

IN THE HIGH COURT OF SINDH, KARACHI

1. Suit No.1353 of 2016
2. Suit No.1349 of 2016
3. Suit No.1355 of 2016
4. Suit No.1358 of 2016
5. Suit No.1374 of 2016
6. Suit No.1524 of 2016

Dates of hearing: 08.09.2016, 09.09.2016 & 15.09.2016.

Plaintiffs: Iqbal Umer, Ali A. Rahim, Usman Ahmed Ansari a.k.a. U.A. Ansari, Abid Hussain Africawala, Homi B. Khambata and Syed Ghazanffar Ali, through M/s Dr. Muhammad Farogh Naseem, Azhar Ahmed Shah, Rehan Aziz Malik, Abdul Mobeen Lakho, Hasan Khurshid Hashmi, Anwar Mansoor Khan, Asim Mansoor Khan, Advocates.

Defendant No.1 and 8: Karachi Gymkhana and Zahid Bashir, through Khawaja Shams-ul-Islam, Advocate.

Defendant No.3: Shaikh Javed Mir, Advocate.

Defendant No.13: Mr. Basit Alavi, in person.

ORDER

Muhammad Faisal Kamal Alam, J: - Since identical relief is sought in the below mentioned interlocutory applications, therefore, all are decided by this common order: -

1. C.M.A.No.9090 of 2016 filed in Suit No.1353 of 2016,
 2. C.M.A.No.9068 of 2016 filed in Suit No.1349 of 2016,
 3. C.M.A.No.9166 of 2016 filed in Suit No.1355 of 2016,
 4. C.M.A.No.9106 of 2016 filed in Suit No.1358 of 2016,
 5. C.M.A.No.9207 of 2016 filed in Suit No.1374 of 2016, and
 6. C.M.A.No.9971 of 2016 filed in Suit No.1524 of 2016
- (hereinafter referred to as the “**Injunction Applications**”)

Similarly, Defendants No.1 and 8 have filed the following applications under Order XXXIX, Rule 4 of C.P.C., for vacating the ad-interim injunction operating in favour of the Plaintiffs in their respective suits: -

1. C.M.A.No.10161 of 2016 filed in Suit No.1353 of 2016,
2. C.M.A.No.10159 of 2016 filed in Suit No.1349 of 2016,
3. C.M.A.No.10163 of 2016 filed in Suit No.1355 of 2016,
4. C.M.A.No.10165 of 2016 filed in Suit No.1358 of 2016, and
5. C.M.A.No.10167 of 2016 filed in Suit No.1374 of 2016
(hereinafter referred to as the “**Applications for Vacation of ad-interim Orders**”).

2. The grievances of the Plaintiffs are, *inter alia*, that the Defendants have terminated the membership of Plaintiffs in an unceremonial manner and in complete disregard of the Rules and Bye Laws (the “**Said Rules**”) of Defendant No.1-Karachi Gymkhana. The Plaintiffs through their above list Injunction Applications have prayed that operation of the forensic audit report prepared and submitted by Defendant No.14 (Ernst & Young Ford Rhodes Sidat Hyder, Chartered Accountant) dated 16.11.2015 and subsequent report of Investigation Committee of May 2016, which is impugned in the present proceedings as well as decisions / resolutions of the General Body of Defendant No.1-Karachi Gymkhana dated 26.05.2016 and finally the impugned letters of termination of memberships all of 26.05.2016, should be suspended.

3. The relevant facts for deciding the Injunction Applications and Applications for Vacation of ad-interim Orders are that the Plaintiffs of these suits are permanent members of Defendant No.1-Karachi Gymkhana Club and also remained its office bearers in the past. Main controversy amongst the parties hereto is the (purported) financial misappropriation reported in Members Lodges Project and Driveway Project (the “**Said Projects**”). It would be advantageous to reproduce hereunder the relevant and operative part of the impugned decision of 26.05.2016 passed by Defendant No.4 (Mr. Asim Adil Shah), who is currently Honorary Secretary of Defendant No.1: -

“Dear Sir,

As per the resolution adopted at the Special General Body Meeting held on Thursday May 26, 2016, with an overwhelming majority, your membership has been terminated with immediate effect.

Please surrender you and your family membership cards immediately.

*Yours sincerely,
(ASIM ADIL SHAH)”*

4. Defendants No.2, 3, 4 and 5 are the present office bearers of Karachi Gymkhana.

5. Dr. Muhammad Farogh Naseem, learned counsel for the Plaintiff, in Suit No.1349 of 2016, has contended that the Said Projects were completed under the supervision of the Project Committee, which was constituted by the General Body of Defendant No.1-Karachi Gymkhana. He has challenged the aforementioned audit report of Defendant No.14 and stated that complaint against it has already been preferred to the Institute of Chartered Accountants of Pakistan (“ICAP”). Learned counsel has referred to Annexure “R/1” (Page No.221 of second part of Court file), which is a notice of 15.01.2016 addressed to Plaintiff by the Investigation Committee (of Defendant No.1-Karachi Gymkhana) for attending its proceeding on 20.01.2016. According to learned counsel, the very language of this notice is self-explanatory, whereby the Plaintiff (Ali A. Rahim) was called to lend a helping hand to the Investigation Committee and even in that meeting of 20.01.2016, only informal discussion took place. Learned counsel has raised serious questions on the credibility and authenticity of Report of May, 2016 (as referred above) of Defendant No.7 (Investigation Committee of Club). He also categorically refuted the allegations mentioned against his above named

client in the said Investigation Report. Mr. Farogh Naseem has referred to Rule 30 of the Said Rules and argued that for terminating membership of permanent member, clauses (b) and (d) of the Rule 30 of the Said Rules is to be complied with, the relevant portion of Rule 30, which pertains to misconduct, is mentioned herein under: -

“Misconduct

30. (a) The President, Vice-President or Secretary shall have authority to request any person whose behaviour in his opinion is unbecoming of a gentleman and a member of the Club to leave the Gymkhana premises. All such cases concerning members must be reported at the earliest with full details to the Managing Committee.

