ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI
HCA No.248 of 2023

Date:	Order with signature of Judge(s)

1.For orders on office objection.
2.For hearing of Main Case,
3.For orders on CMA No.2648/2023.

Yousuf Ali Sayeed, J
Mohammad Abdur Rahman, J

Date of hearing	:	20.06.2023:
Appellants	:	Khaliq-ur-Rahman & Others through Shahbakhat Pirzada and Mayhar Mustafa Kazi, Advocate s.
Respondent No.1	:	Ahsan Usman Laliwala & Others through Mr. Rehan Kiyani, Advocate .
Respondents No.2 to 9.	:	None present.

JUDGEMENT

Mohammad Abdur Rahman, J. The Appellants have maintained this Appeal under Section 15 of the Code of Civil Procedure (Amendment) Ordinance, 1980 impugning an "ad-interim ex parte" order dated 31 May 2023 made by a learned Single Judge of this Court on CMA No. 8735 of 2023, being an application under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908, which was filed in Suit No. 458 of 2023 whereby the operation of a letter dated 1 March 2023 has been suspended by the learned single judge to the prejudice of the Appellants and which they contend ought to be set aside through this Appeal.

2. The Appellants and the Respondent No. 1 have enjoyed a relationship as partners of a prominent Chartered Accountants Firm

operating in the name and style of "Grant Thornton Anjum Rahman". In or around February 2023 the Appellants' and the Respondent No. 1's relationship became strained causing the Appellants to issue a notice dated 1 March 2023 to the Respondent No. 1 terminating their association. The termination was not accepted by the Respondent No. 1 who had instituted Suit No. 458 of 2023 before the Original Civil Jurisdiction of this Court for "Declaration, Injunction, Rendition of Accounts, Cancellation and Damages". In that Suit the Respondent No. 1 has filed CMA No. 5134 of 2023 being an application under Order XXXIX, Rule 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908, praying for the following interim relief:

> " … It is most respectfully and most humbly submitted that, for the sufficiency of reasons as stated in the accompanying Affidavit, this Honourable Court may graciously be pleased to suspend the operation of the Impugned Letter dated 01.03.2023 and Impugned Deed dated 02.03.2023 [Annex 'D-3 and 'D-4' to the plaint], and to restrain the Defendants, or any and all other persons acting through or under them, from taking take any adverse action against the Plaintiff, during the pendency of the present suit.
>
> Ad-interim Orders in the above terms are also solicited."

The application was supported by an affidavit inter alia Indicating that the termination of the Respondent No. 1 as a partner has been done in violation of the law governing the relationship between the Appellants and the Respondent No. 1 i.e. the Partnership Act, 1932 and of various internal policies that regulated their relationship. The matter was fixed for hearing on the Respondent No. 1's application on 28 March 2023 and on which date the following order was passed by the learned Single Judge:

> " … 28.03.2023:
>
> Mr. Rehan Kayani, Advocate for the Plaintiff.
>
> _____
>
> 1. Urgency granted.
>
> 2. On behalf of the plaintiff, learned counsel undertakes that the requisite Court fee shall be deposited within seven (07) days.
>
> 3. Learned counsel requests that the plaintiff may be allowed to join JS Bank Ltd. as a defendant in the

> present Suit. As notices and summons have not yet been issued, the request is allowed, Let the amended title be filed within three (03) days. Upon filing the amended title and affixation of requisite Court fee, notice be issued to the defendants for 18.04.2023.*

As is apparent no "ex parte ad interim" injunctive relief was granted on 28 March 2023 and with various directions, notices were directed to be issued to the defendants in Suit No. 458 of 2023 for 18 April 2023.

3. The record of Suit No. 458 of 2023 reflects that on 18 April 2023, for whatever reason, the matter was discharged by the learned Single Judge. It is also noted that the Appellants had filed their Counter Affidavit to CMA No. 5134 of 2023 and that no rejoinder had been filed in respect thereof. Finally, from 19 April 2023 until 31 May 2023 no urgent application was moved by the Respondent No. 1 pleading urgency for the hearing of CMA No. 5134 of 2023.

4. On 31 May 2023, the Respondent No. 1, in Suit No. 458 of 2023 moved two applications bearing CMA No. 8734 of 2023 (which was an application under Section 110 of the Sindh Chief Court Rules pleading urgency) and an application bearing CMA No. 8735 of 2023 (which was a second application under Order XXXIX, Rule 1 and 2 of the Code of Civil Procedure, 1908) with the following prayer:

> “ … It is most respectfully and most humbly submitted that, for the sufficiency of reasons as stated in the accompanying Affidavit, this Honourable Court may graciously be pleased to restrain the Defendants, and any and all other persons acting through or under them, from interfering with the Plaintiff's right to access his office situated at 14 Floor, Modern Motors House, Beamont Road, PIDC House, Karachi, which is within the office of the Defendant No. 1 or from giving effect, in any way or form, to Impugned Letter dated 01.03.2023, during the pendency of the present case.
>
> Ad-interim Orders in the above terms are also solicited."

