

IN THE HIGH COURT OF SINDH KARACHI

Suit No. 2206 of 2017

[M/s. Chhipa Corporation v. Sui Southern Gas Company Limited & Another]

Plaintiff : M/s. Chhipa Corporation, through Mr. Mushtaque Hussain Qazi, Advocate.

Defendants 1&2 : Sui Southern Gas Company Limited through M/s. Asim Iqbal and Farmanullah Khan, Advocates.

Defendant No. 3 : Nemo.

On Court notice : Mr. Anwar Kamal, Assistant Attorney General for Pakistan.

Date of hearing : 13-01-2021 & 18-01-2021

Date of decision : 17-03-2021

ORDER

Adnan Iqbal Chaudhry J. - By CMA No. 14994/2019 the Defendant No.1 (SSGC) prays for rejection of plaint under Order VII Rule 11 CPC on the ground that the suit is barred by Order II Rule 2 CPC as a previous Suit No. 738/2014 filed by the Plaintiff against the SSGC on the same cause of action is pending before this Court.

2. In Suit No. 738/2014 (the first suit) it is pleaded by the Plaintiff that by way of STGO No. 16/2007 it was granted a zero-rated facility by the FBR in respect of sales tax on gas supplied to it by the SSGC; that though the STGO mentioned the wrong account number against the name of the Plaintiff, the SSGC accepted the same and up until November 2013 it did not charge sales tax except at zero-rate; that all of a sudden, from December 2013, the SSGC started charging sales tax on current bills at the full rate; that by letter dated 21-04-2014 the SSGC intimated that the zero-rated facility had been withdrawn and that the Plaintiff was in arrears of sales tax amounting to Rs. 5,656,033/- for February 2007 to November 2013; that the gas bill for the month of March 2014 included sales tax on the current bill as well as said arrears and the

SSGC threatened disconnection if the entire bill was not paid. The main relief sought in the first suit is for a declaration that the Plaintiff is entitled to the zero-rated facility in respect of sales tax on gas supply as per STGO No.16/2007; and for an injunction against the SSGC from recovering said sales tax from the Plaintiff.

3. The instant suit (second suit) by the Plaintiff also against the SSGC in respect of the same premises, was filed on 18-10-2017. The Plaintiff has pleaded that though it had let its premises to a tenant, the gas bills were being paid without default and did not show any arrears; that all of a sudden the gas bill for October 2017 included arrears of Rs. 5,656,036/- and subsequently the SSGC threatened disconnection if the same is not paid. The relief sought in the second suit is simply for a declaration that said arrears have been charged without justification, and for injunctions against SSGC from recovering said sales tax and from disconnecting gas supply.

4. Pending suits, the Plaintiff received from the SSGC notice dated 14-01-2019 for recovery of sales tax of Rs. 5,656,033/-. On 20-02-2019 the Plaintiff moved CMA No. 2737/2019 in the instant suit (second suit) for a temporary injunction, whereupon the notice of recovery was suspended by an interim order on the condition of deposit of the said sum.

5. While arguing that this second suit is barred by Order II Rule 2 CPC, Mr. Asim Iqbal, learned counsel for the SSGC drew attention to paras 14 to 16 of the plaint of the first suit to show that the challenge there is to the bill/recovery of sales tax arrears on gas supply amounting to Rs. 5,656,033/; and then to prayer clause (ii) of this second suit which also prays for a declaration that the same arrears of Rs. 5,656,036/- are without justification. Learned counsel submitted that when cause of action for both suits is the same, the ancillary prayers made in the second suit would not save it from the bar of Order II Rule 2 CPC.

6. On the other hand, Mr. Mushtaque Qazi, learned counsel for the Plaintiff submitted that the cause of action for the second suit

was a fresh one, in that the SSGC did not charge sales tax arrears in gas bills issued from April to September 2017, but then the gas bill in October 2017 again included sales tax arrears of Rs. 5,656,033/-. Learned counsel submitted that the other cause of action for the second suit was the threat of disconnection of gas supply, and the fact that the notice of recovery of sales tax dated 14-01-2019 is now also subject matter of the second suit. He further submitted that the SSGC did not have any authority to charge sales tax on gas supply for the period in which the Plaintiff was provided a zero-rated facility by the FBR under STGO No.16/2007.

7. In rebuttal, Mr. Asim Iqbal, learned counsel for the SSGC submitted that for some time the SSGC had stopped including sales tax arrears of Rs. 5,656,033/- in the Plaintiff's gas bills because by letter dated 19-07-2017 the Plaintiff had portrayed, though falsely, that it had been granted a stay order in the first suit. Learned counsel submitted that though the STGO No.16/2007 mentioned the Plaintiff as having been granted a zero-rated facility, that was for a specific account number, and when it was noted that the account number of the Plaintiff was different, the zero-rated facility was withdrawn.

