

ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI

C. P. No.S-420 of 2023

C. P. No.S-421 of 2023

Dated: Order with signature of Judge(s)

C.P. No.S-420 of 2023:

- 1.For orders on CMA No.3300/2023.
- 2.For orders on CMA No.3301/2023.
- 3.For orders on CMA No.3302/2023.
- 4.For hearing of Main Case.

C.P. No.S-421 of 2023:

- 1.For orders on CMA No.3303/2023.
- 2.For orders on CMA No.3304/2023.
- 3.For orders on CMA No.3305/2023.
- 4.For hearing of Main Case.

Date of Hearing : 3 May 2023

Petitioner : Junaid Iqbal through
Mr. Muhammad Nadeem Khan,
Advocate.

Respondents : Hanfia Alamgir Jama Masjid Trust
& Others.

ORDER

Mohammad Abdur Rahman, J. The Petitioner, through these Constitution Petitions, each filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, has impugned orders each dated 13 April 2023 passed by the District & Sessions Judge Karachi (East) in First Rent Appeal No. 41 of 2022 (FRA No. 41 of 2022) and First Rent Appeal No. 42 of 2022 (FRA No. 42 of 2022) emanating from two orders the first dated 19 November 2019 passed by the VIIIth Rent Controller Karachi East in Rent Case No. 351 of 2018 and Rent Case No. 352 of 2018 and the second dated 29 January 2022 passed by the VIII Rent Controller Karachi East in Execution Application No. 10 of 2019 and Execution Application No. 11 of 2019 filed in Rent Case No. 352 of 2018 and Rent Case No. 351 of 2018 respectively.

2. The Petitioner is a tenant of the Respondent No.1 (which is a Public Charitable Trust) and in such a capacity are in possession of two tenements namely:

- (i) Shop No.152, Adjacent to Alamgir Jama-e-Masjid Area 2-A, Sector 37-K, Near Babar Market, Landhi No.3, Karachi 7516; and
- (ii) Shop No.158, Adjacent to Alamgir Jama-e-Masjid Area 2-A, Sector 37-K, Near Babar Market, Landhi No.3, Karachi 75160

(the "Said Tenements") against a monthly rent of Rs. 3,500 and Rs. 300 per month respectively.

3. In or around July 2018 the Respondent No.1 filed an application under Clause (ii) of Sub-Section (2) of Section 15 of the Sindh Rented Premises Ordinance, 1979 seeking the eviction of the Petitioner from the Said Tenements on the grounds that the Petitioner had failed to pay rent to the Respondent No.1 and was liable to be evicted on account of such default. The Applications were numbered as Rent Case No. 351 of 2018 and Rent Case No. 352 of 2018 and which were each presented before the VIIIth Rent Controller Karachi (East). Notices were thereafter issued to the Petitioner, who despite being served, with a notice of the institution of Rent Case No. 351 of 2018 and Rent Case No. 352 of 2018 chose not to appear and was on 2 October 2018 debarred from participating in both of Rent Case No. 351 of 2018 and Rent Case No. 352 of 2018 and whereafter both of these Rent Cases proceeded ex parte. Thereafter, the Respondent No.1 adduced evidence "ex-parte proof" and on 30 March 2019 Rent Case No. 351 of 2018 and Rent Case No. 352 of 2018 were each decreed in favour of the Respondent No. 1 with directions to the Petitioner to vacate the Said Tenements within a period of sixty (60) days.

4. Pursuant to the Decree dated 30 March 2019 passed in Rent Case No. 351 of 2018 and Rent Case No. 352 of 2018, the Respondent No.1 instituted execution proceedings bearing Execution Application No. 10 of 2019 and Execution Application No. 11 of 2019 before the VIIIth Rent Controller Karachi (East). The institution of these proceedings led the Petitioner to maintain an application under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 on the following grounds:

