IN THE HIGH COURT OF SINDH, KARACHI

HCA NO.165 OF 2016

Present:
Mr. Justice Munib Akhtar
Mr. Justice Arshad Hussain Khan

Dr. Farzana Zaidi Vs. Syed Shahrukh Abbas and others

Appellant: Dr. Farzana Zaidi in person

Respondents: Syed Shahrukh Abbas and others,
None present.

Date of hearing: 25.04.2017

JUDGMENT

Arshad Hussain Khan, J: This High Court Appeal has been filed by the appellant against the two orders passed by the learned Single Judge of this Court in Suit No.661 of 2011; **(i)** order dated 11.01.2016, whereby application under Order VI Rule 17 CPC filed by present appellant seeking amendment in the pleadings was dismissed and the said suit was ordered to be transferred to the Court of Senior Civil Judge having pecuniary jurisdiction in the matter and **(ii)** order dated 07.05.2016, whereby application under Section 152 CPC, filed by present appellant seeking review of the order dated 11.01.2016 was also dismissed.

2. Brief facts leading to the filing of the present appeal as stated therein are that the appellant (plaintiff in Suit 661/2011) by profession is a medical doctor having dual citizenship, i.e. Pakistan and USA. Respondent No.1 (defendant No.1 in Suit 661 / 2011), the real brother of the appellant, during the absence of the appellant from Pakistan, illegally and unauthorizedly occupied apartment bearing No. 18-02, Phase-I, DHA, Karachi, (subject apartment), owned by the appellant, and subsequently let it out to respondents 2 and 3 (defendants 2 and 3 in Suit No.661 of 2011). The appellant came to know the said fact when she came back to Pakistan from USA in the year 2010. Soon upon knowledge of said fact, she filed complaint under Illegal Dispossession Act against the respondents. The appellant eventually succeeded in the said proceedings and got possession of the subject

apartment back from the respondents. The appellant upon taking over possession of the subject apartment was shocked to see the condition of the apartment as the same was damaged and was not in a habitable condition. The appellant by spending an amount of Rs.210,000/- put the subject apartment again in a habitable condition. In the year 2011, the appellant filed a Civil Suit bearing No. 661 of 2011, on the Original Side of this Court, for recovery and damages against the respondents in respect of the subject apartment. The said suit was presented in the Court on 06.05.2011. The counsel for the appellant in response to the office objections in respect of valuation of suit for the purposes of jurisdiction of this Court, without informing the plaintiff, who was overseas at the time, introduced and added interpolations in the original plaint in a misconceived manner and misstated the valuation. Upon coming to know about such fact, the appellant filed application under Order VI rule 17 CPC bearing CMA No. 5894/2014, seeking amendment in the Plant. The said application was ultimately heard and decided on 11.01.2016, and the Learned Single Judge dismissed the said application and transferred the Suit of the appellant to the Court of Senior Civil Judge having pecuniary jurisdiction in the matter. After the said order, the appellant filed another application under Section 152 CPC, bearing CMA No. 947/2016, seeking review of the order 11.01.2016 and the same was heard and also dismissed on 07.05.2016. The appellant being aggrieved by the said orders of the Learned Single Judge filed the present appeal.

3. The notice of the present appeal was served upon the respondents through publication but they chose to remain absent and did not come forward to contest the present appeal.

4. We have heard the appellant, appearing in person and have perused the documents annexed with the appeal. The appellant during course of her arguments while reiterating the contents of memo of appeal has contended that the impugned orders are not sustainable in law being adverse to the record and contrary to principles of equity, based on incorrect appreciation of facts and arithmetical mistakes. It is also contended that the learned Single Judge has failed to appreciate the fact that when the counsel introduced and added the interpolations

in the original plaint, the appellant was out of the country and such was done by the former counsel without permission of the appellant who had no knowledge of the same. Further contended that the Learned Single Judge failed to appreciate the gross arithmetical mistakes leading to incorrect valuation which had occurred, which resulted in unjustified transfer of Suit to inferior courts. Further contended that the case of the appellant has been transferred on technical grounds, and the orders impugned in the present proceedings are solely based on arithmetical mistakes and errors arising therein from accidental slips and omissions. Further contended that the impugned orders suffer from non-consideration of the admitted facts and misapplication of appropriate law in the case.

