IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Mohammad Ali Mazhar** and **Agha Faisal**, **JJ**.

First Appeal 88 of 2017	:	Mohammad Shahid Murtaza vs. Warid Telecom Private Limited & Others
For the Appellant	:	Mr. Khawaja Naveed Ahmed Barrister at Law
For the Respondent No.1	:	Mr. Rajendar Kumar Chhabria Advocate
Date of Hearing	:	20.08.2019
Date of Announcement	:	04.10.2019

JUDGMENT

Agha Faisal, **J**: The present appeal assails the order dated 23.04.2014 ("Impugned Order"), rendered by the learned Vth Additional District Judge Karachi East in Suit 85 of 2011 ("Suit"), wherein *inter alia* the plaint filed by the then plaintiff, present appellant, was rejected under Order VII Rule 11 CPC. It may be pertinent to reproduce the operative part of the Impugned Order herein below:

> "After hearing I have gone through the material placed before me, which reveals that plaintiff has filed suit for defamation and damages under defamation Ordinance 2002 for recovery of damages worth Rs. 150,000,000/-. The back ground of these applications are that plaintiff was permanent employee of the defendant and allowed official car and subsequently on termination of service of plaintiff, defendants demanded their car, but plaintiff did not return the same and ultimately FIR was registered, which was subsequently disposed of under "C" class vide order dated 17.10.2011 passed by learned VI Judicial Magistrate Karachi East. From perusal of record it appears that the entire memo of plaint is silent with regard to any material published and distribute by the defendant which disrepute the plaintiff in the society and his relatives. In absence of any publication material the law of defamation ordinance would not come into force. It is matter of record that suit has been filed on the basis of lodgment of FIR which was disposed of under "C" class which act of the defendant falls within the meaning of malicious prosecution. Moreover the plaintiff filed suit against the defendants No.2 &

> 3 in their personal capacity, whereas FIR was registered by Masroor Hussain defendant No.3 in his official capacity and such facts are clear from the contents of FIR of crime No.217/2011, therefore, joining of defendants No.2 & 3 in their personal capacity is not justified and proper. Moreover the plaintiff in prayer clause claimed for damages worth Rs. 150,000,000/-, which is beyond the pecuniary jurisdiction of this court.
>
> For the foregoing reasons I am of the considered view that suit of the plaintiff is barred under law of Defamation Ordinance-2002, which attract order U/O VII Rule 11 (d) CPC, therefore, plaint stands rejected. Since the plaint has been rejected, therefore, application U/O 38 Rule 5 CPC stands infructuous, the same is also dismissed with no order as to cost."

2. Briefly stated, the facts pertinent hereto are that the appellant was a contractual employee of the respondent no. 1 and his services were terminated in 2011. The appellant filed a suit for damages against the respondent no. 1, claiming damages in the sum of Rs. 281,500,000/-, and the said suit remains pending. A FIR was registered by the respondent no. 1 against the appellant for wrongful retention of a company vehicle. The said FIR culminated in being declared "C" Class, vide an administrative order of the learned Judicial Magistrate dated 17.11.2011, wherein it was observed that the dispute appeared to be of a civil nature, which merited adjudication by a court of competent civil jurisdiction. The appellant, claiming to have been defamed by the registration of the FIR there against, filed the Suit, in which the plaint was rejected by virtue of the Impugned Order.

Even though the appellant was not precluded from presentation of a fresh plaint, pursuant to Order VII rule 13 CPC, the appellant preferred the present appeal instead.

3. Barrister Khawaja Naveed Ahmed, advocated the case of the petitioner and submitted that the Impugned Order was erroneous in law as the finding that the Suit did not fall within the ambit of Section 3 of the Defamation Ordinance, 2002 ("Ordinance") was without foundation. Per learned counsel, the registration of the FIR gave the appellant a cause actionable under the Ordinance and the learned trial court failed to appreciate the same. It was submitted in closing that this Court may be

pleased to set aside the Impugned Order and remand the case back to the trial court for proceedings on merit.

