No.3 in the said application was that the suit instituted by the appellant was barred under the principle of *res judicata* since the subject matter of the said suit was directly and substantially the same as the suit titled "Muhammad Waqar Azeem Vs. Raja Muhammad Khalil etc." which had been decided, vide judgment and decree dated 05.01.2017. The appellant contested the said application by filing a written reply.**

**17. Vide impugned order and decree dated 13.09.2017, the learned civil Court allowed the said application and rejected the plaint. The learned civil Court appears to have appreciated the fact that the appellant was not a party to the previous suit for specific**

**performance instituted by respondent No.1. However, the learned civil Court held that since the appellant was claiming specific performance of one of the agreements through respondent No.1 who was a party to the previous suit, the suit for specific performance instituted by the appellant was barred under the principle of *res judicata.* The said order and decree dated 13.09.2017 has been impugned by the appellant in the instant regular first appeal.**

**18. The vital question that needs to be determined is whether the suit for specific performance instituted by the appellant on 31.01.2017 could be held to be barred by the principle of *res judicata*, even though the appellant was not a party to the previous two suits for specific performance (instituted by respondent No.1 on 01.09.2015 and 29.12.2015), and even though the specific performance of the agreement dated 17.06.2015 was not sought by respondent No.1 in the previous two suits.**

**THE PRINCIPLE OF *RES JUDICATA*:**

**19. The rule of *res judicata* enacted in section 11 C.P.C. is based on the principle that a decision once rendered by a competent Court on a matter in issue between the parties after a full inquiry should not be agitated over and again. For the purposes of clarity, section 11 C.P.C. is reproduced herein below:-**

> ***"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 added)**

**20. The principle of *res judicata* is based on public policy and necessity to ensure an end to litigation. In the case of Province of Punjab Vs. Malik Ibrahim and Sons (2000 SCMR 1172), it has been held that in order to attract the principles of *res judicata*, the following conditions must be complied with:-**

> ***"(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 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."***

**21. Now, in the earlier two suits for specific performance, respondent No.1 (i.e. the plaintiff therein) had sought the specific performance of agreement dated 04.06.2015 against respondent No.3. In the suit instituted by the appellant, specific performance of agreement dated 04.06.2015 as well as agreement dated 17.06.2015 has been sought. In the case of Mustafa Kamal Vs. Daud Khan (2009 SCMR 221), it has been held that when the subject-matter of the previously instituted suit was not the same as the fresh suit and the parties were also not the same, the principle of *res judicata* was not applicable.**

**22. The plaintiff in the earlier suits was respondent No.1, whereas the plaintiff in the subsequent suit was the appellant. The appellant was not even a party to the earlier suits instituted by respondent No.1. Therefore, it is my view that the test laid down in the case of Province of Punjab Vs. Malik Ibrahim and Sons *(supra)* for the applicability of the principle of *res judicata* is not satisfied in the case at hand.**

**23. In the case at hand, the appellant was not the plaintiff or even a party in the earlier two suits, in which specific performance of agreement dated 17.06.2015 had not even been prayed for. Since the agreement dated 17.06.2015 was not the subject matter of the earlier suits, the suit filed by the appellant is not hit by the principle of *res judicata*. In the case of Hafiz Noor Muhammad Vs. Ghulam Rasul (1999 SCMR 705), the Hon'ble Supreme Court observed that in order to apply the bar of *res judicata*, the Court must first determine whether the issue was raised, determined and decided in**

**the former proceedings between the parties. Since the agreement dated 17.06.2015 was not the subject matter of the earlier suits filed by respondent No.1 and since the appellant was not impleaded as a party in the said suits, the learned civil Court could not have applied the principle of *res judicata* to the relief of specific performance of agreement dated 17.06.2015 sought by the appellant.**

**WHETHER FOR THE APPLICABILITY OF THE PRINCIPLE OF *RES JUDICATA* THE EARLIER PROCEEDINGS SHOULD HAVE BEEN DECIDED ON MERITS:**

