

# IN THE HIGH COURT OF SINDH AT KARACHI

## High Court Appeal No. 195 of 2017

Present: -

**Mr. Justice Adnan-ul-Karim Memon**  
**Mr. Justice Agha Faisal**

Date of hearing: 07.08.2018  
Appellant: Abdul Tauheed Khan, present in person  
Respondents: Through Mr. Khalid Mehmood Siddiqui,  
Advocate

### **JUDGMENT**

**ADNAN-UL-KARIM MEMON, J.** Appellant has assailed the Judgment dated 06.02.2017 and Decree dated 27.02.2017 passed by the learned Single Judge (Original Side) of this Court in Civil Suit No. 44 of 2010 (Re- Abdul Tauheed Khan Vs. Federation of Pakistan & others), whereby the suit of the Appellant being barred under Order II Rule (2) CPC 1908 was dismissed as not maintainable.

2. Brief facts of the case as per averments of the parties are that on 12.01.2010 Appellant filed Civil Suit No. 44 of 2010 against Federation of Pakistan & others with the following prayer:-

- 1) ***That the plaintiff is entitled to receive the mesne profits on withheld amounts of pay, allowances & pension amounting to Rs. 11,948,368.00 and updated till payment.***
- 2) ***That the plaintiff is entitled to receive compensation of Rs. 13,069,454.00 on Mesne profits and updated till payment.***
- 3) ***That the plaintiff is also entitled to receive of Rs. 10,250,000.00 as damages from the Defendant Authority since he and his family have suffered mental torture, agony, humiliation and harassment due to adamant and illegal approach of Defendant Authority.***

- 4) ***That this Hon'ble Court may be pleased to pass a decree and issue a mandatory injunction against the Defendant Authority directing to make the said payments to the plaintiff immediately.***
5. ***That this Hon'ble Court may also be pleased to allow any other relief deem fit and proper under the circumstances of the case to meet the ends of justice.***

3. The Respondent-Civil Aviation Authority (Defendant No.2) filed written statement and denied allegations leveled against them by the Appellant and prayed for dismissal of the suit against the Defendant No.2.

4. The learned Single Judge (Original Side) vide Judgment dated 06.02.2017 and decree dated 27.2.2017 dismissed the suit of the Appellant with the following observation:-

***“In view of hereinabove facts and circumstances of this case, issue No.1 is answered in negative by holding that instant Suit is not maintainable being barred under Order 2 Rule 2 CPC. In view of such findings other issues are not required to be decided. Suit stands dismissed however with no orders as to cost.”***

5. The Appellant being aggrieved by and dissatisfied with the impugned Judgment and decree has filed the instant appeal and inter alia contended that he was appointed as Assistant Accounts Officer in the office of the Auditor General of Pakistan on 11.10.1952 and proceeded on leave preparatory to retirement (LPR) w.e.f. 1.3.1984 to 1.3.1985 for a period of one year. He further contended that before expiry of LPR, he was re-employed by the Civil Aviation Authority as Deputy Manager (Accounts) in Pay Group in BPS-17 on 28.10.1984 and after serving for nine years, eight months and twelve days, he finally retired from the post of

Corporate Manager Finance PG-9 (BPS-18) on 15.03.1995 and he was issued Pension Payment Order No. 985 by sectioning gratuity only at the time of his superannuation. Therefore, the Appellant, through Constitutional Petition No. D-1469 of 2006, (*Re-Abdul Tauheed Khan vs. Federation of Pakistan & others*) filed in this Court claimed his pensionary benefits for his service with the following prayer:-

***“It is, therefore, humbly prayed that this Hon’ble Court may be pleased to allow this C.P and order to either release pension under C.S.R’s Art 423 (1) be revising Pension Payment Order 985 or pay the Capitalized Value of its share to Govt. for revision of P.P.O No.16293/PAK by A.G.P.R Lahore under C.S.R Article 529 read with Article 807 together with any other relief which this Hon’able Court may deem equitable under the circumstances of the case.”***

He further averred that the learned Division Bench of this Court vide Judgment dated 15.09.2008 allowed the Constitutional petition with the following observations:-

