

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI.
Suit No. 2702 of 2016

DATE: **ORDER WITH SIGNATURE(S) OF JUDGE(S).**

For hearing of CMA No.18000/16

17th April, 2017

Mr. Mushtaque Ali Lakhair, advocate for the plaintiff.
Bashir Ahmed Qadwai, Attorney of Def.No.5 is present.
Syed Aal-e-Maqbool Rizvi, A.A.G.
Ms. Naheed Akhter, State Counsel.

The present suit has been filed against official and private defendants in respect of a plot bearing No.B-112, measuring 400 Square Yards, situated in Sindh Baloch Cooperative Housing Society Limited, Gulistan-e-Jauhar, Karachi (“**Society**”). The grievance of plaintiff is that defendant No.4-Society has illegally cancelled the allotment order and subsequently a registered Sub-Lease bearing No.4149, dated 27.06.2005, which was in favour of plaintiff in respect of the above subject plot. Copies of the allotment order and ancillary documents with indenture of Sub-Lease have been annexed with the plaint as Annexures ‘B’ to ‘B-5’.

Today the matter is heard at length and on behalf of contesting defendant No.5-Mst. Naheed Parveen, her husband appeared, who has filed a detailed written statement being the attorney of defendant No.5-Mst. Naheed Parveen, in whose favour the present allotment of the above suit property is existing. After perusal of record, it appears that this case has a chequered history and in earlier litigation as well, learned Division Bench

of this Court has made certain observations against defendant No.4-Society while passing an order in C.P.No.D-3336 of 2015. Record also confirms that earlier another lis was filed in this Court, which was withdrawn by defendant No.4-Society.

Learned counsel for the plaintiff has referred to the Judgment dated 27.05.2013 passed in Civil Suit No.737 of 2010 by learned Ist Senior Civil Judge, Karachi East, wherein it has been held that the above plot in favour of present defendant No.5 was rightly cancelled by defendant No.4-Society. In the present proceedings, plaintiff has impugned the letter dated 20.03.2015 issued by defendant No.4-Society under which various orders passed at different Fora were referred while cancelling the allotment in favour of plaintiff.

On the other hand, the attorney of defendant No.5 has referred to the Judgment dated 19.03.2016 handed down in Civil Appeal No.175 of 2013, which was filed against the aforementioned decision given in the said suit. Certain observations and findings of the Appellate Court are of significance, in which after appraisal of the evidence, the learned Appellate Court has held that cancellation of above plot in favour of present defendant No.5-Naheed Parveen was an illegal exercise of authority by defendant No.4-Society and consequently, the plot in question was restored. In the above Appellate Judgment, admission on behalf of defendant No.4-Society, has also been highlighted with the observation that **mala fide** on the part of respondent No.1 is apparent.

The legal position, which is prevailing in the matter, is that whether the aforesaid Appellate Judgment, which is still holding the field, can be directly or indirectly interfered with or in other words, its effect can be diluted in present proceeding, which inherently is of original civil nature?

The plaintiff's counsel has strenuously argued that admittedly his client (Plaintiff-Muhammad Ibrahim) was never made a party to the above referred proceedings, which shows the mala fide on the part of parties particularly defendant No.5. He further argued that a registered document cannot be cancelled as is done by defendant No.4-Society, which is violative of Section 39 of the Specific Relief Act, 1877.

The above arguments were rebutted by attorney of defendant No.5, namely, Bashir Ahmed Qidwai. When queried, learned Additional Advocate General Sindh has addressed his arguments primarily on the legal issue, by making his submissions that though the present plaintiff was not impleaded as a party in the above referred proceedings, but still in law, he has a remedy by challenging the afore-mentioned Appellate Judgment, *inter alia*, by filing an application under Section 12(2) of C.P.C., but present suit in its present form is not maintainable. In rebuttal, the learned counsel for the plaintiff submits that he is in process of filing a proper application under Section 12(2) of C.P.C. in the above mentioned Civil Appeal.

After taking into account the arguments of respective parties, I am of the considered view that the Appellate Judgment handed down by a competent Court of jurisdiction, is still in the field, which cannot be interfered with either directly or indirectly in a collateral proceeding, that is, through present proceedings, but the same is to be challenged as provided under the law. With regard to the other submission of learned counsel for the plaintiff that the Lease could not have been cancelled by defendant No.4-Society, suffice it to say that the Lease was cancelled in compliance of the afore-mentioned Judgment passed in Civil Appeal No.175 of 2013 and in my view, the same does comply with the requirement of Section 39 of Specific Relief Act, 1877, *inter alia*, as the Lease was rightly cancelled,

in order to implement the decision of the Court. However, it is clarified that any observation made hereinabove are of tentative in nature and will not prejudice the right or interest of any party if at all the latter opted to challenge the aforementioned Appellate Judgment.

Under Order VII, Rule 11 of C.P.C. the Court has ample power to even reject the plaint suo moto if it comes to the conclusion that the plaint is hit by any of the provisions of Order VII, Rule 11 of C.P.C. What it appears that defendant No.4-Society after losing their case at different judicial fora, has brought forward the present plaintiff with a claim that already stood adjudged by the aforesaid Judgment of the Appellate Court. Principle of collateral proceeding is a settled rule, under which, a final decision by a competent Court of jurisdiction cannot be upset or interfered with in some parallel or collateral proceeding, as the plaintiff has attempted to do through present suit. I am fortified in my view by the following two reported Judgments: -

- i) P L D 2006 SC page-53 [**Ghulam Farid alias Farida v. The State**],
- ii) P L D 2007 Karachi page-62 [**Nek Muhammad and another v. The State**].

Crux of the above case law is that if a party has not preferred a remedy before higher forum then the sentences awarded in cases, have attained finality and same cannot be agitated in a collateral proceeding.

It is not a disputed fact that the aforementioned Appellate Judgment has attained finality and till date the same has not been questioned by any of the parties, thus, through present lis, issues decided in the aforesaid Judgment cannot be reopened. The present suit is hit by the principle of Constructive *res judicata* also.

In my considered view, the present cause / plaint amongst other being hit by afore-mentioned legal principles, therefore, the same is barred by law and consequently the plaint is rejected.

Riaz / P.S*

Judge