5. The affidavit supporting this application again reiterates more or less the same ground as was stated in the affidavit in support of CMA No. 5134 of 2023 i.e. that the termination of the partnership infer so the Appellants and the Respondent No. 1 was in violation of various provisions of the Partnership Act. 1932 and various internal policies that regulated the partnership. Prima face the only additional facts that were mentioned was that publicity was being made with regard to the purported termination of the Respondent No. 1 from the partnership and that the various personal belongings of the Respondent No. 1 were being illegally removed from the registered office of the partnership. It is necessary to mention that the factual disclosure of CMA No. 5134 of 2023 was made in the affidavit supporting CMA No. 8734 of 2023 by the Respondent No. 1. These two applications were heard on 31 May 2023 and on which date the follow ex parte ad interim injunctive relief in the following form was granted:

> " … 31.05.2023
>
> Mr. Rehan Kayani, Advocate for the Plaintiff along with Mr. Adil Channa, Advocate.
>
> 1. Urgent application is granted.
>
> 2. Let notice issued to the defendants for a date to be fixed by the office in the first week of August, 2023. Meanwhile, defendants No. 1 to 7 are restrained from taking any adverse action against the plaintiff on the basis of impugned Letter dated 01.03.2023."

6. Mr. Shahbakht Pirzada, has entered appearance on behalf of the Appellants and has contended that the scope of this Appeal is limited to the maintainability of CMA No. 8735 of 2023 which he argued cannot be entertained during the pendency of CMA No. 5134 of 2023. He has stressed that the filing of CMA No. 8735 of 2023 was in abuse of the process of this Court and renders that application liable to be dismissed as not maintainable. He stressed that he does not in any manner wish to dilate on the merits of CMA No. 8735 of 2023 and if this Court comes to the

conclusion that the application is maintainable he will thereafter pursue his relief before the learned Single Judge in Suit No. 458 of 2023.

7. Regarding the maintainability of this Appeal, he accepted that while such an appeal is generally not entertained against an ad interim ex parte order as per the decision of the Supreme Court of Pakistan in **Habib Bank Limited and Others vs. Syed Zia ul Hasan Kazmi** wherein it was held:?

> " … We may observe that this Court, being the apex Court, generally does not interfere with an interlocutory order passed by competent Courts but if the same is arbitrary or capricious or against the well- settled proposition of law, this Court is bound to interfere with the same in order to obviate miscarriage of justice. We may further observe that the principle that non-interference in interlocutory orders of the Courts below by this Court is a matter of rule and interference is an exceptions, seems to be a sound principle subject to what has been observed earlier."

He argued that the order dated 31 May 2023 passed on CMA No. 8735 of 2023 being made during the pendency of CMA No. 5134 of 2023, amounted to a miscarriage of justice and on which basis he maintains this Appeal before this Court.

8. Mr. Shahbakth Pirzada, had relied upon Section 10 of the Code of Civil Procedure, 1908 and argued that the principle of res sub judice, while applicable to suits, should on account of the provisions of Section 141 of the Code of Civil Procedure, 1908 be made applicable to the adjudication of interlocutory applications. He places reliance on a judgment of the Supreme Court of Pakistan reported as **Gulistan Textile Mills & another vs. Soneri Bank Limited & another**.' This was a suit instituted under Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 before the Banking Court in which an application had originally been filed seeking the sale of certain goods that had pledged in favour of a bank

and which application was dismissed by the learned Banking Court. No appeal having been preferred against the order dated 16 April 2023, it seems that another application seeking the same prayer was filed by the same party and which was allowed on 4 December 2015. An appeal was preferred before this court which was dismissed and thereafter a further appeal was maintained before the Supreme Court of Pakistan and wherein it was, inter alia, held:

> " … As regards civil proceedings, this concept is codified in Section 11 of the C.P.C. However, the said section specifically refers to 'suits and therefore restricts the application of the principle thereto. Interlocutory applications can not be regarded as 'suits'; hence, strictly speaking Section 11 of the C.P.C. would not be attracted to such applications Nevertheless, the general legal principles of res judicata would most certainly apply. Therefore an order passed pursuant to any interlocutory application at one stage of the proceedings would operate as a bar upon similar interlocutory applications made at a subsequent stage of the proceedings based on the general principles of res judicata. However this general rule will not apply where the order on such interlocutory application does not involve any adjudication. Examples of such instances are: where there is no decision on merits, but a mere expression of opinion not necessary for the disposal of the application; where a matter, though in issue has, as a fact, not been heard and decided, either actually or constructively; where a matter in issue has been expressly left open and undecided; where the suit is not pressed; or where the suit is withdrawn. A further exception is highlighted in the case of Amanullah Khan and others v. Khurshid Ahmad (PLD 1963 (W.P.) Lah. 566). which holds that where an application has been decided once, but subsequently a fresh application is made on facts and circumstances different from those which existed earlier, res judicata would not apply. In this context the case reported as Mst. Sarkar Khano A. Molo v. Abdul Malik Rehmanahtullah Kasim Lakha through L.Rs. and others (2016 YLR1506) is germane which holds that the change of the status of a suit property, even during the pendency of a suit, could be pressed as a fresh ground to re-present an application, even in the event of the existence of an earlier order on an application of the same nature or title. We find it pertinent to make reference to the case of Arjun Singh v. Mohindra Kumar and others (AIR 1964 SC 993) wherein it was held that interlocutory orders such as orders of stay, injunction or receiver which are designed to preserve the status quo during the pendency of the litigation and to ensure that the parties may not be prejudiced by the normal delay occasioned in the proceedings before the Court, do not decide in any manner the merits of the controversy in issue in the suit and are capable of being altered or varied by subsequent applications for the same relief, but only on proof of new facts or new situations which subsequently emerge. The, Indian Supreme Court drew a fine but elegant distinction between the rule of res judicata and a rejection on the ground that no new facts have been adduced to justify a

> different order. It held that if the decision on a particular issue of fact is based on the principle of res judicata even if fresh facts were placed before the Court, the bar would continue to operate and preclude a fresh investigation of the issue, whereas in the other case, on proof of fresh facts, the court would be competent, indeed would be bound to take those into account and make an order in conformity with the new facts. Thus in our view, the proof of new facts or circumstances is necessary in order to exclude the application from the bar of res judicata in respect of interlocutory applications during the pendency of a suit..."

He averred that while the provisions of Section 11 of the Code of Civil Procedure, 1908 would not be applicable here as CMA No. 5134 of 2023 was a decision that has not been adjudicated on merits, however by analogy as the provisions of Section 11 of the Code of Civil Procedure, 1908 had been applied by the Supreme Court of Pakistan to interlocutory applications, similarly the provisions of Section 10 of the Code of Civil Procedure, 1908 i.e. res sub judice may be pressed into service to prevent CMA No. 8735 of 2023 from being maintained in Suit No. 458 of 2023. Concluding his arguments, while stating that CMA No. 8735 of 2023 had clearly been filed in abuse of the process of this Court and should not have been entertained by the learned Single Judge in Suit No. 458 of 2023, he sought that the order dated 31 May 2023 be set aside and CMA No. 8735 of 2023 be dismissed.

9. Mr. Rehan Kiyani, Advocate for Respondent No. 1 explained the background of the dispute as between the Appellants and the Respondent No. 1 which had started in the year 2022 and which culminated in the termination letter being issued on 1 March 2023. He states that after the termination letter had been issued, he filed CMA No. 5134 of 2023 to suspend the termination letter dated 1 March 2023 and to restrain the exclusion of the Respondent No. 1 from the affairs of the Partnership**. He candidly conceded that the prayers in both CMA No. 5134 of 2023 and CMA No. 8735 of 2023 were identical in nature but argued that as**

additional factual circumstances had arisen, which gave him the right to maintain a second application Ie. CMA No. 0735 o/ 2023. The factual circumstances that had occurred which necessitated the fling of the new application were indicated by Mr. Kiyani as being the wide publicity that was being given by the Appellants against the termination of the Respondent No. 1 from the partnership. He stressed that such information was being disseminated, with mala fide intent, to clients that the Respondent No. 1 had developed over the years and introduced into the partnership. He also stated that an application had been made to the Registrar of Joint Stock Companies to strike off the name of the Respondent No. 1 as a partner which also prejudiced the Respondent No. 1. Mr. Kiyani conceded that this court had jurisdiction to entertain an appeal as against an *exparte ad interim" order where the exercise of such power could be termed as arbitrary, capricious or perverse or where the principles relating to the grant of injunction were ignored." He relied on **Raomi Enterprises (Private) Limited vs. Staffor Miller Limited and others and Karachi Electricity Supply Corporation vs. Muhammad Shahnawaz and others** to stress the point that this Court has the power to grant an injunction to undo a mala fide action on the part of the Appellants through the grant of its powers under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908 and which has been correctly done by the learned Single Judge in the order dated 31, May 2023 passed on CMA No. 8735 of 2023. He while also placing reliance on the judgment of the Supreme Court of Pakistan reported as **Gulistan Textile Mills & another vs. Soneri Bank Limited & another**, stated that the additional facts that had been averred in his affidavit in support of CMA No.8735 of 2023 as per the decision of the Supreme Court of Pakistan could not attract the provisions of Section 11 of the Code of Civil Procedure, 1908.

