

IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal No. 268 of 2014

Date of hearing: 09.10.2017
Appellant: Moula Bux Khatian through
Mr. Shahanshah Hussain, Advocate.
Respondents: SSGC & others through Mr. Asim Iqbal,
Advocate.

JUDGMENT

ADNAN-UL-KARIMMEMON, J. Appellant has impugned Order dated 24.09.2014 passed by the learned Single Judge (Original Side) of this Court in Civil Suit No. 247 of 2010 (Re-Moula Bux Khatian Vs. Sui Southern Gas Company Ltd.), whereby plaint is rejected under Order VII Rule 11 CPC on the grounds of time barred and Res-judicata.

02. Brief facts of the case are that on 11.12.2009 Appellant filed Civil Suit No. 247 of 2009 with prayer as follows:-

- 1) To direct the defendant to pay the amount of Rs. 2, 02, 64,048/- which is the legal right of the plaintiff on account of his retirement dues in accordance with law.
- 2) Any other relief or relieves, which this Honorable Court deem fit and proper in the circumstances of the case.
- 3) Cost of the suit may also be awarded.

03. The Respondent-Company (defendant) filed Application under Order 7, Rule 11 CPC read with Section 151 CPC on 03.05.2010 for rejection of plaint on the ground that suit is time

barred, hit by res-judicata and filed against official designation/title.

04. The learned Single Judge (Original Side) vide Order dated 24.09.2014 allowed the above specified Application and rejected the plaint as barred by law with the following observations:-

“20.In view of what has been discussed above, patently the plaint of the plaintiff is barred under the law; hence the same is rejected as such.”

05. The Appellant claims that he was appointed by the then Sui Southern Gas Company Limited (SSGCL) as an Officer in the Executive Cadre on 15.08.1975. He has further averred that on 03.06.1989 he was posted as Private Secretary to Minister for Culture & Sports in his own pay & scale (OPS) and was relieved from Sui Southern Gas Company Limited vide their letter No. DO: MRK dated 07.06.1989. Per Appellant, his deputation was approved by the Ministry of Petroleum and Natural Resources. Appellant further asserted that while he was working on deputation from SSGCL to Federal Government, his service was placed at the disposal of Government of Sindh vide Notification No. 50-1/90/E-2 dated 09.01.1991 with further direction that on reversion from Government of Sindh the Appellant will report to his parent organization i.e. Respondent-Company (Sui Southern Gas Company Ltd). Appellant further added that he filed Constitutional Petition No. D-2356 of 1993 before this Court against Notification dated 16.08.1993 praying that the same be declared unlawful. Appellant further added that the said Petition was accepted vide

Judgment dated 10.09.1995. Appellant further averred that he was permanently absorbed in the service of Government of Sindh and retired in the year 2009 and his lien was terminated on 10.10.2001 by SSGCL/ Respondent-Company after keeping him on the active role for 12 years on deputation. Appellant further added that the Respondent-Company did not settle the accounts and pensionery benefits with effect from 15.08.1995 to 10.10.2001 to which the Appellant is entitled and as agreed by the Respondent-Company vide letter dated 29.08.2004. Appellant further averred that from 2001, he requested Respondent-Company to pay his retirement benefits i.e. pension, gratuity and provident fund as per Service Rules of SSGCL but they have been avoiding paying his legal dues along with consequential final settlement for service of 26 years. Appellant further averred that he is entitled to difference of pay and scale from 1989 to 2001 as done in the cases of Grade-IV officers at the time when Appellant was sent on deputation to Federal Government. Appellant added that Respondent-Company sent a stereotyped letter dated 10.08.2005 whereby clarified and confirmed the service of Appellant for 26 years, one month and 27 days but, did not pay monetary service benefits stated supra to Appellant in violation of their own service Rules. Appellant further averred that Respondent-Company failed to settle terms of Appellant, hence huge monetary loss occurred to the Appellant from 1989 to 2001 i.e. deputation allowance @ 10%. Per Appellant he was not awarded Notional alleviation which was allowed to his colleagues in Grade-VI in SSGCL from 1989 to 2001. Appellant added that he filed Constitutional Petition No. D-993 of 2006

before this Court for direction to the Respondent-Company to release the payment as per attached claim of Appellant, which was dismissed vide Order dated 29.02.2008 with the observations that the Appellant shall have to file a suit for recovery of the amount of service benefits salary and allowances before Competent Court of Civil jurisdiction. The said Order was assailed before the Hon'ble Supreme Court of Pakistan in Civil Petition for leave to Appeal No. 184-K of 2009, which upheld the decision of this Court vide Order dated 24.11.2009. Appellant claims that cause of action accrued to him firstly, when he was appointed on deputation and finally when he claimed retirement dues and the same continued till filing of the Civil Suit No 247 of 2009 before this Court, which was dismissed vide impugned Order dated 24.09.2014. The Appellant being aggrieved by and dissatisfied with the said impugned Order filed the instant High Court Appeal No. 268 of 2014 on 20.10.2014.