(b) The Managing Committee shall take immediate cognizance of any infraction of the Rules or Bye-Laws of the Gymkhana. If a member shall persist in any infraction thereof or shall in or out of the Gymkhana be guilty of conduct which in the opinion of the Managing Committee is unworthy of the character of a gentleman, or calculated to cause annoyance to other members or detrimental to the dignity and prestige of the Gymkhana, the Managing Committee may request him in writing to resign his membership of the Gymkhana forthwith.

(d) If the offender is a permanent member and declines to resign, or fails to resign within three days of the date of the Managing Committee request to him to do so, the Managing Committee shall refer the matter within four weeks to a special general meeting to be convened for the purpose. Pending the decision of the special general meeting the Managing Committee shall prohibit such member from entering the Gymkhana grounds/premises. At this meeting permanent members only shall be present and the Managing Committee shall furnish to each of them a copy of its report against such offending member who will be entitled to be present at the meeting to give any explanation. The opinion of the general meeting shall be obtained by ballot and if the members present at the meeting by a majority of votes decide that the offending member has merited expulsion, he shall

cease to be a member of the Gymkhana and notification thereof shall be sent to him by the Secretary.” (underlining is for emphasis)

6. According to the learned counsel representing different Plaintiffs of these suits, the above provisions of Rule 30 were grossly violated as neither the Plaintiffs were called upon by the Managing Committee of Defendant No.1 to tender their resignations nor the procedure given in Clause(d) (ibid) has been adopted. According to learned counsel for the plaintiffs, the conduct and arbitrariness of Defendants can be determined from the facts that although the said Clause(d) mandates that opinion with regard to termination of membership of permanent member should be obtained from the permanent members attending the special general meeting by way of balloting, but no such balloting took place and Plaintiffs were deprived of their club membership in an illegal manner. While summing up their arguments, it was also argued that the impugned action of terminating the membership of Plaintiff is tainted with mala fide and is a result of abuse of authority and power vested in the present office bearers of Defendant No.1-Karachi Gymkhana. Dr. Muhammad Farogh Naseem has cited number of reported decisions to augment his arguments, which have been adopted by other learned counsel appearing for other Plaintiffs with some additional arguments. It is noteworthy to mention that case of injunction application filed in Suit No.1344 of 2016 will be dealt with separately and in the later part of this order for the reasons to be mentioned therein. Similar is the case of Syed Ghazanfar Ali, who is Plaintiff in Suit No.1374 of 2016 and was the Contractor of Members Lodges Project.

- i) P L D 1960 (W. P.) Karachi page-325 (*D. M. Malik Vs. Jockey Club of Pakistan & others*),
- ii) P L D 1969 Karachi page-692 (*Abbas Khaleeli & others Vs. Saifuddin Valika & others*),

- iii) P L D 2014 Balochistan page-206 (*Attaullah & another Vs. Government of Balochistan, Local Government Rural Development and Agrovilles Department & another*),
- iv) P L D 1983 Karachi page-303 (*Mst. Salma Jawaid & others Vs. S. M. Arshad & others*),
- v) 1999 Y L R page-1634 (*Al-Jamiaul Arabia Anasanul Uloom and Jamia Masjid & others Vs. Syed Sibte Hasan & others*),
- vi) 2005 C L D page-303 (*Lt. Col. (Retd.) Riaz Mohiuddin & others Vs. Karachi Gymkhana Club & others*),
- vii) 2012 C L C page-1829 (*Jahangir Moghul & others Vs. Karachi Gymkhana*),
- viii) 2006 C L C page-1621 (*Kashif Anwar Vs. Agha Khan University*),
- ix) 2004 C L C page-1029 (*Arif Majeed Malik & others Vs. Board of Governors Karachi, Grammar School*),
- x) P L D 2009 Supreme Court page-507 (*Human Rights Commission of Pakistan & others Vs. Government of Pakistan & others*)
- xi) P L D 1971 Lahore page-1002 (*Syed Mazhar Ali Shah Vs. Agricultural Development Bank of Pakistan & another*),
- xii) 2015 S C M R page-338 (*Warid Telecom (Pvt.) Limited & others Vs. Pakistan Telecommunication Authority*),
- xiii) 1992 S C M R page-1852 (*Government of Pakistan Vs. M.I. Cheema, Dy. Registrar, Federal Shariat Court & others*),
- xiv) 1990 C L C page-609 (*Molasses Export Co. Ltd. Vs. Consolidated Sugar Mills Ltd.*),
- xv) 1997 C L C page-1936 (*Shahid Mahmood Vs. Karachi Electric Supply Corporation Ltd.*) and
- xvi) 1997 C L C page-302 (*Agha Saifuddin Khan Vs. Pak Suzuki Motors Company Limited & another*)

7. Mr. Asim Mansoor Khan, Advocate representing Plaintiff in Suit No.1374 of 2016 has questioned the validity of the forensic audit and the report of the Investigation Committee. He has referred to certain portions of the impugned Report of May, 2016 of Defendant No.7 (Investigation Committee) relating to his client, who is also a former President of Defendant No.1-Karachi Gymkhana. According to him, though the Investigation Committee conducted the purported investigation with a

biased mind, even then it reprimanded the Plaintiff (Homi B. Khambata), but in spite of these recommendations, the Managing Committee/Defendant No.6, *inter alia*, in league with other Defendants have unlawfully inflicted the punishment on Plaintiff by terminating his membership. He has also referred a report, which is annexure “L” with the plaint and its Annexure “A”, which is available at page 697 of the case file, to show that Plaintiff (Homi B. Khambata) followed the laid down procedure while making the payments.

