

IN THE HIGH COURT OF SINDH AT KARACHI

H. C. A. No. 116 of 2020

[Shahzad Noor Muhammad *versus* Karachi Gymkhana and others]

Present:

Mr. Irfan Saadat Khan, J.

Mr. Muhammad Faisal Kamal Alam, J.

Dates of hearing : 26.08.2020, 08.09.2020, 21.09.2020,
28.09.2020 and 06.10.2020.

Appellant : Shahzad Noor Muhammad, through
Mr. Salman Hamid, Advocate.

Respondents 1-9 : Karachi Gymkhana and 8 others, through
M/s. Khawaja Shams-ul-Islam and Imran Taj,
Advocates.

JUDGMENT

Muhammad Faisal Kamal Alam, J.:- Through the present Appeal, Appellant has initially challenged the short order dated 16.06.2020 (“**the Impugned Order**”), whereby Review [C.M.A. No.4856 of 2020] filed by Respondents was allowed, earlier ad-interim order was recalled and the plaint of Suit No. 615 of 2020 was rejected with the costs of Rupees Five Hundred Thousand, while cautioning the present Appellant not to approach the Court in violation of Section 10 of Civil Procedure Code, 1908 (“**CPC**”) and his Suit No.537 of 2020 would proceed in accordance with law.

2. Succinctly, Appellant is a member of Respondent No.1 (Karachi Gymkhana) and was also elected as one of the members of its Managing Committee. The present Appellant had agitated his concerns that the affairs of Respondent Club were / are not managed in accordance with rules, by the private Respondents and according to Appellant, the Respondent No.2

(President of the Club) had taken certain decisions on his own without proper approval of the Managing Committee. The Secretary of Respondent Club (Respondent No.9) issued a Show Cause Notice dated 18.04.2020 to Appellant, calling upon him to explain about the Whatsapp sent by Appellant, which, according to the Respondents, contained derogatory language against Respondent No.2 (this correspondence is available at page-45 of the present Appeal). It was followed by another correspondence of 27.04.2020 being first remainder to Appellant to explain with evidence his allegations. Appellant filed Suit No.537 of 2020 (“**Earlier Lis**”), plaint whereof is available in record of the present Appeal, wherein, *inter alia*, he sought declaration that the above correspondences are violative of ‘Karachi Gymkhana Rules and Byelaws’ (“**the Said Rules**”) while seeking permanent injunctive relief. Initially, no ad-interim relief was granted to present Appellant. During pendency of *Earlier Lis*, the Managing Committee of Respondent Club while exercising power (*purportedly*) under Rule 30 of the Said Rules, suspended the membership of Appellant, which was challenged in subsequent Suit No.615 of 2020 (“**Second Lis**”).

3. In the *Second Lis* an ad-interim injunction was granted by the learned Single Bench of this Court, but upon filing of Review by the Respondents, wherein, *primarily*, it was stated that the present Appellant obtained ad-interim restraining order by concealment of facts and mis-representation, the Impugned Order was passed, followed by detailed reasons, which has been appended as Annexure ‘**A/1(a)**’ by the Appellant with his ‘Further Grounds to the Appeal.

4. Mr. Salman Hamid, learned counsel representing the Appellant, has submitted that causes of action in both suits are different and second suit was not at all malicious; the *Earlier Lis* was primarily against the Show Cause issued by Respondent Club to Appellant, *whereas*, in the *Second Lis*

the latter has challenged his suspension. He has averred that no concealment of fact was done and the reason for filing both suits were to forestall the highhandedness of Respondents against the Appellant. It is averred that Appellant being elected member of Managing Committee of Respondent Club, cannot be suspended by exercising authority under Rule 30 of the Said Rules, and even if a case was made out, (for the arguments' sake), the applicable provision is Rule 13 of the Said Rules, which was neither applied nor the procedure laid down therein was followed. He argued that Respondents, basically at the behest of Respondent No.2 (President of Karachi Gymkhana) cannot punish the Appellant just because he was raising genuine concerns about the Respondent Club, *particularly*, the construction work of Car Parking, swimming pool and Tennis Court, besides misuse of authority and financial corruption. Learned Advocate has argued that Second *Lis* was not hit either by Order II, Rule 2 or Order XXIII, Rule 1 of CPC or any provision of law, because it was based on new set of facts and development, which took place during pendency of Earlier *Lis*. In support of his arguments, he has cited the judgment reported as – *Iqbal Umer and others versus Karachi Gymkhana, through Secretary* [2017 C L C Note page-173] – **KG Case**, with a further statement that the same was upheld by the learned Division Bench of this Court in High Court Appeals No. 310 to 315 of 2016 reported in **2020 M L D page-1073**, and before the Apex Court also no interference was made in the last mentioned decisions. He has placed on record the last two Decisions.