**24. It may be recalled that in the earlier two suits, there had been no adjudication on merits. The first suit instituted by respondent No.1 was dismissed as withdrawn, whereas the plaint in the second suit instituted by respondent No.1 was rejected under Order VII, Rule 11 C.P.C. on the ground that the first suit was withdrawn without permission to file afresh. Hence, there was no adjudication on merits i.e. whether agreement dated 04.06.2015 was specifically enforceable against respondent No.3. It is well settled that *res judicata* does not apply where an earlier suit is not decided on merits. In order to apply the bar of *res judicata*, the Court must first determine whether the issue was raised, determined and decided in the former proceedings between the parties. Where there was no indication that the question involved had been conclusively determined in the earlier litigation, the invocation of the principle of *res judicata* was not justified. The matter on which plea of *res judicata* was founded should have been finally adjudicated and decided in previous proceedings in order to furnish a ground for such a plea to succeed. Even a matter which was in issue in the previous litigation but was left open and undecided, subsequent proceedings on the said matter were not barred on the principle of *res judicata*. The principle of *res judicata* cannot be pressed into service unless it is established that the matter in issue was earlier adjudicated on merits and conclusively decided. Reference in this regard may be made to the law laid down in the cases of Muhammad Akram Vs. Member Board of Revenue (2007 SCMR 289), Muhammad Saleem Ullah Vs. Additional District Judge, Gujranwala (PLD 2005 SC 511), Hafiz Noor Muhammad Vs. Ghulam Rasul (1999 SCMR**

**705), Mian Khan Vs. Aurangzeb etc (1989 SCMR 58) and Abdul Ghafoor Vs. Chief Settlement Commissioner (1985 SCMR 464). In the case of Mst. Kaniz Fatima Vs. Member (Revenue), Board of Revenue, Punjab Lahore (PLD 1973 Lahore 495), it has been held *inter-alia* as follows:-**

> ***"The decision of the Court under Order VII, Rule 11 rejecting the plaint is not on merits, because the suit in such a case virtually does not come before the Court for disposal on merits but falls out for the reason that preliminary steps to present the suit before the Court properly and effectively were not taken by the plaintiff. The principle of res judicata cannot be pressed into service unless the matter had been heard and finally decided. In order to invoke the principle of res judicata it is necessary to show that there was a decision finally granting or withholding the relief sought."***

**25. Additionally, in the case of Irum Cheema Vs. Auqaf Department (1999 SCMR 2289), it was held that where no findings were recorded by Court on a particular aspect of the matter and the point was left open for a decision in fresh proceedings, principle of *res judicata* would not be applicable to such matters. Furthermore, in the cases of Province of Punjab Vs. Ghazanfar Ali Shah (2017 SCMR 172), Abdul Hamid Vs. Dilawar Hussain alias Bhalli (2007 SCMR 945) and Managing Director, Oil and Gas Development Company Ltd. Vs. Syed Najmul Hassan Naqvi (2005 SCMR 890), it has been held that rejection of plaint does not operate as *res judicata* against the plaintiff in a subsequent suit. The rationale behind this is that rejection of plaint was not an adjudication on merits and it was said to be a decree only by fiction, which was no bar to a fresh suit.**

**26. In the case at hand, it is an admitted position that there was no adjudication on merits when the suits for specific performance instituted by respondent No.1 were disposed of. Hence, the learned civil Court erred by rejecting the plaint in the appellant's suit on the ground of *res judicata*.**

**WHETHER THE PRINCIPLE OF RES JUDICATA WILL APPLY WHERE THE FORMER SUIT IS DISMISSED AS WITHDRAWN:**

**27. It is well settled that where a plaintiff withdraws a suit unconditionally, then under Order XXIII, Rule 1(1), C.P.C he would be precluded from instituting a fresh suit in respect of the same**

