IN THE HIGH COURT OF SINDH AT KARACHI

BEFORE:
Mr. Justice Mohammad Shafi Siddiqui

J.M. No.20 of 2013
Saeed Allahwala
Versus
Zam Zam Corporatioin/
Federation of Pakistan & others
A N D
J.M. No.37 of 2013
M/s Drug Regulatory Agency
Versus
Zam Zam Corporation & others

Date of Hearing:	28.03.2016
Applicant in JM 20/2013:	Through Mr. Ayan Mustafa Memon Advocate.
Applicant in JM 37/2013:	Through Mr. Khalid Ishtiaq Advocate.
Respondent No.1:	Through Mr. Makhdoom Ali Khan Advocate along with M/s Abdul Ghaffar Khan and Sarmad Hani Advocates.

J U D G M E N T

Mohammad Shafi Siddiqui, J.- By this order I would dispose of two J.M. bearing No.20 and 37 of 2013 wherein common order dated 11.03.2013 has been challenged.

Brief facts of the case are that the respondent No.1 (Zam Zam Corporation) filed Suit No.943 of 2012 in relation to SROs 862 and 863(I)/2012 dated 13.07.2012. While the interim order was in operation in relation to the subject SROs, a compromise was arrived in terms of report dated 19.11.2012 which was filed and the suit was disposed of. Such report recommended enhancement of the price in relation to the drugs/medicines. With this background the applicants have challenged the authority of the Sub-committee in entertaining the medicines of respondent No.1 for fixation/enhancement of its prices.

Learned counsel for the applicants submitted that in pursuance of Drugs Act, 1976 read with Drug Regulatory Authority Act, 2012 (Act of 2012) since it is a federal subject the meeting was held on 09.10.2012 by

Drugs Pricing Committee and in this meeting referred the price enhancement issue to a sub-committee of the respective provinces. The sub-committee approved the respective prices on 19.11.2012 vide its report, copy of which is available on record. The report of the sub-committee was filed by learned DAG in Court on 11.03.2013 and the plaintiff having been satisfied with the report, the suit was disposed of in terms indicated in the report referred above.

It is the case of the applicant in J.M. No.37 of 2013 that the sub-committee did not enjoy the mandate as to fixing prices in relation to those drugs which were not recommended by the Drug Price Committee and hence they exceeded to the authority delegated to them. Learned counsel submitted that after passing of the order impugned here the respondent No.1 without the recommendation of the Chairman Drug Price Committee have unilaterally enhanced the prices and are portraying it to be a decree of the Court for enhancing the prices based on the report of the sub-committee, which is incorrect since the Chairman Drug Pricing Committee had in its subsequent meeting deferred the issue. Thus, in J.M. 37 of 2013 the applicant's case is limited to the extent that the sub-committee did not enjoy the authority to consider those drugs, which were not referred to them by the Drug Pricing Committee and hence applicant has played fraud with the Court while obtaining the impugned order.

In addition to the above, learned counsel for the applicant in J.M. 20 of 2013 submitted that the minutes of the meeting presented on 11.03.2013 were not the same as were finalized on 19.11.2012. The first two pages available at page 85 and 87 of JM 20 of 2013 were other than those which were finalized. Though learned counsel admits the recommendation at the concluding page insofar as enhancement of price is concerned, he substantially disputed the reasoning assigned to it. The report was filed by DAG on 22.02.2013 in relation to the sub-committee's observation and recommendation dated 19.11.2012. Based

on this recommendation, which was also signed by the applicant of JM 20 of 2013, a warning was issued by the Drugs Regulatory Authority to the applicant with the observation to ensure that the representative of PPMA should ensure that they do not sign agenda/minutes of Board/ committee of the Regulatory Authority as they are only observers in the DRAP Board/committee meetings. Aggrieved with this, the applicant in JM 20 of 2013 preferred this JM to the effect that the conclusion based on certain bullet points of Para 6 were not part of the original report available at page 147 of J.M. 37 of 2013. The two distinguished pages are also available at page 87 and 151 of J.M. 20 of 2013 file which the applicant considers sufficient to impugn it in this JM under section 12(2) CPC.

In the affidavit in rejoinder of the applicant in JM 37 of 2013 the same report of 19.11.2012 was filed as Annexure D by DAG on 22.02.2013 on the basis of which the suit was disposed of on 11.03.2013.

Hence, both the learned counsel appearing for the applicants in respective JMs submitted that the respondent No.1 has played fraud with the Court and hence the impugned order is liable to be set aside.

