IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR

SUIT NO.2460/2014

Plaintiffs	:	M/s. Amreli Steels (Private) Limited & another, through Mr. Muhammad Vawda, advocate.
Defendants	:	Mr. Syed Saeed Ahmed Kazmi and another, through Mr. Abbadul-Hasnain, advocate.

Date of hearing	:	18.01.2017.
Date of announcement	:	17.04.2017.

O R D E R

Through CMA No.1938/2015 (under Order VII Rule 11 CPC) defendants seek rejection of plaint on the ground that plaintiffs have no cause of action.

2. Precisely relevant facts as set out in plaint are that plaintiff is one of the largest manufacturers of steel reinforcement bars in Pakistan having certificate ISO 900:2008, plaintiffs and defendants were involved in litigation; plaintiff purchased a piece of land measuring 32 acres at Dhabeji, Tapo Gharo, Taluka Mirpur Sakro, District Thatta; that present suit is in respect of defamatory letter dated 03.08.2014 and letter dated 23.09.2014 circulated by defendant No.1; plaintiff received such copy from bank, such letter contains false

allegation against plaintiffs as well has misinterpreted the order passed by this Court in CP No.D-1629/2010 with regard to demolition of Amreli Steel Mills, hence in this background plaintiff prayed as under:-

> a. Award damages against the defendants, jointly and severally, and in favour of the plaintiff, in the sum of Rs.2,000,000,000/- (Rupees two billion), together with markup thereon @ 12% per annum with quarterly rests, from the date of suit till realization;
>
> b. Permanently restrain the defendants from making, circulating and/or publishing defamatory letters/publications in relation to the plaintiffs;"

3. Learned counsel for defendant has referred paragraph No.17 of the plaint which is that :-

> "That the cause of action arose to the plaintiff, on 03.08.2014, when the defamatory letter was circulated and again on 23.09.2014 when the second defamatory letter was circulated. The cause of action continues to arise on a day to day basis."

He further contends that on the contents of that letter which was addressed to concerned authorities with regard to illegal acts of the plaintiff whereby the plaintiff occupied the land in Deh Kohistan-I whereas plaintiff was owner of land in Deh Gharo, suit for damages is not maintainable; he further contends that CP No.D-1629/2010 was disposed of by order dated 08.02.2016 that was challenged before apex Court but honourable Supreme Court while setting aside the order passed by this Court observed that matter pertains to factual controversy hence jurisdiction lies with revenue hierarchy hence

parties were directed to agitate their issues before the revenue fora; he further contends that in case of rejection of plaint, suit would not be dismissed however would be transposition of the party and defendant would be plaintiff as he has taken plea of set off / counter claim in his written statement; he referred 1970 SCMR 39; PLD 1992 SC 590; 1991 SCMR 515; 2004 SCMR 948; 2002 CLD 1794 and 2011 YLR 2231.

4. In contra learned counsel for plaintiff while reiterating his contents of plaint, contends that this is a case of letters addressed by defendants based on misrepresentation despite of having knowledge of orders passed by this Court, he circulated such letters hence this case falls within the definition of section 2 of Defamation Ordinance which provides jurisdiction. At one hand, the defendants seek rejection of the plaintiff but in same breath seek transposition of defendants into plaintiffs which itself is an *admission* that suit is not liable to be rejected hence application on this count alone merits dismissal. It was also argued that suits under Defamation Ordinance 2002 are maintainable before this Court .