5. On the other hand, Mr. Khawaja Shams-ul-Islam, Advocate, representing the Respondents, has argued that since the Appellant failed to get any ad-interim relief in the Earlier *Lis*, thus in a surreptitious manner, he filed the Second *Lis* (Suit No.615 of 2020) and obtained the order by misleading the Court and upon filing of Review, when conduct of

Appellant was highlighted, the Impugned Order was passed, which is justifiable in the circumstances. He has submitted that nature of both the suits was not different, as argued by learned Advocate for the Appellant. To support this submission, he has referred to C.M.A. No.4451 of 2020 (at page-117 of this Appeal), wherein the Appellant sought suspension of the letter dated 11.05.2020 and its implementation. He has referred to the last correspondence, whereby, membership of Appellant was suspended for a period of six months with further directions to offer an unconditional apology to Respondent No.2 (President of the Club). Averred, that since Appellant did not make present Respondent No.1 (Karachi Gymkhana) as one of the Respondents in his Earlier *Lis*, he also attempted to fill up this lacuna by filing an application under Order I, Rule 10 of CPC being C.M.A. No.4392 of 2020, in the Earlier *Lis*. With these two applications filed in Earlier *Lis*, its scope and nature was identical to the Second *Lis*. Order of 08.05.2020 passed in earlier H.C.A. No.100 of 2020 (at page-195 of this Appeal) was also read by the Advocate, in order to show the conduct of present Appellant, that even in the proceeding on that day before this Court, the Appellant's Advocate stated that former (Appellant) was not prepared to appear before the Managing Committee on 09.05.2020, in connection with earlier referred Show Cause Notice. Correspondences and Whatsapp messages exchanged between the parties, which are available in the record, were also referred in support of his arguments, that Appellant has scandalised the Respondent Club as well as its President and to forestall such malicious campaign, the action was taken in which due process was strictly followed. He has referred to the Minutes of Meeting of 09.05.2020 (in which the Appellant was required to be present in connection with Show Cause Notice), that when the complaint of Respondent No.2 against Appellant was taken up, the former (Respondent No.2-President) withdrew from the meeting. It is argued that Respondent No.1 correctly exercised its

authority and suspended the membership of Appellant under Rule 30 of the Said Rules, although it also empowers Respondent No.1 to terminate the membership of a member. He further argued that the Respondents cannot sit idle and watch a defamatory campaign going against the Respondent Club.

6. Learned counsel for Respondents has also produced during hearing under his Statement dated 08.09.2020, the record of earlier Constitution Petition No. D – 2468 of 2020, filed by present Appellant. He argued that the earlier petition was dismissed vide order dated 29.06.2020, by observing that the above two suits were filed by the present Appellant, out of which Second *Lis* has been dismissed. He has cited the following case law in support of his arguments, *particularly*, relating to the concept of concealment and fraud_

1. **2020 M L D page-1073**
[*Karachi Gymkhana and others versus Usman Ahmed Ansari and others*];
2. **2006 M L D page-148**
[*Mirza Bashir Ahmed and another versus Habib and 6 others*];
3. **1983 S C M R page-196**
[*Principal, King Edward Medical College, Lahore versus Ghulam Mustafa ETC.*];
4. **2015 C L C page-34**
[*Major (Retd.) Ahmed Nadeem Sadal and 3 others versus Federation of Pakistan through Secretary Sport, Islamabad and 3 others*] – **Sadal Case**;
5. **2017 C L C Note page-159 (Sindh)**
[*Muhammad Yousuf and others v. Government of Sindh and others*] – **Yousuf case.**

7. Arguments heard and record perused.

8. Learned counsel for Appellant has relied upon the above judgments to augment his argument on the applicability of said Rules to the facts of present case as well as non-applicability of Order II, Rule 2 and other relevant provisions of CPC to the Second *Lis*.