On the other hand learned counsel for respondent M/s Zam Zam Corporation has objected to the maintainability of main application under section 12(2) CPC. In relation to J.M. 37 of 2013 learned counsel has taken me to the definitions and provisions of Drug Regulatory Authority Act, 2012 to define the definition of "Board". In terms of Section 2(vi), the Federal Government through notification in the Official Gazette has established the authority called DRAP to carry out the purposes of this Act. The constitution of the Authority is defined in terms of section 4 of the Act 2012.

It is further urged by the learned counsel that J.Ms. are not maintainable as the Authority could only act with the approval of the Board, defined above, either by general or special order in writing with the condition or limitation to delegate any of its powers and functions to

any of its officer. Be that as it may, per learned counsel, the Authority could only act for such delegation if the Board's approval is available. It is further urged that the Board in fact is a Policy Board consisting of 15 members, as highlighted in Section 9 of the Act 2012. Its functions and powers are to monitor and supervise the functions of the Authority in terms of Section 11 of the Act 2012.

Learned counsel further submitted that apart from having been no locus standi, the applicants cannot challenge the order under section 12(2) CPC as one of the representative of DRAP namely Umme Lela was also in attendance on the day when the suit was disposed of on 11.03.2013. It is urged by learned counsel for the respondent that the Federal Government through DAG has presented the report of 19.11.2012 in presence of Umme Lela, the Assistant Drug Controller, and hence the defects of the nature, as being highlighted today and/or in the main application, could have been urged on 11.03.2013 when the impugned order was passed since the same were available to them at that time as well.

In relation to the Authority of the sub-committee to consider the enhancement of price of the drugs which were not recommended by the Drug Price Committee, learned counsel contended that this is purely an internal issue between the Committee and Sub-Committee and since the applications of subject drugs were entertained and recommended, it is an indoor management to which the respondent has no concern. Hence, indoor management issue cannot be considered in these proceedings since fraud and misrepresentation with Court in specified terms is to be presented to set aside the order of 11.03.2013 under section 12(2) CPC, which the applicants have failed to.

In relation to J.M. No.20 of 2013 learned counsel for the respondents submitted that the grievance of the applicant is only in relation to the warning letter issued and substantially if the applicant is aggrieved of such warning, an independent suit, petition or litigation

could have been initiated but he would gain nothing even if he succeeds in setting aside the impugned order. Learned counsel further submitted that it is not case of the applicant that he has not signed the report of 19.11.2012. He has referred to an affidavit in rejoinder of the applicant and submitted that the applicant had taken a consistent plea/approach throughout and in Para 6 of affidavit in rejoinder he admitted that as an observer and being member of PPMA he only recommended the case of the respondents/plaintiff for approval. It is also admitted by the applicant in Para 6 that he is not aware as to how the said meeting was allegedly considered an illegal and a warning was issued in this regard. Learned counsel submitted that this J.M. is a collusive application/ proceeding and has been purposely filed prior to the application of the DRAP as they could have achieved such benefit only in such manner which otherwise could not have been achieved by DRAP in their own J.M.

Learned counsel for respondent further referred to Para 8 of rejoinder in which it is admitted that the meeting was properly constituted, convened and attended by several government officials and as such as to its alleged illegality the applicant has no reason to be believed and so also the purported warning issued to the applicant by the DRAP as being illegal and unlawful.

As to issue of maintainability in rebuttal Mr. Khalid Ishtiaq has not argued whereas Mr. Ayan Mustafa Memon urged that the scope of word "person" in Section 12(2) CPC is wide enough to cover the applicant since he is aggrieved of the letter of warning based on order dated 11.03.2013.

I have heard the learned counsel for the parties and perused the material available on record.

Since the respondent has pleaded the question of maintainability of both the JMs, I would first deal with this issue. The first JM No.20 of 2013 appears to have been filed by one Syed Allahwala who was not party to the proceedings. The provisions of section 12(2) CPC allows a

person to initiate proceedings under section 12(2) to challenge the validity of a judgment and decree on the plea of fraud and misrepresentation and for want of jurisdiction. However, in order to apply the legislative intent, one has to understand the need and requirement of this amendment brought some decade back. The person challenging the validity of a judgment and decree on such grounds mentioned therein must move to Court for a remedy which was infringed, curtailed by the judgment and decree under challenge. The applicant in JM No.20 of 2013 was member of PPMA and in terms of Act 2012 required to be in attendance in a meeting to be held in compliance of the provisions of the Act 2012. The applicant has not denied his presence and he being member of PPMA and attending and forwarding the conclusion of that meeting, was neither aggrieved of judgment and decree nor any of his interest or right was infringed. The only concern that he has managed to place is that warning letter was issued on account of signing the report of 19.11.2012. Thus, the remedy