**subject matter as in the earlier suit. However, where the earlier suit is dismissed as withdrawn which implied that there was no adjudication or determination of the dispute on merits, a subsequent suit would not be barred by *res judicata*. Since the first suit filed by respondent No.1 was dismissed as withdrawn and since the plaint in the second suit filed by respondent No.1 was rejected on the ground that the first suit was dismissed as withdrawn without permission to file afresh, it cannot be said that there had been adjudication or a decision on the merits of the case. The bar of *res judicata* is not applicable where the earlier proceedings are dismissed as withdrawn. Reference in this regard may be made to the following case law:-**

**(i) In the case of Gulistan Textile Mills Ltd. Vs. Soneri Bank Ltd. (PLD 2018 SC 322 = 2018 CLD 203), in the following terms:-**

> ***"Res judicata the Latin term for "a matter (already) judged" and entails the concept of claim preclusion; once a matter has been decided and adjudicated on merits by an adjudicatory body, the same cannot be raised again. The purpose of this principle is to create repose and to prevent multiple and possibly contradictory findings on the same issues and to curb unnecessary delays in proceedings. As regards civil proceedings, this concept is codified in section 11 of the C.P.C. However, the said section specifically refers to 'suits' and therefore restricts the application of the principle thereto. Interlocutory applications can not 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."***
>
> **(Emphasis added)**

**(ii) In the case of Ghulam Nabi Vs. Seth Muhammad Yaqub (PLD 1983 SC 344), it has been held as follows:-**

*"It is established law that a mere withdrawal of a suit does not operate as res judicata for the reason, if for nothing else, that there was no adjudication on merits."*

**The said dictum was quoted and followed by the Hon'ble Supreme Court in the case of Muhammad Akram Vs. Member, Board of Revenue (2007 SCMR 289).**

**(iii) In the case of Khairat Masih Vs. Aziz Sadiq (2004 MLD 943), the plaint was rejected by the learned trial Court on the ground that the suit was barred by the principle of *res judicata* since the earlier suit on the same cause of action had been withdrawn without permission to file a fresh one. It was held by the Hon'ble Lahore High Court that since the earlier suit was withdrawn and was not decided on merits, the principle of *res judicata* was not applicable. Furthermore, it was held that a suit which had not seen adjudication and decision on merits of the case can in no manner create a bar envisaged by Order II, Rule 2, C.P.C.**

**(iv) In the case of Ghulam Qadir Vs. Ahmad Ali (2002 MLD 632), the Hon'ble Lahore High Court has held as follows:-**

*"4. ...Withdrawal of a suit is governed by Order 23, rule 1, C.P.C. Now consequences of withdrawal of suit by a plaintiff under Order 23, rule 1(1), C.P.C. are stated in rule 1(3) of the said Order 23, C.P.C. According to this provision of law where a plaintiff withdraws from a suit unconditionally then he shall be precluded from instituting a fresh suit in respect of subject-matter of such a suit. It is the only penal consequence provided by law in the matter of unconditional withdrawal of a suit by the plaintiff. The withdrawal of a suit does not operate as res judicata because a Court decides nothing while permitting the plaintiff to withdraw a suit. There is no final decision by a Court in such-like situation of a matter directly or substantially in issue."*

**(Emphasis added)**

**(v) In the case of Ghulam Sughran Vs. Sahibzada Ijaz Hussain (PLD 1986 Lahore 194), the Division Bench of the Hon'ble Lahore High Court, held as follows:-**

*"26. As for the question, that plaintiffs' suit was barred by principle of res judicata, it is pointed out that previous suit filed by Sahib Yar Khan an Muhammad Yusuf, sons of donor, was for specific performance of agreement (Exh. P/3) wherein Ashiq Hussain declared himself to be 'Amin' of the properties of donor. The suit was later on withdrawn on 9-9-1961 by Muhammad Yusuf, the predecessor-in-interest of plaintiffs Nos. 3 and 4. Mst. Sughran Bibi and Mst. Wafa*