He further relied on a decision reported as **Amanullah Khan and others vs. Khurshid Ahmed** which enunciated the same proposition. He stressed that unless the Respondent No.1 maintalned CMA No. 8735 of 2023, the issue of his termination would have become a fait accompli and that the relief to that extent that he would have sought in the Suit No. 458 of 2023 would have been rendered nugatory. In this regard he relied on two decisions reported as **Civil Aviation Authority vs Noor Muhammad** and **Noor Muhammad vs. Civil Aviation Authority**. He also averred that by granting this Appeal we would in fact be dismissing the suit as the order that would be passed rejecting the application would decide the entire lis. He further contended that both applications are pending before the learned Single Judge and by exercising our jurisdiction in appeal we would be directly interfering in the jurisdiction of learned Single Judge. Finally, he contended that this Court on a policy basis should not entertain such an appeal as otherwise there will be unnecessary interference in the jurisdiction of learned Single Judge as a matter of practice.

10. As Mr. Shahbakhat Pirzada, was not available, Mr. Mayhar Mustafa Kazi, with permission of this Court and with the consent of the Respondent No. 1 "came to his rescue" and addressed arguments in rebuttal. Mr. Mayhar Mustafa Kazi, averred that the practice that was adopted by the Respondent No. 1 of filing multiple applications seeking the same relief should not be "dignified" by this Court. He stressed that between 18 April 2023 and 31 May 2023 counter affidavits had been presented by the Appellants to CMA No. 5134 of 2023 and to which no rejoinder had been filed by the Respondent No. 1. He further averred that the Respondent No. 1 had not been even filed one urgent application for the hearing of CMA No. 5134 of 2023 between that period to demonstrate any urgency for the

hearing of that application. He therefore impugns both the urgency and the maintainability of OMA. Nos. 8734 of 2023 and 8735 of 2023 respectively. Finally, he concluded by stating that the CMA No. 8735 of 2023 had been filed in abuse of the process of this Court and which should be dismissed.

11. We have heard both the counsel for the Appellants and the Respondent No. 1 and have perused the record. The Appeal has raised an important issue regarding the abuse of the process of this Court and which has becoming more prevalent on the hearing of interlocutory applications before this Court. In particular as to whether during the pendency of an interlocutory application, a second interlocutory application can even be **maintained** by the same party **seeking identical or similar relief**?

12. Mr. Shahbakth Pirzada and Mr. Mayhar Mustafa Kazi have placed reliance on Section 141 of the Code of Civil Procedure to advance an argument that applying that section, the principles of res sub judice, as contained in Section 10 of the Code of Civil Procedure, 1908 should be applied to the maintainability of interlocutor applications and where an application is found to be premised on the same facts, the provisions of Section 10 of the Code of Civil Procedure, 1908 should be invoked to prevent the Applicant from maintaining the second application before the Court. We are not convinced by this argument. Section 141 of the Code of Civil Procedure, 1908 states that:

> " … 141. The procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction."

While there is some merit in stating that the provisions of this Section can be used to allow the procedure provided in the Code of Civil Procedure, 1908 to be made applicable to the maintainability and hearing of certain

applications which are in the nature of original proceedings, "1 such a proposition cannot be extended to the hearing of applications which are not In the nature of original proceedings and are in the nature of interlocutory applications. Reliance in this regard may be placed on the decision of in **Mrs. S.M. Hanif vs. Mst. Khursheed Begum and others** where the Court, while considering whether the provisions of Section 141 of the Code of Civil Procedure, 1908 would cause the provisions of the Code to regulate the maintainability and hearing of an application under Order 1, Rule 10 of the Code of Civil Procedure, 1908 held that:

> " … 9. With the greatest of respect to their Lordships of the Full Bench of the Allahabad High Court, it seems to me that the trend of authority has been to interpret the dictum of their Lordships of the Privy Council as meaning that Section 141 of the Civil Procedure Code is intended to extend the provisions of the Code only to original matters in the nature of suits, which may be pending before any Court of Civil Jurisdiction. In any vase there is not authority for extending the provisions of Section 141, read with Order IX, Rule 9 to an application of under Order 1, Rule 10 of the Civil Procedure Code. On the contrary, there is authority for not extending the scope of Order IX, Rule 9 to an application of almost similar nature, namely, an application for bringing on record the legal representatives of a deceased plaintiff. I am of the view that there are good reasons for not extending the provisions of Order IX, rule 9 read with section 141 of the Civil Procedure, Code, to an application under Order 1, Rule 10 of the same Code. Reference to rule 10 of Order 1 of the Civil Procedure Code would show that the Court has the power at any stage of the suit to substitute or add a plaintiff or to joint any party, who is necessary or proper, or to strike of any party, who has been improperly joined. The Court can exercise this power irrespective of the fact whether any party applies to it or not in this behalf. It appears to me that the intention of the rule is that the power may be exercised at any stage and , therefore, it would not be in accordance with the spirt of the rule to impose an artificial restriction in this matter by invoking the provisions of Order IX, Rule 8 read with section 141 of the Code. An application under Order1, rule 10 of the Civil Procedure Code must, therefore be regarded as a miscellaneous application, which is not an original matter in the nature of a suit and, therefore, not covered by section 141 of the Civil Procedure Code."
>
> (Emphasis is added)

13. While we are of the opinion that the provisions of Section 141 of the Code of Civil Procedure, 1908 could not therefore he held applicable to

regulate the maintainability and hearing of an application under Order XXXIX, Rule 1 and 2 of the Code of Civil Procedure, 1908 as such applications are clearly in the nature of an interlocutory applications and not in the nature of original proceedings, we also do not see how the provisions of Section 10 of the Code of Civil Procedure, 1908 can be invoked by the Counsel for the Appellants to challenge the maintainability of CMA No. 8735 of 2023 which was filed in Suit No. 458 of 2023. The applicability of Section 10 of the Code of Civil Procedure, 1908 to regulate the maintainability of CMA No. 8735 of 2023 is also no help to the Appellants. The provisions of Section 10 of the Code of Civil Procedure, 1908 states that:

> " … 10. No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in Pakistan having jurisdiction to grant the relief claimed, or in any Court beyond the limits of Pakistan established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.
>
> Explanation.- The pendency of a suit in a foreign Court does not preclude the Courts in Pakistan from trying a suit founded on the same cause of action."

The application of the provisions of Section 10 of the Code of Civil Procedure, 1908 would at best entitle the Appellant to stay the hearing of CMA No. 8735 of 2023 until the decision of CMA No. 5134 of 2023 and not to prevent CMA No. 8735 of 2023 from being maintained. Secondly, on the assumption that Section 10 of the Code of Civil Procedure, 1909 could regulate such interlocutor applications then an argument could also be made that as the facts pleaded are dissimilar, as the reliefs asked for were the same, then both the applications should be consolidated and decided together. The Supreme Court of Pakistan **Atif Mehmood Kivani and another vs. Messrs Sukh Chayn (Private) Limited, Royal Plaza, Blue Area Islamabad and Another** while considering the consolidation of two

suits having similar facts in the context of Section 10 of the Code of Civil Procedure, 1908 has held that:

> " … 6. For attracting the application of the provisions of section 10 of the Code of Civil Procedure, 1980("C.P.C."), the matter in issue or all the matters in issue, if there are more than one, must be directly and substantially the same. It is true that the matter as to determining which party is at fault for the alleged breach of the land purchase agreement is in issue between the petitioners and respondent No.1 in both the suits; but in the second suit filed by respondent No.1 an additional matter as to entitlement of respondent No.1 to receive damages from the petitioners for the alleged breach of the contract, loss of profits and opportunity costs has also been raised, which is not in issue, and cannot be decided, in the suit filed by the petitioners. Where some of the matters in issue in the subsequent suits are same and some are not, then proceedings of that suit cannot be stayed under section 10, C.P.C.; however, in order to avoid any conflicting finding on the issues that are common in both the suits, the proceedings of both the suits may be consolidated by the court in exercise of its inherent power under section 151, C.P.C., for securing ends of justice and preventing abuse of the process of the court. In "Muhammad Yagoob v. Behram Khan" (2006 SCMR 1262), this Court, while maintaining the impugned judgment whereby the High Court had directed for consolidation of both the suits by setting aside order of the trial court staying proceedings of the subsequent suit, observed:
>
> 3 ... It is a settled principle of law that where a common subject of claim is in dispute in counter-suits, both the suits are consolidated and decided together. This rule is imperative in order to avoid conflicting decisions. The rule was completely ignored by the trial Court as it failed to decide the issue, in question and committed error to stay the proceeding of the respondent's suit which was rightly rectified by the learned High Court with cogent reasons in the impugned judgment. It is pertinent to mention here that parties in both the suits are the same and subject-matter/property is the same. It is well-settled by a long chain of authorities that the consolidation of the suits can be ordered by the Court in exercise of its inherent powers. The consent of the parties is not the condition precedent for exercise of such powers. The purpose of consolidation is to avoid multiplicity of litigation to eliminate award of contradictory judgments and to prevent the abuse of the process of the Court."