- “
1. That the applicant / D.H. has annexed the tenancy agreement between Javed Iqbal and applicant trust as Exh.A/2. Whereas the applicant / D.H. has filed the Rent Case against the J.D. / opponent namely Junaid Iqbal, which is not sustainable under the SRPO 1979 and this facts was concealed by the applicant trust.
 2. That the instant rent application of the applicant is hit under the principle of U/O I Rule 3 CPC.
 3. That the Javed Iqbal was died on 21.01.2014, hence he should made be party of this case and his legal heirs may also be arrayed as opponent in this case but the applicant despite knowledge did not make any effort to bring the legal heirs / representative of Javed Iqbal in this instant case.
 4. That as per Extract which is exhibited as A/8, give power to two persons namely Muhammad Laiq Ahmed and Muhammad Saeed Khan Sabri but interestingly only Muhammad Saeed Khan Sabri has filed this instant rent case, which is the violation of Extract Form as per law that if a law requires a thing to be done in particular manner it should be done in that manner and should not be done otherwise.
 5. That no Trust Deed is being exhibited by the applicant before this Hon'ble Court in order to verify the extract that who are the members of trust who executed their signature on the extract form.”

5. It is important to note that the decrees dated 30 March 2019 passed in Rent Case No. 351 of 2018 and Rent Case No. 352 of 2018 were **not assailed by the Petitioner on the ground that service had not been properly effected on him** and rather it was assailed on the grounds that:

- (i) the trustees of the Respondent No.1 had not properly authorized their attorney to institute Rent Case No. 351 of 2018 and Rent Case No. 352 of 2018 or for that matter Execution Application No. 10 of 2019 and Execution Application No. 11 of 2019 before the VIIIth Rent Controller Karachi (East);
- (ii) as the original tenancy agreement had been entered into by the Respondent No. 1 with the Petitioner's father, after his passing the other legal heirs of his father ought to have been impleaded as parties and which omission was not curable; and
- (iii) the trust deed of the Respondent No. 1 had not been produced so as to confirm how title in the Said Tenements came to vest in the Trustees of the Respondent No. 1.

6. The applications under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 that had been presented by the Petitioner in Execution Application No. 10 of 2019 and Execution Application No. 11 of 2019 were dismissed by the VIIIth Rent Controller Karachi (East) on 19 November 2019 stating:

- (i) that there was no need for the Respondent No. 1 to produce the trust deed as the Petitioner having not denied the relationship of landlord and tenant cannot inquire into the title of the Respondent No. 1 to the Subject Tenement,
- (ii) that as it was admitted by the Petitioner that he was in possession as a legal heir of his (late) father; the relationship of landlord and tenant stood established as between the Petitioner and the Respondent No. 1 and as a

consequence there was no need to implead any other person in these proceedings,

- (iii) that as the Petitioner had not raised any allegation that service had not been affected in accordance with law, meant that the Petitioner admitted having knowledge of the institution of Rent Case No. 351 of 2018 and Rent Case No. 352 of 2018 which he deliberately chose not to participate in.

7. That an appeal as against the order dated 19 November 2019 **was not preferred by the Petitioner** and instead, he presented two other applications in Execution Application No. 10 of 2019 and Execution Application No. 11 of 2019; one under Sub-Section (2) of Section 20 of the Sindh Rented Premises Ordinance, 1979 and another application under Section 47 read with Section 151 of the Code of Civil Procedure, 1908 with prayers as under:

“ **Application U/S 20(b) S.R.P.O.1979**

It is most respectfully prayed on behalf of the opponent / J.D. that this Hon'ble Court may be please to direct the applicant to produce the Trusts Deed before this Hon'ble Court for inspection and supply the copy to the opponent, as the applicant claiming himself as General Secretary of the trust and produce Extract of Resolution at Exh.A/1.

It is, therefore, in the interest of justice and equity to inspect the trust deed in order to ascertain that the applicant is duly authorized person to file the instant rent case / rent execution or otherwise.

Prayed accordingly.”

“ **Application U/S 47 CPC R/W Section 151 CPC**

1. Whether the D.H. / applicant can be filed rent case against the J.D / opponent solely? As per annexure A/1 filed with the memo of rent application, the tenancy agreement was executed between the late father Javed Iqbal and applicant / D.H., hence the rent case is barred under the principle of U/O I Rule 3 CPC.
2. Whether the provision of U/O V CPC were complied with the instant rent case or not?

