

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Shafi Siddiqui
& Jawad Akbar Sarwana JJ

Azeem Ahmed Siddiqui v. Syed A. Mohiuddin and Two Others

Constitution Petition No.D-8061 of 2022

Petitioner:	Azeem Ahmed Siddiqui, through Mr Muhammad Kamran Mirza, Advocate
Respondent No.1:	Syed A. Mohiuddin, through Mr. Muhammad Iqbal, Advocate
Respondent Nos. 2 to 7:	Nemo
Date of hearing:	24.10.2023
Date of decision:	24.10.2023

J U D G M E N T

Jawad A. Sarwana, J: This Constitution Petition is filed by the Petitioner/Defendant in the Civil Suit No.326/2022 pending in the Court of Vth Senior Civil Judge, Karachi East (“trial court”), who is aggrieved by the Additional District Judge (MCAC) Karachi East impugned Judgment dated 19.12.2022 in Civil Revision Application No.143/2022 upholding the trial court’s order dated 25.08.2022 allowing the Respondent No.1/Plaintiff’s Application under Section 151 CPC directing the Petitioner/Defendant and the Government Official Respondent Nos.2 to 5 not to dispose of, sell and create third party interest in the suit property till the conclusion of the trial proceedings. The Petitioner/Defendant contends that the trial court

could not have granted the interim relief as it had earlier declined the same relief and that the Additional District Court's Judgment is without lawful authority and beyond its jurisdiction, hence this Petition.

2. The brief facts are that Respondent No.1/Plaintiff, Syed A. Mohiuddin s/o S.A. Fateh, through his lawful attorney, Muhammad Amir s/o Muhammad Imdad Hussain, filed a civil suit before the trial court for declaration, cancellation and permanent injunction against the Petitioner/Defendant and Respondent Nos.2 to 5/Defendant Nos.2 to 5. The Respondent No.1/Plaintiff claims title in Property No.C-24, Blick-13-D-1-, Scheme 24, KDA, Karachi (measuring 600 sq.yds.) (the "Suit Property") under Indenture of Lease vide Registration No.3702, Page No.21 to 25 Volume 1846, Book No.1, Additional in the office of Sub-Registrar T-Division IV dated 17.05.1980. Among other reliefs sought from the trial court, the Respondent No.1/Plaintiff sought cancellation of the Registered Sale Deed between Syed A. Mohiuddin S/o S.A. Fattah and Petitioner/Defendant No.1 dated 11.10.1983 vide registration no.5805, Pages 70 to 75, Volume 2458, Book No. I-Additional Sub-Registrar T-Division IV and Transfer Mutation Letter vide Computer No.00000064178 dated 29.11.2021, Dispatch No.669 dated 01.12.2021 regarding the same Suit Property.

3. During the proceedings in February 2022, Respondent No.1/Plaintiff, through Attorney, filed an Application under Order 39 Rules 1 & 2 C.P.C. read with 151 CPC along with a supporting affidavit of the Attorney, Muhammad Amir s/o Muhammad Imdad, seeking ad-interim injunction from the trial court to restrain the Defendants (including the Petitioner) or anyone else from creating third party interest on the Suit Property and from illegal dispossession of Respondent No.1/Plaintiff or his watchman from the Suit Property as well as soliciting ad-interim order for maintaining status quo (the "First Application"). In March 2022, Petitioner/Respondent No.1 filed his Counter-Affidavit and opposed the grant of the First Application. After

hearing Counsels on 06.04.2022, the trial court dismissed the First Application vide order of even date, i.e. 06.04.2022 (the "First Order"). Thereafter, on 24.04.2022, the Petitioner/Defendant No.1 filed his Written Statement. On 01.06.2022, Respondent No.1/Plaintiff, through Attorney, filed an Application under Section 151 CPC seeking interim orders from the trial court to direct Defendants, including the Plaintiff, not to dispose of, sell and create third-party interest on the Suit Property along with a supporting affidavit of the Attorney, Muhammad Amir s/o Muhammad Imdad (the "Second Application"). The Petitioner/Defendant No.1 filed his Counter-Affidavit opposing the Second Application. After hearing Counsels on 25.08.2022, the same trial court, conducted by the same learned Judge, granted the Second Application vide order dated 25.08.2022 (the "Second Order"). The Petitioner/Defendant No.1 filed a Civil Revision Application under Section 115 CPC against the trial court's Second Order. After hearing the parties, the Additional District Judge vide Judgment dated 19.12.2022 dismissed the revision.

