

ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1470 of 2011

DATE	ORDER WITH SIGNATURE OF JUDGE
------	-------------------------------

- 1) **For hearing of CMA No. 16976/2016.**
- 2) **For hearing of CMA No. 226/2015.**
- 3) **For hearing of CMA No. 16576/2016.**

13.03.2017.**Mr. Qamarul Islam Advocate for Plaintiff****Ms. Sana Akram Minhas Advocate for defendants.**

Through application listed at Serial No. 2 the Defendant seeks rejection of the plaint under Order 7 Rule 11 CPC, whereas, on 20.10.2014 and 12.11.2014 this Court had also raised objection as to maintainability of this Suit, whereas, through application listed at serial No. 1 the Plaintiff seeks condonation of limitation if any for filing of instant Suit. Both these applications as well as the objection of maintainability are being decided through this order.

Learned Counsel for the Plaintiff submits that the Suit is within time inasmuch as the date for cause of action to file instant Suit arose on 30.10.2010 when finally in the Execution proceedings before the Civil Judge, the Decree was satisfied; however, subject to the legal compensation and recovery of cost and damages. Per learned Counsel the Defendants had denied the clearance certificates at the relevant time to the Plaintiff, which resulted in non-registration of the Plaintiff with Institute of Chartered Accountants Pakistan (ICAP) against which a Suit bearing No. 1120/1997 was filed before the Civil Court. He submits that the said Suit was decreed after exhaustive litigation between the parties and thereafter, Execution bearing No. 20/2010 was filed wherein, the Defendants produced original certificate of clearance as required. Thereafter, the Execution was disposed of but the Plaintiff's right for claiming damages remained intact. He submits that neither the suit is time barred nor is barred under Order 2 Rule 2 CPC as instant Suit has been filed independently for claiming damages. In support he has relied upon *Abdul Abid V. Siddique Moti and another (PLD 2008 Karachi 532)*, *Anjum Rehmat & another V. Squadron Leader (Retd) Shaikh & others*

(SBLR 2014 Sindh 1495) and *Abid Ali & others V. Tajbar Khan and others* (PLD 2003 Lahore 409).

On the other hand, learned Counsel for the Defendants submits that the Plaintiff was expelled from the College on 13.9.1997 who thereafter, filed a Suit bearing No. 1120/1997 wherein, the relief for reinstatement as well as clearance certificate was sought; however, no damages were claimed. She further submits that in that situation provisions of Order 2 Rule 2 CPC would apply as the relief of damages was not claimed in the first Suit and thus, it amounts to waiver. She further submits that according to the Plaintiffs own case as set up in the plaint, the Suit is time barred inasmuch as the cause of action initially accrued in the year 1997 and merely for the fact that subsequently and belatedly, a legal notice was issued before filing of instant Suit, limitation cannot be cured. Per learned Counsel the certificate as desired by the Plaintiff was never issued, hence, even otherwise no claim for any damages would be maintainable. Learned Counsel has relied upon *Digital Radio Paging Ltd. V. Pakistan Industrial Credit and investment Corporation and others* (2003 CLD 1612), *Syed Imtiaz H. Rivzi V. Abdul Wahab and another* (2007 CLC 483) and *Messrs Imperial Builders and another V. Lines (Pvt) Limited and 3 others* (PLD 2006 Karachi 593). She further submits that there is a counter claim of the Defendants in this matter; however, if the plaint is rejected she will not be pressing the same but will reserve the right to press upon the same if the plaint is restored subsequently in appeal.

I have heard both the learned Counsel and perused the record. Insofar as the issue of limitation is concerned, the Plaintiff's case appears to be that the limitation would start running from 30.10.2010 when the Execution application pursuant to judgment and decree in Suit No. 1120/1997 was disposed of. The Plaintiff's further case is that since the Execution was disposed of on the basis of a statement filed by the Plaintiff and the same was done by retaining the right to legal compensation and recovery of damages; hence, the fresh Suit is within time. With regard to the applicability of Order 2 Rule 2 CPC the Plaintiff's case appear to be that it is a fresh cause of action after issuance of a clearance certificate; therefore, Order 2 Rule 2 CPC does not apply.

Insofar as the question of limitation is concerned, I am of the view that the relief of damages was not dependent on the outcome of the Execution proceedings as contended on behalf of the Plaintiff. The cause of action for claiming damages started from the day when the Plaintiff was expelled and the necessary clearance certificate was withheld. For such purposes the Plaintiff filed a Suit in the year 1997 wherein, the Plaintiff never claimed any damages. Therefore, the contention that the limitation is to be computed from the date of disposal of Execution application and issuance of a final legal notice is not correct, and I am not impressed with such line of argument.

Insofar as applicability of Order 2 Rule 2 CPC is concerned, again in my view the Plaintiff ought to have claimed damages in the first Suit as it was the first occasion by which the Plaintiff was aggrieved and had filed the Suit. The grievance was his expulsion and withholding of the clearance certificate as alleged. The Plaintiff chose not to claim any damages in the first Suit; resultantly, the same appears to have been waived. The provision of Order 2 Rule 2 CPC is clear to that extent and reads as under.

2. Suit to include the whole claim.- (1) Every Suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the Suit within the jurisdiction of any Court.

Relinquishment of part of claim—(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Omission to sue for one of several reliefs—(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation: For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.”

The aforesaid provision provides that every Suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action; but a Plaintiff may relinquish any portion of his claim in order to bring the Suit within the jurisdiction of any Court and where a Plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, *he shall not afterwards sue in respect of the portion so omitted or relinquished*. Rule further provides that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted. Though the Plaintiff did made an attempt to argue that the relief being sought through instant Suit is a subsequent relief and is not arising out of the same cause of action for which he had filed the earlier Suit; however, I am not inclined to agree with his submissions. Nothing prevented the plaintiff from claiming the relief of damages at the time of filing of the said Suit, as the cause of action for doing so had already accrued in the shape of expulsion and denial of

clearance certificate as alleged. The plaintiff admittedly, relinquished such claim and therefore, now at this stage the principle of Res-judicata squarely applies on him and the Suit appears to be barred under Order 2 Rule 2 CPC. Moreover, at the time of disposal of the Execution proceedings, neither any such order was passed by the Court so as to permit the plaintiff to claim damages as suggested, as perusal of the order passed on plaintiff statement does not reflect so. Notwithstanding this, even otherwise, the Executing Court could not have granted such relief or permission to the plaintiff being beyond the judgment and decree of which the Execution was being sought.

In view of hereinabove facts and circumstances of this case, I am of the view that the plaint in this matter is barred by limitation as well as under Order 2 Rule 2 CPC and therefore, the same is liable to be rejected. Consequently, application listed at serial No.1 is dismissed, whereas, the application listed at serial No.3 has become infructuous and is accordingly dismissed. Insofar as the counter claim of Defendants is concerned, in view of rejection of the plaint the Counsel has not pressed the same; however, if the plaint is restored in Appeal, then the defendants will be within their right to press upon their counter claim.

The application at Serial No.2 under Order 7 Rule 11 CPC is allowed. Accordingly, plaint is rejected under Order 7 Rule 11(d) CPC as being barred in law.

J U D G E

ARSHAD/