3. Whether the rent case was filed with the right person or not? As when law requires a thing to be done in a particular manner, it should be done in that manner and should not be done otherwise, because the Exhibit A/8 give authority to two persons, whereas the instant case was filed by one person, which is sheer violation of Section 48 as well as 55 of Trust Act, 1882.
4. That any other ground(s) will be argued at the time of hearing of this application.”

7. That these two applications were heard and decided on 29 January 2022 by the VIIIth Rent Controller Karachi (East) who dismissed each of them on the basis that the grounds raised in each of these applications had already been raised in the earlier application filed under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 and which were grounds that had been considered and rejected by the Order dated 19 November 2019 passed by the VIIIth Rent Controller Karachi (East) and against which no appeal was preferred.

8. That on 5 March 2022 the Petitioner preferred twos appeal under Section 21 of the Sindh Rented premises Ordinance 1979 bearing FRA No. 41 of 2022 and FRA No. 42 of 2022 before the District & Sessions Judge Karachi (East) as against both:

- (i) the order dated 19 November 2019 passed by the VIIIth Rent Controller Karachi (East) which had dismissed the application under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908; and
- (ii) the order dated 29 January 2022 passed by the VIIIth Rent Controller Karachi (East) dismissing the application under Sub-Section (2) of Section 20 of the Sindh Rented Premises Ordinance, 1979 and an application under Section 47 read with Section 151 of the Code of Civil Procedure, 1908.

9. FRA No. 41 of 2022 and FRA No. 42 of 2022 were heard by the learned District & Sessions Judge Karachi (East) and who on 13 April 2013 dismissed the appeal on the following grounds:

- (i) the appeal against the order dated 19 November 2019 passed by the VIIIth Rent Controller Karachi (East) having been presented on 5 March 2022, the application under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908, was barred by 2 years 2 months and 17 days.
- (ii) the appeal against the order dated 29 January 2022 passed by the VIIIth Rent Controller Karachi (East) on the application under Sub-Section (2) of Section 20 of the Sindh Rented Premises Ordinance, 1979 and on the application under Section 47 read with Section 151 of the Code of Civil Procedure, 1908 being presented in Execution Application No. 10 of 2019 and Execution Application No. 11 of 2019 were not maintainable as:
 - (a) the grounds raised in each of these applications had already been raised in the earlier applications filed under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 and which were grounds that had been considered and rejected by the Order dated 19 November 2019 passed by the VIIIth Rent Controller Karachi (East) and against which no appeal was preferred, and
 - (b) an appeal against the order passed in an Execution Application was barred under Section 22 of the Sindh Rented Premises Ordinance, 1979.

10. That against the order passed by the District and Sessions Judge Karachi (East) in FRA No. 41 of 2022 and FRA No. 42 of 2022 the Petitioner has preferred these two Petitions under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 and has contended that:

- (i) as per the Resolution of Board of Trustees dated 21 May 2017, two individuals namely Muhammad Saeed Khan Sabri and Muhammad Laeeq Ahmed were authorised to file the rent application but the Application has been presented only by Muhammad Saeed Khan Sabri and consequentially each of the rent cases were instituted by persons who were not competent to institute the same and should be dismissed;
- (ii) under Section 48 of the Trust Act, 1882 a single trustee is prohibited from acting alone and must act jointly along with another trustee; and
- (iii) aside from Mr. Junaid Iqbal, there are other legal heirs of Mr. Javed Iqbal (the Original Tenant) who have not been made as Defendants and as such the judgment and decree should be set aside for misjoinder.

That no citations were relied on by the Petitioner at the time of advancing arguments.

11. That I have heard the counsel for the Petitioner and perused the record.

12. It is admitted by the Petitioner that Rent Case No. 351 of 2018 and Rent Case No. 352 of 2018 were instituted by the trustees of the Hanfia Alamir Jama Masjid Trust which is a charitable trust

established for the regulation of a Masjid known as the “Hanfia Alamgir Jama Masjid”.