4. Petitioner/Defendant No.1 Counsel has argued that the Additional District Judge justified dismissal of the Civil Revision not based on the Second Order, which was the order impugned by the Petitioner/Defendant No.1, but, instead, the Additional District Judge based it on the First Order which was not impugned in the Revision. The Additional District Judge held that the "trial court had erroneously refused the injunction application of the Respondent/Plaintiff filed under Order 39 Rules 1 and 2 CPC. . . ." Counsel further argued that Respondent/Plaintiff did not file any appeal against the First Order dismissing the First Application; hence the First Order had obtained finality with regards to the relief sought in the First Application. As such the Additional District Court (MCAC) Karachi East exceeded its jurisdiction when it passed the Second Order, holding that the First Order was erroneously dismissed and ending the finality of the First Order even though the Respondent No.1/Plaintiff never preferred any appeal against the First Order. He contended that the Second

Application was filed to circumvent the bar of limitation of the First Order. Respondent No.1/Plaintiff did not file any appeal against the First Order as the time for filing it had expired; therefore, Respondent No.1/Plaintiff moved the Second Application on the same subject to the trial court, which the Additional District Court should not have allowed by granting the Civil Revision Application. Respondent No.1/Plaintiff Counsel opposed the contentions of Petitioner/Defendant No.1. He submitted that the First and Second Applications had to be filed in view of intervening events and developments between the filing of the First and Second Applications. He argued that Respondent No.1/Plaintiff had to file the Second Application consequent to news from reliable sources that Petitioner/Defendant No.1 was trying to sell the suit property by concealing the actual position/stage of the instant suit. He submitted that the application was allowed in the larger interest of justice. He argued that the impugned Judgment of the Additional District Court was sound and correct. The current Petition is liable to be dismissed.

5. We have heard the arguments of both Counsels and perused the documents available with the Petition.

6. We have carefully read the First and Second Applications as well as the trial court's First and Second Orders dated 06.04.2022 and 25.08.2022, respectively, and the Additional District Court's impugned Judgment dated 19.12.2022. It is apparent on comparison of the First and Second Applications that the relief prayed therein was the same. Further, the contesting parties and the persons filing affidavits supporting their positions were also the same. The Second Application did not identify any material change in the circumstances for the trial court to consider in the subsequent application seeking the same relief, except that the second application referred to alleged "reliable sources" as fresh information. The "reliable sources" were never disclosed by name or by documents to establish the bonafide of such a claim. There was nothing available on record or pleaded,

such as Respondent No.1/Plaintiff sending a Notice to the Record-Keeper of Rights alerting him of the same news he mentioned in the Second Application and seeking update, information of any visit(s) to the Suit Property by some Real Estate Agent(s) inquiring from the occupants if it is for sale, publication of an advertisement for the sale of Suit Property published in the local newspaper, etc. Respondent No.1/Plaintiff relied on the briefest of statement to plead a change in circumstances between the filing of the First and Second Applications. The pleadings appear to suggest that the mention/reference to the news from reliable sources was purposely inserted to provide something for Counsel to latch on for the purpose of his submissions in Court to argue changed circumstances between the First Application and Second Applications. Yet the same learned Judge who passed both the First and Second Orders failed to acknowledge, consider and discuss that there were new circumstances between the filing of the First and Second Applications for the grant of the Second Application by the trial court. Instead, the trial court did not apply its mind and granted the second application on the same subject.

7. It is well-settled that the principles of res judicata are applicable even in relation to interlocutory applications and proceedings within the same suit.¹ Thus, the principle underlying the rule of res judicata may be invoked in a proper case without recourse to the provisions of Section 11 CPC.² This is the cardinal principle of law based on the maxims that no person should be vexed twice over the same cause of action (“*nemo debet bis vexari, si constat curiae quod sit pro una et eadem causa*”) and that there should be an end to litigation (“*interest reipublicae ut sit finis litium*”). A Division Bench of the Lahore High Court, whose two members later became Chief Justices of the Supreme Court of Pakistan, held that if the same agitation of

¹ Messrs. Shezan Services (Pvt.) Ltd. through Assistance Accounts Manager v. Federation of Pakistan through Secretary, Ministry of Defence and 2 Others, 2011 CLC 1573.