9. The crux of the case law relied upon by learned Advocate for Respondent is that when a person does not disclose the material facts, particularly, about some earlier litigation, he is disentitled for any relief. The case law cited in support of the arguments on fraud and misrepresentation, it would be appropriate to discuss them as well. The learned Division Bench in the case of Bashir Ahmed (*ibid*), dismissed the constitution petition of petitioner, because he did not disclose the fact about filing of review application before the Revenue Authorities, which in fact addressed the grievance of petitioner (of the reported decision). In the second case of *Medical College*, appeal of appellant King Edward Medical College was allowed and disciplinary action against the respondent student, which was earlier annulled by the learned Lahore High Court, was reversed. It was held that since the respondent student while filling the form of appellant Medical College, did not disclose the information about his appearance in earlier pre-medical examination and did not fill up a specific column Number 10, that pertained to those students, who had appeared in the pre-medical examination more than once, the act of respondent student was held to be a fraudulent act. The defence on behalf of respondent student did not impress the Hon'ble Apex Court, that non-filling of relevant column, was a mere omission on the part of respondent student, which did not entail any penalty or consequence. In *Sadal Case*, material facts were that petitioner challenged a notification of Pakistan Cricket Board regarding which the Honourable Supreme Court has already given its decision, but the same fact was concealed by the petitioner (of the reported case) before the learned Islamabad High Court, which also observed that petitioners were habitual litigants. It was also observed in the said reported case that petitioners mis-stated before the Court and in this context it was held that concealment of relevant facts is a kind of fraud and "jugglery"; frivolous, vexatious litigation based on suppression of facts has serious consequences

for administration of justice and it is an abuse of process of Court. In Yousuf case (*ibid*) also, earlier decision on the issue given in a constitutional petition was deliberately concealed in the subsequent suit, that resulted in rejection of plaint.

10. The pivotal question for deciding this Appeal is that whether Appellant sought ad-interim injunctive order through concealment of facts and deception.

11. Admittedly, two suits have been filed by Appellant, being Suit No.537 of 2020 and Suit No.615 of 2020 (Earlier *Lis* and Second *Lis*). Plaint of Earlier *Lis* is at page-29, wherein, relief was sought against letters of 18.04.2020 (Show Cause Notice) and 27.04.2020 (reminder), being purportedly violative of Rules and Bye-Laws of Respondent Club and further declaration that communication made by Plaintiff relating to the affairs of the Respondent Club, is not misconduct as envisaged in Rule 30 of the Said Rules. The plaint of Earlier *Lis* contained the following prayer clause_

- “a. Declare that the Impugned Letters dated 18.04.2020 and 27.04.2020 are illegal, arbitrary and have been issued in violation of applicable Rules and Bye Laws of the KG and therefore operation and effect thereof be suspended.**
- b. Declare that the communication made by the Plaintiff in no manner and style can be construed as misconduct under Rule 30 of the KG Rules or any other Rules or ByeLaw of the KG.**
- c. Declare that the Plaintiff has not violated any provisions of the KG Rules and Bye Laws.**
- d. Grant a permanent injunction restraining the Defendants from proceeding under the two Letter dated 18.04.2020 and 27.04.2020 and set aside the same and restrain the Defendants not to harass or intimidate or coerce the Plaintiff in any manner whatsoever.**
- e. Any other relief.”**

12. Hence, from the above prayer clause, it is quite clear that the Earlier *Lis* was filed with regard to the Show Cause Notice issued to the Appellant

and its reminder. Paragraph-20 of the plaint (cause of action) of above suit is also to this effect.

13. Since no restraining order was given in the above Earlier *Lis*, the present Appellant preferred a High Court Appeal No.100 of 2020 against the order of 07.05.2020, issuing a notice to Defendants, who have been impleaded as private Respondents in the present Appeal. It was argued by Appellant in the above earlier appeal that instead of a simple notice, the learned single bench could have passed some restraining order. Stance and apprehension of present Appellant was not accepted by this Court in the above Appeal, which **was dismissed by the Order** of 08.5.2020, with an observation that Managing Committee of Respondent Club would proceed in accordance with law. It was also observed that present Appellant did not want to appear before the Managing Committee of Respondent Club, but he should, in connection with the above Show Cause Notice, although he addressed a reply thereto.