***“In view of foregoing reasons, petition is allowed competent authority is directed to calculate the pensionary benefits of petitioner in accordance with rules and considering and deeming it as one pension for both period of services rendered by petitioner with Auditor General of Pakistan and C.A.A. as provided in Civil Service Regulations referred above.”***

The Appellant further contended that the Civil Aviation Authority impugned the Judgment dated 15.09.2008 passed by this Court in CP No.D-1469 of 2006 before the Hon’ble Supreme Court of Pakistan in Civil Petition No.1467 of 2008, which was decided on 5.12.2008 with the following observations:-

***“3. We have heard the learned counsel for the petitioner at length and have also perused the available record. Admittedly, the respondent joined the service of petitioner while he was still in the service of Auditor-General of Pakistan and his leave preparatory to retirement had not yet expired. In view of the length of his service for about 10 years, the High Court was***

***justified on equitable grounds, to direct the petitioner to grant pensionary benefits to the respondent. Needless to observe that his appeal before the Federal Service Tribunal remained pending for a considerable period when the same stood abated in view of the law laid down by this Court in Mobeen-ul-Islam's case PLD 2006 SC 602. Therefore, the question of laches would not arise in this case in our view; the impugned judgment is just and fair to which no exception can be taken. The other points of law raised by the learned counsel such as application of the Civil Service Regulations to the employees of Civil Aviation Authority are left to be examined in some other appropriate case."***

Appellant has further submitted that he received his pay and pension dues from Respondent-Civil Aviation Authority after 14 years of his superannuation on 15.03.1995 on implementation of Judgment passed by this Court in the aforesaid cases. He further contended that the Respondent-Civil Aviation Authority did not pay interest on illegally withheld amount and pay & allowances. Appellant claims that he is entitled to 16% profit on withheld amount of pay & allowances, pension and commutation as provided under Civil Aviation Authority Pension Fund. Appellant has averred that he was not paid a single penny on this account as mesne profit earned by CAA in respect of Appellants withheld arrears of monthly pay and allowance since 1.3.1985 till 17.2.2009 and 25.2.2009 and in respect of commutation and monthly pension; that Appellant served a notice on the Respondent-CAA in year 2009; but they paid no heed to it. As such, the Appellant was constrained to file Civil Suit No. 44 of 2006 before this Court for redressal of his grievances; which was dismissed by the learned Single Judge vide impugned judgment and decree as not maintainable in terms of Order II, Rule (2), CPC, 1908 and Judgments pronounced by the Hon'ble Supreme Court of Pakistan.

He further contended that the learned Single Judge dismissed the Suit by misinterpreting the Order II, Rule (2), CPC though the evidence was recorded by the Commissioner; that the learned Single Judge failed to appreciate the factum of damages he and his family have suffered, mental torture, agony, humiliation and harassment due to adamant and illegal approach of Respondent Authority; that the learned Single Judge failed to give finding on other issues framed. He concluded that the Suit No. 44 of 2010 was maintainable and liable to be decreed on merits. In support of his contention, the appellant relied upon in the cases of *Contempt of Proceedings against General Retd. Mirza Aslam Baig* (1993 PSC 620), *Miss Irini Wahab Vs. Lahore Biocent Trust Association* (2002 SCMR 300), *Mst. Akhtar Begum and others Vs. Nawabzada Asad Mumtaz Ali Khan & others* (1999 SCMR 985), *Miss Haleema Tahir & others Vs. Naheed & others* (2004 MLD 227), *Mithan & others Vs. Mst. Jamila & others* (2004 YLR 2200), *Muhammad Azim Vs. Pakistan Employees Cooperative Housing Society Limited Karachi and others* (PLD 1985 Kar. 481), *Bank of Credit & Commercial International Credit Vs. Miss Shahida Jam Sadiq Ali* (PLD 2009 Kar. 303), *Muhammad Inayat Vs. Mst. Sardara Bibi* (2011 CLC 343), *Chirag Vs. Abdul & others* (PLD 1999 Lahore 340), *Ragho Ravji Bharde Vs. Gopal Janardan* (AIR 1930 Bombay 132), *Venugopal Pillai and others Vs. Thirugnanavalli Ammal* (AIR 1940 Madraas 934), *Rama Kallappa Pujari Vs. Saidappa Sidrama Pujari and another* (AIR 1935 Bombay 306), *Mg. Ko Lay and others Vs. Maung Nyo and others* (AIR 1927 Rangoon 237), *Tadepalli Ramiah Vs. Madala Thathiah and others* (AIR 1937 Madras 849) *Mst.*