5. From the perusal of the record, it appears that the plaint of Suit 661/2011, presented by the plaintiff on 06.05.2011, was lacking pecuniary jurisdiction of the Original Side of this Court. The office of this Court on the very same date had raised objection in this regard, which was complied with by learned counsel for the appellant, appearing at the relevant time, on the very next day, i.e. on 07.05.2011. Where after, notices of the said suit were issued to the defendants, upon which defendant No.1 (present respondent No.1) on 29.03.2012, filed his written statement denying the allegations leveled in the plaint and raised preliminary objections regarding maintainability of the said suit. For the sake of ready reference the preliminary objections are reproduced as under:-

> "PRELIMINARY OBJECTIONS:
> a) The suit as framed is not maintainable under the law.
> b) That the instant suit is hopelessly barred by limitation.
> c) That this Hon'ble Court lacks the pecuniary jurisdiction as the total amount claimed is 20,10,000/-(Two Million Ten Thousand) only and therefore the plaint has to be returned to the plaintiff."

[Underlining is to add emphasis]

6. The appellant upon the said notice, initially on 24.09.2012 filed application under Order VI Rule 17, read with Section 151, bearing CMA No. 10253/2012, however, subsequently, the said application was dismissed as not pressed by the appellant on 10.04.2014. The said application though is not available on record of the present appeal nor the appellant has mentioned this fact in the appeal. However, the said

fact is apparent from the order sheet of Suit No.661/2011, annexed by the appellant as Annexure-H of the memo of appeal. For the sake of ready reference the order sheet dated 10.04.2014 of Suit No. 661 of 2011 is reproduced as under: -

"**10.04.2014**

Plaintiff in person
Mr. Zaidullah advocate holding brief for Syed Amjad Hussain advocate for defendant No.1

....

1. Mr. Zaidullah advocate holding brief for Syed Amjad Hussain advocate requests for adjournment on the ground that latter learned counsel is busy before another Bench. Such request is not opposed by the plaintiff who is present in person. Adjourned.

2. <u>Plaintiff, appearing in person, does not press this application under Order VI Rule 17 read with Section 151, CPC [CMA No.10253/201] which was presented on 24.09.2012. Accordingly, the same is dismissed as not pressed.</u>

To come up on 30.4.2014

Sd/-
Judge"

[Underlining is to add emphasis]

7. The appellant filed another application under Order VI rule 17, CPC [CMA No.5894/2014] seeking numerous amendments in the plaint as well as in prayer clause. Counter affidavit and affidavit in rejoinder were exchanged between the parties and the same are also available on record. For the sake of ready reference relevant portions of the application are reproduced as under:-

"For the reasons and facts disclosed in the accompanying affidavit, it is most humbly and respectfully prayed on behalf of the plaintiff above named that this Hon'ble Court may graciously be pleased to allow the plaintiff for some necessary amendments in the suit as the same were not mentioned due to oversight and some computer fault. The same may be allowed which are as under:

<u>In Para 10</u> at the end of the para and the plaintiff paid legal fees amounting to Rs.300,000/=' may be added.
<u>In Para 12,</u> in the seventh lane after solely 'and spent Rs.25,198,000/=' may be added.

<u>In Para 13</u> after several times. 'The plaintiff spent Rs.35,000/= for her treatment as she sustained injuries from mal treatment by defendant No.1.

<u>In Para 14</u> after back to Pakistan, `and amount of Rs.540,000/= were spent, being the expenses borne by the plaintiff in USA' may be added.

In Para 16 in line three 'huge amount to the tune of Rs.7,500,000/=
In Para 17, line seven 'Rs.16,610,000/= may be read instead of Rs.1,000,000/=.

That the number of Para 19 is wrongly typed as Para 13 and in this para after jurisdiction may be added 'the Suit is valued at Rs.51,286,800/-

That the Para 20 is wrongly typed as Para 14.

In Prayer Clause, "a" 'money decree for a sum of Rs.51,286,800/=', instead of Rs.800,000/=, and after received by 'the defendant No.1', is read instead of the plaintiff, and after future mark-up, 'mark-up @ bank rate', may be added and then after payment, following may be mentioned 'by the defendant severally or jointly'.
The Prayer Clause "b" and "C" may be deleted."

[Underlining is to add emphasis]

8. Before going into further discussion, it would be appropriate to discuss the provisions of Order VI Rule 17 CPC, which reads under: -

"ORDER VI-PLEADINGS GENERALLY

Pleading— "Pleading", shall mean plaint or written statement.