² Amanullah Khan and Others v. Khurshid Ahmad, PLD 1963 (W.P.) Lahore 566.

fraud which had been agitated earlier by the Petitioners but had failed before the Executing Court as well as dismissed in the appeal was re-agitated subsequently on the basis that there were “some further elements of fraud”, then the principles of equity enunciated by Order II Rule 2 CPC can be squarely applied to debar the petitioners in their second attempt in the same proceedings for the same relief.³ Thus, when the trial court had refused the first application for a temporary injunction vide its First Order and another (second) application was presented to the trial court on the same grounds, the trial court should not have hesitated to dismiss the subsequent (second) application in its Second Order based on the principles of res judicata and of equity enunciated by Order II Rule 2 CPC, that if any of the grounds that existed and could have been taken and not taken cannot form part of subsequent application. In the present case, the Second Application was not made on facts and circumstances which were materially different from those which existed earlier and relied upon. Merely changing the subject headings of the Application did not make the applications different. Although the contents of the First and Second Applications were different, i.e. one invoking provisions of Order 39 Rule 1 and 2 CPC read with Section 151 CPC and the other one filed under Section 151 CPC, they were otherwise essentially based on the same content. The trial court’s Second Order thus transgressed a valuable right accrued to the Petitioner/Defendant due to the First Order.

8. There is another aspect of the matter. The impugned Judgment of the Additional District Judge Karachi East in the exercise of his revisional jurisdiction is not only against the law and suffers from infirmities carried forward from the trial court’s illegalities in passing the Second Order as discussed herein but also curtailed the vested rights of the Petitioner/Defendant that had accrued to the latter as a result of Respondent No.1/Plaintiff not filing an appeal against the

³ Messrs New Rahat Engineering Works through Proprietor and 4 Others v. National Bank of Pakistan and Another, 2003 CLD 382, 385, Paragraph 4.

First Order. The First Order, notwithstanding any appeal filed against the said order and change of circumstances that could have been subsequently pleaded (but were not), became final within the trial, and the suit pending before the trial court. The Additional District Judge should have allowed the revision because the Second Application sought the same relief from the trial court as prayed in the First Application without seeking the remedy of filing an appeal against the First Order passed by the same trial court.⁴ The Respondent No.1/Plaintiff had lost his right of appeal/revision where he could have impugned the First Order. This was not a mere illegality but a jurisdictional error, too. Thus, the Additional District Judge acted beyond his jurisdiction in dismissing the revision and, in turn, accepting the procedural “side-step” / “frog leap” in play by Respondent No. 1/ Plaintiff.

9. Finally, the impugned Judgment of the Additional District Judge was also passed without lawful authority and arbitrary when he held that the trial court had passed the First Order erroneously when, in fact, the Revision before the Court impugned the Second Order and not the First Order. The learned Additional Judge had no basis to look into an order which was neither part of the revision nor challenged by the Petitioner/Defendant No.1. The Additional District Judge also acted perversely and arbitrarily in passing the impugned Judgment when it held that to meet the ends of justice, trial Court can always pass appropriate orders under its inherent powers u/s 151 CPC but did not provide any reasons for how the trial court’s Second Order was an “appropriate order”. The Additional District Judge based his reasoning on dismissing the revision because the impugned Order was necessary “to avoid multiplication of litigation” when in fact, the conduct of Respondent No.1/Plaintiff filing a Second Application on the same subject matter as the First Application was contrary to the principles of res judicata discussed herein.

⁴ Messrs. K.K.P. (Pvt.) Ltd v. Management Committee Quaid-e-Azam University Staff Housing Scheme through Vice-Chancellor/Chairman and Another, 2003 CLD 876

10. In view of the above, the impugned Judgment having been passed without lawful authority, beyond jurisdiction, curtailing the vested rights of the Petitioner/Defendant No.1, is illegal and arbitrary and perverse and is set aside. Accordingly, the Constitution Petition is allowed along with all listed applications. Parties shall bear their own costs.

11. The observations made herein are strictly for the purpose of deciding this Constitution Petition and shall not in any way affect the trial of the suit and its decision.

12. The above are the reasons for the Short Order passed on 24.10.2023.

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