*Bilquis Begum Vs. Khalid Hameed Khan* (2007 YLR 2212), *Muhammad Anwar Vs. Dr. Gohar Ali* (2007 CLC 621), *Haji Muhammad Khan Vs. Muhammad Nasir Khan* (2007 YLR 2067), *Maulvi Abdul Aziz Khan Vs. Imtiaz Begum* (1994 CLC 1703), *Ghulam Haider Badini and others Vs. PTV Corporation and others* (NLR 1995 Service 172), *Javed Iqbal Vs. PASCO and others* (2004 CLC 478), *A AZuberi Vs. Additional Accountant General Pakistan Revenue Lahore & others* (2010 PLC (CS) 1211), *Mst. Bilquis Begum & others Vs. Khalid Hameed Khan & others* (2007 YLR 2212). He lastly prayed for allowing the instant High Court Appeal as prayed.

6. Mr. Khalid Mehmood Siddiqui, learned Counsel for the Respondents has supported the impugned Judgment dated 06.02.2017 and Decree dated 27.02.2017 passed by the learned Single Judge and argued that the instant High Court Appeal is not maintainable under the law on the ground that each and every aspect of the case has been discussed in the impugned Judgment passed by the learned Single Judge of this court as such no further interference of this Court in the matter is warranted. He further submitted that no compensation for delayed payment of pension is payable. In support of his contention, he relied upon the case of *Allah Bakhsh Vs. Government of Punjab* (1993 SCMR 2104), *M. Asghar Ali Vs. Secretary to the Government of Pakistan, Ministry of Foreign Affairs & others* (1998 PLC (CS) 1215), *Mst. Amnat Vs. Province of Sindh & others* (2005 PLC (CS) 1404), *Haji Muhammad Ismail Memon, Advocate Complainant: In the matter* (PLD 2007 SC 35), *Director General of Civil Aviation Authority, Karachi Vs. Abdul*

*Touheed Khan (2010 SCMR 468) & Muhammad Sarwar & 9 others Vs. Federation of Pakistan through Secretary Ministry of Finance, Islamabad (2013 MLD 45)*. He further submitted that the Appellant omitted the relief of compensation and the damages in CP No.D-1469 of 2006 for adjudication by the learned Division Bench of this Court as well as by the Hon'ble Supreme Court of Pakistan. He concluded that the relief claimed, through the instant appeal is barred under Order II Rule 2 CPC and that the learned Single Judge has rightly dismissed the suit of the Appellant. He lastly prayed for dismissal of the instant Appeal being not maintainable under the law.

7. We have heard the Appellant present in person and the learned Counsel appearing on behalf of the Respondent-Civil Aviation Authority, perused the impugned Judgment dated 06.02.2017 and decree dated 27.02.2017, passed by the learned Single Judge and other material available on record and case law cited at the bar.

8. Perusal of the impugned Judgment and decree passed by the learned Single Judge of this Court on Original Side has premised his findings on the issue whether the suit is maintainable for the recovery of amount claimed in the suit against the Respondents/Defendants and no findings have been given on rest of the issues framed out of pleadings of the parties.

9. To appreciate the controversy between the parties in its true perspective, it would be beneficial to have a glance at the Order II,

Rule 2 of Code of the Civil Procedure, 1908 its provisions are reproduced as follows:

***“ Order II Rule 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.”***

10. The question arises whether the entire case of the appellant fell within the ambit of Order II, Rule (2), Civil Procedure Code, 1908. As the main object of Order II Rule 2 CPC is that there cannot be one proceeding after another with respect to the same cause of action and a Plaintiff must claim all reliefs on the basis of the cause of action in the first suit, which is filed. If however the earlier suit is disposed of and thereafter a subsequent suit is filed, the subsequent suit which claims reliefs, which are based on the same cause of action, which was the subject matter of the earlier suit, then, prima-facie the second suit would attract by Provision of the Order II Rule 2 CPC.