8. Mr. Azhar Ahmed Shah, Advocate, appearing for Plaintiff in Suit No.1353 of 2016, while adopting the arguments of Dr. Muhammad Farogh Naseem, further submitted that the present Managing Committee of Defendant No.1-Karachi Gymkhana had adopted a hostile attitude towards its members and particularly Plaintiffs including the counsel himself. Learned counsel with his statement, has also filed a complaint made to the Secretary of the Club-Defendant No.4.

9. It is not necessary to discuss each and every reported decision cited by the learned counsel, except few of them, which are relevant. The first judgment is of the High Court of Balochistan reported as P L D 2014 Balochistan page-206 (supra), which has been relied upon by the Plaintiffs’ side that if in the Rules or Bye Laws a certain mechanism of voting is given then the same mechanism should be adhered to. Consequently, the amendments brought in the Election Rules by changing the mechanism of secret ballot to that of show of hand was struck down in the cited judgment, *inter alia*, by holding that the Honourable Supreme Court of Pakistan and Federal Shariat Court have endorsed the secrecy of ballot. With regard to not providing opportunity of hearing to the Plaintiffs before taking such harsh action of expelling them from Defendant No.1, the Plaintiffs’ counsel have argued that after

insertion of Article 10A in the Constitution of the Islamic Republic of Pakistan, 1973 (the “**Constitution**”) through 18th Amendment, the right to a fair trial is now a fundamental right of the citizens. In the cited case (2015 S C M R page-338) the Honourable Supreme Court has held (in paragraph-13 of its Judgment) that the person is entitled for hearing before an adverse action is contemplated against him. This principle has now been embodied in Article 10A of the Constitution, therefore, learned counsel for the Plaintiffs argued that violation of the above Said Rules has also violated the fundamental rights of these Plaintiffs as citizens of this Country and the wrong be remedied under present proceedings. It was also argued that granting of the injunctive relief as prayed will not grant the final relief to the Plaintiff, but in case it does so, even then the interim relief cannot be withheld on this ground alone, if other basic ingredients are present in the case of Plaintiff. He has relied upon the Judgments reported in 1999 Y L R page-1634 and 1992 S C M R page-1852. He has strenuously argued that total strength of permanent members of Defendant No.1-Karachi Gymkhana is approximately five thousand, whereas in the meeting of 26.05.2016 only 480 permanent members turned up and the impugned decision was admittedly taken by show of hands instead of ballot as provided in above Rule 30, sub-Rule (d). According to Plaintiff’s counsel, the final outcome of the Investigation Committee report and that of Special General Body Meeting in the shape of terminating membership of Plaintiffs is in violation of Article 10A of the Constitution, as neither before the Investigation Committee the Plaintiff was given any charge sheet or questionnaire nor provided a fair opportunity to defend himself, nor in the above referred Special General Body Meeting a fair opportunity was given. Even the Special General Meeting of 26.05.2016 was convened undisputedly in contravention of Rule 30 of the Said

Rules, as thirty (30) days' notice as required in the Rule was never given to the Members of Defendant No.1-Karachi Gymkhana.

10. It was next argued that if violation of law is apparent then the impugned action can be corrected even at the stage of hearing Injunction Applications. In this regard a reported case has been cited; 1997 C L C page-1936 (*Shahid Mehmood Vs. Karachi Electric Supply Corporation*), the gist of this case is that if a violation of law is complained of then the Plaintiffs are entitled to injunction, provided the case for its grant is made out on merits.

11. On the question of maintainability, Dr. Muhammad Farogh Naseem has cited number of judgments which have also been mentioned hereinabove. On the question that proceedings of the nature cannot be instituted against a Club, in the instant case Defendant No.1, reliance has been placed on a learned Division Bench judgment of this Court reported in 2004 C L C page-1029 (*supra*) wherein scope of Section 42 of the Specific Relief Act, 1877, which relates to legal character of a person filing suit has been enlarged. The other case referred to is 2012 C L C page-1829 (*Jahangir Moghul and others Vs. Karachi Gymkhana*). This case is also in respect of present Defendant No.1, wherein, *inter alia*, learned Single Judge of this Court has held that a suit against Defendant No.1 is maintainable while interpreting Section 42 of the Specific Relief Act, 1877, and by holding that:-

“.....Firstly, as I have said, the jurisdiction of the courts cannot be ousted in relation to authoritatively pronouncing upon the legal meaning and interpretation of a document such as the Rules. Secondly, since the grievance of the plaintiffs is precisely that the Managing Committee has (according to them) wrongly interpreted the Committee itself in this regard.”

