JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A No.15 of 2019

Syed Ashfaq Hussain Shah
Vs.
Mst. Ishrat Jabeen & others

Appellant by:	Raja Aleem Khan Abbasi, Ms. Erum Rasheed and Ms. Memona Saghir, Advocates.
Respondents No.1 to 4 by:	Mr. Ehtesham Turk, Advocate.
Respondent No.7 by:	Mr. Muhammad Saqib Bhatti, Advocate.
Respondent No.8 by:	Mr. Muhammad Bilal, Advocate.
Respondents No.5, 6 & 9:	Ex-parte.
Date of Hearing:	**11.04.2025.**

INAAM AMEEN MINHAS, J:- Through the instant appeal, the appellant has assailed the order and decree dated 03.11.2017 **("Impugned Order and Decree")**, passed by the learned Civil Judge 1st Class-West, Islamabad **("Trial Court")**, whereby application under Order VII, Rule 11, Code of Civil Procedure 1908 **("CPC")** filed by respondent No.7 was accepted and plaint of the appellant's suit was rejected.

2. The facts, in brief, are that the appellant, original allottee of Plot No. 385-A, Street No.38, F-11/3, Islamabad **("Suit Plot")** since 1985 agreed to sell it to Abid Hussain in 1995. Due to disputes, the said Abid Hussain filed a suit in 1996 and obtained an ex-parte decree in 2000, leading to multiple transfers of the Suit Plot. The said ex-parte decree was later on set aside in 2003 and the suit was dismissed for non-

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prosecution in 2006 restoring title to the appellant. The appellant being in possession of the Suit Plot through an application to CDA sought to re-record the title in his name. Subsequently the appellant and respondent No.1 to 5 agreed to sell the Suit Plot to third party against the sale consideration to be equally divided between the parties in result of the understanding to withdraw their pending cases. The appellant and respondents No.1 to 5 executed an agreement to sell with respondent No.6 against the sale consideration of Rs.9,500,000/- (Ninety Five Lac). Respondent No.6 failed to pay amount of Rs.4,500,000/- (Forty Five Lac) of the appellant's share, therefore, he issued a cheque and got transferred the Suit Plot in his name and thereafter the Suit Plot was transferred to respondent No.7. The cheque was dishonoured on its presentation by the appellant before the concerned bank. The respondents committed cheating and fraud with the appellant and deprived him from his valuable property, therefore, the appellant filed a suit for declaration, recision of contracts, cancellation of transfer/allotment of the Suit Plot, permanent and mandatory injunction, in which respondent No.7 filed an application under Order VII, Rule 11 CPC, which was allowed through the Impugned Order and Decree, hence, this appeal.

3. The learned counsel for the appellant contended that the Impugned Order and Decree are against the law and facts of the case; that the learned Trial Court erred in concluding that the appellant concealed the withdrawal of the earlier suit, despite the plaint explicitly disclosing such withdrawal with a supporting certificate; that both the suits involved distinct cause of action, parties, and claims as such the

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learned Trial Court erroneously applied *res judicata*. He further contended that the learned Trial Court failed to consider the question of abuse of process requires a full trial and evidence and prematurely rejected the plaint under Order VII, Rule 11 CPC without examining section 12(1) CPC and Order II, Rule 2 CPC; that even if based on the exact cause of action, the suit could not be dismissed summarily, particularly when permission for instituting a fresh suit had been sought; that the matter was decided ex-parte without affording the appellant an opportunity of hearing, as shown in the affidavit; that the learned Trial Court also overlooked critical factual distinctions in the pleadings and misread or failed to consider the material on record; that the appellant cannot be prejudiced by the Court's own act as when the learned Additional District Judge entertained the appeal against the Impugned Order and Decree, its operation was suspended, however, the appeal was returned due to a lack of pecuniary jurisdiction; that the appeal is within time and the question of limitation does not arise.

4. The learned counsel for the respondents contended that the appellant is guilty of concealing material facts by not disclosing that he had previously filed and withdrawn a similar suit for specific performance based on the same agreement dated 21.09.2009, after dismissal of his stay application on 03.10.2014; that the present suit violates the conditional withdrawal order dated 10.11.2014, which only permitted filing a fresh suit on a new cause of action; that the grounds raised in the present suit were available to the appellant in his earlier suit and that the suit and the appeal are time barred.

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5. I have heard the learned counsel for the parties and gone through the record.

