

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
ABBOTTABADBENCH

(Judicial Department)

Civil Revision No. 67-A/2020

Iftikhar Ahmed
Vs.
Muhammad Shabbir

For petitioner: Mr. Tanveer Ahmed Din, Advocate.

For respondent: Mr. Asad Ali Chohan, Advocate.

Date of hearing **16.05.2024**

JUDGMENT

MUHAMMAD FAHEEM WALI, J.-Petitioner through this petition filed under Section 115 of the Code of Civil Procedure (Act-V) 1908, has called in question the Judgment & Decree dated 09.01.2020 rendered by learned District Judge, Mansehra, whereby the appeal filed by the respondents/defendants against the Judgment & Decree dated 22.04.2014 of the learned trial Court was accepted and the decree passed in favour of petitioners / plaintiffs was set-aside by remanding the case back to the learned trial Court.

2. Facts of the case are that petitioner /plaintiff instituted a declaratory suit against respondents/defendants to the effect that through registered deed No. 1213 dated 24.08.2007, the respondents/defendants sold property measuring 02 Kanals 03 Marlas from Khasra No. 1388 in lieu of sale consideration of Rs. 4300,000/- to the plaintiff/petitioner. The plaintiff/ petitioner paid entire sale consideration to respondents/defendants but later on, it was found that share of respondents/ defendants in Khasra No. 1388 of Mauza Dara, Mansehra was reduced pursuant to decision in suit No. 68/1 to the extent of 01 Kanal and 10 Marlas, however, said litigation was kept secret by the defendants/respondents, therefore, the defendants/ respondents were bound to transfer 01 Kanal 10 Marlas property from Khasra No. 1387 of Mauza Dara, Mansehra or to pay Rs. 28,60,667/- to plaintiff/petitioner. In Para-Bay mandatory injunction was sought while in Para-Jeem, recovery of Rs. 28,60,667/- along with consequential charges, was sought as an alternative relief. Defendants/respondents contested the suit by filing their written statement. Learned trial Court, framed issues, recorded pro and contra evidence and finally decreed the suit vide judgment and decree dated 22.04.2014. The respondents/ defendants assailed judgment and decree of

the learned trial Court through appeal. Learned District Judge, Mansehra, accepted the appeal by setting aside judgment and decree of the learned trial Court, vide judgment dated 09.01.2020, on the ground that in respect of same subject matter, subsequent suit filed by the respondents/plaintiffs was pending, and remanded the case to the learned trial Court, with direction to consolidate both the suit, frame consolidated issues and thereafter, re-decide both the suits on merits, within three months. Feeling aggrieved, the petitioner/plaintiff has approached this Court through instant Civil Revision.

3. Arguments of the learned counsel for parties heard and record gone through with their valuable assistance.

4. Perusal of record reveals that the learned appellate Court has not decided the appeal on merits, rather remanded the suit to the learned trial Court on the ground that subsequent suit, in respect of same subject matter was pending before the learned Civil Court, therefore, in order to avoid conflicting judgments, the appeal was allowed and the suit was remanded to learned trial Court.

5. Learned appellate Court, while deciding the appeal, has delved into the ground of error, while misinterpreting

Section 10& 11 of the Civil Procedure Code, 1908, which reads;

“10. Stay of Suit. ---No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between the parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in Pakistan having jurisdiction to grant the relief claimed, or in any Court beyond the limits of Pakistan established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

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.

Explanation I. – The expression “former suit” shall denote the suit which has been

decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II. – For the purposes of the 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.

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 others.

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.

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.

Explanation VI. – Where persons litigate bona fide in respect of a 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 person so litigating.”

6. The heading of Section 10 *ibid* is “*stay of suit*” but from its very start, the Section puts an embargo upon the Court to try any suit in between the same parties and in respect of same subject matter, which is already under litigation. The words “*No Court shall proceed with the trial of any suit*” appearing in Section 10 CPC and the words “*No Court shall try any suit*” appearing in Section 11 CPC are sufficient to understand that proceedings in the subsequent suit have been barred by the legislature, in order to avoid multiplicity of litigation. The restraint found in both the above referred sections of the CPC are not only limited to the parties, but it also extends to their predecessors, successors and representatives under whom, the parties or any one of them claims litigating under the same title. The development of law on the subject i.e Section 10 CPC, carved a way to consolidation of counter suits, where the proceedings in subsequent suit are stayed and former suit is tried but the intention of legislature behind introduction of these Sections in the Civil Procedure Court, 1908, could not sufficiently be achieved. In view of Section 10 & 11, the proceedings in subsequent trial would be barred in the following situations;

- i. Where the matter in subsequent suit is directly and substantially in issue in the former suit;*
- ii. The parties to the suits are same or acting under or on behalf of the same parties; and*
- iii. The Court has the jurisdiction to grant relief in the matter.*