12. On the other hand, Khawaja Shams-ul-Islam, learned counsel for the Defendants No.1 and 8 has started his arguments by inviting Court's

attention to the injunction application of Plaintiff (Ali A. Rahim) and submitted that no grounds in the affidavit have been mentioned in support of the injunction application. Learned counsel strenuously argued that Plaintiffs have miserably failed to make out a case of violation of Article 10A of the Constitution as they were not condemned unheard. At all relevant times, the Plaintiffs and especially the Plaintiff of Suit No.1349 of 2016 were not only in knowledge of the enquiry proceedings but also participated in it and was given a fair opportunity to defend himself / themselves. To substantiate his arguments, he has referred to various documents from the case record and mostly of Plaintiffs. The first document he has referred is the draft report dated 29.10.2015 (Annexure "A" of the plaint), wherein the Defendant No.14 Ernst & Young, the Chartered Accountant Firm, which was appointed to carry out the forensic audit has sought objections from the Management of Defendant No.1, then the complaint dated 02.02.2016 filed before the Institute of Chartered Accountants of Pakistan ("ICAP") against the final audit report has been referred to. As per the learned counsel for the Defendants that though the mala fide on the part of Plaintiffs is obvious that after Defendant No.14 submitted its final report / forensic audit report dated 16.11.2015 to the Managing Committee-Defendant No.7, the Plaintiff of Suit No.1353 of 2016 (Iqbal Umer) opted to file a complaint to ICAP against the said Defendant No.14 merely to dilute the effect of the said impugned report. Learned counsel defended the impugned forensic Audit Report from all corners by referring to its various paragraphs, in order to show that the said forensic audit report has been prepared with full responsibility and by employing due diligence. He has referred to its page-81, clause-2.1.5 to point out that Defendant No.14 for their audit assignment under dispute has even engaged the services of SGS Pakistan (Pvt.) Limited for giving an expert

opinion on the engineering component / technical aspects of the Members' Lodges Project. He has also referred to paragraph-4.2 of the above impugned Report, wherein it has been mentioned that contractors were appointed without proper competitive bidding process. Similarly, Defendants' counsel has referred to various paragraphs of another report, viz. the Impugned Investigation Committee Report dated May, 2016. He has invited Court's attention to those paragraphs of the Investigation Committee Report, wherein different Plaintiffs of these connected suits were called upon to appear before the Inquiry Committee and their responses. According to Mr. Shams-ul-Islam (Advocate), since these Plaintiffs have admitted their guilt before the Investigation Committee, therefore, there was no other option but to terminate their memberships, to say the least. On a query that in terminating the memberships of these Plaintiffs, whether Said Rules were complied with, the counsel replied that this being an unprecedented case of corrupt practices in the history of Karachi Gymkhana Club, therefore, no specific rule can be invoked for the impugned action, but it is the General Body of the Club being the supreme authority that has taken the action against these members who were also office bearers of Karachi Gymkhana in the past. To fortify his arguments, he has referred to Rule 11, 13, 17 and 30 of the Said Rules. According to him, Rule 30 on which the Plaintiffs have laid much emphasis, is not applicable to their case, as the said Rule under the heading **Misconduct** primarily relates to misbehavior and demeanor of members and does not cover subject issues which relates to corrupt practices and are of grave nature. He has also made a distinction that the term 'ballot' used in Rule 30 for terminating the membership of a member does not mean that it can be only done by way of secret balloting, but it is to be taken in general sense and looking at the peculiar facts of the case where in a prestigious Club like Karachi Gymkhana,

gross irregularities have been reported against Plaintiffs, Rule 30 if at all is to be invoked should be given a wider meaning. He further argued that in the impugned subject General Meeting dated 26.05.2016, 479 permanent Members were present and the overwhelming majority had decided to take the decision against the Plaintiffs, thus, the requirements of Rule 30 has been complied with, as instead of balloting, the permanent members / participants of subject Special General Meeting have given their verdict by show of hands. He particularly referred to Sub-Rules (e), (f) and (g) of Rule 17 in furtherance of his arguments that for a subject Special General Meeting only seven days' notice was required which was duly given and as per Sub-Rule (f), 100 permanent Members form a quorum, whereas undisputedly at the Meeting in question, there were around 479 participants / permanent members. Learned counsel for the Defendants was of the view that in terms of Article 46(A) of the Qanun-e-Shahadat Order, 1984, even at this stage video and audio recordings of Plaintiffs can be taken into account by the Court, which evidence will demolish the stance of the Plaintiffs. Learned counsel has cited following case law in support of his arguments: -

- i) 1974 S C M R page-519 (*Marghub Siddiqi Vs. Hamid Ahmad Khan & others*) and
- ii) P L D 2003 S.C page-344 (*Irshad Hussain Vs. Province of Punjab & others*)

13. In the first case of **Marghub Siddiqi** (supra) the well-established rule for refusing of injunction was laid down, *inter alia*, that where a suit in which perpetual injunction is not claimed, then interim injunction of the nature cannot be granted. In the second case of **Irshad Hussain** (supra), it has been held, *inter alia*, that injunction being an equitable relief is based upon well-known principle of equity, that is, one who seeks equity must also do equity and give effect to all equitable rights of

his adversary. It has been further held that the relief of injunction is conditional in the sense that Plaintiff should also consent to give the Defendant such corresponding rights which he may be entitled to in respect of the subject matter of the suit.

