ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. Nil of 2020

(Damen Shipyards Gorinchem B.V. vs. the Ministry of Maritime Affairs & others)

DATE	ORDER WITH SIGNATURE OF JUDGE

1. For orders on CMA No. 4478/2020 (if granted)
2. For orders on CMA No. 4408/2020. (U/S 149 of CPC)
3. For orders on CMA No. 4409/2020. (U/S 94 R/w Order 39 rule 1 & 2 CPC)
4. For orders on CMA No. 4460/2020. (U/O 23 Rule 1 CPC)

18.05.2020.

Mr. Omair Nisar, Advocate for Plaintiff.

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1. For the reasons so stated in the supporting affidavit and submissions made by the learned Counsel for the Plaintiff, in the given facts urgency granted.

2-3. Deferred.

4. This is an application under Order 23 Rule 1 CPC for withdrawal of this Suit on the ground that Plaintiff has now filed a Constitution Petition before a learned Division Bench of this Court. At the very outset, I have confronted the learned Counsel for the Plaintiff as to how such an application can be entertained, to which he has argued that the Plaintiff, in the current situation and suspension of all Civil/Original work, has already filed a Constitution Petition bearing No.D-2461/2020. According to him, it is the right of the Plaintiff to invoke the Constitutional Jurisdiction to seek its remedy and withdraw instant Suit. He further submits that while filing the said petition proper disclosure has been made regarding filing of this Suit; hence, the application merits consideration and may be allowed as per past practice.

I have heard the learned Counsel for the Plaintiff and perused the record. On 07.05.2020 on CMA No. 4407/2020 being an urgent application, the following order was passed: -

> "1) After having heard learned Counsel, in my opinion no case for any indulgence or urgency is made out in this current situation of pandemic (COVID-19) read with Circular dated 22.03.2020 issued on the instructions of Hon'ble Chief Justice. Urgent application is dismissed."

It appears that after having failed to convince this Court to grant any urgency in the matter, as apparently the Court was of the view that the cause of action had accrued prior to the issuance of Circular dated 22.03.2020 and the current pandemic (COVID-19) situation, the Plaintiff has filed C.P No.D-2461/2020 on the same cause of action without first seeking withdrawal of this Suit with a permission to pursue any other remedy in accordance with law. This *post facto* withdrawal though titled as *"unconditional"* is *per-se* not unconditional; but amounts to condoning the filing of Constitution Petition without first withdrawing this Suit and obtaining any permission to that effect. It needs to be appreciated that in terms of Order 23 Rule 1 CPC, the Plaintiff can always withdraw its Suit unconditionally (barring cases wherein rights have accrued to the Defendant), and the Court is bound to grant such permission, come what may (See-***Pakistan Defence Housing Authority v Muhammad Afsar***- **PLD 2015 Sindh 239**); however, when the Plaintiff is seeking permission to pursue any other remedy in terms of Rule 1(2) and (3) of Order 23, then it is incumbent upon the party to seek permission to pursue the other remedy, whereas, in that case, the Court may or may not grant such conditional withdrawal. Admittedly, it is not a case of withdrawal due to some technical defect or curing the same, for which ordinarily permission is granted as a matter of routine.

If the Plaintiff was of the view that the proper remedy as available in the law was a Constitutional Petition and not a Suit, which they may have been filed due to some mistake or an ill advice; then the Plaintiff first ought to have made an application for withdrawal of this Suit seeking permission to seek any other appropriate remedy as may be available in law including a Constitutional Petition, and then proceed with the Petition, which would then have been dealt with accordingly. However, the facts in this case are contrary to this; rather obverse. First a Petition has been filed and now this Court has been approached to seek withdrawal of the Suit through an application, which though states that the withdrawal is *unconditional*; but otherwise seeks permission to pursue the Constitutional Petition. Such conduct on the part of the Plaintiff as well as Counsel in question cannot be appreciated. This Court i.e the *High Court of Sindh at Karachi* has been

conferred with two parallel jurisdictions in civil matters. The one is under Article 199 of the Constitution of Pakistan, being exercised presently by learned Division Benches of this Court. The other is the Original Side Jurisdiction, which is though conferred under the Civil Courts Ordinance, 1962; but is an independent jurisdiction of this Court acting as a High Court being a Constitutional Court and not a District Court, as recently affirmed by the Hon'ble Supreme Court in the case reported as ***Searle IV Solution (Pvt.) Ltd and others V. Federation of Pakistan and others (2018 S C M R 1444).***

