

**ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI**

Suit No. 1920 of 2010

Muhammad Anwar & another

Versus

Badaruddin & others

Date	Order with signature of Judge
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For hearing of CMA No.1326 /11  
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Dated of hearing: 04.12.2014

Ms. Naheed A Shahid Advocate for the plaintiff.  
Mr. Muhammad Aziz Khan Advocate for the defendant  
Mr. Muhammad Idrees Alvi Advocate for KMC  
.X.X.X.

Through this order, I decide the application bearing CMA No.1326/2011 under order 7 Rule 11 CPC originally filed by defendants No.1 & 2 but now being maintained and argued by defendant No.2 only.

2. Although a number of grounds have been raised while arguing this application, however the only point that requires consideration was that the earlier suit filed by the plaintiff in the Court of IVth Senior Civil Judge, Karachi (South) bearing Suit No. 967/2010 was withdrawn under Order 23 Rule 1 CPC and as such this suit in the light of the order passed thereon could not be maintained.

3. Learned Counsel for the defendant No.2 while arguing this application has placed on record the order passed in the aforesaid suit No. 967/2010 and submitted that since no permission was granted to the plaintiff for filing this fresh suit therefore, it is considered that he has abandoned his claim. Learned Counsel submitted that instant suit was filed on 18.12.2010 i.e. prior to the filing of the application under Order 23 Rule 1 CPC in the above referred suit and such application was disposed on 06.4.2011 without such permission as prayed for. Learned Counsel further submitted that the earlier suit and the instant suit are

based on the same cause of action and hence on this score alone this suit would not lie.

4. On the other hand learned Counsel for the plaintiff has argued that both the suits were based on different and distinct cause of actions as at the time when earlier suit was filed no sublease was in existence which is sought to be cancelled in the instant proceedings. Learned Counsel submitted that the earlier suit of the plaintiff was filed only to seek declaration that he should not be dispossessed without due process of law and that the plaintiffs were in lawful occupation. Learned Counsel submitted that in the instant suit the cause of action accrued when the City District Government, Karachi executed the registered sub-lease on 17.4.2010 and on the basis of such cause of action the instant suit has been filed which cause of action was not available at the time when the earlier suit was filed. Learned Counsel for the plaintiff submitted that although the order was passed on 06.4.2011 on an application under Order 23 Rule 1 CPC in Suit No. 967/2010, however such order is vague as despite the fact that such permission was sought as incorporated in the application, the order is silent. Hence for all intents and purposes such permission deemed to be passed. Learned Counsel submitted that the provisions of Order 2 Rule 2 CPC could only be invoked in case both the suits appear to have been filed on the basis of same cause of action.

5. Heard the learned Counsels and perused the record. I have perused the contents of the earlier plaint in Suit No.967/2010 which is available as annexure-E-1 at page 171 wherein declaration that has been sought is only to the extent that he is in lawful occupation and may not be dispossessed. The cause of action was also mentioned in para-11 of the earlier plaint which provides that it accrued to the plaintiff when the defendant No.1 tried to obtain lease of the suit property and also on 25.11.2010 when the defendant No.1 threatened the plaintiff of their

illegal dispossession from the suit property. The perusal of the lease which is now available shows that it was executed on 17.4.2010 and the earlier suit was filed on 26.11.2010 i.e. at the time when the lease hold rights against Badaruddin father of the plaintiff were already in existence.

6. In paras-3 and 4 of the plaint of Suit No. 967/2010 the plaintiffs have shown that they have spent certain amounts by selling ornaments of their wives and by obtaining loans from various banks and have constructed the suit plot. It is also contended in para-7 that the defendant No.1 turn dishonest and at the instigation of other relatives started harassing the plaintiffs and started claiming to be the sole owner of the suit property . It is the case of plaintiff that the legal notices concerning plot were issued to the concerned authorities including the Secretary Local Government, The City Nazim Karachi and the EDO Katchi Abadis, CDGK. The only point now required to be seen is, as to whether the plaintiff could have obtained and incorporated such relief in the earlier plaint and that what prevented the plaintiff from obtaining such relief in the earlier proceedings.

7. It is apparent that the plaintiff has sought cancellation of lease in the instant proceedings which he has not sought in the earlier suit though it was registered. In terms of Article 91 of the Limitation Act, it appears that three years limitation period is provided from the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him. From the pleadings of the earlier suit, it appears that the plaintiff was not aware that the instrument has already been registered by CDGK and that now the facts entitling the plaintiff to have instruments cancelled or set aside became known to him and he filed this instant suit for its cancellation not only against defendants No.1 & 2 but also against the concerned authority who were not party in earlier proceedings. It appears to be a mixed question of law and facts as to

when such facts entitling the plaintiff to have the instrument cancelled came to the knowledge. The answer of this question could not be provided in terms of date of registration otherwise the legislature would have been clearly stated that it is to be reckoned from the date of its registration. However words used in this article have some importance when it says that the facts entitling the plaintiff to have the instrument cancelled became known to the plaintiff. In the cause of action in para-15 it is stated that such cause of action for the cancellation of the deed arose when it was disclosed by the defendant No.1 that the lease has already been registered and that the property was purchased by defendant No.2 who is no one but the immediate neighbour conducting business. Thus prima facie the two causes of actions are different and distinct and the bar under Order 2 Rule 2 CPC would not apply.

8. Although after the above observation, further discussion in terms of Order 2 Rule 2 CPC is not required, however for academic purpose, I would like to discuss the same. The permission to file a fresh suit need not be expressed but may be implied from the circumstances under which the order was passed. In absence of express order by the Court granting permission to file fresh proceedings while allowing withdrawal of suit it could be a natural outcome and necessarily follow that such permission has been granted by the Court as in case the Court does not wish to grant the conditional application for permission, it can dismiss the application and direct the plaintiff to proceed with the suit and if he fails to do so the Court can dismiss the suit for non-prosecution. Since an express application has been filed the Court could not allow the suit to be withdrawn and at the same time refuses liberty to agitate grievance in subsequent proceedings. In case of *Maula Buksh v. Muhammad Zahid & another* (PLD 1990 SC 596) it is observed that if the Court passes such orders ignoring to grant such permission to agitate its grievance in the subsequent suit, such an order can be ignored being treated nullity in the eyes of law even though it has not been challenged

on the previous occasions. In this regard if some authorities are needed the cases of Fazal Ahmed & another v. Naeem Akhtar & others (1992 MLD 251), Pakistan Industrial Development Corporation v. Pakistan through Secretariat of Ministry of Finance, Islamabad & another (PLD 1984 Karachi 1) and Maula Buksh v. Muhammad Zahid & another 1990 PLD SC 596) can be looked into. Thus if the Court permitted withdrawal without any express permission for filing fresh suit, it would be deemed to be inbuilt in the order permitting withdrawal if permission to file fresh suit was prayed for either in an oral submission before the Court or in a written application. In the instant case, the present suit appears to have been filed prior to obtaining such permission and it is stated that such permission ought to have been obtained prior to the filing of this suit. As I stated earlier that the cause of action for filing the suit is apparently distinct from the one on the basis of which earlier suit was filed as the facts entitling the plaintiff to have instrument cancelled were not known to the plaintiff when he filed the earlier suit. Thus the present suit could independently be maintained on the basis of fresh cause of action.

9. In view of above findings and reasons the application under Order VII Rule 11 CPC is dismissed with no order as to cost. However, since other grounds, which require adjudication as being question of fact, appropriate issues in this regard may be framed at the stage of settlement of issues.

Judge