13. It was contended by the Petitioner that at a meeting of the trustees of the Respondent No. 1 held on 21 May 2017 the trustees of the Respondent No. 1 had nominated two individuals to institute proceedings as against the Petitioner i.e.

- (i) Muhammad Laeeq Ahmed
- (ii) Muhammad Saeed Khan Sbari

On a plain reading of the trust document it is apparent that the resolution is *silent* as to whether the power conferred by the trustees on the two individuals abovenamed has been conferred on each of the independently i.e. so that each of them could sign independently of the other or as to whether the power conferred by the trustees was done jointly and severally i.e. where each of them had the power to sign either independently or jointly with the other or as to whether the power conferred by the trustees was conferred on these two individuals jointly i.e. that it was necessary for the two individuals to exercise the power conferred on them by the Resolution together. On this basis, it is the first contention of the Petitioner that the Resolution passed at a meeting of the trustees of the Respondent No. 1 that had been held on 21 May 2017 by the trustees of the Respondent No. 1 should be interpreted strictly and should be read as having given such powers “jointly”. Consequentially, as the Rent Cases and the Execution Applications had both been instituted under the signature of only one of the persons mentioned in the Resolution i.e. Mr. Muhammad Saeed

Khan Sabri each of those should have been dismissed. Alternatively, it was also pressed by the Advocate for the Petitioner that the provisions of Section 48 of the Trusts Act, 1882 prohibit a trustee of a trust from acting alone and as such any actions of Mr. Muhammad Saeed Khan Sabri that he has taken singly should be set aside as having been made in violation of Section 48 of the Trusts Act, 1882

14. It was further contended by the Petitioner that the Said Tenement had been rented by the Respondent No. 1 to the father of the Petitioner i.e. Mr. Javed Iqbal who had since expired and that the Respondent No.1 having instituted Rent Case No. 351 of 2018 and Rent Case No. 352 of 2018 only as against one of the legal heirs i.e. the Petitioner, who was in possession of the Said Tenement, to the exclusion of the other legal heirs of the (late) Javed Iqbal the decree passed in Rent Case No. 351 of 2018 and Rent Case No. 352 of 2018 should be set aside for misjoinder.

15. I have examined the maintainability of these applications. The application of the provisions of the Code of Civil Procedure, 1908 to proceedings under the provisions of the Sindh Rented Premises Ordinance, 1979 have been limited by Section 20 which reads as under:

- “ 20. (1) Subject to this Ordinance, the Controller and the appellate authority shall, for the purpose of any case under this Ordinance, have powers of a Civil Court under the Code of Civil Procedure, 1908 (Act V of 1908), in respect of only the matters, namely:
- (a) Summoning and enforcing the attendance of any person and examining him on Oath;
 - (b) Compelling production or discovery of documents;

- (c) Inspecting the site; and
- (d) Issuing commission for examination of witnesses or documents.”

This section has been interpreted by the Supreme Court of Pakistan in **Haji Usman Bhai vs. Syed Ali Imam Zaidi**¹ wherein while considering the application of rule 22 of Order XLI of the Code of Civil Procedure, 1908 to appeals under the Sindh Rented Premises Ordinance, 1979 it was held that:²

“ ...A plain reading of the above-quoted section 20 of the Ordinance shows that all the provisions of the Civil Procedure Code have not been made applicable to the proceedings under the Ordinance, but the Controller and the Appellate Authority i.e. High Court have been given powers of a Civil Court under the C.P.C. for the purposes specified in the above-quoted clauses (a), (b), (c) and (d). In this view of the matter, the provisions of rule 22 of Order XLI, C.P.C. which is applicable to an appeal against a decree cannot be invoked in aid by the learned counsel for the respondents. The position was somewhat different when a second appeal was provided to the High Court under the Late West Pakistan Rent Restriction Ordinance and provisions of C.P.C. were made applicable to such appeals.”

