

123

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Sardar Tariq Masood
Mr. Justice Mazhar Alam Khan Miankhel

C.P.L.A.No.159-P/2014

(Against the judgment dated 18.11.2013 passed by Peshawar High Court, Peshawar in C.R.No.1374/2010)

Zakirullah and others

...Petitioner(s)

VERSUS

Muhammad Rehman and others

...Respondent(s)

For the petitioners : Mr. Muhammad Shoaib Khan, ASC
(Through Video Link Peshawar)
For the Respondent : Mr. Muhammad Javaid Yousafzai, ASC
(Through Video Link Peshawar)
Date of Hearing : 21.11.2024

ORDER

Mazhar Alam Khan Miankhel, J:- The petitioners being plaintiffs of a suit for possession through partition of their share in the suit property have questioned the judgment dated 18.11.2013 of the Peshawar High Court, Peshawar whereby their civil revision was dismissed upholding the rejection of plaint under Rule 11 of Order VII of Civil Procedure Code (CPC) by the two courts below. Hence, instant petition for leave to appeal.

2. We have heard the learned counsel for the parties and have gone through the available record. The respondents in this petition were put on notice by this Court vide order dated 08.08.2024 which is reproduced for ready reference: -

“The suit of the petitioners for partition of the suit property was rejected by invoking the provision of Rule 11 of Order VII of Civil Procedure Code, (CPC) on the ground that their suit is hit by the principle of res-judicata as their earlier suit regarding the same subject matter between the same parties was dismissed. The contention of the learned counsel for the petitioners is that the earlier suit between the parties was a suit for

declaration (not decided on merits) wherein, a registered deed dated 23.04.1980 and a mutation No. 499 attested on 26.05.1980 on the strength of above registered deed was questioned whereas, the present lis between the parties is simply a suit for partition of their joint property (the same property) and this very fact is apparent from the bare reading of both the plaints available on record. Further contends that principle of res-judicata is not attracted in the given circumstances and invoking provision of Rule 11 ibid is not warranted in the given situation. We in the circumstances, put the respondents on notice on the question, as to whether, dismissal/rejection of earlier declaratory suit would bar a subsequent suit for partition of the joint property in the above noted situation?

2. *Let the respondents be put on a notice for a short date in office as this matter pertains to the year 2008."*

A look at the above order would reflect that the suit of the petitioners for partition of their property was dismissed for being barred by Rule 11 of Order VII as *res-judicata* and thereby their plaint was rejected. The earlier suit for which the present suit for partition has been dismissed/rejected was for a declaration under section 42 of the Specific Relief Act, 1877 and that admittedly was not decided on merits but that would not bar the subsequent suit for partition. The right of partition of one's property is an independent right and cannot be considered as a subsequent suit being barred by the principle of *res-judicata*. The learned counsel for the respondents tried to make out a case by arguing that the suit of the petitioners is also barred by Order II Rule 2 of CPC and they were required to ask for partition of their share in the suit property in the earlier round of litigation. We are afraid, the argument of learned counsel for the respondents appears to be based on some misconception of law. The right of partition is an independent right and cannot be connected with any previous suit even with regard to the same property and cannot be declared as barred by Rule 11 of Order VII CPC.

3. So, in view of the above discussion, this petition is converted into appeal and allowed and the judgment and decrees of all the three courts below are set aside. The suit of the petitioners would be deemed pending before the trial court who should proceed with the same from the stage where it was dismissed/rejected. The parties of the suit, no doubt, would be at liberty to raise their legal objections if any. The parties are directed to appear before the Civil Judge-VII, Peshawar on 15.01.2025.

ISLAMABAD
21.11.2024
Approved for Reporting
(Irfan Aslam)

24/11/24