apparently is in seeking appropriate declaration in relation to the warning letter issued and not the judgment and decree. Section 12(2) CPC provides that where a person challenges the validity of a judgment and decree on the score of fraud and misrepresentation or for want of jurisdiction he shall seek his remedy by making an application to the Court which passed final judgment and decree and not by a separate suit. In such situation he could hardly succeed in establishing that judgment was outcome of fraud and misrepresentation and even if he could his relief is in seeking declaration in relation to the warning letter which could hardly be assumed to be granted while setting aside the judgment and decree.

If the provisions of Section 12(2) CPC are allowed to facilitate a stranger to the suit whose rights have not been affected by the outcome, the provisions are not available for the applicant as otherwise it would open the floodgate of litigation for initiating the proceedings. The application under section 12(2) CPC filed by Saeed Allahwala appears to be misconceived. He may have remedy available with him to initiate proceedings in relation to the warning letter issued but by moving this application he could achieve nothing in this regard.

It may also be pertinent to note that although fraud and misrepresentation has not been defined in Civil Procedure Code, the provisions of Section 17 of the Contract Act defines fraud as under:-

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The scope of the proceedings under section 12(2) CPC is confined to fraud practiced upon the Court itself and obtaining an order or decree through misrepresentation. Party alleging fraud and misrepresentation by its own representative or attorney or officer would not entitle to relief under section 12(2) CPC. He may have some other remedies available under the law but the scope of this application cannot be stretched to such an extent where the utility of the provision could be

misused. I do not find any reason to appreciate that the applicant in this JM No.20/2013 is a person whose relief in pursuance of the warning letter lies in setting aside the order/judgment/decree in the suit, hence the contention of the grievance of the applicant falls completely outside the scope of Section 12(2) CPC as he is not an effected person of the order passed on 11.3.2013. In response to the preliminary objection against JM No.37/2013 it seems that the Federation of Pakistan/ defendant no.1 in the suit and Mr. Amanullah defendant No.3 who has also been arrayed as respondent in this JM have not filed the JM. The applicant i.e. DRAP has filed this JM being an aggrieved person. A very heavy burden lies upon them when it is claimed that they are an aggrieved person despite the fact that the suit was disposed of in pursuance of one of their representative in whose presence the Deputy Attorney General has filed the report based on which the suit was disposed of.

A perusal of the Act, 2012 provides that it has a complete code and mechanism to administer the affairs. Subsection (2)(iv) of the Act, 2012 describes authority i.e. Director Regulatory Authority established under section 3 of this Act. Sub-clause (vi) provides definition of Board which means the Policy Board of the authority constituted under section 9 of the Act. In terms of Section 3 of the Act, 2012 the Federal Government is under obligation since the commencement of the Act to issue a notification in official gazette establishing authority to be known as Drug Regulatory Authority of Pakistan. In pursuance of such notification the DRAP regulates its functions under the Act, 2012. It is a body incorporated having perpetual succession and common seal, and may sue and be sued in its own name and subject to and for the purpose of this Act, may enter into contracts and may acquire, purchase, take, hold and enjoy movable and immovable of every description and may convey, assign, surrender, yield up, charge, mortgage, demise, reassign, transfer or otherwise dispose of or deal with any movable and

immovable or any interest vested in it. The composition of the authority i.e. the DRAP consists of full time Chief Executive and 13 directors to be appointed by the Federal Government on the recommendation of the Board whose classification, terms and conditions are to be prescribed. The mandate is provided under section 4(a) onwards. In terms of Section 8 of the DRAP Act, 2012 the authority could act once the powers are delegated with the approval of the Board by general or special order in writing who may enjoy the privilege to the extent of condition enumerated therein to delegate the function of any of its officer as it may deem appropriate meaning thereby that the individual on behalf of the authority can only act once the approval of the Board is accorded. The Board which is called Policy Board is defined under section 9 of the DRAP Act, 2012 consisting of 15 members. The functions of the Board is also defined under section 11 of the *ibid* Act which include but not limited to monitor and supervise all the functions of the authority. There is no iota of evidence that such authority or powers were delegated upon Policy Board of the DRAP and could only then delegate it to any individual to initiate the proceedings.