4. Mr. Rajendar Kumar Chhabria, Advocate appeared on behalf of the respondent No.1 and supported the Impugned Order in its entirety. Learned counsel submitted that the rejection of the plaint was predicated upon the memorandum of plaint being silent with regard to any material published and/or distributed which could damage the reputation of the appellant. It was further argued that as a consequence of the foregoing the precepts of the Ordinance were never attracted. Learned counsel submitted that in addition to the grounds contained in the Impugned Order, it was also an admitted position that no mandatory statutory notice was ever served upon the defendants and that in itself was sufficient ground for rejection of the plaint. Learned counsel relied upon the judgment in *Shah Jehan vs. Feroz Shah & Others* reported as *2013 CLD 1807* and the judgment in *Ayesha Bibi vs. Additional District Judge, Lahore* reported as *2018 SCMR 791* ("*Ayesha Bibi*") in support of his contentions and submitted that the present appeal merits dismissal forthwith.

5. We have appreciated the arguments of the respective learned counsel and have also considered the documentation / authority cited before us. The primary point for determination before us, framed in pursuance of Order XLI Rule 31 CPC, is whether the plaint, filed in the Suit, was rightly rejected in application of the provisions of Order VII Rule 11 CPC.

6. It is settled law that for a determination under Order VII Rule 11 CPC the court is primarily required to consider the averments contained in the plaint. The Impugned Order records at that the memorandum of plaint, filed in the Suit, is devoid of any allegation with regard to any material published and distributed by the present respondent, which would lower the reputation of the appellant in society, and in the absence thereof a claim under the Ordinance would not be permissible.

Order VII rule 11 contains a list of prescriptions in pursuance whereof a court may reject a plaint filed there before. Section 3 of the Ordinance requires that for there to be defamation there needs to be a

wrongful act or publication or circulation of a false statement or representation made orally or in writing or visual form, which injures the reputation of a person. It falls before us to consider whether the learned trial Court was correct in holding that the plaint did not contain the requisites to maintain a suit pursuant to the Ordinance.

We have perused the plaint, filed by the appellant in the Suit, and it is *prima facie* devoid of any reference to any publication or circulation of actionable material. On the contrary it terms the registration of a FIR, in itself, as the wrongful act. Consideration of the plaint further demonstrates that there is no allegation in the plaint with regard to the propagation of the news of the FIR by the respondents, or any other person for that matter. In view hereof we have no cavil with the conclusion drawn by the learned trial Court that the entire plaint is silent with regard to any material published and distributed by the respondents which could lower the reputation of the plaintiff in society and that the assertions in the plaint could at best be considered in a suit for malicious prosecution, hence, no case for defamation, per the Ordinance, was ever set forth in the memorandum of plaint.

7. At this juncture it may be beneficial to address the issue of whether registration of an FIR, in itself, could constitute an offence of defamation. The august Supreme Court held in *Ayesha Bibi* that the action for defamation on account of initiating criminal proceedings is hit by the rule of immunity, which rule is devised for the proper administration of justice. The august Supreme Court relied upon a preponderance of commonwealth authority to demonstrate that a complaint made to a police officer by the complainant from its very nature is privileged and the same is irrespective of the fact whether the criminal action succeeds or not. The instructive observations, contained in *Ayesha Bibi*, are reproduced herein below:

> "4. Maintenance of peace in the society is one of the most important characteristics of public interest which requires effective policing. Effective policing depends upon flow of information about any crime and its perpetrator. Experience shows that many people though mindful of their civic duties are unwilling to put forward a complaint out of fear that it will involve them in litigation. Only when they feel assured that the administration of justice, which is a vital and foremost facet of public interest, requires that a complainant or an informant should enjoy immunity for what he states orally or in writing to the investigators as a matter of public policy so that they are confident in coming forward and giving information to the police. No doubt this rule can be abused by a revengeful person but for such reason pubic interest cannot be compromised.

5. In a judgment of House of Lords in the case of Taylor v. Director of the Serious Fraud Office [1999] 2 AC 177 while expressing his opinion on immunity, Lord Hope at page 218 states as follows:-

> 'The public interest requires that those involved in such an investigation should be able to communicate freely and without being inhibited by the threat of proceedings for defamation. The requirement, therefore, should be accorded priority over the countervailing consideration that sometimes a malicious informant may be able to benefit from such a rule in circumstances which would appear to be unfair or unjust.'