While the provisions of the Code of Civil Procedure, 1908 do not apply *in toto* to proceedings under the Sindh Rented Premises Ordinance, 1979, it has also been held by the Supreme Court of Pakistan that the “equitable” provisions of the Code of Civil Procedure, 1908 may be pressed into service by the Rent Controller when required in the “interests of justice”.³ In this context it was held in **Ismail vs. Subedar Gul Inayat Shah**⁴ that the provisions of sub-section (2) of Section 12 of the Code of Civil Procedure, 1908 can be applied to proceedings under the Sindh Rented Premises Ordinance, 1979 and wherein it was clarified:⁵

¹ 1994 SCMR 1918

² *Ibid* at pgs. 1924-925

³ See **Smt. Vidayabai and others vs. Moorajmal** 1980 SCMR 267 at pg. 268; **Messrs Bambino Limited vs Messrs Selmore International Limited and another** PLD 1983 SC 155 at pgs. 156-157; **Khyber Insurance Company Limited vs. Pakistan National Shipping Corporation** PLD 1994 SC 725 at pg. 731

⁴ PLD 1991 SC 997

⁵ *Ibid* at pgs. 1000-1001

“ ... We may refer to Muhammad Hussain Tahir v. Ashfaq Hussain (1989 S C M R 258), cited by Mr.Khalid Ishaque in which this Court proceeded on the assumption that section 12(2) of the C.P.C. was applicable to proceedings under the Sindh Rented Premises Ordinance. In Messrs Bambino Ltd. v. Messrs Selmor International Ltd. (PLD 1983 SC 155), it was held that the C.P.C. is not in terms applicable to the proceedings before the Rent Controller by its own force, but the Rent Controller was free to follow equitable principles contained in C.P.C., and this- dictum was applied to the provisions of Sindh Rented Premises Ordinance. There cannot be any doubt that section 12(2), C.P.C. is in recognition of the well-settled principle that every Court or Tribunal has inherent jurisdiction to rescind or recall a void order passed by itself. In The Chief Settlement Commissioner v. Raja Muhammad Fazil Khan and others PLD 1975 SC 331, it was held that the preponderance of judicial authority supports the proposition that every authority, Tribunal or Court has power to even suo motu recall or review an order obtained from it by fraud, on the general principle that fraud vitiates the most solemn proceedings, and no party should be allowed to take advantage of his own fraud. On this principle in that case the Court held that there can be no distinction between the powers available in this behalf to a Court of general jurisdiction and a Court or Tribunal of a special or limited jurisdiction, for in either case the effect of fraud is the same and the duty to undo that effect must lie on the authority on which fraud is practised. **Therefore, on the rule that the equitable principles of C.P.C. can be invoked by the Rent Controller and that fraud vitiates the proceedings of a Court or a Tribunal, there can be no escape from the conclusion that the Rent Controller under the Sindh Rented Premises Ordinance has the power to set, aside any order which has been secured by practising fraud or misrepresentation upon him.**”

(Emphasis is added)

16. As can be understood the application that was moved by the Petitioner under sub-section (2) of Section 12 of the Code of Civil Procedure, 1908 being maintainable in proceedings under the Sindh Rented Premises Ordinance, 1979, it was incumbent on the Petitioner when that application was dismissed on 19 November 2019 to prefer an appeal under Section 21 of the Sindh Rented Premises Ordinance, 1979 within the 30 day period prescribed in that section. It has been admitted that such an appeal was not preferred within the time prescribed and instead an appeal was only preferred against the order dated 19 November 2019 in FRA No. 41 of 2022 and FRA No. 42 of 2022 which was presented on 5 March 2022 and which was as correctly stated by the District & Sessions Judge Karachi (East) as having been filed 2 years 3

months and 17 days after the passing of the order and which was therefore filed 2 years 2 months and 17 days after the period prescribed in Section 21 of the Sindh Rented Premises Ordinance, 1979 and was not maintainable.