> ***Begum plaintiffs were not parties to the suit, they could, therefore, validly maintain the suit, for enforcement of their rights as heirs of the donor. Admittedly the previous suit was withdrawn and not dismissed on merits. The dismissal of the previous, suit, therefore, could not operate as res judicata."***
> **(Emphasis added)**

**28. A plaintiff is said to have an indefeasible right to withdraw a suit or to abandon any part of his claim after the institution of the suit. Permission to withdraw a suit could only be granted with respect to a matter pending before the Court. In the case of Haji Muhammad Boota Vs. Member (Revenue), Board of Revenue, Punjab (PLD 2003 S.C. 979), it has been held that permission to withdraw a suit could only be granted with respect to a matter pending before the Court. It ought to be borne in mind that the agreement to sell dated 17.06.2015 was not the subject matter of the civil suits instituted on 01.09.2015 and 29.12.2015 by respondent No.1. As mentioned above, the appellant was not even made a party to the said suits. Respondent No.1, being the plaintiff in the said suits, decided not to make any disclosure as to the agreement to sell dated 17.06.2015 with the appellant in the said suits. Since the agreement dated 17.06.2015 was not the subject-matter of the earlier suits filed by respondent No.1, the suit filed by the appellant for the specific performance of agreement dated 17.06.2015 as well, cannot be said to be barred by *res judicata*.**

**WHETHER THE APPELLANT COULD BE AWARDED DAMAGES/COMPENSATION IN HIS SUIT FOR SPECIFIC PERFORMANCE:**

**29. Now, when the appellant executed the agreement to sell dated 17.06.2015 with respondents No.1 and 2, the title in the suit plot did not vest in the said respondents. The title vested in respondent No.3 with whom respondents No.1 and 2 had entered into agreement to sell dated 04.06.2015. By executing agreement dated 17.06.2015 with parties who were not in a position to transfer the suit plot to the appellant, the latter took a risk. The appellant could not have expected respondents No.1 and 2 to transfer to him rights or title in the suit plot which respondents No.1 and 2 did not possess. An agreement to sell can be specifically enforced against a party/vendor who is not the owner of the property at the time of the**

**execution of the agreement to sell, only after the title of such a party in the property is perfected. Indeed, in the case at hand, there was no privity of contract between the appellant and respondent No.3. Despite the fact that the agreement to sell dated 04.06.2015 between respondent No.3 and respondents No.1 and 2 contains a clause empowering respondents No.1 and 2 to sell the suit plot to a third party, with the withdrawal of the first suit for specific performance by respondent No.1 and the rejection of the plaint in the second suit for specific performance, all hopes for the transfer of suit plot by respondent No.3 in favour of respondents No.1 and 2 through the process of the Court were lost. But would this mean that the suit instituted by the appellant was to no end?**

**30. As mentioned above, the appellant in his suit, had also sought specific performance of the agreement dated 17.06.2015. The appellant had paid earnest money in the sum of Rs.35,00,000/- to respondents No.1 and 2. Could, in such circumstances, it be said that the appellant had no cause even against respondents No.1 and 2. It is clear that respondents No.1 and 2 cannot do both the things, namely, the enjoyment of the earnest money and also not be in a position to transfer title in the suit plot to the appellant. It is well settled that on breach of a contract for sale of immovable property owing to the defect in the vendor's title, the vendor is bound to refund the amount of earnest money to the vendee. Additionally, a vendor who breaks the contract by failing to convey the land to the purchaser is liable to damages for the purchaser's loss of bargain by paying the market value of the property less the contract price.**

**31. The appellant, in his suit, has not prayed for the award of damages against respondents No.1 and 2. However, a Court has discretion in the matter of granting appropriate relief. There is nothing in the law to prevent a Court from granting damages in lieu of specific performance even if the plaintiff has not prayed for the award of damages in his suit. Order VII, Rule 7, C.P.C. provides that every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be**