06. Mr. Shahenshah Hussain, learned Counsel for Appellant contended that impugned Order passed by the learned Single Judge is based on mis-appreciation of law and against provisions of Order VII, Rule 11 CPC. Appellant added that learned Additional Registrar (O.S) vide Order dated 07.09.2009 struck off the application of Respondent-Company filed under Order VII, Rule 11 read with section 151 CPC (CMA No. 4381/2010). However, as per record the same was restored vide Order dated 18.03.2011. Learned counsel asserted that services of the Appellant were requisitioned by Government of Pakistan as Private Secretary to the Federal Minister for Culture and Sports on deputation basis in

his own pay and scale and Respondent-Company relieved Appellant vide Letter dated 7th June 1989; the said reliving order neither terminated services of the Appellant nor his accounts namely Provident Fund, Gratuity, Pension and other benefits etc. were settled; however, Appellant remained on active strength of SSGCL as its executive on deputation to Federal Government; the learned Single Judge failed to consider such averments made in the plaint in violation of the provision of Order VII, Rule 11 CPC. The learned counsel asserted that when there are contradictory versions the only recourse is to record evidence of the parties and decides the suit on merit. Therefore, finding of the learned Single Judge without recording evidence is not sustainable in law. He next contended that the learned Single Judge ignored the fact that the Appellant was working in the Federal Department on deputation and his lien was not terminated in Respondent-Company. Per learned Counsel the learned Single Judge in his findings in para No.9 of the impugned Order observed as under:-

“It is not a disputed position that the present plaintiff did file the C.P. No. D-2356/1993 (reported as PLD 1996 Karachi 68 (DB) wherein he had challenged the notification dated 16.08.1993, whereby he (plaintiff) was transferred and ordered to report to his parents department (SSGC).”

07. Learned counsel further contended that above observations of the trial Court and the Notification dated 16.08.1993 also prove that services of the Appellant were requisitioned by Federal Government on deputation and Appellant filed instant Suit in view of observations of this Court in C.P. No. D-993/2006 and in

compliance of Order dated 24.11.2009 passed by Hon'ble Supreme Court in Civil Petition for leave to Appeal No. 184-K/2008. Learned counsel in support of his contention has relied upon the case of Chief Executive Progressive Papers Ltd/ Chairman National Press Trust, Islamabad Vs. Sh. Abdul Majeed and another (2005 PLC (C.S) 1439), Abdul Hamid and others Vs. Chief Secretary N.W.F.P and others (1983 SCMR 2455), Azad Jammu and Kashmir University through Registrar and 2 others Vs. Prof. (Retd.) Muhammad Aslam Khan (2010 PLC (C.S) 229). He lastly prayed for setting aside the impugned Order dated 21.9.2014 with direction to the trial Court to dispose of the matter on merits.

08. Mr. Asim Iqbal, learned Counsel for Respondent-Company supported the impugned Order dated 24.09.2014 and narrated that services of Appellant were terminated by relieving him of his duties in Respondent-Company with effect from 07.06.1989. Per learned counsel the Appellant was not on deputation under the service Rules of SSGC and there was no lien and commitment to reappoint the Appellant if he was relieved by the requisitioning Authority. He further contended that Appellant was absorbed in the Government service on his own request through Order dated 10.09.1995 passed by this Court in C.P. No. D- 2356 of 1993 and Appellant did not pursue any further proceedings in this regard hence, the matter attained finality; the Civil Suit No. 247 of 2009 filed on 11.02.2010 against pensionery benefits of Appellant w.e.f. 07.06.1989 was time barred; that Appellant was not retired from Respondent-Company. Learned counsel referred to the Order dated