Rule 17. Amendment of pleadings— The Court may at any stage of the proceedings allows either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

9. There is no cavil to the legal proposition that the court always has the jurisdiction under Order VI, Rule 17 C.P.C. and enjoys vast discretionary powers to allow amendments in a plaint at any stage of the proceedings, which in the opinion of the court, are just and necessary for final disposal of case between the parties in accordance with law. However, at the same time, the court is bound to exercise such discretion in accordance with settled judicial principles, firstly, while allowing request for amendment in the plaint, no prejudice shall be caused to other side, and secondly, amendment shall be necessary for accurate determination of the dispute between the parties. It needs no reiteration that while allowing amendment in the plaint, the defendant's right should also be kept in view and no amendment should be allowed, which is aimed to change complexion of the case altogether or to introduce a new case based on new cause of action.

10. The scope and extent of Order VI Rule 17 C.P.C. has been expounded through various judicial pronouncements including the case of *Mst. Ghulam Bibi and others Vs.. Sarsa Khan and Others* **PLD 1985**

SC 345, which can be summarized as follows:-

(i) Amendment can be allowed at any stage, if it does not change the cause of action of the suit;

(ii) Amendment can be allowed to seek consequential relief arising from the cause of action originally incorporated in plaint;

(iii) Amendment can be allowed to add additional relief available to plaintiff even before the higher Courts of jurisdiction, including High Courts and Supreme Court;

(iv) Amendment can also be allowed to base a plaint on different title;

(v) Amendment would also not be allowed to change complexion of the case;

(vi) Amendment cannot be permitted if it amounts to cause prejudice or injustice to opposite party;

(vii) Amendment would also not be allowed which may amount to introducing a new cause of action, which was not available at the time of filing of suit;

(viii) Rights accrued in favour of one party would not be allowed to be snatched away by allowing amendment in a casual manner, unless it qualifies the test in the light of decisions of Superior Courts as referred to hereinabove and ;

(ix) Amendment is not allowed when (i) it is moved not in good faith, (ii) it is likely to result in injustice to opposite side, and (iii) the period of limitation has run, since the accrual of actual cause of action.

11. Reverting back to the case in hand, if the proposed amendments, which were sought by the appellant (plaintiff) in her suit, are analyzed in view of the above legal position, we are inclined to hold that these proposed amendments, if allowed to be incorporated in the pleadings of the Appellant (Plaintiff), would change the nature and complexion of the case of the Appellant, as the proposed amendments sought to be incorporated appear to be an afterthought and an attempt to fill up lacuna in the plaint, that too, when the respondent No.1 raised the objection in his written statement in this regard. And further serious prejudice will be caused to the respondents (defendants) in the event the amendments, sought to be incorporated in the plaint, are allowed. It seems that the Learned Single Judge after hearing the parties, passed a comprehensive and well-reasoned order, which is impugned in the present proceedings, whereby the application under Order VI Rule 17 CPC filed by the present appellant was dismissed. Relevant portion of the said order for the sake of ready reference is reproduced as follows :-

"I have heard the plaintiff as well as the counsel for the defendant No.1 and perused the record of the case, upon which it appears initially that the plaint of the suit was presented on 06.05.2011 was for recovery and damages to the tune of Rs.20,10,000/-, however, as an afterthought and without obtaining any permission from this Court, and instead of withdrawing the present suit with permission to file fresh, the plaintiff added a hand written line in para-13 after the full stop **"as the suit is valued at Rs.18,210,000/-."** It is not understandable as to how the plaintiff arrived at the conclusion that the suit is valued at the said amount, nor does the plaint disclosed anywhere any calculation of such an amount or any reason justifying the plaintiff to mention the same.

Turning now to the prayer clause, which is still intact, it transpires that the plaintiff has prayed for a judgment and decree for only an amount of Rs.20,10,000/-. This discrepancy between the valuation clause along with its hand written note and the amount for which the judgment and decree are sought is not reconcilable, which the plaintiff could not justify either during the course of arguments or from the contents of the plaint, and now when the plaintiff realized that the initial defect in the prayer clause of the suit still persists, which is going to be fatal to it at the end of the day, through the instant application the plaintiff is seeking permission to enhance the claim in the suit to Rs.51,286,800/- which in my opinion is quite an exorbitant amount and which, if allowed, will change the entire complexion of the instant suit, because even the value of the apartment in question itself is not that much. It is well settled law of the superior courts of our country that no such amendment could be allowed to be introduced into the plaint which will change the entire colour and complexion of the suit. After carefully examining the contents of the application, I am of the considered view that the same do not relate to the cause of action accrued to the plaintiff for filing the instant suit.