6. In Messr. Bapala & Co. v. AR Kristmaswami Aiyer AIR 1941 (Mad) 26 it was held that a complaint made to a police officer by the complainant from its very nature if called upon in court to substantiate upon oath is absolutely privileged, this can be reflected in the following passage which is reproduced below:

> 'Both Judges apply the principle of Watson v. M'Ewan (1905) A.C. 480, to a complaint to the police and Ghose, J., points out on page 580 that the reason for the privilege is stronger in the case of a complaint to the police than in the case of statements to a solicitor for the question whether a prosecution shall follow upon the complaint is taken out of complainant's hands by his own action.
>
> 5. I am accordingly of opinion that the weight of authority is in favour of the view that a complaint to a Police Officer from its very nature as a statement which the complainant is prepared later, if called upon to do so, to substantiate upon oath is absolutely privileged.'

7. In Bira Gareri v. Dulhin Somaria AIR 1962 (Patna) 229 it was held as under:-
' .. giving information to the police of a cognizable offence with the object of setting the law in motion for the police to investigate and institute the case to be taken in the conduct of a legal proceedings and statements made in such an information must be absolutely privileged.'

8. The principle is further elaborated in the case of Thekkittil Gopalankutty Nair v Melepurath Sankunni Ezhuthaseah AIR 1971 Ker 280 which discusses when statements would be covered by the said immunity. It was held:-

> 'absolute immunity is not confined to statements made 'coram judice' but extends to statements made in the course of proceedings so closely related to judicial proceedings as to constitute a step in or towards such a proceedings and, therefore, proceedings forming part of the administration of justice. The privilege attaches not merely to proceedings at the trial, but to proceedings which are essentially steps in judicial proceedings, including statements in pleadings and communications passing between a solicitor and his client on the subject on which the client has retained the solicitor and which are relevant to the matter.'

9. Likewise taking a case from English jurisdiction in Westcott v. Westcott [2008] EWCA Civ 818 the Court while considering the public importance of absolute privilege held as under:-

> '..The policy being to enable people to speak freely, without inhibition and without fear or being sued, the person in question must know at the time he speaks whether or not the immunity will attach. Because society expects that criminal activity will be reported and when reported investigated and, when appropriate, prosecuted, all those who participate in a criminal investigation are entitled to the benefit of absolute privilege in respect of the statements which they make. ..The police cannot investigate a possible crime without the alleged criminal activity coming to their notice. Making an oral complaint is the first step in that process of investigation. In order to have confidence that protection will be afforded, the potential complainant must know in advance of making an approach to the police that her complaint will be immune from a direct or a flank attack. In my judgment, any inhibition on the freedom to complain will seriously erode the rigors of the criminal justice system and will be contrary to the public interest. In my judgment immunity must be given from the earliest moment that the criminal justice system becomes involved. Making of both the oral complaint and the subsequent written complaint must be absolutely privileged.'

10. In the case of National Society for the Prevention of Cruelty To Children v. D (Married Woman) [1979] 2 All ER 993 the rule of immunity was emphasized in the following words:-

> 'That the rule can operate to the advantage of the untruthful or malicious or revengeful or self-interest or even demented police informant as much as one who brings information from a high minded sense of civic duty. Experience seems to have shown that though the resulting immunity from disclosure can be abused the balance of public interest lies in generally respect it.'

11. Furthermore in the case of Lincoln v. Daniels [1962] 1 Q.B. 237 at 257, it was held:-

> 'The absolute privilege which covers proceedings in or before a court of justice can be divided into three categories. The first category covers all matters that are done coram judice. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purposes of the proceedings and starting with the writ or other document which institutes the proceedings. The third category is the most difficult of the three to define. It is based on the authority of Watson v. M' Ewan [1905] A.C. 480 in which the House of Lords held that the privilege attaching to evidence which a witness gave coram judice extended to the precognition or proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings.'