29.02.2008 passed by this Court in Constitutional Petition No. D-993 of 2006 and argued that the Appellant was non-suited by this Court so the question of lien with the Respondent-Company as claimed by the Appellant has been heard and decided through judgment dated 10.09.1995 passed in Petition No. 2356 of 1993. Per learned counsel it is an admitted position that Appellant never challenged the above said Order dated 10.09.1995 which is a past and closed transaction. Per learned counsel the Appellant is not entitled to any service benefits including pay and allowances claimed by him; that the above referred Order regarding lien was assailed by Appellant before the Hon'ble Supreme Court in CPLA No. 184-K of 2008 and the same was dismissed vide Order dated 24.11.2009; therefore, the Appellant is neither entitled to benefits claimed nor has any cause of action to file suit for recovery of pensionary benefits against Respondent-Company; besides, the plaint is hit by doctrine of laches and law of limitation. Learned counsel in support of his contentions has relied upon the case of Aziz ur Rehman Vs. Atiq ur Rehman (2016 YLR 2411), Mir Sahib Jan Vs. Janan (2011 SCMR 27), Pir Bakhsh Vs. The Chairman Allotment Committee and others (PLD 1987 SC 145) He lastly prayed that the instant Appeal may be dismissed.

09. We have heard learned counsel for Appellant and learned counsel appearing on behalf of the Respondent-Company as well as, perused the impugned Order, other material available on record and case law cited at the bar.

10. Perusal of the impugned Order dated 24.09.2014 passed by the learned Single Judge of this Court on Original Side shows correct application of law and facts.

11. For interpreting scope of Order VII, Rule 11 of Code of Civil Procedure, 1908 its provisions are reproduced as follows:

The plaint shall be rejected in the following cases:

- a) *Where it does not disclose a cause of action;*
- b) *Where the relief claimed is under-valued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;*
- c) *Where the relief claimed is property valued; but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;*
- d) *Where the suit appears from the statement in the plaint to be barred by any law.*

12. We have noted that the above provision of law is mandatory in nature as the word “shall” has been used. Meaning thereby that a Court is bound to reject a plaint if it “appears” from the statement in the plaint to be barred by any law.

13. We have examined the plaint and noted following aspects of the case:-

- i) Appellant/plaintiff after lapse of more than 10 years, he filed suit in the year 2010.
- ii) Appellant was permanently inducted in the service of Sindh Government in the year 1995 with all consequential benefits.

- iii) Appellant/plaintiff continued receiving the benefit / fruits of his service (s) in the Sindh Government after his permanent induction.
- iv) Appellant/plaintiff retired on attaining the age of superannuation in the year 2009 from Government of Sindh with all benefits. Service Rules of SSGC not legalizing the claim of Appellant/plaintiff regarding his requisition as on deputation.
- v) Appellant/plaintiff is claiming benefit of services with SSGC/Respondent-Company while admittedly his requisition was converted into permanent induction with all consequential benefits.
- vi) Appellant/plaintiff cannot seek exception from law of limitation and Res-judicata which debars the Appellant/plaintiff from filing the suit
- vii) From the perusal of impugned order, which shows that the learned Single Judge has elaborately dealt with the issue of recovery of pensionary benefits in the impugned order.

14. The pivotal questions which need to be addressed in order to reach a just decision are as follows:-

- i) Whether the plaint of the Appellant/plaintiff is barred under the law?
- ii) Whether the Appellant/plaintiff is entitled to service benefits from SSGC for a period of 12 years i.e. 1989 to 2001?
- iii) Whether, said issues decided by this court, cannot be opened by the Appellant/plaintiff again, thus falls within the ambit of Res-judicata?

15. Addressing the first question we observe that the learned Single Judge has rejected plaint on the point of law of limitation for the reason that the Appellant/plaintiff filed Suit on 11.02.2010 whereas, the alleged cause of action accrued to Appellant when he was relieved from Respondent-Company on 7.8.1989. It is a well settled principle of law that Limitation Act, 1908 or any other

special law contain inbuilt provisions for seeking remedy within the time, otherwise right of remedy is lost and vested right of other party is created which cannot be extinguished at the whims and wishes of indolent.

16. Reverting to the second question we observe that the Appellant was permanently absorbed in Sindh Government in year 1995 and retired from service in 2009 with all pension benefits after attaining age of superannuation i.e. 60 years. Again to claim the identical pension benefits from Respondent-Company, the Appellant filled above specified Suit, which is not sustainable under the law. Secondly, the Appellant has relied upon some copies of the letters of the Respondent-Company which are disputed and denied by them. Therefore, all such documents are subject to proof by means of evidence. It is a settled principle of law that no reliance can be placed on a document which is relied upon by one party in the proceedings and is denied by the other. Reliance is placed on the case of Haji Abdul Karim and others Vs. Messrs Florida Builders (Pvt) Limited (PLD 2012 SC 247).