8. Heard the learned counsel.

9. The SSGC is defendant in both suits. In the second suit, the Commissioner Inland Revenue was added as a defendant by the Court on its own motion. Learned counsel for the Plaintiff had submitted that the absence of the Commissioner Inland Revenue from the first suit would rule out Order II Rule 2 CPC. However, since the Federal Board of Revenue, to whom the Commissioner Inland Revenue is subordinate, is a defendant in the first suit, the parties in both suits are the same for all intents and purposes. The first suit is pending and issues have been settled therein.

10. For the present, the inquiry is whether cause of action for both suits is the same, or, in other words, whether the second suit (instant suit) is based on a fresh cause of action so as to negate the bar

contained in Order II Rule 2 CPC. It is settled law that the intent behind Order II Rule 2 CPC is to control splitting-up of claims and to restrict multiplicity of suits¹. A test to determine whether cause of action of two suits is the same was laid down by the Supreme Court in *Abdul Hakim v. Saadullah Khan* (PLD 1970 SC 63) as under:

“The expression ‘cause of action’ in Order II, rule 2, C.P.C means the cause of action for which a suit is brought. In order that the cause of action for the two suits may be the same, it is necessary not only that the facts which would entitle the plaintiff to the right claimed must be the same but also that the infringement of his right at the hands of the defendants complained against in the two suits, must have arisen in substance out of the same transaction. In considering the application of this bar, regard is to be had to the allegations in the two suits without reference to the defence that may be set up by the defendants. As laid down by their Lordships of the Privy Council in *Muhammad Khalil Khan and others v. Mahbub Ali Mian and others* (PLD 1948 PC 131) “the bar under Order II, rule 2 refers entirely to the grounds set out in the plaint as the cause of action or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour”. A rough test, although not a conclusive one, is to see whether the same evidence will sustain both suits which would be the case if both the suits are founded on continuous and inseparable incidents in the same transaction. The question, however, is to be examined in substance and not merely on form as the cause of action in the two suits may be found to be the same, in spite of the facts alleged not being exactly identical in the two cases. It is not open to the plaintiff to split up the parts really constituting the same cause of action and file different suits in respect of them. In other words, a plaintiff must ask for all his reliefs which flow from the grievances caused to him by the infringement of his rights by the defendant in the course of the same transaction, but he cannot and is under no obligation to add to his grievances which did not occur in that transaction.”

11. A perusal of the plaint of the first suit shows that the cause of action was letter dated 21-04-2014 whereby the SSGC intimated to the Plaintiff that the zero-rated facility in respect of sales tax on gas supply had been withdrawn, and that the Plaintiff was in arrears of sales tax amounting to Rs. 5,656,033/; and when the Plaintiff received gas bill for the month of March 2014, which included sales tax on the current bill as well as said arrears. The cause of action for the second suit is said to be the gas bill for October 2017 which

¹ *Mian Muhammad Iqbal v. Mir Mukhtar Hussain* (1996 SCMR 1047).

included the same sales tax arrears of Rs. 5,656,036/-. While the Plaintiff has moved CMA No. 2737/2019 in the second suit to stay notice dated 14-01-2019 for recovery of arrears of Rs. 5,656,036/-, that notice is clearly premised on the withdrawal of the zero-rated facility and the arrears charged to the Plaintiffs account in April 2014, which issue is subject matter of the first suit inasmuch as, the matter of the zero-rated facility granted to the Plaintiff under STGO No.16/2007 and its denial by the SSGC is not pleaded in the plaint of the second suit.

12. Though the plaint of the second suit has been drafted to portray a simple billing dispute and does not disclose the first suit, the comparison above exhibits that the arrears of sales tax on gas supply (Rs. 5,656,036/-) challenged in the second suit, are the very arrears (Rs. 5,656,033/-) that are under challenge in the first suit. In fact, while making submissions, Mr. Mushtaque Qazi, learned counsel for the Plaintiff had acknowledged that the arrears billed by the SSGC to the Plaintiff in October 2017, which are under challenge in the second suit, emanate from SSGC's refusal to recognize the zero-rated facility granted to the Plaintiff by the FBR under STGO No.16/2007.² Such refusal by the SSGC was first made by letter dated 21-04-2014, and the arrears of Rs. 5,656,033/- were first charged to the Plaintiff in the bill for March 2014, both of which are the cause of action of the first suit. Per Mr. Mushtaque Qazi, since the SSGC had stopped billing the Plaintiff for said arrears until a bill for the same was raised again in October 2017, the latter bill gives rise to a fresh cause of action. That, in my view, is a misconception and is addressed by the Explanation clause to Order II Rule 2 CPC as under:

"Explanation. For the purposes of this rule an obligation and collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

² Section 4(d) of the Sales Tax Act, 1990 under which STGO No. 16/2007 was issued, was omitted by the Finance Act, 2019, and hence the suits relate to the period during which the said STGO subsisted.