14. Learned counsel for the Defendants No.1 and 8 has also relied upon the Judgments of Honourable Supreme Court reported in P L D 2014 Supreme Court 100 (*SUO MOTU ACTION REGARDING ILLEGAL SELLING OUT THE AUQAF PROPERTIES BY THE CHAIRMAN EVACUEE TRUST PROPERTY BOARD*) and P L D 1992 SC 822 (*Khurshid Ali & others Vs. Shah Nazar*), to fortify his arguments on authenticity of audit report, which should be given due weightage while deciding the present interlocutory applications of the parties. The other case of **Khurshid Ali & others** (supra), primarily has laid down the principle that procedural matters cannot deprive a person of his right if he is entitled to it otherwise. This decision, in my considered view, is not relevant to the present controversy.

15. Khawaja Shams-ul-Islam, Advocate, has also vehemently refuted that present Managing Committee or any of its members whom he is representing has ever misbehaved with any of the members of the Club including Mr. Azhar Ahmed Shah, Advocate.

16. Shaikh Javed Mir, Advocate, who has been impleaded as Defendant No.3 is a sitting Vice President of Defendant-Club and has also made his submissions. According to him, impugned Investigation Committee Report is basically an outcome of investigation done by one rival group against the other and thus lacks credibility. He has stated, which is also evident from page-11 of the Minutes of the Meeting dated 26.05.2016 (page-385 of second part of Suit No.1353 of 2016), that

latter has voiced his opinion that the Plaintiffs should not be terminated in the manner as they have been. He further argued that one of the members of the Investigation Committee Mr. Basit Alvi, who is presently Defendant No.13, in fact conducted the above Special General Meeting of 26.05.2016, instead of the President and Managing Committee, which again is a flagrant violation of the said Rules. In the end, Mr. Javed Mir made an attempt for a reconciliation by proposing that a reinvestigation should be done in the Members' Lodges Project and Driveway Project and the proposed Investigation Committee / Commission should be headed by an impartial person having an unblemished integrity. He suggested the name of Mr. Justice (Retd.) Agha Rafiq Ahmed Khan, the Former Chief Justice of Federal Shariat Court as a head of proposed Commission. In a conciliatory tone, he has also requested both sides; Plaintiffs and Defendants to create a harmonious environment in the Club, which is a second home for all its members.

17. The Defendant No.13 (Mr. Basit Alvi) also appeared in person and besides submitting a written reply has made submissions by categorically denying that he conducted the above impugned Special General Meeting. According to him, he being a member of the Investigation Committee had only apprised the participants of the said Special General Meeting about the Report.

18. In rebuttal, Mr. Anwar Mansoor Khan, who is representing Plaintiff (Mr. Homi B. Khambata) in Suit No.1374 of 2016 has referred to latter's speech, which was given as President of the Club in the Meeting of 19.11.2013, minutes whereof have been filed by the learned counsel for Defendants No.1 and 8 under his Statement dated 09.09.2016. After referring to various paragraphs of this document, he

finally referred to page-15, whereof the General Body of Defendant No.1 in its above Meeting, after due deliberations had given its approval for the construction of front Driveway Project with an amount of Rs.20 Million and also accorded its approval for an amount of Rs.60 Million towards completion of Members' Lodges Project. According to him, both these projects, which form basis for the impugned actions, were duly approved by the General Body of the Club. It was further argued that the present Defendants at whose behest and instigation the present impugned actions have been taken against the Plaintiffs, were fully involved in the decision making process of the above mentioned both projects. It was next argued that one of the reasons for challenging the findings of the Investigation Committee is that the latter (Investigation Committee) has acted in excess of its mandate given by members of Defendant No.1-Club. He has referred to the opening paragraph of the impugned Report of the Investigation Committee, which is available at page-303 of the Court file in Suit No.1353 of 2016. As per submissions of Mr. Anwar Mansoor Khan, since an Investigation Committee from very inception was biased and had a particular motive against his client / Plaintiff as well as other Plaintiffs, therefore, the entire report of the Investigation Committee is tainted with mala fide and an outcome of a prejudicial mind, which ought to be set at naught in the present proceedings. He has also referred to pages-5 and 6 of the above Report and submitted that *ex facie* it is evident that the Investigation Committee has fixed the charge of criminal negligence on the members whom they investigated including present Plaintiffs at the preliminary stage, but others, who belong to the group of Defendants, were given clean chit while handing down the findings. To cite few examples, he has mentioned names of Mr. E. U. Khowaja and Mr. S. M. Muneer, who belong to Defendants' group and were exonerated. With regard to Mr. E.

U. Khowaja, it has been pointed out that he is a partner in Defendant No.14-Ernst & Young Ford Rhodes Sidat Hyder, which has done the impugned forensic audit and that is the reason that no responsibility was fixed upon him, but on the other hand, it has diminished the fairness and credibility of the impugned forensic Report. Certain contradictions were also highlighted in the conclusion drawn in the aforementioned forensic report of Defendant No.14 and the Report of the Investigation Committee. The learned counsel in rebuttal has argued that except for Rule 30, no other rule is applicable for the punishment awarded to the Plaintiffs of present connected suits. He has also cited two reported Judgments; (i) P L D 2012 SC page-610 (*Suo Motu Case No.15 of 2009 (Corruption in Pakistan Steel Mills Corporation)*) and (ii) 2009 1 Supreme Court Cases page-337, to substantiate his arguments that term misconduct has a wider meaning and cannot be limited to misbehavior only, as argued by Defendants' counsel. In his written synopsis, learned counsel for Plaintiff has also relied upon other reported Judgments, primarily to elucidate that if the term ballot is mentioned in some rule, as Rule 30 of the Said Rules provides a procedure that membership of a permanent member can only be terminated through balloting, then it implies that a secret balloting should be held and sanctity of secret balloting should be preserved at all cost(s). It was also argued that while terminating membership of Plaintiffs, who all are permanent members, not only their fundamental rights to a fair trial as envisaged in Article 10A of the Constitution, have been violated but also due process was not followed at all, as is evident from the proceedings of the Special General Meeting of 26.05.2016, *inter alia*, as admittedly no balloting was done for terminating the membership of the Plaintiffs, nor, they (Plaintiffs) were given a fair opportunity to defend themselves. In

support of his contentions the learned counsel has relied upon the following reported decisions:

- i) 2016 S C M R 943 (*Ishtiaq Ahmed Vs. Hon'ble Competent Authority through Registrar, Supreme Court of Pakistan*),
- ii) 2015 S C M R 338 (*Warid Telecom (Pvt.) Limited & others Vs. Pakistan Telecommunication Authority*),
- iii) 2012 S C M R 1235 (*Babar Hussain Shah & another Vs. Mujeeb Ahmed Khan & another*),
- iv) 2006 S C M R 1713 (*Faqir Abdul Majeed Khan Vs. District Returning Officer & others*),
- v) 2005 S C M R 1699 (*Muhammad Naeem Kasi & another Vs. Abdul Latif & others*),
- vi) 2004 S C M R 1092 (*Puri Terminal Ltd. Vs. Government of Pakistan & others*),
- vii) (1984) 2 Supreme Court Cases 556 (*Pandurang Dattatraya Khandekar Vs. Bar Council of Maharashtra, Bombay & others*),
- viii) P L D 2014 Balochistan 206 (*Attaullah & another Vs. Government of Balochistan, Local Government Rural Development and Agrovilles Department through Secretary and another*),
- ix) P L D 2014 Supreme Court 232 (*Sarfraz Saleem Vs. Federation of Pakistan & others*),
- x) P L D 2013 Lahore 405 (*Nadeem Aftab Sindhu Vs. F.O.P. through Secretary of Law, Justice and Parliamentary Affairs and others*),
- xi) P L D 1970 Supreme Court 180 (*Mian Muhammad Latif Vs. Province of West Pakistan and another*),
- xii) 2016 P L C (C.S.) 418 (*Dr. Asif Mehmood Hamraz Vs. Government of Punjab and another*),
- xiii) 2014 P L C (C.S.) 884 (*Sarfraz Saleem Vs. Federation of Pakistan and others*),
- xiv) 2005 P L C (C.S.) 1434 (*Muhammad Asif and another Vs. Director Public Instruction Punjab and another*),
- xv) 2016 C L D 1453 (*Pakistan Defence Officers Housing Authority Vs. Greek Marina (Pvt.) Limited (Pakistan)*),
- xvi) 2011 Y L R 2907 (*Abdul Ghaffar Jangda Vs. Haji Abdullah Haroon Muslim Gymkhana and others*) and
- xvii) 2004 C L C 1647 (*Messrs Al-Noor Construction Co. Contractors Vs. Cantonment Board, Peshawar and others*).

19. In rebuttal, Dr. Muhammad Farogh Naseem has submitted that it is a basic rule that while carrying out a forensic audit, persons who are involved in the project in question have to be confronted. A bare perusal of the audit report shows that it has been prepared without adhering to some of the basic principles, *inter alia*, as no material / documents have been mentioned for drawing a comparative chart in which difference in costs of the above referred projects were highlighted, which ultimately have been made the basis to level charges of misappropriation against Plaintiffs. It was also stated that the engineering portion of the forensic audit report was prepared with the help of SGS Pakistan (Pvt.) Limited, which has not conducted its part of assignment in a professional way and even otherwise it lacks technical expertise.

20. Sardar M. Ejaz Khan, Advocate, who represents the Plaintiff in Suit No.1524 of 2016, could not appear on the dates of hearing and reported to be out of station. The learned counsel though submitted his written arguments on 17.09.2016, crux of which is that his client (Syed Ghazanffar Ali) is the owner of M/s Precise Constructors, which was awarded contract for construction of Members Lodges Project through a bidding process. The said Plaintiff executed work on the Members Lodges Project according to the drawings, specifications and under the supervision of Project Committee, Resident Engineers and Consultants. According to him, the final bill payment was made after approval from competent persons of Defendant No.1-Karachi Gymkhana, which includes Resident Engineer. He has also challenged his termination of membership on the same grounds as agitated by the Plaintiffs in other connected suits.

21. Now adverting to the injunction application filed in Suit No.1355 of 2016, by Mr. Usman Ahmed Ansari, who is represented by Mr. Rehan

Aziz Malik, Advocate. The Plaintiff in the present suit has sought the same injunctive relief but his case is little different from other Plaintiffs as earlier he had also instituted a Suit No.1304 of 2016, which was later withdrawn by him on 03.06.2016. Copies of the earlier plaint (Suit No.1304 of 2016) as well as the order for withdrawal and the injunction application have not been filed by the Plaintiff but by Defendant's counsel with his counter affidavit to the injunction application. Mr. Rehan Aziz Malik, learned counsel has cited number of reported decisions (mentioned herein under) in support of his arguments that present suit is neither hit by Section 11 nor by Order II, Rule 2 and Order XXIII, Rule 2 of CPC.