14. It is relevant to mention here that the afore-referred impugned Order of 07.05.2020 (in the earlier appeal) along with other formal orders have been produced by the learned counsel for the Respondents during proceedings, which have been taken on record.

15. Since, Appellant did not appear before the Managing Committee on 09.05.2020, thus it issued a correspondence of 11.05.2020 and was of the opinion that the conduct of Appellant of levelling allegations against Respondent No.2 (Fawad Malik, President of Respondent Club) is 'unbecoming that of a gentleman' and is violative of Rule 30 of the Said Rules; consequently, membership of Appellant was suspended for a period of six months with direction to offer an unconditional apology to the Respondent No.2.

16. As an immediate reaction, Appellant filed second application for injunctive relief, being C.M.A. No.4451 of 2020 (under Order XXXIX Rules 1 and 2, read with Sections 94 and 151 of CPC), available at page-97 of the Appeal's file. In this application, it is prayed that, *inter alia*, implementation of above letter dated 11.05.2020 may be suspended. This application was filed on 13.05.2020 in the Earlier *Lis*. Order Sheet shows that only notice was issued on this application and no ad-interim restraining order was passed.

17. In the intervening period, Second *Lis* was filed, wherein, present Respondent No.1 was impleaded as Defendant No.1. Scope of prayer clause was enhanced so as the cause of action, in view of the new development as mentioned in the foregoing paragraphs, that membership of present Appellant was suspended vide a communication dated 11.05.2020 (of Respondent Club). For a ready reference, prayer clause of Second *Lis* is reproduced herein under_

- “a. *Declare that the MC meeting of 09.05.2020 was illegally convened and that the order of suspension of Plaintiff that was passed and recorded in the Minutes of the Meeting was illegal and is of no effect and the same may therefore be declared as such and/or suspended together with its effects and that the agenda prepared for 05.06.2020 meeting is unlawful and in violation of the KG Rules and Bye Laws and the same be declared as such and that it is of no effect or consequence.***
- b. *Declare also that the communication made via illegal Letter dated 11.05.2020 of the illegal suspension of the Plaintiff and order passed illegally on 09.05.2020 is of no effect and consequence and therefore such Letter dated 11.05.2020 be suspended and the same be declared illegal and of no effect and that the agenda prepared for 05.06.2020 meeting is unlawful and in violation of the KG Rules and Bye Laws and the same be declared as such and that it is of no effect or consequence.***
- c. *Grant damages to the Plaintiff stipulated and detailed hereinabove and to be recovered from the Defendants.***
- d. *Grant a permanent injunction restraining the Defendants from acting upon the Letter dated 09.05.2020 and/or Letter dated 11.05.2020 in any manner whatsoever and set aside the same and restrain the Defendants not to harass or intimidate or coerce the Plaintiff in any manner whatsoever and further restrain them in convening the meeting on 05.06.2020 or on any other date and***

co-opt any other member as member MC of KG in place of the Plaintiff.

e. Any other relief.”

18. The Second *Lis* when fixed in Court on 04.06.2020, ad-interim order was passed by the learned Single Bench of this Court. However, the same was recalled through the Impugned Order on the Review Application being C.M.A. No.4856 of 2020 filed by the Respondents. Order sheets (Court diaries), available in record, show that Earlier *Lis* was fixed on 15.06.2020 along with Second *Lis*. On 16.06.2020, Ealier *Lis* was adjourned to a date in office. Record of the Case also points out that after filing of Second *Lis* an Application for withdrawal of Earlier *Lis* was filed [CMA No.4761/2020], which is available at page-407.