14. In Johnson vs. Gore Wood and Co,15 Lord Bingham clarified the premise of adjudication of civil disputes in the context of abuse process and has very eloquently stated:

> " ... The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court (*Yat Tung Investment Co. Lid. v. Dao Heng Bank Lid. (1975*) AC 581 at 590 per Lord Kilbrandon, giving the advice of the Judicial Committee; Brisbane City Council v. Allorney-General for Queensland (1979] AC 411 at 425 per Lord Wilberforce, giving the advice of the Judicial Committee). This does not however mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward. For there is, as Lord Diplock said at the outset of his speech in Hunter v. Chief Constable of the West Midlands Police (1982] AC 529 at 536, an
>
> > *inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

In our jurisdiction the same principles find themselves enshrined in Section 151 of the Code of Civil Procedure, 1908. The section reads as under:

> " … 151. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice **or to prevent abuse of the process of the Court**.
>
> (Emphasis is added)

A general statement on the expansive powers conferred under Section 151 of the Code of Civil Procedure, 1908 and Its limitations were articulated by

the Supreme Court of Pakistan Collector of Central Excise and Sales Tax vs. Pakistan Fertilizer Company Limited wherein it was held that:

> " … Insofar as the provisions as contained in section 151, C.P.C. are concerned the same could not have been pressed into service for the simple reason that where the jurisdiction of a Court is expressly limited to the decision of particular questions, the decision of other questions A must be regarded as impliedly removed from its jurisdiction. The powers as conferred upon a Court under section 151, C.P.C. can only be exercised with respect to procedural matters and the exercise of such inherent powers must not affect the substantive rights of the parties. In this regard we are fortified by the dictum as laid down in case Padam Sen v. State of U.P. AIR, 1961 SC 218 wherein it was held that "the inherent powers saved by section 151,of the Code are with respect to the procedure to be followed by the Court in deciding the cause before it. These powers are not powers over the substantive rights which any litigant possess. Specific powers have to be conferred on the Courts for passing such orders which would affects such rights of a party. Such powers cannot come within the scope of inherent powers of the Court in the matters of procedures, which powers have their source in the Court possessing all the essential powers to regulate its practice and procedure". It may not be out of place to mention here that such inherent powers cannot be used when some other remedy is available and more so, it cannot be exercised as appellate powers. The inherent powers as conferred upon a Court under section 151,C.P.C. applies only to the exercise of jurisdiction where some lis is pending before the Court and does not confer jurisdiction to entertain a matter which was not pending for adjudication. In this regard, reference can be made to case Rasab Khan v. Abdul Ghani 1986 CLC 1400; Sajjad Amjad v. Abdul Hameed PLD 1998 .Lah. 474; Nazar Muhammad v. Ali Akbar PLD 1989 Kar. 635; Muhammad Ayub Khan v. Riyazul Hasan PLJ 1985 Pesh. 22; Commerce Bank Limited v. Sarfraz Autos PLD 1976 Kar. 973; Muhammad Ashfaq v. Shaukat Ali PLD 1976 Lah. 15; Commerce Bank Limited v. Sarfraz Autos PLD 976 Karc. 973; Mian Muhammad Ashfag v. Lt.-Col. Shaukat Ali 1975 Law Notes Lah. 725; Ganisons Indus. Ltd. v. Akhlaque Ahmed PLD 1974 Kar. 339; Lal Muhammad v. Niaz Parwara PLD 1971 Pesh. 157; Karamatullah v. Government of West Pakistan PLD 1967 Lah.171; Bashir Begum v. Abdul Rehman PLD 1963 Lah. 408; Sher Muhammad v. Khuda Bux PLD 1961 Lah. 579; Inayatullah Butt v. Cantonment Board, Rawalpindi PLD 1937 Lah. 583; in re: Subramania Desika AIR 1958 Mad. 284 and Muhammad Usman Khan v. Miraj Din PLD 1978 Lah. 790. There is no cavil with the proposition that pursuant to the provisions as contained in section 151, C.P.C. the inherent powers can only be exercised to secure the ends of justice or for the purpose of preventing abuse of the process of the court and the words "ends of justice" and "abuse of the process of the Court" should be construed with due regard to rest of the provisions of the Code because the main object of section 151, C.P.C. is to prevent the Court from being rendered powerless on account of any omission in the Code and empowers the Court to make necessary orders and no other orders. If any authority is needed reference can be made to case Emirates Bank International Ltd. v. Adamjee Industries Limited 1993 CLC 489"

It is therefore clear that:

(i) the main object of section 151 of the Code of Civil Procedure, 1908. is to prevent the Court from being rendered powerless on account of any omission in the Code and empowers the Court to make necessary orders and no other orders as may be necessary to 'meet the ends of justice and to prevent the abuse of the process of the court;

(ii) such power under Section 151 of the Code of Civil Procedure, 1908 cannot be invoked where there is a substantive provision of law in the Code of Civil Procedure, 1908 which controls the rights as between the litigants;

(iii) the Court cannot exercise such power without a lis being pending before it;

16. In **Benoy Krishna Mukerjee vs. Mohanlal Goenka** where the Court had been misled to the facts, on an appeal as to whether the provisions of Section 151of the Code of Civil Procedure,1908 could be pressed into service to remedy such an order on the ground that order has been passed in abuse of the process of the Court. Arthur Trevor Harries, C.J. held.

> " … 60. Lastly, it was urged by the appellant that a Court has inherent power to correct its own proceedings when it has been misled, for example, by the fraud of one of theparties. Reliance was placed on a Bench decision of this Court in Peary Choudhury v. Sondory Das MANU/WB/0533/1914: 19 C. W. N. 419: (A. I. R. 1915 Cal. 622). In that case a decree passed by consent in an appeal was set aside on an application by the respondent under Order 41, Rule 19, Cwil P. C., the Court findiny, that the appellant got the service, of the notice of the appeal suppressed and had a false and fraudulent vakalatnama and a petition of compromise filed and that the respondent came to know about the compromise decree: only after process in execution of the decree was taken out. 'The Bench held that Order 41, Rule 19 had no application to the case, but the decree could be set aside on review under Order 47, Rule 1, and the Court had abso inherent jurisdition to set aside the decree. The Beach further obverved that it was an inherent power of every Court to correct its own proceedings when it had been misled.

> 61. In the present case the Court at Asansol was undoubtedly misled because the first order in the second execution case dated 24th November 1932, presupposes the existence of a fresh certificate of non-satisfaction and such is ordered to be annexed on the record. How the Court was misled is not clear, but it was undoubtedly due to the fault of the respondent decree-holder, because at that stage the judgment-debtor appellant was not before the Court. If the decree-holder misled the Court, as he must have, then it appears to me that this Bench decision applies and that the Court has inherent power to correct its own proceedings. The only way in which it can correct its own proceedings is to set aside this sale which was wholly without jurisdiction. In my view the learned Subordinate Judge was wrong in holding that the application was barred by the doctrine of res judicata. The appellant did in his objections vaguely raise the question of jurisdiction, but even so the matter was never pressed and never adjudicated upon. Whether adjudication would have affected the question the Court need not consider as all that can be argued is that the question of jurisdiction could and should have been raised and therefore cannot be agitated again. In my view the orders did not preclude the appellant from urging that the sale should be set aside and in my opinion the learned Subordinate Judge should have set aside this sale for want of jurisdiction."

17. We are however mindful that in **Sharbati Devi vs. Kali Pershad** the High Court Lahore while examining the interpretation of the words abuse of process in the context of Section 151 of the Code of Civil Procedure, 1908 has held that:

> " … 4. No authority directly in point has been quoted by either side but in Chitaley's Code of Civil Procedure, Vol. I, under Section 151, Civil P.C., the learned author deals at some length in Note 6 on (p. 1220) with the meaning of the words "abuse of the process of the Court" in that section. After detailing t the actions which might amount to such an abuse, none of which apply to the present case, the learned author cites authorities for the proposition that no act done or proceeding taken as of right and in due course of law, is an abuse of the process of the Court simply because such proceeding is likely to embarrass the other party. A person who brings himself within the terms of a statute is not to be deprived of a right conferred by that statute on 'so treacherous a ground of decision as an abuse of the process of the Court. Nor is the failure to conform to a mere rule of practice, an abuse of process in every case; **the Court must find in each case what exactly the abuse is**."
>
> (Emphasis is added)

18. Having clarified that Section 10 read with Section 141 of the Code of Civil Procedure, 1908 could not be invoked by the Applicants and that there is no other provision in the Code of Civil Procedure, 1908 that would regulate the maintainability of a second application being filed by the same

party seeking substantially identical relief we are clear that by invoking Section 151 of the Code of Civil Procedure, 1908 we are not regulating any substantive rights of the Respondent No. 1 to maintain CMA No. 8735.of 2023.