5. I have heard the respective parties and have also gone through available record.

6. At the outset, I would add that the exercise of jurisdiction within meaning of Order 7 rule 11 CPC is never dependent upon an *invitation* (application) from the side of the defendants but can well be

exercised by the Court *itself* for rejecting a plaint, if the circumstances (material & legally established principles) satisfy the conscious of the Court (s) that plaint is hit by any of the clauses, mentioned under rule 11 of Order VII CPC. Reliance can well be made to the case of Raja Ali Shan vs. M/s. ESSEM Hotel Limited reported as **2007 SCMR 741** wherein it is held as:

> *"It is pertinent to mention here that in view of the Order VII rule 11 CPC it is the duty of the Court to reject the plaint if, one a perusal thereto, it appears that the suit is incompetent, the parties to the suit are at liberty to draw courts' attention to the same by way of an application. The Court can, and, in most cases hear counsel on the pint involved in the application meaning thereby that court is not only empowered but under obligation to reject the plaint, even without any application from a party, if the same is hit by any of the clauses mentioned under rule 11 of Order VII CPC."*

Thus, it should not be confusing any more that competence of the Court to reject a plaint, falling within any of the clauses, mentioned under rule 11 of Order VII CPC, is not subject to making of an application rather Court is competent to examine maintainability of the suit (plaint) therefore, objection of learned counsel for the plaintiff that since defendants seek transposition and not rejection hence application be dismissed, cannot be taken as a *bar* from examining maintainability of the suit.

7. Before taking the merits of the case, I would like to attend the *arguments* of learned counsel for the defendants with regard to

transposition of the *defendants* into *plaintiffs* and *plaintiffs* into *defendants.* To properly attend the *legality* of such *plea* , it would be fair enough to first refer the Rule 10 of Order-I of the Code which reads as:

> "*Suit in name of wrong plaintiff.* – Where a suit has been instituted in the name of the wrong person as **plaintiff** or where it is **doubtful** whether it has been instituted in the name of the **right plaintiff**, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a *bonafide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order **any other person** to be **substituted** or added as plaintiff upon such terms as the Court thinks just."

A bare reading of the above shows that the Court has *ample* power to order **any other person** , substituted or added, as plaintiff but *only* where the Court comes to a conclusion that:

> *i) the suit has been instituted in the name of* **wrong person** *as* **plaintiff** *which too due to bonafide mistake;*
>
> &
>
> *ii) transposition is necessary* **to achieve complete adjudication** *of all the* **questions** *which are involved in the lis;*

The deliberate use of phrase **'any other person'** is sufficient to include any of the defendants but would not permit the Courts to turn all defendants into plaintiffs and all plaintiffs into defendants else it shall not only prejudice the requirement of Order VI of the Code but will also frustrate the deliberate use of phrase necessary for the determination of the real matter in dispute'. This means to avoid multiplicity in matters where transposition neither changes the nature and character of the suit (*dispute)* in respect of entitlement of parties to

suit. Reference may be made to the case of *Rukhsana Mashadi v. Qasim* PLD 2002 Karachi 542 wherein it is held as:

> "Transposition of party, in legal parlance means to alter or change the order or position of a party usually opposite from the position earlier held i.e from plaintiff to defendant or vice versa as the case may be. Power to transpose a party emanate from power to add, implead or strike out a party as conferred on Courts under Rule 10 to Order 1 C.P.C. Such powers are exercisable by the Court either suo motu or on the application of any of the party to the proceedings. For reference one may refer to Central Government of Pakistan and others v. Suleman Khan and others PLD 1992 SC 590, Muhammad Qasim Khan and 6 others v. Mst. Mehboob and 6 others 1991 SCMR 515."

In same case further it is held as:

> "Transposition of parties is general allowed liberally by the Court in order to avoid multiplicity of litigation between the parties to a proceeding and to bring to an end the controversy or lis before the Court. General transposition is allowed in legal proceedings, where parties are accountable to each other out of the same or same series of transactions subject-matter of suit, like for instance suit for accounts between the co-owners / joint owners of the property or where interest of any party in same group becomes hostile inter se and common with the interest of opposing parties or where interest of one party devolves, assumed, assigned or transferred unto another party in the opposite group or otherwise."