- i. P L D 2005 Supreme Court 605 (*Fecto Belarus Tractor Ltd. Vs. Government of Pakistan & others*),
- ii. 2014 Y L R 2218 (*Muhammad Akbar Vs. Muhammad Tariq & others*),
- iii. 1999 S C M R 705 (*Hafiz Noor Muhammad & others Vs. Ghulam Rasul & others*),
- iv. 2013 C L C 1659 (*Anis Ahmed & others Vs. Mst. Roshan Ara Begum & others*),
- v. P L D 1992 Karachi 423 (*Fayyaz Hussain Vs. Tahir Naseem*),
- vi. P L D 1966 (W. P.) Karachi 126 (*Abdur Rashid Vs. Burmah-Shell Oil Storage and Distribution Company of Pakistan Ltd. & others*),
- vii. P L D 2000 Karachi 58 (*Haji Hafeezuddin & others Vs. Lucas Service Pakistan Ltd.*),
- viii. P L D 1999 Lahore 340 (*Chiragh Vs. Abdul & others*),
- ix. 2000 S C M R 1172,
- x. 2004 M L D 943,
- xi. P L J 1983 Karachi 21,
- xii. AIR 1919 Allahabad 270 and
- xiii. AIR (34) 1947 Calcutta 11.

22. The crux of his above reported decisions is that_

- (i) if a case is not adjudicated upon merits then Section 11 of CPC relating to the principle of *res judicata* will not apply. For

invoking this principle, it is necessary that it must be first determined that issues raised in the former proceedings and the pending one were substantially the same and were decided on merits.

- (ii) When cause of action in both suits are distinctive and based on different set of facts and also recurring, then it becomes a mixed question of law and facts.

23. Controverting the above submissions, Khawaja Shams-ul-Islam, learned counsel for the Defendants, has argued that the plaint of subsequent suit (Suit No.1355 of 2016) be rejected under Order VII, Rule 11 of C.P.C., as it is clearly hit by Order II, Rule 2 as well as Order XXIII, Rule 1 C.P.C. According to him, while withdrawing his earlier suit, the Plaintiff did not seek permission of the Court to file a fresh suit and, therefore, present suit falls within the mischief of the above referred provisions.

24. The submissions have been taken into account. If the cause of action and the prayer clause of both suits are compared, it is apparent that the cause of action of the previous and the present suits are different so also few of the prayer clauses. In the present suit, the Plaintiff is seeking declaration against the decisions / resolution of General Body Meeting of Defendant No.1 dated 26.05.2016 as well as the impugned action of terminating his membership and seeking a permanent injunction against the actions of Defendants, which have already been enumerated hereinabove. In the present, the Plaintiff has not claimed damages against Defendant, whereas in the previous suit he did. Similarly, present suit was filed on 31.05.2016 and earlier one was withdrawn subsequent to filing of this suit, that is, on 03.06.2016.

25. In the present case, in my considered view, the most relevant case law is the famous case of *Ghulam Nabi & others Vs. Seth Muhammad*

Yaqub & others reported as P L D 1983 Supreme Court page-344. In this case their lordships have held that bar of Order XXIII, Rule 1 of CPC will not be applicable when previous suit has been withdrawn after filing of subsequent suit, which in fact has happened in this case. It was further held that principle of *res judicata* will not be operative merely because a previous suit was withdrawn simplicitor, but as mentioned above this principle can be invoked in those cases where in a previous proceedings the decision was given on merits. Similarly the test for applicability of Order II, Rule 2 of CPC has been mentioned in two other reported Judgments; (i) 2002 C L C page-1784 (*Mst. Shamim Sshfaq Vs. Muhammad Rafiq & others*) and (ii) P L D 1970 Supreme Court page-67 (*The Rivers Steam Navigation Co. Ltd. & others Vs. The District Council of Bakarganj & another*). It has been held that cause of action of both suits should be seen vis-à-vis the evidence. If the same evidence can sustain both suits, then applying this rough test (as termed by the Honourable Court), the applicability of Order II, Rule 2 CPC can be determined. In other words, if different set of evidence is to be led for proving or disproving controversial issues, then the subsequent suit will not be barred by the Order II, Rule 2 of CPC. Even otherwise, in the earlier suit there is no prayer challenging termination of the Club membership of Plaintiff, which has now been included in the present suit. Even, if the Plaintiff is entitled to one of the reliefs claimed, his plaint cannot be rejected in piecemeal, which is another cardinal principle for rejection of plaint under Order VII, Rule 11 of CPC. Resultantly, in my considered opinion, present Suit No.1355 of 2016 is not barred by Order II, Rule 2 or any of the provisions mentioned above and, therefore, the plaint whereof cannot be rejected at this stage.

26. With regard to the injunction application-C.M.A.No.9971 of 2016 filed by Syed Ghazanffar Ali, in whose favour ad-interim interim

injunction order as mentioned in the preceding paragraphs, was earlier granted, but on account of the adjournments sought by the counsel concerned and in view of the observations contained in the order dated 08.09.2016 passed by the learned Division Bench of this Court in H.C.A. Nos. 198 to 202 of 2016, the above ad-interim order which was with regard to the Minutes of Special General Body Meeting dated 26.05.2016 stands vacated. But at the same time since the above named Plaintiff of Suit No.1524 of 2016 is aggrieved of the same impugned actions of Defendant, which are subject dispute in other connected suits, therefore, the Plaintiff of Suit No.1524 of 2016 is at the same time entitled to a relief, which can and/or would be extended to other Plaintiffs.