7. In these situations, the subsequent suit should not be tried by any Court, because the parties have got sufficient opportunity to put forth their respective claims through pleadings as well as written statement and to substantiate the same through evidence. When the Courts have been restrained from trying such subsequent suit, there remains no reason for keeping said suit pending or adjourning the same, till conclusion of trial of the former suit and such subsequent suit should be buried at its inception. However, in exceptional circumstances, where the complexion of subsequent suit is such, which requires its conclusive decision on merit and same decision has bearing on the fate of former suit, such suit may be consolidated with the former suit and tried together, in order to avoid conflicting views. But for that purpose too, the subsequent suit should not be hit by the barring conditions contained in Section 10 CPC.

8. However, in Section 11 CPC, when the former suit in respect of same subject matter and in between the same parties, stands decided, any further suit on the same subject matter would be barred, provided that the issue raised in the subsequent suit, had already been raised, heard and decided in the former suit. Explanation IV under Section 11 of the CPC provides that the plea raised in plaint or written statement of the former suit, cannot be re-agitated in subsequent suit while explanation V states that the relief claimed in earlier suit and not expressly granted by the decree, would be deemed to have been refused. The careful perusal of both these Sections, makes the intention of legislature abundantly clear that the parties have only one opportunity to put forth their pleas and defence through their respective pleadings and further suit, in respect of same issue would not be maintainable. Even the opportunity to amend the pleadings has been provided under Order-VI Rule-17 of the Civil Procedure Code, where such amendment is found necessary in order to determine the real issue and controversy between the parties. The opportunity to amend the pleadings, is curative measure of the legislature for the party, which fails to put forth his entire claim in his pleadings. In the case of “*Secretary Local Government, Election Rural Development, Khyber*

Pakhtunkhwa and others Vs. Muhammad Tariq Khan and others” reported as **2021 SCMR 1433**, honourable Supreme Court of Pakistan held that;

“Now we come to the third question i.e. whether the writ petitions filed by the respondents in the instant round of litigation are hit by the principle of res judicata? There is an old latin maxim 'res judicata pro veritate accipitur'. According to this maxim, a suit/dispute in which the matter directly or substantially in the issue has been directly/ substantially in issue in a former suit/proceeding between the same parties or between parties under whom they or any of them claim has been decided by a competent court shall not be tried again in the same matter in any other courts. In simple words, a decision once rendered by a competent court on a matter in issue between the parties after a full inquiry should not be permitted to be agitated again by the same court or some other court between the same parties in the same matter. The rule of estoppel by res judicata is a rule of evidence, which prevents any party to a suit/proceeding which has been adjudicated upon by the competent court from disputing or questioning the decision on merit in subsequent litigation. It is based on the concept of public policy and private justice which apply to all the judicial proceedings. According to this, public policy involves that the general interest of the litigation must come to an end or that the litigation must have its finality. Similarly,

private justice requires that an individual should be protected from vexatious multiplication of suits and prosecutions at the instance of an opponent whose superior power and resources may enable him to abuse the process of court. A decision by a competent court, which is final, should be binding and the same questions are sought to be controverted in the subsequent litigation for which this maxim applies.”

9. Coming to the case in hand, the former suit filed by the petitioner/plaintiff was based on registered deed No. 1213 attested on 24.08.2007 and it was claimed therein that through said registered deed, he purchased property measuring 02 Kanals 03 Marlas from the defendants/respondents from Khasra No. 1388 of Mauza Dara, Mansehra. Such claim of the petitioner/ plaintiff was rebutted by the respondents/ defendants in their written statement, wherein they denied any agreement to sell as well as execution of registered deed No. 1213. Through their subsequent suit, i.e. suit No. 107/1 of 2014, the respondents/ defendants sought declaration to the effect that transfer in favour of present petitioner on the basis of registered deed No. 1213, was wrong, illegal, against the law and facts and based on fraud and malafide. The matter agitated in the subsequent suit, was directly and

substantially in issue in between the same parties in the former suit. Therefore, under Section 10 & 11 CPC, the same subsequent suit could not be tried.

10. The learned appellate Court has failed to appreciate that the subsequent suit filed by the respondents was hit by Section 10 & 11 of the Civil Procedure Court, therefore, while allowing this Civil Revision, the impugned judgment & decree passed by the learned appellate Court is set-aside and since the learned appellate Court has not decided the appeal on merits, therefore, the matter is remanded back to the learned appellate Court to re-decide the appeal on merits, after providing opportunity of hearing to the parties, in accordance with law.

Announced.
16.05.2024
(Tufail.)

JUDGE

(S.B) Hon'ble Mr. Justice Muhammad Faheem Wali