6. The doctrine of *res judicata*, enshrined in section 11 CPC is designed to prevent the re-litigation of issues finally adjudicated between the same parties in a Court of competent jurisdiction. However, this principle is inapplicable where the subsequent suit is based on a fresh or independent cause of action, distinct from that which formed the subject matter of the earlier litigation. It is a settled legal position that dismissing a previous suit on procedural or technical grounds such as non-prosecution, jurisdictional defects, or lack of compliance with procedural formalities does not preclude the institution of a subsequent suit founded on different facts or legal grounds. In the present case, the earlier suit was for the specific performance of a contract dated 21.09.2009. At the same time, the subsequent suit and proceedings relate to the cancellation of the agreement on grounds of breach, fraudulent conduct and the dishonour of cheque events that occurred subsequently and gave rise to an entirely new cause of action. These issues were neither raised nor adjudicated in the earlier suit and therefore, cannot be deemed to have been finally decided. Moreover, the earlier suit of the appellant was dismissed for non-prosecution as such that suit was neither finally decided nor determined the rights and liabilities of the parties. Consequently, the learned Trial Court's invocation of the bar of *res judicata* reflects misapplication of the doctrine as it failed to appreciate the substantive distinction in the factual and legal basis of the two suits.

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7. To apply the doctrine of *res judicata* following conditions must be cumulatively satisfied:-

(i) The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit.

(ii) It must have been heard and finally decided.

(iii) The former suit must have been between the same parties or their privies.

(iv) The Court that decided on the former suit must have been competent to try the subsequent one.

(v) Issue must have been finally decided on merits.

8. Order II, Rule 2 CPC mandates that a plaintiff must claim all reliefs available to him/her arising from the exact cause of action in one suit, failing which he/she may be precluded from asserting those claims in subsequent proceedings. The underlying objective of this rule is to prevent multiplicity of litigation and ensure finality in adjudication. However, this rule is not applicable where the subsequent claim is based on a distinct and independent cause of action that either did not exist or had not matured at the time of filing the earlier suit. In the present case, the cause of action founded upon the dishonour of cheque and allegations of fraudulent conduct arose only after the withdrawal of the previous suit, which pertained to a different set of rights and obligations. These subsequent events constitute a fresh and legally separable cause of action, distinct in time and substance from the earlier claim. As such, the bar under Order II, Rule 2 CPC is not applicable in the present case and any contrary interpretation would unjustly curtail the appellant's right to seek redress for grievances that could not have been litigated previously.

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9. The learned counsel for the respondents strongly objected to the maintainability of the present appeal arguing that it has been filed beyond the legally allowed time limit; that the main point was raised in paragraph 18 of the plaint, where the appellant himself assessed the value of the suit at Rs.95,00,000 (Ninety Five Lakh); that based on this valuation, the appeal should have been filed before the High Court instead of the learned Additional District Judge, who has jurisdiction to hear appeals up to Rs.25,00,000/- (Twenty Five Lac); that despite this clear legal position, the appellant mistakenly filed the appeal before the Additional District Judge, who kept the matter pending for more than nine months before returning it due to a lack of pecuniary jurisdiction.

10. Conversely, the learned counsel for the appellant argued that the delay is not attributable to the appellant rather is due to the procedural handling by the Court; that at the time of passing of the decree, the learned Trial Court failed to mention the court fee as is evident from the decree sheet and for this reason the appellant could not file the appeal before this Court; that acting under a *bona fide* belief and within the prescribed limitation period, the appellant preferred the appeal before the learned Additional District Judge, which was entertained and treated as within time; that the appeal remained under judicial consideration for nearly nine months before being returned solely due to lack of pecuniary jurisdiction, therefore, the appellant promptly filed the appeal before this Court and that the appellant should not suffer adverse consequences for a delay caused by the Court's actions, as the principle

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actus curiae neminem gravabit, an act of the Court shall prejudice no one, squarely applies in the circumstances.

11. After giving weight to the arguments of the learned counsel for the parties, it is obvious that the delay in filing the appeal before the correct forum i.e this Court was not caused by any intentional wrongdoing, carelessness or dishonest conduct of the appellant. Instead, the delay happened due to a genuine and honest mistake in choosing the wrong forum, followed by the time consumed in the procedural handling of the case by the learned Additional District Judge. The appellant initially filed the appeal in good faith, believing it to be the correct forum and the learned Additional District Judge accepted it and kept it pending for over nine months before ultimately returning it for lack of pecuniary jurisdiction. As soon as the jurisdictional error was pointed out and the appeal was returned, the appellant promptly approached the High Court. Given that the appellant acted in good faith, did not deliberately delay the matter and considering that the error was partly due to the Court's own procedural process, it would be unjust to penalize the appellant for a mistake that was not entirely within his control. The principles of justice require a fair and flexible approach and a strict application of the limitation law in this case would do more harm than good by denying the appellant the opportunity to be heard. As such there is no delay in filing of the appeal before this Court.

12. In view of above discussion, the instant appeal is **allowed**. The Impugned Order and Decree is set aside. The suit shall be deemed pending before the learned Trial Court. The learned Trial Court shall

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proceed in the matter in accordance with law. The civil suit pertains to the year 2014, therefore, the learned Trial Court is directed to decide the same within a period of four months from the date of receiving of copy of this judgment under intimation to this Court.

(INAAM AMEEN MINHAS)
JUDGE

Announced in open Court on <u>29.04.2025</u>

JUDGE

R.Anjam.

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