Time and again it has been noted with concern as well as anguish that parties are coming before this Court (*Sindh High Court*) by resorting to any one of these remedies; i.e. either by way of a Civil Suit or a Constitutional Petition and after having failed in getting any ad-interim order(s) to their satisfaction, immediately make efforts to seek the other remedy as the case may be. At times, (*though very remotely*) the proper course is adopted by the parties and their Counsel by first withdrawing one of the cases/remedies with a permission to seek the other, and then approach the second Court for availing such remedy, which is then dealt with by such Court accordingly. However, recently, it has been noticed that mostly, after failing to get any ad-interim order(s)/ relief(s), the parties immediately approach the other Court and make an attempt to seek ad-interim orders without properly disclosing and or assisting the Court as to filing and seeking of the 1st remedy, and even if it is sp disclosed, the same is done in a manner that the Court is not able to take immediate notice of it while hearing the application for passing of an ad-interim order. This conduct on the part of the parties and their Counsel by way of choice, will, and Bench hunting tactics has resulted in multiplicity of litigation and so also making mockery of the Judicial System due to availability of these two jurisdictions in one High Court in the same premises. It is an attempt to take chances before Benches / Judges of one's choice. The proper course which needs to be adopted is, that first, the party should withdraw its first litigation by apprising the Court of the true facts as well as reasons for doing so, and then seek permission to pursue any other remedy, which may include the remedy under the Constitutional Jurisdiction. If the Court is satisfied, then permission can be granted and naturally such permission would also include permission to pursue the other remedy. However, without doing

this and after filing and availing the second remedy, the party is not permitted to seek withdrawal of the first litigation by stating that it is being withdrawn (*though unconditionally*); but at the same time seeking implied permission to pursue the Petition already filed. If such an application is granted, this would amount to giving permission to proceed with the Petition as well. This in the given facts is not permissible and the Court must take notice of the same. It is settled law that once an application has been filed for withdrawal with a permission to file a fresh case, then notwithstanding the fact that the Court might not have granted any such permission, it is always deemed to be granted. Therefore, if this application is allowed it would not only permit withdrawal; but an implied permission to pursue the other remedy already chosen and availed by the Plaintiff.

The Hon'ble Supreme Court in the case reported as ***Trading Corporation of Pakistan v Devan Sugar Mills Limited*** (**PLD 2018 SC 828**), though while dealing with a challenge to an ex-parte decree / order and the selection of remedies chosen by a litigant, but has affirmed this view that a litigant after choosing to select a particular remedy from a host of all remedies available to him, cannot resort to the other remedy which was available before making a selection. It has been held that once a selection is made then the party generally (meaning at least without due course and permission) cannot be allowed to hop over and shop for one after another coexistent remedies. The relevant observations are as under;

> 8. Heard the counsel and perused the record. We have examined the contents of the application under section 12(2) C.P.C. which was filed on 7.12.2011, heard and decided by the executing Court on 7.8.2012 and maintained by High Court on 9.8.2016 and the one filed under section 47 C.P.C. on 14.10.2016. We have noted that facts and ground in both set of the proceedings are substantially same. **The moment suitor intends to commence any legal action to enforce any right and or invoke a remedy to set right a wrong or to vindicate an injury, he has to elect and or choose from amongst host of actions or remedies available under the law. The choice to initiate and pursue one out of host of available concurrent or co-existent proceeding/ actions or remedy from a forum of competent jurisdiction vest with the suitor. Once choice is exercised and election is made then a suitor is prohibited from launching another proceeding to seek a relief or remedy contrary to what could be claimed and or achieved by adopting other proceeding/action and or remedy, which in legal parlance is recognized as doctrine of election, which doctrine is culled by the courts of law from the well-recognized principles of waiver and or abandonment of a known right, claim, privilege or relief as contained in Order II, rule (2) C.P.C., principles of estoppel as embodied in Article 114 of the Qanun-e-Shahadat Order 1984 and principles of res-judicata as articulated in section 11,**

> **C.P.C. and its explanations**. Doctrine of election apply both to the original proceedings/action as well to defences and so also to challenge the outcome on culmination of such original proceedings/ action, in the form of order or judgment/decree (for illustration it may be noted that multiple remedies are available against possible outcome in the form of an order/judgement/decree etc. emanating from proceedings of civil nature, which could be challenged/defended under Order IX, rule 13 (if proceedings are ex-parte), section 47 (objection to execution), section 114 (by way of review of an order), section 115 (revision), under Order XXI, rules 99 to 103 C.P.C. and section 96 C.P.C. (appeal against the order/judgment) etc. Though there is no bar to concurrently invoke more than one remedy at the same time against an ex-parte order/judgment. However, once election or choice from amongst two or more available remedy is made and exhausted, judgment debtor cannot ordinarily be permitted subsequently to venture into other concurrently or coexisting available remedies. In a situation where an application under Order IX, rule 13, C.P.C. and also an application under section 12(2), C.P.C. seeking setting aside of an ex-parte judgment before the same Court and so also an appeal is filed against an ex-parte judgment before higher forum, all aimed at seeking substantially similar if not identical relief of annulment or setting aside of ex-parte order/judgment. Court generally gives such suitor choice to elect one of the many remedies concurrently invoked against one and same ex-parte order/judgment, as multiple and simultaneous proceedings may be hit by principle of res-subjudice (section 10, C.P.C.) and or where one of the proceeding is taken to its logical conclusion then other pending proceeding for the similar relief may be hit by principles of res-judicata. Giving choice to elect remedy from amongst several coexistent and or concurrent remedies does not frustrate or deny right of a person to choose any remedy, which best suits under the given circumstances but to prevent recourse to multiple or successive redressal of a singular wrong or impugned action before the competent forum/court of original and or appellate jurisdiction, such rule of prudence has been evolved by courts of law to curb multiplicity of proceedings. As long as a party does not avail of the remedy before a Court of competent jurisdiction all such remedies remain open to be invoked. Once the election is made then the party generally, cannot be allowed to hop over and shop for one after another coexistent remedies……".

