IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1774 of 2016
[**Asad Zaheer v. Muhammad Ismail and another**]

Date of hearing	:	03.10.2018
Date of Decision	:	03.10.2018
Plaintiff	:	Asad Zaheer, through Mr. Muhammad Ikram Siddiqui, Advocate.
Defendant No.1	:	Muhammad Ismail, through Mr. Masood Khan Ghory, Advocate.
Defendant No.2	:	Karachi Metropolitan Corporation, through Mr. Muhammad Shahban Solangi, Advocate.

O R D E R

***Muhammad Faisal Kamal Alam, J.*: -** Through the application [**CMA No. 2974 of 2018**], filed under Order VII, Rule 11 of C.P.C., Defendant No.1 seeks rejection of plaint.

2. It is the case of learned counsel for Defendant No.1 that the present suit of the Plaintiff is barred by law; under Order II, Rule 2 and Order XXIII, Rule 3 of Civil Procedure Code, 1908 {**C.P.C.**}, as the Plaintiff earlier had also filed two suits being Suits No.81 of 2002 and 623 of 2016, containing the same pleadings as that of the present suit. Suit No.81 of 2002 was withdrawn simplicitor as is reflected from the order dated 25.02.2009 – Annexure 'D-1' with the listed application of Defendant No.1, ***whereas***, plaint of subsequent Suit was rejected vide order dated 03.08.2016; *Annexure-D/4*. It is further argued that due to occupation of extra space of shop by the Plaintiff, the Defendant No.1 is facing continuous difficulty to carry on his business. Learned counsel has further narrated the background of earlier litigation. He has appended order dated

02.12.2015 passed by learned VII-Senior Civil Judge, Karachi, refusing the injunctive relief to present Plaintiff in Suit No.623 of 2015, which was however challenged in Civil Misc. Appeal No.82 of 2015 (Annexures 'D-2' and 'D-3', respectively of the application), but the lower Appellate Court also dismissed the appeal by maintaining the order of the Trial Court. Eventually, the above order of 03.08.2016 was passed, which was never challenged. In support of his contention, learned counsel has relied upon the following case law_

1. 2017 S C M R page-2005 [***Shahbaz Khan v. Additional District Judge, Ferozewala and others***];

2. 2015 C L C page-107 [***Dad Karim and 12 others v. Ishaq and 20 others***]; and

3. 1996 C L C page-1672 [***Muhammad Latif v. Muhammad Iqbal***].

3. Mr. Muhammad Ikram Siddiqui, learned counsel for the Plaintiff, has vehemently argued that cause of action in all previous proceedings and present ***lis*** is quite distinct. He has also appended memo of plaint of the afore-referred earlier suit with his Counter Affidavit to advance his arguments that the earlier Suit No.81 of 2002 was filed only against the then City District Government Karachi (now Karachi Metropolitan Corporation), whereas, subsequent Suit No.623 of 2015 was filed against the present Defendants, because at that relevant time, the present Defendant No.1 (Muhammad Ismail) was making false complaints against the Plaintiff. Learned counsel for the Plaintiff has further argued that since in the present suit a relief of damages has been claimed, for which evidence is to be led, therefore, the plaint of the present ***lis*** cannot be rejected at this stage without a proper trial as intricate factual dispute is involved. In this context, he has further argued that reported decisions relied upon by the learned counsel for Defendant No.1, are distinguishable.

4. Arguments heard and record perused.

5. Undisputedly, this matter relates to shop No.337 at K.M.C. Market, J.P. Road, Jubilee, Karachi, which is under occupation of present Plaintiff and according to him, he is a tenant of Defendant No.2 – K.M.C; the latter (K.M.C.) has filed its Written Statement and has confirmed that Plaintiff is the tenant, who is paying rentals regularly, while disputing the claim of present Defendant No.1.

6. In the entire pleadings of present ***lis***, the institution and withdrawal of first Suit No. 81 of 2002 is not mentioned, which Plaintiff should have, because a party to the proceeding in order to show his / her *bona fide*, has to disclose all previous and *sub judice* litigation / cases and non-disclosure of such vital information is fatal.

7. Paragraph-10 of the present plaint avers that the subsequent Suit No.623 of 2015 was filed but the present Plaintiff wanted to withdraw the same simplicitor by invoking order XXIII, Rule 1 of C.P.C. with the permission to file a fresh suit, but, because of the objections of present Defendant No.1, learned Trial Court after hearing the parties had passed the order dated 03.08.2016. Surprisingly, this Order of 3-8-2016 is also mentioned as part of the cause of action of the present ***lis***. The first Suit No. 81 of 2002 was withdrawn simplicitor without seeking any permission of Court to file a fresh proceeding. The Order on withdrawal is annexed with the present Application of Defendant No.1 as Annexure-D/1.