**given as the Court may think just to the same extent as if it had been asked for. It is also provided that the same Rule shall apply to any relief claimed by the defendant in his written statement.**

**32. Additionally, in a suit for specific performance, the Court has ample power under section 19 of the Specific Relief Act, 1877, to award damages even though the plaintiff had not prayed for such relief. The said section is reproduced herein below:-**

> ***"19. Power to award compensation in certain cases. -- Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.***
> ***If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.***
> ***If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.***
> ***Compensation awarded under this section may be assessed in such manner as the Court may direct."***

**33. It is clear that the first part of section 19 only enables the person suing for specific performance to ask for compensation for its breach. He may do so either in addition or in substitution for such performance. The appellant/plaintiff, in the instant case, had not asked specifically for compensation for the breach of any contract. The second part of section 19 imposes a mandatory duty upon the Court to award compensation, whether it is asked for or not. The conditions that have to be satisfied before compensation is granted under the second part of section 19 are that the Court must decide that specific performance ought not to be granted; there must be a contract between the parties which must have been broken by the defendant against whom the compensation is to be granted; and the plaintiff must have proved his right to the compensation to be awarded. It is obvious that this part of section 19 comes into play only when there is privity of contract between the plaintiff and the party against which an order for damages for breach of contract can be passed.**

**34. In the case at hand, the learned civil Court was competent to award damages in the appellant's favour if he was able to prove that respondents No.1 and 2 had breached the agreement dated 17.06.2015. This is so even though the appellant had not prayed for the award of damages against respondents No.1 and 2 and even though the appellant could not specifically enforce the agreement dated 04.06.2015 against respondent No.3, because firstly, the appellant was not a party to the agreement dated 04.06.2015 and secondly, because respondent No.1 had withdrawn his suit for specific performance against respondent No.3. In holding so, I derive guidance from the law laid down in the following cases:-**

**(i) In the case of Nigar Pictures, Karachi Vs. United Brothers, Lahore (PLD 1970 Karachi 770), it was observed that section 19 of the Specific Relief Act, 1877, confers express power on the Court to award damages either in addition to or in substitution of specific performance whenever the Court considers the award of damages to be just. Furthermore, it was held that it was settled law that damages for breach of contract can be awarded in a suit for specific performance even though the plaintiff had not claimed damages.**

**(ii) In the case of Muhammad Sharif Vs. National Motors (1989 CLC 916), the Hon'ble Mr. Justice Saleem Akhtar (as he then was) after referring to a catena of case law, held as follows:-**

> ***"The rule laid down by these authorities is that section 19 of the Specific Relief Act intends to prevent multiplicity of suits and do complete and substantial justice between the parties. In a suit for specific performance the plaintiff is not obliged to specifically seek relief of damages. In such a suit the Court has ample discretionary power to grant damages provided foundation for such relief has been laid and the plaintiff has neither abandoned nor disentitled himself from seeking relief of specific performance. In these circumstances if F the Court is of the opinion that the facts justify grant of relief of damage and it is an appropriate remedy, it should be granted even if there is no prayer for such a relief. Furthermore if the relief of specific performance or injunction cannot be granted as pecuniary compensation is an adequate relief then subject to the afore stated principle damages can be awarded. The appellate Court can even remand the case for inquiry on question of damages."***

(iii) In the case of Shushilendra Pal Singh Vs. Kailash Chand Bhargava (AIR 1945 Allahabad 395), Wali Ullah J. reiterated the law laid down in the case of Callianji Harjivan Vs. Narsi Tricum ((1895) 19 Bombay 764), that when the Court holds in its discretion that neither specific performance of the agreement nor an injunction against the defendant would be a proper remedy on the ground that pecuniary compensation is an adequate remedy it ought not to dismiss the suit but should either itself award damages or order an inquiry with regard to the same.