17. It would seem that realising that the appeal against the order Dated 19 November 2019 was barred, the Petitioner, had preferred to file the two applications under sub-section (b) of Section 20 of the Sindh Rented Premises Ordinance, 1979 and under Section 47 of the Code of Civil Procedure, 1908 on what would seem to me are the same grounds as were raised in the application under sub-section (2) of Section 12 of the Code of Civil Procedure, 1908. This fact becomes clearer when one is to compare the applications one with the other:

Application under Sub-section (2) of Section 12 of the Code of Civil Procedure, 1908	Application under sub-section (b) of Section 20 of the Sindh Rented Premises Ordinance, 1979	Application under Section 47 of the Code of Civil Procedure, 1908
<p>1. That the applicant / D.H. has annexed the tenancy agreement between Javed Iqbal and applicant trust as Exh.A/2. Whereas the applicant / D.H. has filed the Rent Case against the J.D. / opponent namely Junaid Iqbal, which is not sustainable under the SRPO 1979 and this facts was concealed by the applicant trust.</p> <p>2. That the instant rent application of the applicant is hit under the principle of U/O I Rule 3 CPC.</p> <p>3. That the Javed Iqbal was died on 21.01.2014, hence he should made be party of this case and his legal heirs may also be arrayed as opponent in this case but the applicant despite knowledge did not make</p>		<p>1. Whether the D.H. / applicant can be filed rent case against the J.D. / opponent solely? As per annexure A/1 filed with the memo of rent application, the tenancy agreement was executed between the late father Javed Iqbal and applicant / D.H., hence the rent case is barred under the principle of U/O I Rule 3 CPC.</p>

any effort to bring the legal heirs / representative of Javed Iqbal in this instant case.		
		2. Whether the provision of U/O V CPC were complied with the instant rent case or not?
<p>4. That as per Extract which is exhibited as A/8, give power to two persons namely Muhammad Laiq Ahmed and Muhammad Saeed Khan Sabri but interestingly only Muhammad Saeed Khan Sabri has filed this instant rent case, which is the violation of Extract Form as per law that if a law requires a thing to be done in particular manner it should be done in that manner and should not be done otherwise.</p> <p>5. That no Trust Deed is being exhibited by the applicant before this Hon'ble Court in order to verify the extract that who are the members of trust who executed their signature on the extract form."</p>	<p>It is most respectfully prayed on behalf of the opponent / J.D. that this Hon'ble Court may be please to direct the applicant to produce the Trusts Deed before this Hon'ble Court for inspection and supply the copy to the opponent, as the applicant claiming himself as General Secretary of the trust and produce Extract of Resolution at Exh.A/1.</p> <p>It is, therefore, in the interest of justice and equity to inspect the trust deed in order to ascertain that the applicant is duly authorized person to file the instant rent case / rent execution or otherwise</p>	<p>3. Whether the rent case was filed with the right person or not? As when law requires a thing to be done in a particular manner, it should be done in that manner and should not be done otherwise, because the Exhibit A/8 give authority to two persons, whereas the instant case was filed by one person, which is sheer violation of Section 48 as well as 55 of Trust Act, 1882.</p>

As is apparent, the pleas in respect of the production of the trust deeds under sub-section (b) of Section 20 of the Sindh Rented Premises Ordinance, 1979 and the authority of the person appointed by the resolution of the trustees of the Respondent No. 1 to institute these proceedings overlaps with the same plea that was taken by the Petitioner in the application under sub-section (2) of Section 12 of the Code of Civil Procedure, 1908. Similarly, the plea taken in the application under Section 47 of the Code of Civil Procedure, 1908 regarding the authority of the trustees under the Trust Deed of the Respondent No. 1 was also raised in both the applications. Finally, and more interestingly, an issue

regarding the application of service of notice under Order V of the Code of Civil Procedure, 1908, which to my mind should have but had not been raised in the earlier application under sub-section (2) of Section 12 of the Code of Civil Procedure, 1908, was raised for the first time in the application under Section 47 of the Code of Civil Procedure, 1908.