8. The first Suit No.81 of 2002, though was filed only against the then City District Government Karachi, but in the pleadings, the present Plaintiff has leveled serious allegations against one Chaudhry Nazir Allah Dita, who was never impleaded as one of the Defendants. The first suit also relates to the grievance of Plaintiff that the latter wants to utilize an open space

measuring 8x9 feet adjacent of his shop No.337, but the above-named Chaudhry Nazir is creating impediment. In subsequent Suit No.623 of 2015, the Plaintiff himself has admitted (in paragraphs 2 and 3) that the above-named Chaudhry Nazir is the brother of present Defendant No.1 (Muhammad Ismail son of Allah Ditta), who is owner of the adjacent shop, causing nuisance by not allowing the plaintiff to utilize the afore mentioned extra space adjacent to the Shop No. 337 of Plaintiff. Plaints of Suit No.81 of 2002 and that of 623 of 2015 have been appended with the Counter Affidavit of present Plaintiff to the application under consideration (Under Order VII, Rule 11 of C.P.C. filed by Defendant No.1).

9. The main prayer clauses of the above suit, subsequent Suit No.623 of 2015 and the present ***lis*** are substantially the same, except that now the Plaintiff is also seeking a remedy of damages.

10. The subsequent suit, in which the present Defendant No.1 is impleaded as Defendant No.1 pertains to the same grievance as agitated in the present ***lis***. Paragraph-9 relating to cause of action of above suit states that Defendant No.1 and his brother were continuously causing nuisance by filing false complaints before different authorities, ***whereas***, the present cause of action also contains the same grievance against Defendant No.1. However, the date of complaint has been changed to 20.05.2016 instead of June 2015, as mentioned in the earlier cause of action of above suit.

11. The specific query was put to the learned counsel for the Plaintiff that if till date order dated 03.08.2016 passed by the Court of competent jurisdiction in Suit No.623 of 2015 is still holding the field, can the same decision be eclipsed by way of present ***lis***. Learned Counsel for the plaintiff argued that since the present ***lis*** is on a distinct and different cause of action seeking relief of damages on account of the continuous harassment and

unlawful activities of Defendant No.1, therefore, present ***lis*** is to be adjudicated upon its own merits.

12. In my considered view, the above reply of the Plaintiff's side does not address the undisputed legal and factual position. It is a settled rule that a decision passed by an authority, tribunal or Court having jurisdiction in the matter cannot be interfered with, made ineffective or diluted either directly or indirectly in a collateral proceeding. The decision passed by the learned Trial Court dated 03.08.2018 was admittedly never challenged by the Plaintiff's side in terms of Civil Procedure Code, 1908. Merely, by adding a paragraph in pleadings and the prayer clause seeking damages will not bring the case of present Plaintiff in that exception of order VII, Rule 11 of C.P.C., wherein the Courts have held that a plaint cannot be rejected in piecemeal. The question here is not of rejecting the plaint in piecemeal but allowing the proceeding to continue against the settled principle of law.

Secondly, under the Rules, an order rejecting the plaint is to be followed by a decree, in terms of subsection (2) of Section 2 of C.P.C. It means that a decree is operating against the present Plaintiff, which he has never challenged in accordance with law.

Thirdly, a reported decision of the Honourable Supreme Court handed down in the case of ***Tahir Hussain and others v. Ilyas Ahmad and others*** (**2014 S C M R page-1210**) is relevant here; wherein, the Honourable Apex Court has explained the principle of collateral proceeding. The relevant portion of the above decision is reproduced herein under_

> ***" 11. We have noticed that the respondents time and again attempted to defeat the ejectment order by making various objection Petitions before the Executing Court and dragged the proceedings. An Executing Court has limited jurisdiction. It cannot entertain any objection Petition on the issues already decided by it nor could it consider objection Petition on the basis***

> ***of issues pending in collateral proceedings before any other forum. Likewise ejectment order cannot be interfered with by any Civil Court in collateral proceedings. The learned High Court has failed to notice that on 7-6-2001, the Rent Controller has passed ejectment order holding that relationship of landlord and tenant existed between the appellant's successors and respondents Nos.30 and 31. This order attained finality in Appeal. The Executing Court through objection Petitions by respondents or Raja Sanaullah has allowed to introduce issues which have changed the complexion of execution proceedings to that of original rent proceedings. Such powers are not conferred on the Executing Court. For the above reasons, we hold that the appellants were deprived from the benefit of the ejectment order passed on 7-6-2001 till date."***
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> **(*Underlined to add emphasis*)**

Fourthly, principle of election of proceedings for redressal of grievance is also attracted to the present set of facts. In a recent judgment of the Honourable Supreme Court given in Civil Petition No.60-K of 2018 [***Trading Corporation of Pakistan v. Devan Sugar Mills Limited and others***], the above principle has been discussed in detail; gist of which is that if a person chooses an action or proceedings out of multiple remedies, then after exhausting the one, he cannot go back to opt for other remedy right from the beginning. It would be advantageous to reproduce the relevant paragraphs from the afore-referred judgment: -