19. The detailed reasons of the Impugned Order are in the Appeal File as Annexure ‘A/1(a)’. It is stated that the *ex parte* order (ad-interim injunctive order of 04.06.2020) in the Second *Lis* was obtained through concealment of facts and misrepresentation and keeping the Court in dark about the pendency of Earlier *Lis*. It is further observed in the detailed reasons of the Impugned Order that when the learned Division Bench in the earlier High Court Appeal had already directed the present Appellant to appear before the learned Single Bench, his counsel though appeared (in suit proceeding) and also sought time to consider the Written Statement filed on that day by present Respondents; but, subsequently, a Second *Lis* was filed and on first day (that is 04.06.2020) an impression was conveyed to the Court as if it is a case of first impression and did not disclose the pendency of Earlier *Lis* and High Court Appeal. It is also stated in the detailed reasons that pendency of above C. P. No. D – 468 of 2020, which was filed by present Appellant in respect of construction activity at the Respondent Club, was also not mentioned in the Second *Lis*.

20. Plaintiff of Second *Lis* is carefully examined. In paragraph-6, the Earlier *Lis* has been mentioned (but without suit number), coupled with the averment that Earlier *Lis* of the Appellant has become infructuous and he would withdraw the same, because after his suspension from Respondent No. 1, a new cause of action has accrued to him and the subject matter of both suits are different. In following **paragraph 7**, the Appellant again mentioned the fact about filing of suit. In paragraph-11 of Second *Lis* an apprehension was pleaded that Appellant may be expelled from the Respondent Club; *whereas*, paragraph-12 has questioned the co-option of Appellant by some other member. The contents of paragraphs-13 and 14 relate to defamation and monetary compensation claimed by the Appellant. Paragraph-15 is the cause of action and its comparison with the Earlier *Lis* leads to the conclusion that the cause of action of Second *Lis* is different from the Earlier *Lis*.

21. To probe the veracity of above pleadings of Second *Lis*, we have called its Suit File and have seen that Plaintiff of Earlier *Lis* has been annexed as Annexure 'G'.

22. As regard the non-disclosure of above C. P. No. D – 2468 of 2020 (which was already dismissed by the learned Division Bench of this Court, as stated above), perusal of the contents of said constitution petition shows that it was against present Respondent Nos. 1 to 4, that they were involved in dismantling of Tennis Court, illegal construction of Car Parking and operating a Liquor Bar. For reference, the prayer clause of said constitution petition is also reproduced herein under_

- “i) *for declaration to the effect that the acts of the Respondent No.1 to 4 of dismantling tennis court for construction park is illegal, without jurisdiction and in violation of law;*
- ii) *declaration to the effect that selling liquor in cigar room or any place of the premises of KG is illegal and liable to stopped at once;*

- iii) *declaration to the effect any alterations/changes in the swimming pool/spa project, landscape and ambience of the courtyard at respondent No.1 without following procedure and prior approval of heritage committee is illegal;*
- iv) *direction to the Respondent No.1 to 4 to immediately stop alteration and dismantling tennis court and bring the tennis courts to its original position as it was before dismantling it;*
- v) *directions to the respondent No.5 to 8 to enforce their directives in view of their letter written to the respondent No.1;*
- vi) *directions to the respondent No.1 to 4 not to sell and serve liquor in cigar room or in anywhere whatsoever within the premises of respondent No.1;*
- vii) *direction to respondents No.1 to 4 not make alterations/changes in the swimming pool/spa project, landscape and ambience of the courtyard of KG without following procedure and prior approval of heritage committee is illegal;*
- viii) *Any other relief which the Honourable Court may deem fit in circumstances of the case.”*

23. The subject matter of the said constitution petition was different from the above two suits. But in any case, present Appellant should have disclosed the fact about the said constitution petition and the order passed thereon in his Second *Lis*. However, non-disclosure of the said constitution petition in view of the above facts, cannot be taken as *ex facie* evidence of fraud and jugglery {as explained in the cited case law}, resulting in the rejection of plaint and imposition of heavy costs, *inter alia*, because, it requires a deeper probe that whether non-disclosure of a proceeding which has no nexus with the litigation under consideration, was done as a deceptive tactic in order to play fraud upon Court, bearing serious consequences, or it was a rectifiable error or mistake for which party or his counsel should be reprimanded.

24. The Appellant has also not disclosed the fact and fate of earlier H.C.A. No.100 of 2020 in the Second *Lis*. But fact of the matter is that no

question relating to present controversy was decided in the above earlier appeal, while dismissing it vide order dated 08.05.2020 (as discussed in the foregoing paragraphs), whereafter, the membership of Appellant was suspended by Respondents and communicated to Appellant by the letter dated 11.05.2020. If in the earlier H.C.A. No.100 of 2020, any issue relating to the present controversy was decided, then, the rule laid down in the cited case law relied upon by Respondents, would be applicable here. Hence, what is held *supra* for the C.P. No. D-2468 of 2020, is applicable to the above Appeal as well.