18. The principles of Res Judicata have been codified in Section 11 of the Code of Civil Procedure, 1908 as under:

- “ 1. No Court shall try suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

The Supreme Court of Pakistan in **Muhammad Tufail vs. Atta Shabir**⁶ has clarified the rationale being the principles of res judicata wherein it has stated that:⁷

- “ ... The object of the principle of res judicata as suggested by the expression itself is that finality should impart to judicial decision and if a case is res judicata, it may not be reopened so as to be adjudged again. In other words once a matter between the parties to a suit or proceedings is decided and the decision has become final either (i) because no appeal lies or (ii) no appeal was taken or (iii) if taken, it was dismissed, none of the parties shall be allowed to canvass the same matter again in a subsequent suit or proceedings between the same parties. But for this curb on litigation it would become interminable, human nature being what it is. As a result of the application of this principle as embodied in section 11 of the C.P.C. all future litigation any length between the parties must proceed on the presumption of correctness of the previous decision.”

Explanation IV to Section 11 of the Code of Civil Procedure, 1908 codifies the doctrine of constructive res judicata as under:

- “ ... Explanation 1V.-Any matter which might and ought to have been made ground of defence or attack in such former suit

⁶ PLD 1977 SC 220

⁷ *Ibid* at pg. 226

shall be deemed to have been a matter directly and substantially in issue -in such suit.

The explanation has interpreted by the Supreme Court of Pakistan in **Amanul Mulk vs. Mian Ghaffor-ur-Rehman**⁸ wherein it was clarified:⁹

“ ...This doctrine is embodied in Explanation VI to section 11, C.P.C. and is an essential constituent of doctrine of res judicata. It is because of principle of res judicata that the doctrine of res judicata is rendered fully effective. The aim of the doctrine is to compel both the parties to the suit to raise before the Court in support of their contentions all the grounds of attack and defence available to them. By force of this doctrine, the parties have to bring their whole case to the Court and cannot reserve for the purpose of a second suit grounds available them in support of their case. The rationale behind the constructive res judicata is that if the parties have had an opportunity of asserting a ground in support of their claim or defence in a former suit and have not done so, they shall be deemed to have raised such grounds in the former suit and it shall be further deemed that these grounds had been heard and decided as if these matters had been actually in issue. As such, such parties shall be precluded from raising these grounds in a subsequent suit.”

19. The principles of Res Judicata have been held by the Supreme Court of Pakistan to apply to proceedings under the Sindh Rented Premises Ordinance, 1979.¹⁰ In **Trading Corporation of Pakistan vs. Devan Sugar Mills Limited**¹¹ while examining the application of the principles of res judicata to an application moved under section 47 of the Code of Civil Procedure, 1908 after a parallel application under sub-section (2) of Section 12 of the Code of Civil Procedure, 1908 had been dismissed it was held that:¹²

“ ... 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

⁸ 1997 SCMR 1796

⁹ *Ibid* at pg. 1799

¹⁰ See **Trading Corporation of Pakistan vs. Devan Sugar Mills Limited** PLD 2018 SC 828, **Vaim Metal and Plastic Works vs. Azra Vaqar** 1888 CLC 2164; **Mohiuddin Ansari vs. Muhammad Arif Siddiqui** 1991 CLC 72

¹¹ *Ibid*

¹² *Ibid* at pgs. 833-836

suitor intends to commence any legal action to enforce any right and 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. In an illustrative case this court in the case of Mst.Fehmida Begum v. Muhammad Khalid and others (1992 SCMR 1908) encapsulated the doctrine of election as follows:

“However, it is one thing to concede a power to the statutory forum to recall an order obtained from it by fraud, but another to hold that such power of adjudication or jurisdiction is exclusive so as to hold that a suit filed in a civil Court of general jurisdiction is barred. I am therefore in agreement with my brother that a stranger to the proceedings, in a case of this nature has two remedies open to him. He can either go to the special forum with an application to recall or review the order, or file a separate suit. Once he acts to invoke either of the remedies, he will, on the general principles to avoid a conflict of decisions, ultimately before the higher appellate forums, be deemed to have given up and forfeited his right to the other remedy, unless as held in *Mir Salah-ud-Din v. Qazi Zaheer-ud-Din* PLD 1988 SC 221, the order passed by the hierarchy of forums under the Sindh Rented Premises Ordinance, leaves scope for approaching the Civil Court

9. In the case of *Behar State Co-operative Marketing Union Ltd. v. Uma Shankar Sharan and another* [(1992) 4 Supreme Court Cases 196] Indian Supreme Court confronted with somewhat identical situation as to availability of plurality of remedies under a statute in paragraph No.6 at page 199 concluded as follows:

“6. Validity of plural remedies, if available under the law, cannot be doubted. If any standard book on the subject is examined, it will be found that the debate is directed to the application of the principle of election, where two or more remedies are available to a person. Even if the two remedies happen to be inconsistent, they continue for the person concerned to choose from, until he elects one of them, commencing an action accordingly.”