(iv) In the case of Pratapchand Vs. Raghunath Rao (AIR 1937 Nagpur 243), it has been held that the word *"compensation"* used in section 19 of the Specific Relief Act, 1877, must be understood in the sense of damages contemplated in section 73 of the Contract Act, 1872, which has been held to apply to cases of breach of contract to sell immovable property.

(v) In the case of Natu Ram Barman Vs. Ulluk Chand Barman (AIR 1926 Calcutta 1041), it was held as follows:-

> *"If the defendants were not willing to perform the contract, the plaintiff might very well say that he did not want to have the contract specifically performed, but that he would be satisfied if he gets the earnest money with proper damages. The plaintiff is, therefore, entitled to the damages."*

(vi) In the case of K.H. Skinner Vs. Rosy Skinner (AIR 1925 Lahore 132), the Division Bench of the Hon'ble Lahore High Court came to the conclusion that in a suit for specific performance, the plaintiff is not bound to pray specifically for damages either in addition or in substitution as he has a choice of remedies open to him to apply for and the Court has discretion to allow damages if it finds that damages will be the appropriate remedy.

(vii) In the case of Arya Pradishak Pratinidhi Sabha through Lala Hans Raj Vs. Chaudhri Ram Chand (AIR 1924 Lahore 713), the plaintiff, in his suit for specific performance of a contract, had not prayed for the award of damages or compensation. Shadi Lal C.J. held that the rule of law which is enacted by section 19 of Specific Relief Act, 1877, is to the effect that if in a suit for

**the specific performance of a contract, the Court decides that specific performance ought to be granted but it is not sufficient to satisfy the justice of the case and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly; and that the plaintiff is not obliged in a suit for specific performance to pray specifically for damages and that the Court has always a discretionary power to award damages in a suit for specific performance and ought to exercise that discretion when it is of the opinion that damages should be given.**

**WHETHER THE SPECIAL POWER OF ATTORNEY EXECUTED BY RESPONDENTS NO.1 AND 2 IN FAVOUR OF THE APPELLANT AND THE WITHDRAWAL OF THE SUIT ON 02.12.2015, PRECLUDED THE APPELLANT FROM FILING THE SUIT FOR SPECIFIC PERFORMANCE:**

**35. Now, on 11.09.2015 (i.e. during the pendency of the first suit for specific performance instituted by respondent No.1 on 01.09.2015) a special power of attorney is said to have been executed by respondents No.1 and 2 authorizing the appellant to do the following acts on behalf of respondents No.1 and 2 with respect to the suit for specific performance and permanent injunction titled "Waqar Azeem Vs. Raja Muhammad Khalil etc." pending before the Court of the learned Civil Judge, Islamabad:-**

***"1. To appoint the Advocate, Pleader, Attorney to file or contest the suit.***

***2. To sign, verify, submit the plaint, application, written reply, review, revision, appeal in the court concerned or in the appellate court.***

***3. To appear in person for entering into compromise, recording of statement.***

***4. To make and file compromise or confession of judgment and to refer the case to Arbitration.***

***5. Generally to do all other lawful acts necessary which shall be construed as it is lawfully done by us in the legal proceedings of the above mentioned suit, appeal, revision for said Plot No.104, Sector D-12/4, Islamabad, Plot size 35'x70', measuring 272.22 Sq. Yds.***

***6. AND we hereby agree that the acts, deeds and things lawfully done by us said attorney shall be construed as acts, deeds and things done by us and we undertake to ratify and confirm all and whatsoever out said attorney shall lawfully do or cause to be done for us by virtue of the power hereby conferred upon our attorney."***