11. To go up with the above legal position of the case, in this regard we would like to shed light on the following important aspects of the case:-

***The learned Division Bench of this Court vide its judgment dated 15.09.2008 allowed the Constitutional Petition by directing to calculate the pensionary benefits of petitioner as one pension for both period of services rendered by petitioner with Auditor General of Pakistan and C.A.A. as provided in C.S Regulations referred above.***

12. The Judgment dated 15.09.2008 passed by this Court in CP No.D-1469/2006 was maintained by the Hon'ble Supreme Court of Pakistan in Civil Petition No.1467 of 2008 vide Judgment dated 5.12.2008.

13. Upon perusal of the record, we have noticed that the learned Single Judge vide order dated 08.03.2011 framed the following issues:-

- 1) ***Whether the Suit is maintainable for the recovery of amount claimed in the Suit against the Defendants?***
- 2) ***Whether at the time of full and final settlement of the dues of the Plaintiff any amount was withheld by the Defendants?***
- 3) ***Whether the Plaintiff is entitled to claim mesne profit on withheld amount of pay, allowances and pension, if so to what extent?***
- 4) ***Whether the Plaintiff is entitled to receive compensation in the sum of Rs.13.069.454.00?***
- 5) ***Whether the Plaintiff is entitled to receive damages in the sum of Rs.10, 250,000/- due to mental torture, agony, humiliation and harassment if any suffered by the Plaintiff?***
- 6) ***What should the decree be?***

14. Record further reflects that the learned Single Judge vide order dated 8.3.2011 appointed the Commissioner to record evidence followed by subsequent order dated 27.5.2011 for changing the Commissioner. The learned Commissioner completed

the recording of evidence and filed his report on 23.2.2013, which was taken on record. We are cognizant of the fact that the matter, which was pending before the learned Single Judge was fixed for final arguments on 13.01.2017, and after hearing the parties the Judgment, was reserved.

15. The learned Single Judge while dismissing the Suit has observed as under:-

***“10.It is also a matter of record notwithstanding the observations hereinabove that the Plaintiff stood retired on 1.08.1995 and Defendant No.2 paid his pension and gratuity according to their own calculation. However, the Plaintiff never challenged such claim in respect of his pensionary benefits until 2.3.2002 when he has filed Appeal before the Service Tribunal. Therefore apparently even his first claim was hopelessly time barred before the Service Tribunal. Moreover insofar as the judgment of the learned Division Bench and so also the dismissal of the Civil Petition for Leave to Appeal by the Hon’ble Supreme Court is concerned, it appears that both the Courts have though granted relief to the Plaintiff; however, at the same time it may be observed that the Hon’ble Supreme Court upheld the Judgment of the High Court by observing that the High Court was justified on equitable grounds to direct the Petitioner i.e. Defendant No.2 to grant pensionary benefits to the Respondent. Even the learned High Court while allowing the petition had condoned the deficiency, if any, in the Plaintiff’s service for entitlement of complete pensionary benefits in view of certain regulations concerning the Civil Servants.*”**

***11. In view of hereinabove facts and circumstances of this case, issue No.1 is answered in negative by holding that instant Suit is not maintainable being barred under Order 2 Rule 2 CPC. In view of such findings other issues are not required to be decided. Suit stands dismissed however with no orders as to cost.”***

16. Appellant in exercising his right of rebuttal has referred to paragraph 15 to 19 of the Memo of Plaint available at page and submitted that the Respondent-Authority owe an amount of Rs. 13,069,454.00/- on account of following charges: -