25. Disclosure of Earlier *Lis*, undertaking to withdraw it and appending a copy of plaint of Earlier *Lis* as Annexure 'G' with the Second *Lis*, leads to the conclusion that the rule laid down in the case law cited by learned counsel for the Respondents is not applicable to the peculiar facts of the present case.

26. Second *Lis* is not hit by Order II, Rule 2 of CPC and this aspect was discussed in detail in the reported decision handed down in K.G. Case (*ibid*), which judgment was maintained up to the Honourable Supreme Court. Gist of above reported judgment about Order II, Rule 2 of CPC, as also explained by various judicial pronouncements, is, that apart from different cause of action and prayer clause in multiple proceedings, if different set of evidence is to be led for proving or disproving triable issues, then subsequent suit will not be barred by the provisions of Order II, Rule 2 of CPC.

27. The Impugned Order has not considered the afore-mentioned undisputed facts and apparently that was the reason that it was held that Appellant approached the Court with unclean and soil hands by concealing the proceedings of the Earlier *Lis* and the entire claim was "mere

reproduction of the Earlier *Lis*". Although it is mentioned in the Impugned Order that Earlier *Lis* was mentioned but not above H.C.A. No.100 of 2020. Fact of the matter is that the undisputed record is contrary to what has been observed and held in the Impugned Order, consequently, it cannot be maintained in this Appeal.

28. Adverting to the second limb of the arguments of Appellant's Advocate, that since Appellant is an elected member of the Managing Committee, therefore, he cannot be suspended, but an action against him could be taken under Rule 13 of the Said Rules, is not correct. *Primarily*, Rule 13, *inter alia*, deals with disqualification of a Member, but Rule 30 provides for suspension. Undisputedly, Appellant has not been disqualified, but membership of Appellant has been suspended; whether it was correctly done within the parameters of the Said Rules or not, it is to be decided by the learned Single Bench. But at the same time, it appears that in the intervening period, the co-option is done by Respondents to fill up a vacancy of Appellant; this act cannot be sustained, for the reason that the provision of co-option is mentioned in Rule 13 sub-rule (e) of the Said Rules and is related to disqualification or vacancy occurring between annual Elections. Since Appellant was neither disqualified by the General Body as envisaged in the cited Rule, nor his suspension under Rule 30 (of the Said Rules) can be construed as such nature of vacancy, which is to be filled up by co-option, *inter alia*, because the period of suspension is maximum for 180 days, therefore, the Appellant in the present circumstances, cannot be co-opted by any other member; it is an illegal exercise of authority by Respondents and is hereby set aside.

29. We have also noted with concern that a missive dated 27.06.2020 was issued on behalf of Respondent Club under the signature of Secretary (Respondent No.9), in respect of the ongoing litigation, in which it was

stated that the Appellant filed an Appeal against the subject Impugned Order, which was also rejected by this Court. Respondents are cautioned to be careful in future and should not discuss and comment upon *subjudice* matters, as it could entail adverse consequences. It is needless to mention that Respondent Club and its Managing Committee has to act fairly, justly and reasonably, in the best interest of the Respondent Club and not individuals. At this juncture, we must also state that all parties and their Advocates should be mindful of the fact that under the garb of judicial proceedings, there is no absolute privilege to level bald, sweeping and scandalous allegations, which can be construed as libellous, bearing consequences. At the same time, it is necessary for all the members of Respondent Club, including the present Appellant, to adhere to the rules and the bye-laws of the Club and maintain a harmonious environment.

30. The upshot of the above is that the Impugned Order is set aside, including the cost of Rs.500,000/-. Plaint of Second *Lis* is restored. Learned Single Bench, seized of the matter, will decide the pending applications.

31. Any observation made above will not affect the trial and judgment in the suit(s).

32. Parties to bear their respective costs.

Judge

Judge

Karachi,
Dated: 05.11.2020.

Riaz / P.S.