**36. By the time the said power of attorney is said to have been executed (i.e. on 11.09.2015), the first suit for specific performance instituted by respondent No.1 had not been withdrawn and the second suit for specific performance had not been instituted by respondent No.1. Therefore, at best, the said power of attorney could only be with respect to the first suit which was withdrawn by respondent No.1 on 02.12.2015. No mention is made about the said power of attorney in the appellant's suit for specific performance. However, in paragraph 4 of the instant appeal under the title "previous litigation", it has been pleaded that *"during pendency of the 2nd suit", a Special Power of attorney executed by respondents/ defendants No.1 and 2 in favour of the appellant/plaintiff alongwith Vakalatnama was submitted in the court on 10.06.2016 without knowledge and due permission of the appellant/plaintiff. Such introduction of Vakalatnama and Power of Attorney was made with malafide intentions and ulterior motive just to give an impression that the appellant/plaintiff was aware of the litigation between the respondents/defendants No.1 & 3, while the appellant/plaintiff was absolutely un-aware of the previous litigation between the respondents No.1 and 3."***

**37. Given the fact that the appellant has denied knowledge about the suits for specific performance instituted by respondent No.1, we are of the view that it will be for the learned civil Court to determine after the recording of evidence whether the suit instituted by respondent No.1 on 01.09.2015 was withdrawn through a counsel engaged by the appellant. The findings of the learned civil Court on these matters would have a bearing on the appellant's right to seek the award of compensation against respondents No.1 and 2, in the event he is successful in proving that the said respondents had committed breach of the agreement dated 17.06.2015. In the case of Punjab Board of Revenue Vs. Additional District Judge (2003 SCMR 1284), rejection of plaint was sought on the ground that the matter was barred by res judicata. The Hon'ble Supreme Court held that it had been rightly held that the question as to whether the plant**

**was liable to be rejected on the ground of res judicata could be decided after framing regular issue and leading evidence.**

**38. Admittedly, the appellant had no privity of contract with respondent No.3. In the case of Mrs Shakila Zaidi Vs. Hammad Asif Dosslani (2011 CLC 1011), the Hon'ble High Court of Sindh has held that in a suit for specific performance the plaintiff has no reason to join parties with whom he had no privity of contract. Recently, in the case of Talaat Inayatullah Khan Vs. Dr. Anis Ahmad (PLD 2015 Karachi 134), the Division Bench of the Hon'ble High Court of Sindh has held as follows:-**

> ***"The doctrine of privity of contract provides that a contract cannot confer rights or impose obligations arising under it on any person or agent except the parties to it. The premise is that only parties to contracts should be able to sue to enforce their rights or claim damages."***

**39. The appellant cannot compel the specific performance of the agreement dated 04.06.2015 between the respondent No.3 and respondents No.1 and 2. This is moreso, after respondent No.1 withdrew his first suit for specific performance against respondent No.3 and the plaint in respondent No.1's second suit for specific performance was rejected. In such circumstances, the appellant cannot be said to have any cause of action against respondent No.3. But it is not permissible to reject a plaint partially. In the case of Khursheed Jehan Vs. Aziz Ahmed Naqvi (1990 CLC 1132), it has been held by the Hon'ble High Court of Sindh that Order VII, Rule 11 C.P.C. can have application only if all the reliefs claimed by the plaintiff are barred by any law. Furthermore, it was held that if some of the claims are barred, the plaint cannot be rejected partially.**

**40. The upshot of the above discussion is that finding of the learned civil Court that the suit for specific performance instituted by the appellant is barred by the principle of *res judicata* is not sustainable. This is because neither was the agreement dated 17.06.2015 the subject matter of the suits of specific performance filed by respondent No.1 nor was the appellant impleaded as a party to the said suits.**

**41. For what has been discussed above, the regular first appeal is allowed and the impugned order and decree dated 13.09.2017 is**

**set-aside; the case is remanded to the learned civil Court which shall give an opportunity to the respondents to file their written statements and thereafter frame issues and proceed with the trial. There shall be no order as to costs.**

**(ATHAR MINALLAH)**
**JUDGE**

**(MIANGUL HASSAN AURANGZEB)**
**JUDGE**

**ANNOUNCED IN AN OPEN COURT ON _____/2018**

**(JUDGE)** **(JUDGE)**

***APPROVED FOR REPORTING***

*Qamar Khan**