13. Since it is not the Plaintiff's case that the arrears of Rs. 5,656,033/- first raised by the gas bill for March 2014 were paid, or that the matter had otherwise been resolved, the second suit against raising of a fresh bill for the same arrears or against a reiteration of the same demand, is only a successive claim arising under the same obligation which would not constitute a fresh cause of action for a second suit when the first suit for the same was pending. That proposition is also explained by a learned Division Bench of this Court in *Abdul Maroof Khan Afridi v. Karachi Development Authority* (1990 MLD 2252) as follows:

"Drawing upon the above factual recitals, it seems clear to us that the action of respondent K.D.A., which has been questioned in this Constitutional petition, is directly relatable to the notice dated 9-4-1981 under M.L.O. 130, alleged to have been served on the petitioner on 18-4-1983. Manifestly, proceedings assailing that notice were initiated in Suit No.1608 of 1983 and are still pending. If, therefore, any action, whether lawful or otherwise, having a clear nexus with such suit, was initiated or continued, by or at the behest of parties to that suit, such grievance, if any, should have been raised in that suit itself. If necessary or proper, respondent-K.D.A. could also have been impleaded in the suit. One of the salutary provisions enshrined in Order II, Rule 1, C.P.C. is that a suit shall be so framed as to afford ground for final decision upon all the subjects in dispute and prevent further litigation concerning them. Rule 2 of the same Order explains that successive claims arising under the same obligation shall be deemed to constitute but one cause of action. With a view to curtail the controversies a plaintiff, under Order II, Rule 3, C.P.C. may, in the same suit, unite several causes of action against the same defendant or defendants. Law, thus, does not countenance any unnecessary duplication of proceedings. Even when a fresh cause accrues, *pendente lite*, which could be part of the same transaction or series of transactions and relief may, conveniently, be sought in the pending litigation and parties can be confined to such proceedings, without doing any violence to procedural requirements, such eminently due process ought to be followed. In situations where a fresh action be called for or is found to be in order, a suit in the same or similar forum, where the earlier *lis* is pending would be a more logical exercise of choice, if any. Like, principles, *mutatis mutandis* apply to Constitution petitions. Adherence to such rule ensures confinement of the *lis* in the same proceedings or, where necessary, at least in the same or similar forum, thereby precluding inconsistency or even possible conflict in decisions."

While dealing with another facet of the same proposition, it was observed by the Supreme Court in *Ghulam Shabbir v. Inspector*

General of Police, Punjab (2007 PLC CS 883) that a reiteration of the earlier decision on a second representation made to the same authority would not give fresh life to the decision and would not constitute a fresh cause of action.

14. The argument on behalf of the Plaintiff that there was a threat of disconnection of gas supply which is a fresh cause of action, is also of no force when that threat is already alleged and pleaded by the Plaintiff in para 34 of the plaint of the first suit. In any case, the threat of disconnection emanates from the arrears of sales tax on gas supply which is subject matter of the first suit, and again, in view of the Explanation clause to Order II Rule 2 CPC and the case of *Abdul Maroof Khan Afridi (supra)*, that would not give cause for a second suit when the first suit was pending.

15. Further, applying the test laid down in the case of *Abdul Hakim (supra)*, it is apparent that if the second suit were to proceed, the evidence required to determine whether the arrears of sales tax claimed are lawful, would be the same evidence as in the first suit. Therefore, it is manifest that the second suit is not founded on a cause of action separate from the first suit.

16. Having discerned that this second suit is not on a fresh cause of action, rather it has been brought against a successive claim under the same obligation that is subject matter of the first suit (Suit No. 738/2014) pending between the same parties, the second suit does not escape the bar contained in Order II Rule 2 CPC. Resultantly, CMA No. 14994/2019 succeeds and the plaint is rejected under Order VII Rule 11 CPC. CMA No. 14305/2017 and CMA No. 2737/2019 are dismissed as infructuous. The amount of Rs. 5,656,033/- deposited by the Plaintiff in Court pursuant to order dated 20-02-2019, shall be treated as a deposit in Suit No. 738/2014.

JUDGE

Karachi
Dated: 17-03-2021