In same case further it is held as:

> Where Court orders transposition of parties either at the motion of any party or suo motu it merely places a party on one side to opposite side or allow any party to interchange or exchange their position with one another. Such exercise of transposition does not affect the pleadings, complexion, character or nature of the suit. …….. In amended plaint, pleading in suit for specific performance are no ore there, instead entirely new facts are pleaded, relief is directed against defendant no.2 only. Complexion, character and nature of the suit of specific

> performance and injunction has been changed to that of mandatory injunction seeking implementation of orders passed in the suit. Had there been any claim / suit in respect of administration, partition and distribution of the estate of deceased pending inter se the parties then of course transposition of some of the defendants as plaintiff in the matter proposed by Mr. Yousuf Maulvi, could have been possible."

In same case further it is held as:

> In view of the discussion made above, since it has been held by me, that transposition of parties can be ordered by the Court both, on application of any party or suo motu in case where Court is satisfied that any party to a proceeding has stepped into the shoe of another or interest of any party to the proceedings had either been acquired, transferred, assumed by way of assignment, devolution, transfer in any lawful manner only then transposition of such party could be ordered to avoid multiplicity of the proceedings to cut short the litigation provided nature, character and complexion of suit is not changed. …….

I would conclude that though there can be no denial to the legal position, as held in the case of *Central Govt. of Pakistan v. Suleman Khan* (PLD 1992 SC 590), that:

> *"..Order 1 Rule 10 C.P.C. is very wide in its scope. The power to transpose is derived amongst others, from the said provision which always been interpreted liberally so as to achieve the complete adjudication of all the questions which are involved in the lis, one of the purpose being to avoid multiplicity of the proceedings. In other words the power to transpose is to be exercised liberally and no technical hurdle is considered so strong as to override the considerations of "adjudication" or right to justice. It is in that very context that when a defendant / respondent is transposed as plaintiff / appellant no question of limitation as such is involved."*

To use the power of *transposing* liberally should always be for considerations of "adjudication' or "right to justice". The "adjudication" always require controversies (issues) through *pleadings* therefore, transposition, if allowed, should not be at the cost of nature and character of suit but should be for:

i) the subject matter should be same wherein either parties have common interest and claim;

ii) adjudication of all questions which *(questions)* however should be of such *formation* that transposition does not effect *onus probandi;*

The above position even finds strength from the case laws, referred by learned counsel for the defendants *too.*

In the case of *Said Alam & Ors (*1970 SCMR 639) transposition was allowed of *proforma defendants (*i.e brothers and minor nephews) who were alleged to have relinquished their rights but *later* claimed. The interests and claims in subject was common hence transposition caused no change in nature of suit nor prejudiced rights of parties.

In the case of *Muhammad Qasim Khan & 6 others* (1991 SCMR 515), the matter was one of *inheritance.*

In the case of Mian Muhammad and others (1991 SCMR 520), issue was transposition of legal heirs of dead plaintiff as plaintiffs

who, on refusal by other legal heirs to be impleaded, were defendants. It was *categorically* held that such transposition caused no prejudice to petitioners (earlier plaintiffs).

In the case of *Rauf B. Kadri* (2002 CLD 1794), the matter was one of winding up of a company wherein petitioners attempted to withdraw the suit so on request of State-Bank, the transposition was allowed for adjudication of all questions relating to concerned, involved in a ordered winding up company.

8. Now, I can *safely* answer the proposition that transposition of all *plaintiffs* into *defendants* and vice-versa legally cannot be allowed but in such circumstances where transposition of some of parties, having common interests or *claims* in a same subject matter under same series of *events,* should however be allowed *liberally.*

9. The instant case is one of recovery of *damages* where one party claims to have suffered *damages* in result of a letter which *other* party claims to be *bonafide*. The suit of damages has *its* own peculiar requirements which *place* both plaintiff and defendant in proving respective *pleas.* The defendants placed nothing on record so as to establish their *interest* in subject matter (specific claim of damages amount)hence transposition, if allowed, shall *surely* change the character and nature of suit.