In view of the above, I am of the considered opinion upon perusal of prayer clause of the suit, the instant suit is only for the recovery of Rs.20,10,000/- for alleged rent, renovation charges and compensation as damages, which is not triable by this Court and which is much less than the minimum pecuniary jurisdiction of this Court, which is beyond Rs.15 million as per amendment introduced in the Sindh Civil Courts Ordinance, 1962 regarding enhancement of pecuniary jurisdiction of Civil Courts in Karachi up to Rs.15 million, effective from 02.03.2011 whereas the present suit has been filed on 06.05.2011. Therefore, this application is dismissed and the instant suit is transferred to the Court of Senior Civil Judge having pecuniary jurisdiction in the matter. The office is directed to comply with this order within a week by transferring the instant suit to the Court of competent pecuniary jurisdiction."

[Underlining is to add emphasis]

12. As regards the second order dated 07.05.2016, impugned in the present proceedings, is concerned the same was passed by the Learned Single Judge on the application, filed by the appellant (Plaintiff), under Section 152 CPC seeking review of the order dated 11.01.2016. In this regard before going into further discussion, it would also be

advantageous to reproduce provisions of Section 152 CPC, which are as follows :-

> **"152.**Amendment of judgments, decrees or orders—
> Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties."

13. From the bare perusal of the above provisions, it is manifestly clear that Section 152 has some limitations, which have been provided therein. The scope is limited to 'clerical', 'arithmetical' mistakes or 'errors" arising from any "accidental slip" or 'omission'. Where the order or judgment is deliberate, having been passed after application of mind, it will be outside the scope of Section 152, as an error or omission in such an order would not be construed as an accidental slip or omission. Not every mistake by a court can be termed as an error resulting from an 'accidental slip' or 'omission'. Contentious issues cannot be considered or corrected under Section 152 of C.P.C. The Hon'ble Supreme Court in case of *Baqar Vs. Mohammad Rafique and Others* **2003 SCMR 1401**, interpreting the provisions of Section 152, held that an 'omission made by a court by positive application of mind cannot be termed as an accidental slip or omission. It must be an error apparent on the face of the record or an 'accidental slip or omission, and should be an error apparent at first sight, and its discovery should not depend on elaborate arguments on questions of facts or law'. The court cannot rectify a decree, judgment or order on the grounds that it was wrong or unfair. The Section does not authorize the court to supplement its judgment, passed after application of mind and having effect of taking away rights accrued to any party. The errors as contemplated by Section 152 are those which may have crept into the order or decree inadvertently or unintentionally. The mistakes, which do not go to the merits of the case and not substantially affecting rights of the parties can always be corrected by exercising jurisdiction under section 152.

14. From the perusal of the order dated 07.05.2016, it appears that Learned Single Judge after hearing the appellant by applying the above principles of law has passed a well-reasoned order; relevant portions whereof, for the sake ready reference, are reproduced as under:-

> "Through this application under Section 152 CPC, the plaintiff seeks review of order passed by me on 11.01.2016, whereby the application being CMA No.5894/2014 under Order 6 Rule 17 CPC for amendment in the suit was dismissed. The reasons for disposal of the said application have been given exhaustively in the said order. The plaintiff in person has argued the application for review of the aforesaid order at length, however, the plaintiff has not been able to point out even a single error apparent on the face of the order either arithmetical mistake or clerical error in the said order.
>
> I may be made clear that application under Section 152 CPC this Court can only review the clerical or arithmetical mistake in the judgments, decrees or orders or errors arising therein, from any accidental slip or omission and if there appears to be such a mistake or clerical error which can be corrected either on its own motion or on the application of any party.
>
> Since the plaintiff has not been able to point out any error or mistake in the aforesaid order, I am of the view, that the application for review is totally misconceived, which is hereby dismissed, however, with no order as to costs."

[Underling is to add emphasis]

15. The upshot of the above discussion is that the orders impugned herein are well reasoned and based on sound principle of law, and as such, we see no reason to interfere with the impugned orders, hence, the present High Court Appeal being devoid of merit is dismissed.

JUDGE

JUDGE

Karachi'
Dated:____________

*Jamil**