12. No doubt section 499, P.P.C. allows a person to bring a separate case against a person who intentionally makes a defamatory statement to harm ones reputation. However, where a person is sued for defamation on account of giving a statement to the police on the basis of which a criminal investigation commences or is given during the course of a criminal investigation, the claim for defamation would certainly undermine the rule of immunity which is devised as a public policy consideration for proper administration of justice and thus the claim of defamation has to be struck down as being abuse of the process of the court. The rule of immunity is attracted irrespective of the fact whether criminal action succeeds or not. However, at the end of the trial if the acquitted person demonstrates that the criminal action was tainted with malice i.e. the law was set in motion maliciously without a reasonable cause i.e. whatever the complainant has stated in the criminal proceedings was based on fabrication of evidence or a statement was attributed to someone which was not said or written by him then he can be sued for malicious prosecution, scope of which falls within the confines of section 250 of the Code of the Criminal Procedure but nothing more as this section only deals with frivolous or vexatious accusations made in the course of proceedings and not with an allegation of defamation. Section 250 of the Code of Criminal Procedure thus can only be invoked when a case has been proved to be false on evidence. The case of Taylor v. Director of the Serious Fraud Office [1999] 2 AC 177 establishes the principle that a remedy in malicious prosecution is available if a person has been found to have maliciously initiated a criminal proceeding in the following words:-

> 'Public interest requires that a remedy for malicious prosecution should remain available against those who would be entitled to the benefit of the absolute privilege but who have acted maliciously and without reasonable and probable cause during the investigation process. But that is a quite separate matter as it is the malicious abuse of process, not the making of the statement, which provides the cause of action. It by no means follows that because a malicious complainant can be sued for malicious prosecution or prosecuted for perjury such a person should also be open, at an earlier stage, to a claim in defamation.'"

8. While the authority of *Ayesha Bibi* is squarely applicable herein with binding force, we consider it expedient to record that a Division Bench of this Court, in *Hakim Ali vs. Pakistan Herald Publications & Others* reported as *PLD 2007 Karachi 415*, has held that in the said

circumstances a published news item, based on an FIR, would also not come within the ambit of defamation. *Rahmat Hussain Jafferi J.* articulated that an FIR recorded, under Section 154 Cr.P.C, in the course of official duty and becomes a public document, per Article 49 of the Qanun e Shahadat Order 1984, and the public have every right to know the content thereof.

A Division bench of the honorable Islamabad High Court has also held recently, in *Summit Bank Limited vs. Mohammad Ramzan* reported as *2016 MLD 139*, that mere filing of a complaint with the police is not a legal wrong.

9. In the present facts and circumstances the entire case of the appellant was predicated upon the lodging of an FIR, which is demonstrably not an actionable cause, based upon the authority cited supra. Even otherwise the relevant FIR was never adjudicated, to be false or else, as it was disposed of vide an administrative order expressly stipulating that the cause of action was better determined by a court of competent civil jurisdiction.

10. Notwithstanding the foregoing it is also observed that the plaint does not contain any allegation of proliferation of the alleged wrongful act to any person, let alone society in general. We have paid due attention to the cause of action pleaded by the appellant, in paragraph 11 of the plaint filed in the Suit, and it contains no allegation of any information regarding the FIR having been proliferated by the respondents or any other person whatsoever.

11. It is relevant to refer to the issue of pecuniary jurisdiction, as considered by the learned trial court. The Impugned Order records that the damages claimed in the prayer clause, of the plaint filed in the Suit, are beyond the pecuniary jurisdiction of the Court, hence, the said ground is also invoked to sustain the conclusion arrived at vide the Impugned Order.

We consider it appropriate to eschew any deliberation upon the validity of the ground invoked, however, it would suffice to observe that the inadequacy of pecuniary jurisdiction may result in return of a plaint,

under Order VII Rule 10 CPC, and not in the rejection thereof pursuant to Order VII Rule 11 CPC.

12. It is imperative to observe at this juncture that the Impugned Order did not preclude the appellant from instituting appropriate proceedings for the redressal of his grievances. The learned trial court held that the appellant had failed to disclose a cause actionable under the Ordinance, however, the appellant remained at liberty, at the relevant time, to prefer a fresh plaint per Order VII Rule 13 CPC, which stipulates that the rejection of a plaint does not, of its own force, preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

13. In view of the reasoning and rationale herein contained, we are of the considered view that the appellant has failed to make out a case for appeal, hence, the present appeal is hereby dismissed with no order as to costs.

J U D G E

J U D G E

Khuhro/PA