10. Further, it may also be added here that in a suit for *recovery of money* the law itself permits the concept of *'set-off'* which in law shall have the same effect as that of **'plaint'.**In the case of *Syed Niamat Ali & 4 others v. Dewan Jairam Dass and another* (PLD 1983 SC 5) the following criterion was fixed for allowing a *set-off* i.e:

> "I. The suit must be one for the recovery of money.
>
> II. As regards the amount claimed to be set-off—
>
> a) it must be an **ascertained sum of money**;
>
> b) such sum must be legally recoverable;
>
> c) it must be **recoverable by defendant** or by all the defendants if more than one;
>
> d) it must be recoverable by the defendant from the plaintiff or all the plaintiffs if more than one;
>
> e) it must not exceed the pecuniary limits of the jurisdiction of the Court in which the suit is brought; and
>
> f) both parties must fill, in the defendant's claim to set-off, the **same character** as they fill in the plaintiffs' suit."

In the case of *Civil Aviation Authority* (2009 SCMR 666), the Apex Court while reiterating said criterion further held as:

> "Thus a plea of legal set-off, in its essential character is a defence and a counter claim combined, defence to the extent of the plaintiff's claim and a claim by the defendant in the suit itself for the balance. This rule read with Order XX, rule 19 C.P.C., permits what is in essence a counter claim of a specific kind, namely where it is for an ascertained amount exceeding the plaintiff's claim in his suit for recovery of money. The doctrine of equitable set-off permits on equitable considerations a defendant, to raise a plea of set-off in respect of an unascertained sum of money on the principle that if there be some connection between the plaintiff's claim for debt and the defendant's claim to set off, it will be inequitable to driver the defendant to a separate suit. Instances of such equitable

set-off are when the **claims of the two parties** arise out of the **same transaction or transactions** which can be regarded as **one transaction** or the cross demands are so connected **in their nature and circumstances** that they can be looked upon as **part of one transaction**. Such a set-off was called an equitable set-off, as it was allowed by the Courts of Equity in England, as distinguished from a legal set-off, which was allowed by the Courts of Common Law in respect only of an ascertained sum. In a number of decisions in the Sub-Continent, it has been held that although a claim for equitable set-off falls outside the provisions of Order VII, rule 6 C.P.C., it is permissible for a defendant to plead an equitable set-off as effectively as a legal set-off. This few finds support from the proposition that the provisions of the Code regulate procedure only, and they have not the effect of taking away any right of set-off which a defendant may have independently of its provisions. Order XX rule 19 is a further statutory recognition of the right of a defendant to plead an equitable set-off and obtain relief thereon. However, there is a well-recognized distinction between a set-off and a counter claim. Although in one sense both are identical inasmuch as they are cross actions on the part of the defendant but a set-off is essentially a weapon of defence. If the defendant succeeds in establishing it, it serves the purpose of answering to the plaintiff's claim either wholly or ***pro tanto*** because a set-off is really **a debt** claimed by the defendant against the plaintiff to counter-balance a debt claimed by the plaintiff against the defendant. A counter claim, on the other hand, is essentially a weapon of offence and is not really relevant as a plea in defence to the claim of the plaintiff. It enables a defendant to enforce a claim against the plaintiff as effectually as in an independent action. Its essential nature is that of a cross suit pleaded through the means of the written statement in the same suit. Having regard to these essential features of the character of a counter claim, **it is plain that a right to make a counter-claim is not admissible if it does not fall within the ambit of Order VIII, rule 6, C.P.C., or qualify as an equitable set-off.** The right to make a counter claim has always held to be a statutory right and as already observed there is nothing in the Code of Civil procedure conferring the right, to plead such counter claim, upon a defendant without proper adjudication by a competent forum if the same is disputed by the plaintiff …."

It is not a matter of dispute that the instant suit has been filed by the plaintiff not with reference to some *transaction* which is not the case in hand hence even the plea of set-off is of no help for the defendants to shoulder their *plea* of transposition which *legally* shall not be available to one (defendant) who claims set-off.

11. In view of what has been discussed above, I have no hesitation in saying that plea of *transposition* is entirely misconceived. I *however* have no hesitation in admitting that defendants while seeking *transposition* cannot ask for rejection of the plaint because *transposition* can only be done in a *pending* lis where *adjudication* of all questions is to be done which (adjudication) cannot be done in a rejected plaint.