19. Relying on the decision in **Benoy Krishna Mukorio vs. Mohanlal Goenka** and acknowledging that a civil court has the requisite power under Section 151 of the Code of Civil Procedure, 1908 to dismiss an application as not being maintainable where it is presentation was found to be in abuse of the process, we are clear that the Respondent No. 1 having conceded that the prayer that the Respondent No. 1 was in CMA No. 8735 of 2023 seeking substantially the same relief as he was claiming in CMA No. 5134 of 2023 would to our mind amount to abusing the process of the Court. We note that in the affidavit in support of CMA No. 8735 of 2023 mention has been made to the pendency of CMA No. 5134 of 2023 and are at pains to state that our finding as to existence of an abuse of process of this court is not premised on the Respondent No. 1 having suppressed facts but rather it is premised on the conduct of the Respondent No. 1 in maintaining a second application seeking the same relief. In this respect the assertion of Mr. Mayhar Mustafa Qazi, that the practice of filing multiple applications seeking the same relief should not be "dignified" by the Court, merits consideration. While the existence of the first application was mentioned in the affidavit accompanying the second, there is nothing to indicate that this state of affairs was specifically brought to the attention of the learned Single Judge at the time that the second application was taken up. Indeed, the impugned order is silent in that regard, and we are sanguine that had the attention of the learned Single Judge been properly drawn to such fact, the application would not have been entertained. We are clear that instead of maintaining CMA No. 8735 of 2023 the Respondent No. 1

should have filed his rejoinder to CMA No. 5234 of 2023 and sought the urgent hearing of CMA No. 5134 of 2023 in an endeavor to obtain an order from the court in that matter.

20. We are not impressed with the arguments of Mr. Rehan Kiyani, that the presence of additional facts would prevent the principles of Res-Judicata as contained in Section 11 of the Code of Civil Procedure, 1908 from non-suiting the Respondent No. 1 from maintaining CMA No 8735 of 2023. Mr Shahbakth Prizada, and Mr. Mayhar Mustafa Qazi, had placed reliance on the decision of the Supreme Court of Pakistan in **Gulistan Textile Mills & another vs. Soneri Bank Limited & another** as by way of an analogy to argue that as in that matter the provisions of Section 11 of the Code of Civil Procedure, 1908 had been applied to adjudicate on an interlocutory application, similarly the provisions of Section 10 of the Code of Civil Procedure, 1908 could also be pressed into service to adjudicate an Interlocutory application. It was never the case of the Appellants, that the provisions of Section 11 of the Code of Civil Procedure, 1908 should regulate the maintainability of CMA No. 8735 of 2023 and rightly so, as the principles of Res Judicata could only have been relied on if the earlier application i.e. CMA No. 5134 of 2023 had been "heard and finally decided" which admittedly it has not. Mr. Rehan Kiyani's second argument that the dismissal of CMA No. 8735 of 2023 would render the issue of his termination as a "fait accompli" aside from having no bearing on the maintainability of CMA No. 8735 of 2023 is also misplaced. The Respondent No. 1 at all times has and will continue to have the right to obtain injunctive relief on CMA No. 5134 of 2023 and which he could have pressed through making an urgent motion for the hearing of that application. If he has chosen not to do so and to his mind that has rendered the hearing of CMA No. 5134 of 2023 as a fait accompli, it is to his own account.

21. Mr. Rehan Kiyani's next argument that the dismissal of CMA No. 8735 of 2023 would in fact decide the entire lis is actually an illogical proposition. Keeping in mind that Suit No. 458 of 2023 is a suit for "Declaration, Injunction, Rendition of Accounts, Cancellation and Damages" and that CMA No. 5134 of 2023 is also pending adjudication, we are unable to understand how the dismissal of CMA No. 8735 of 2023 as not being maintainable would have any bearing on the rights of the Respondent No. 1 either to maintain and press Suit No. 458 of 2023 or for that matter CMA No. 5134 of 2023 which both will be decided on their own merits. Mr. Rehan Kiyani's final argument that this Court should not exercise its Appellate jurisdiction to set aside an ex parte ad interim order despite the same being perverse as it would interfere with the jurisdiction of the learned single judge also cannot be sustained. As has been correctly pointed out by Mr Shahbakth Prizada and Mr. Mayhar Mustafa Qazi by placing reliance on **Habib Bank Limited and Others vs. Syed Zia ul Hasan Kazmi** this Court has ample jurisdiction in appeal to interfere with an exparte ad interim order to obviate a "miscarriage of justice". By failing to do we would be abdicating our jurisdiction in appeal and would be in fact acting contrary to law by failing to exercise our jurisdiction as an appellate court.

22. For the foregoing reasons we are clear that CMA No. 8735 of 2023 was filed by the Respondent No. 1 in the underlying Suit in abuse of the process of the court and is dismissed as not being maintainable. Needless to say. the passing of this order should in no manner prejudice the adjudication of CMA No. 5134 of 2023 which should be heard and decided

on its own merits. The Appeal stands admitted and allowed in the foregoing terms.

JUDGE

JUDGE