> **"*8. . . . . We have noted that facts and ground in both set of the proceedings are substantially same. The moment suitor intends to commence any legal action to enforce any right and or invoke a remedy to set right a wrong or to vindicate an injury, he has to elect and or choose from amongst host of actions or remedies available under the law. The choice to initiate and pursue one out of host of available concurrent or co-existent proceeding/actions or remedy from a forum of competent jurisdiction vest with the suitor. Once choice is exercised and election is made than a suitor is prohibited from launching another proceeding to seek a relief or remedy contrary to what could be claimed and or achieved by adopting other***

***proceeding/action and or remedy, which in legal parlance is recognized as doctrine of election, which doctrine is culled by the courts of law from the well-recognized principles of waiver and or abandonment of a known right, claim, privilege or relief as contained in Order 2 rule (2) CPC, principles of estoppel as embodied in Article 114 of the Qanoon-e-Shahadat Order 1984 and principles of res-judicata as articulated in section 11 CPC and its explanations. Doctrine of election apply both to the original proceedings/action as well to defences and so also to challenge the outcome on culmination of such original proceedings/action, in the form of order or judgment/decree (for illustration it may be noted that multiple remedies are available against possible outcome in the form of an order/judgement/decree etc. emanating from proceedings of civil nature, which could be challenged/defended under Order 9 rule 13 (if proceeding are ex-parte), section 47 (objection to execution), section 114 (by way of review of an order), section 115 (revision), under Order 21 rule 99 to 103 CPC and section 96 CPC (appeal against the order/judgment) etc. Though there is no bar to concurrently invoke more than one remedy at the same time against an ex-parte order/judgment. However, once election or choice from amongst two or more available remedy is made and exhausted, judgment debtor cannot ordinarily be permitted subsequently to venture into other concurrently or coexisting available remedies.*"**

(**underlined to add emphasis**)

"***12. In the instant case no reservation was made or avenue kept open while deciding application under section 12(2) CPC either by executing Court or for that matter by the High Court for the appellant to explore other remedy. Where a judgment debtor fails to raise all objections as may be available at the time when execution was resisted by invoking one out of few other available remedies then he is precluded by his conduct to raise any such objection, and all such objections and challenges, if any, will be deemed to have been raised and decided against him. After exhausting one of the remedies under section 12(2) CPC against the order striking out defence, judgment debtor cannot be allowed to go on expedition to venture another remedy for the same malady, which though available was not invoked, Respondent-tenant cannot be given premium to go on venturing***

> ***one after another remedy. Permitting such course would be nothing but abuse of the process of law and would amount to encourage multiplicity of proceeding, which cannot be approved. Accordingly, this petition is converted into appeal and allowed.*"**
>
> **(underlined to add emphasis)**

Fifthly, the conclusion is that in effect the nature of pleadings and the relief claimed in the earlier and present litigation are substantially the same, particularly of Suit No. 623 of 2015 and the present ***lis***, therefore, merely by claiming an additional relief of damages will not improve the case of Plaintiff by bringing it into the ambit of Order VII, Rule 13 of C.P.C.; rejection of plaint not a bar to present a fresh one on same cause of action. This provision is to be read in conjunction with Section 11 of C.P.C., pertaining to *res judicata,* Order II, Rule (2) and Order XXIII, Sub-Rule 3 of Rule 1 of CPC. Rather, the claim of damages in the present suit is hit by Order II, Rule 2 of CPC, as the Plaintiff did not claim the same in his earlier Suit No. 623 of 2015. In this regard the arguments of the learned counsel of Defendant No.1 has substance and cited decision of Hon'ble Supreme Court in the case of *Shahbaz Khan versus Additional District Judge, Ferozewala (supra)* is applicable here. In the cited case law the Hon'ble Apex Court has applied the afore-mentioned Order II, Rule 2 and Order 23, Rule 1(3) of CPC to the facts of the case and consequently, dismissed the petition as the petitioner earlier withdrew his suit unconditionally and the Order passed by the Revenue Authority attained finality, hence, subsequent suit was held to be barred under the above provisions.

13. In view of the above, the objections raised by learned counsel for Defendant No.1 in the application under Order VII, Rule 11 of C.P.C., are sustained and the application [**C.M.A. No.2974 of 2018**] is accordingly granted. Consequently, plaint of the present suit is rejected.

14. Parties to bear their own costs.

15. Since, the application [**C.M.A. No.2974 of 2018**] has been granted and the plaint of the present suit rejected, therefore, other pending applications are also disposed of accordingly.

Judge

Riaz/P.S.