27. While examining the case file, I have come across two emails (Annexures "J" and "K", page Nos.673 and 675 of the Suit No.1349 of 2016). These emails apparently were sent from the email account of Defendant No.14-Ernst & Young Ford Rhodes Sidat Hyder, Chartered Accountant, dated November 26, 2015, and is addressed to Karachi Gymkhana members. The date of this email shows that it was sent a week later after Defendant No.14 submitted its impugned forensic audit Report. In this email, it is mentioned that misappropriation of Rs.10 crore has been reported in the audit done by the Firm-Ernst & Young Ford Rhodes Sidat Hyder, Chartered Accountant and called upon the members of Karachi Gymkhana to attend special general body meeting for raising their voices against corrupt mafia. At the end, sender's name is not mentioned but the email has ended with the caption **CONCERNED MEMBERS**. The next document (Annexure "K") is also an email from Ernst and Young Ford Rhodes Sidat Hyder, Chartered Accountant, Defendant No.14, in which the contents of earlier email has

been disapproved and the said Defendant No.14 disassociated itself from the above email, which according to them was sent by some third party and the name of Defendant No.14 has been misused. Without giving any conclusive opinion on these emails, *prima facie*, it appears that rivalry amongst the parties hereto did exist.

28. As far as the two impugned reports, viz. forensic audit report of Defendant No.14 and the report of Investigation Committee-Defendant No.7, are concerned, any findings against them at this stage would prejudice the final outcome of these suit proceedings. In any even if both these two reports are sought to be set aside by the Plaintiffs, then parties have to lead evidence and only subsequent thereto the credibility, impartiality and authenticity of these two reports can be adjudged. This exercise obviously cannot be undertaken at this stage of the proceedings, as it will amount to be a trial within trial. In this regard decision by the Council of ICAP though would not be a determining factor but a material one at least, as ICAP is a regulatory body for the accountancy profession in Pakistan in terms of the Chartered Accountant Ordinance, 1961.

29. What can be looked at this stage are the undisputed facts and the applicable law or rules, in order to decide whether Plaintiffs have an arguable case or not. Another thing which I am unable to restrain myself from expressing is that approximately fifty three decisions were cited at the Bar, but, very few were relevant. Most of the citations are mere reinforcement of settled principles and thus their number could have been lessened, specially realizing that the controversy is only at the interlocutory stage.

30. The undisputed facts are that in the Special General Body Meeting of 26.05.2016, the Club memberships of the Plaintiffs were

terminated in violation of Rule 30 [of the said Rules], that is, the decision was not through balloting, but purportedly by show of hands. Admittedly no other provision was pointed out by any of the counsel representing the Plaintiffs or Defendants, except Rule 30, whereunder the membership of a permanent member of Defendant No.1-Karachi Gymkhana can be terminated. The justification given by Defendants' counsel that it is a unique case of corruption and criminal negligence, in which the overwhelming majority of permanent members of Defendant No.1 (Karachi Gymkhana) who were present at the special general meeting have given their verdict against Plaintiffs, is counterbalanced by the arguments from Plaintiffs' side, inter alia, that admittedly none of the Plaintiffs were called upon by the Managing Committee in writing as provided in sub-Rule (b) of Rule 30 to resign from their respective Club Memberships, **before** their matter can be referred to the Special General Meeting, nor the impugned session of Special General Meeting on 26-5-2016 was conducted as per Rule 30, as admittedly no balloting on the question of terminating the club membership of Plaintiffs took place. There are approximately five thousand permanent members of Defendant No.1-Karachi Gymkhana, whereas, only 479 permanent members attended the above Meeting.

31. The above Rule 30 of the Said Rules clearly spells out that first a member should be called upon by the Managing Committee to resign and upon his refusal, his case will be referred to the General Body of Defendant No.1-Karachi Gymkhana in terms of sub-Rule (d) as reproduced in the preceding paragraphs. Admittedly, both the requirements as specifically mentioned in Rule 30 of the Said Rules have been violated in the present case. Termination of membership of the Plaintiffs in such a manner is also a stigma for them and their respective

family members. A reputation of a person is a priceless commodity, which cannot be quantified in monetary terms, hence, if the Plaintiffs succeed in the present suits, to carry the stigma during this intervening period, will cause them [Plaintiffs] irreparable losses. Lastly, if Plaintiffs are allowed to continue as members of Defendant No.1-Karachi Gymkhana till the final decision of these suits, it will not cause any inconvenience to the Defendants and especially Defendant No.6-Managing Committee of Defendant No.1-Karachi Gymkhana, as against the Plaintiffs. In this regard one of the members of Managing Committee Shaikh Javed Mir [the current Vice President] has already given his views which are mentioned in the preceding paragraphs. Consequently, all the listed Injunction Applications are granted **but only to the extent** that the operation of the decision [of 26-5-2016] at the special general meeting and the impugned letter / circular of 26-5-2016, issued by Secretary-Defendant No.4, whereby the club membership of the Plaintiffs has been terminated, will remain suspended till the final decision of these connected suits. Hence, ad-interim orders granted earlier in different suits stand confirmed to the extent mentioned above. As a result, the afore listed Applications for Vacation of ad-interim orders are hereby disposed of with an observation that Plaintiffs shall not create any hindrance in the working of Defendant No.6-the Managing Committee of Defendant No.1-Karachi Gymkhana.

32. It is clarified that observations made herein above are only of tentative nature and in no event will prejudice or influence the trial of these suits and/or final decision of the present proceedings.

JUDGE

Dated:_____