12. Now, I would revert to maintainability of the instant suit. At the very outset, I have no hesitation in acknowledging that law of *torts* does permit filing of a *suit* for recovery of damages against for *'malicious prosecution'* which has got its own *characteristics.* However, since, the plaintiff *categorically* claimed to have filed the suit with reference to *Defamation Ordinance* hence I would confine myself to extent of maintainability of suit with reference to Ordinance *only.*

The Ordinance defines the *defamation* as :

> "Section.3.—(1) Any wrongful act or publication or circulation ***of a false statement*** or ***representation*** made orally or in written or visual from which injures the reputation of a person, tends to lower him in the estimation of others or tends to reduce him to ridicule,

> unjust criticism, dislike, contempt or hatred shall be actionable as defamation."

From above , it is evident that when one (plaintiff) alleges to have received injuries towards reputation, dislike, unjust criticism etc in result of publication or circulation of a *false* statement he may bring a suit within meaning of the Ordinance, being actionable as *defamation.* Before proceeding further, I would refer to meaning of the term *publication* which, per Ordinance, is defined as:

> ""publication" means the communication of the words to at least one person other than the person defamed and includes a newspaper or broadcast through the internet or other media; and;

The above definition is sufficient to *indicate* that publication is not limited to communication through newspaper or broadcast etc but is sufficient where a claimed *false statement* is communicated to a *single* person other than person, defamed.

From combine reading of the *above* two definitions, it can safely be concluded that to maintain a suit under the Ordinance and to save it from rejection under Order 7 rule 11 CPC, it would be sufficient if plaintiff *prima facie* pleads or shows that:

a) *there was a false statement; &*

b) *it was communicated at least to* one *other than the plaintiff himself;*

13. In the instant matter, the plaintiff has claimed to have suffered damages with reference to contents and allegations, made in the letter dated 03.08.2014 by claiming the same not only *false* but to have resulted in causing damages. Such claim (s) , being denied, have become *controversies* of facts, hence require determination thereof after proper *trial.* It is also not a matter of dispute that recipients of such letter was not the *plaintiff* (person claimed to have been defamed) hence *requirement* of publication i.e communication of false statement at *least* to one (other than recipient) is also not disputed. It is needless to add that since a suit, found maintainable, does not necessarily needs an *admission* of its truth but is only an acknowledgment of its maintainability for determination of *claims,* sought therein. I deliberately refrain myself away from making any comments onto the contents of the letter and respective *claims* of either sides with regard to contents to be *genuine* or *false* for which the parties shall have proper opportunity at *proper* time because the provision of Order VII rule 11 CPC *normally* insists taking the contents of the plaint as *correct* hence a suit for recovery under Ordinance would not be open to rejection if *said* two ingredients *prima facie* appear to have been pleaded / existed in plaint.

I am conscious that a leave grant order is not of *binding effect* but against settled legal propositions, as held in the case of Kareem Nawaz Khan (2016 SCMR 291) that:

> '5. .....whether after compromise in an offence under section 302(b) PPC sentence under section 7 of the Act of 1997 can be maintained independently, was *sub-judice* before a larger Bench. Suffice it to say that leave granting order has no binding effect as against the settled legal proposition in this regard as discussed , *inter alia,* in the above cited cases."

However, in said *referred* leave grant order, there is *categorical* observation that pecuniary jurisdiction is not controlled by the said Ordinance but by **Section 6 of the CPC** and the **Sindh Civil Court ordinance, 1962** and such *issue* is sub-judice before Apex Court which *otherwise* is not settled hence I find it proper to refrain myself from making any comment on this aspect.

14. Accordingly, in view of what has been discussed above, I am of the clear view that application of the defendants, seeking rejection of the plaint under Order VII Rule 11 CPC, is misconceived and devoid of substance hence same is hereby dismissed.

IK/PA **J U D G E**