As noted earlier, the case of the Plaintiff before this Court is not of an unconditional withdrawal; in fact, it is a conditional withdrawal i.e. seeking permission to prosecute the petition already filed before the learned Division Bench. In fact, this Court is not in a position to even grant such a prayer to permit the Plaintiff to pursue its petition, and therefore, even otherwise, such an application cannot be granted which may amount to passing of an order with directions to a learned Divisional Bench of this Court. It is for the learned Division Bench to see that whether in view of refusal to grant this application, the petition can still be prosecuted. I have also confronted the learned Counsel, that at best, either this Court could have been approached with a fresh urgent application; or in the alternative, the Appellate Court's jurisdiction could have been invoked, but he was unable to answer this query of the Court with any satisfactory reply, except that this effort

would have met the same fate. I am not impressed with such line of argument being highly presumptive and anticipatory.

If the case of the plaintiff had been the other way round, i.e. filing of a petition first and then, without seeking withdrawal or even a simplicitor withdrawal, filing a Civil Suit, then perhaps, it could have been argued that the Plaintiffs case involves certain factual aspects which they could not have agitated in a petition, whereas, an alternate remedy can always be availed as against a Constitutional Petition; however, this is not the case either. Though a learned Division Bench of this Court in the case reported as ***Amber Ahmed Khan v. P.I.A. Corporation*** (**PLD 2003 Karachi 405**), recently followed by a learned Single Judge of this Court in the case reported **ABDUL QUDUS ALVI Versus The NED UNIVERSITY OF ENGINEERING AND TECHNOLOGY through Registrar and 2 other (2020 CLC 377)** has held that "*….nevertheless, we are of the view that though normally the broad principles and procedural provisions of C.P.C. are applicable to Constitutional petitions, the provisions of Order XXIII, Rule 1, C.P.C. cannot by the very nature of the jurisdiction under Article 199 apply to cases of withdrawal of a Constitutional petition….*"; however, I have not been able to persuade myself to strictly follow this dicta in view of the observations of the Hon'ble Supreme Court in the case reported as ***Javaid Iqbal Abbasi & Company v Province of Punjab*** (**1996 SCMR 1433**), wherein the Hon'ble Supreme Court has been pleased to categorically hold that "*….we are of the view that the Writ Petition No.11880/95 filed before the learned Judge in Chambers being proceeding of a civil nature, the provision of C.P.C. applied to it. Consequently, provisions of Order 23 Rule 1, C.P.C. were applicable to the application for withdrawal of writ petition filed by respondent No.3…"*. Notwithstanding this, even otherwise the facts here are not identical. Here it is vice versa and seems to be a case, whereby, the Plaintiff's Counsel's failure to persuade this Court to grant an urgent application in current pandemic situation, has led to filing of a petition with an effort to convince a learned Division Bench of this Court to see his request with a different eye. If it does not amount to Bench hunting, then what it is? If it was otherwise, then first this Court should have been approached for withdrawal and permission to pursue any such remedy. Such conduct on the part of the Plaintiff and its Counsel cannot be appreciated; rather it is high time that it is deprecated and

viewed strictly. It is not clear as yet that whether this was done on the directions of the Plaintiff or on advice of the Counsel, therefore, at this stage I have restrained myself form giving a finding to this effect.

In view of hereinabove facts and circumstances of this case, I am of the view that the listed application could only be granted it the withdrawal was unconditional, which is not, and therefore cannot be granted, whereas, the conduct of the Plaintiff warrants imposition of cost as well, and therefore, it is dismissed with cost of Rs.10,000/- to be deposited in the account of Sindh High Court Clinic.

Since now, it has become a consistent practice of the parties and their Counsel to seek both remedies i.e. by way of a Civil Suit and a Constitution Petition before this very Court on the same cause of action and at times even without withdrawing the first litigation, therefore, it would be appropriate that a copy of this order be sent to the Registrar of this Court for seeking some appropriate general directions from the Hon'ble Chief Justice, if so desired, in respect of such cases where both these remedies by way of a Civil Suit and a Constitution Petition are being opted / exercised on the same cause of action by the parties without either disclosing it; or properly withdrawing one before having resort to the other.

J U D G E

Ayaz