1	Mesne Profit on Pay and allowances in Para 16	Rs. 7,641,867.00
2	Mesne Profits on Commutation and Pension in Para 17	Rs.4,306,501.00
3	Compensation on Mesne Profits in para 16	Rs.8,348,722.00
4	Compensation on Mesne Profits in para 17	Rs.4,720,732.00
<b>Total amount</b>		<b>Rs. 13,069,454.00</b>

And claiming damages explained at para 29 available at page 61 as under:-

1	Damages for denied Medical treatment in 2001	Rs. 250,000.00
2	Damages for Mental torture & humiliation of Plaintiff	Rs.5,000,000.00
3	Damages for Mental torture & humiliation of family	Rs. 5,000,000.00
<b>Total</b>		<b>10,250,000.00</b>

He next added that appellant has suffered in facing more than 14 years of litigation due to delay in payment of pension benefits by the Respondent-Authority therefore; Appellant is entitled to increase in the payment schedule as mentioned supra. Learned counsel for the Respondent-Authority has refuted the claim of the Appellant. Be that as it may, it is apparent that both the parties are contesting the matter on merit.

17. From bare perusal of the impugned Judgment dated 06.02.2017, the learned Single Judge has confined to the issue No. 01, which relates to the maintainability of the suit and held that the suit being barred under Order II Rule (2), CPC, 1908 is not maintainable and dismissed the same without deciding the lis on the evidence adduced by them on all the issues. The application under Order VII, Rule 11, CPC, 1908 filed by the Respondent/Defendant that the suit is barred under law was dismissed by the Court vide Order dated 08.3.2011 as withdrawn and framed issues with the Court observations that issue would be framed on this point also.

18. It is prima facie apparent that the prayer clause in the plaint included a claim for damages. The said damages were claimed as it was pleaded that the actions of the respondent have been detrimental to the appellant and his family. It is also noted that issue number 5 was framed by the Court to ascertain the entitlement (or lack thereof) of the appellant to the damages claimed. It is also within our contemplation that while the claim for claim for compensation was predicated upon mesne profits, the claim for damages was distinct thereto and grounded on the appellant and his family having suffered, as particularized supra, for which it was alleged that the Respondent Authority was culpable.

19. With utmost respect to the learned Single Judge, it is observed that since the claim for damages was independent of the issue of mesne profits and compensation, hence, the same was required to be determined on its own merits. The claim for damages, in respect whereof an issue was framed, evidence led and final arguments conducted, appears not to have been addressed in its proper perspective.

20. We are bound by the ratio of the Division Bench judgment of this Court dated 01<sup>st</sup> September 2010 in *HCA 203 of 2009* titled *Muhammad Amin Lasania vs. M/s. Ilyas Marine & Associates (Pvt.) Limited*, wherein it was held that “a plaint cannot be rejected in part. Therefore, even if the main or primary cause of action is barred, and it is only a secondary (and clearly less important) cause of action that is not, the plaint cannot be rejected in respect of that part which relates to the primary cause of action.”

21. In the present case the suit has been dismissed upon maintainability and it is not the plaint that has been rejected. The issue of maintainability has also been confined to the issue of res judicata, pertaining to certain constituents of the claim and not all, despite the argument of the appellant that the relief sought was a subsequent relief and not arising out of a cause of action agitated prior in time.

22. It is also worthy of consideration that there were 6 issues framed and evidence was led thereupon. This was not a case where a single preliminary issue with regard to the maintainability was framed and then decided, determining the fate of the suit.

23. In view of this, and with utmost respect to the learned Single Judge, in the present facts and circumstances dismissal of the suit under Order II Rule (2), CPC, 1908, without deciding the matter on the evidence adduced by the parties and giving proper findings on the issues framed, is not justified.

24. In view of what has been discussed above, the impugned Judgment dated 06.02.2017 and Decree dated 27.02.2017 passed by the learned Single Judge of this Court in Civil Suit No. 44 of 2010 (Re- Abdul Tauheed Khan Vs. Federation of Pakistan & others) is set aside and the case is remanded to the Court of the learned Single Judge to give its findings on all the issues after hearing the final arguments of the parties and decide the suit on merits as per law.

**JUDGE**

**JUDGE**