17. So far as above mentioned third question is concerned we are of the view that in the earlier round of litigation, the Appellant/Plaintiff was non-suited by this Court vide Order dated 29.02.2008 in C.P. No. D-993 of 2006, (filed by Appellant). Thus, the question of lien claimed by Appellant is already heard and decided through the above specified judgment dated 10.9.1995 passed by this Court in earlier Petition No. 2356 of 1993, which is admittedly not challenged by the Appellant.

18. We are of the view that Appellant approached this Court through C.P. No. D-2356 of 1993 which was allowed on 10.09.1995. Therefore, similar relief cannot be claimed by filing subsequent legal proceedings as it would fall within mischief of constructive res-judicata. Reliance is placed on the case of State Bank of Pakistan through Governor and others vs. Imtiaz Ali Khan and others (2012 SCMR 280).

19. Record further reflects that above referred Order dated 29.02.2008 was assailed by Appellant before Hon'ble Supreme Court in CPLA No. 184-K of 2008 which was dismissed vide Order dated 24.11.2009 with the observations reproduced as follows:

***“We have heard the petitioner in person and perused the material placed on record particularly the impugned judgment of the Division Bench of Sind High Court which goes to show that the said petition filed by the petitioner has been dismissed with the observations that as disputed question of fact were involved about the claim of service benefits pay and allowances of the petitioner, based on certain letter of respondent No.1 department which have been categorically denied by them therefore proper remedy available to the petition will be before the Civil Court by way of a suit for recovery of amount of service benefits/salary and allowance.*”**

In our opinion, such observations of the High Court are unexceptionable. Accordingly this petition is dismissed and leave refused.”

20. Reverting to the plea taken by learned Counsel for the Appellant that lien of Appellant existed in Respondent-Company we are of the considered opinion that the word “lien” means the *title of a Government servant to hold substantively either*

immediately or on the termination of a period or periods of absence a permanent post, including a tenure post, to which he has been appointed substantively, the only Government Servant can hold lien on the post.” Whereas, Appellant at the time of employment in Respondent-Company was neither Civil Servant nor Government Servant, therefore, the question of existence of Appellant’s lien in the Respondent- Company does not arise.

21. Record reflects that the service rules of the Respondent-Company did not provide any deputation and as such when the appellant’s service was requisitioned by the Federal Government, he was issued last pay certificate which is dated 07.08.1989. This letter clearly states that in compliance with the Government of Pakistan, Cabinet Secretariat Establishment Division Rawalpindi Notification dated 03.06.1989, appellant was relieved of his duties in Respondent-Company. There is no mention of deputation or any indication that his lien was kept with the Respondent-Company. Record further reflects that the Appellant voluntarily left Respondent-Company and never returned to parent department and chosen to remain on deputation. Thereafter, Appellant got himself absorbed in Sindh Government in the year 1995 without consent of Respondent-Company. Therefore, entire claim of Appellant in suit is not sustainable in law.

22. The learned Single Judge has dealt with every aspect of the case and has rightly concluded in the impugned Order that the plaint is barred by law and the Appellant has failed to make out his case on the exception of law of limitation and res-judicata as

provided under Section 11 CPC, hence, no interference is warranted by this Court.

23. So far as the plea taken by the Appellant that this Court vide Order dated 9.2.2008 passed in C.P-No. D-993 of 2006 has condoned the delay in filing of Suit is concerned, we observe that perusal of said order dated 9.2.2008 prima facie shows that delay in filing of the Suit has not been condoned. The observation in the said order that Appellant shall have to file Suit before Competent Court of Civil Jurisdiction does not imply condonation of delay by any angle of interpretation. Therefore, the Appellant cannot take exception of the observations of this Court regarding filing of Suit after delay of more than 15 years.

24. Reverting to the assertion of the learned counsel for the Appellant on the point of limitation, we are of the considered view that the suit is filed by Appellant on 11.02.2010 whereas, cause of action accrued to him in the year 1989 when he was relieved from service of Respondent-Company. Since, the petitioner has retired from Government Service (Sindh Government) on attaining the age of superannuation i.e. 60 years in the year 2009 and not from the Respondent-Company, therefore, the claim of the petitioner for his retirement dues from Respondent-Company is not tenable under the law.

25. The case law cited by the learned counsel for the Appellant is quite distinguishable from the facts of the case in hand.

26. In the light of above facts and circumstances of the case, the High Court Appeal No. 268 of 2014 being misconceived, is dismissed along with listed application(s).

JUDGE

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