10. In the light of above discussions, adverting to merits of case in hands, observation of the learned Revisional Court while attending to the question of second remedy under section 47 C.P.C. after having failed to get any favourable order on

application under section 12(2) C.P.C. is quite apt, it reads as follows: -

“ Looking to the contents of constitution petition filed by the applicant before the Honourable Court of Sindh. It appears clearly that the facts as regards settlement if any between the parties was submitted in the pleadings so also the cheques through the payments were made were specifically mentioned in the memo constitution petition and it was also argued and urged before the honourable High Court of Sindh but no order favourable to applicant was passed by Honourable Court of Sindh as such it is presumed that such a relief was not granted and it was refused and as such the remedy was available to the applicant was to approach before Honourable Supreme Court of Pakistan for which admittedly the applicant obtained time by moving miscellaneous application in the constitution petition. Now the applicant has again agitated the same issue by moving application under section 47 C.P.C. with delay on 14.10.2016 and here is no explanation as to why this application 47 C.P.C. was not filed at the earliest possible opportunity. Which establishes the fact that the point had already been agitated before the Additional Controller of Rent as well as before the honourable High Court of Sindh. The learned executing Court has rightly decided the said application as it was found that the question was earlier decided by Honourable High Court of Sindh as such cannot be agitated before the lower forum”

11. In this view of the matter, the impugned judgment of the learned bench of the High Court cannot be sustained. Fair trial, does not envisage recourse to successive remedies one after another against one and the same impugned order on substantially same set of facts and pleadings seeking substantially similar relief, as it would be against the doctrine of election, as expounded above. A tenant confronted with ex-parte order striking out its defence resulting in his ejection order, quite a few remedies may be available against such order; namely Appeal under section 24 of the Cantonments Act, 1963, Application under Order IX, Rule 13 C.P.C., Application under section 12(2), C.P.C., application under Order XXI, Rules 99 to 103, C.P.C. and not the least application under section 47 C.P.C. all such remedies arm the tenant/ judgment debtor to effectively resist ex-parte ejection order passed against it. In instant case as noted above respondent-tenant, chose not to file appeal under section 24 of the Act, 1963 against the ejection order dated 17.5.2011 but had chosen to invoke provisions of section 12(2) C.P.C. on 07.12.2011, which application was dismissed on merits by the executing Court on 7.8.2012 and maintained by High Court on 19.8.2016. The Appellant after almost five years from date of ejection order, ventured to invoke Section 47 C.P.C. on substantially same facts and grounds. Even if it is assumed that grounds as available under section 47 C.P.C. to question executability, discharge or satisfaction of ejection order passed as a consequence for non-compliance of tentative order, set down different parameter to resist and defend execution of eviction order, then too, all such grounds were very much available when first application under section 12(2), C.P.C. was initially made. Case of the petitioner is squarely covered by explanation IV of section 11, C.P.C., which reads as follows:

“ Any matter which might and ought to have been made ground of defence or attack in such former suit shall

be deemed to have been a matter directly and substantially in issue in such suit."

12. In the instant case no reservation was made or avenue kept open while deciding application under section 12(2) C.P.C. either by executing Court or for that matter by the High Court for the appellant to explore other remedy. Where a judgment debtor fails to raise all objections as may be available at the time when execution was resisted by invoking one out of few other available remedies then he is precluded by his conduct to raise any such objection, and all such objections and challenges, if any, will be deemed to have been raised and decided against him. After exhausting one of the remedies under section 12(2) C.P.C. against the order striking out defence, judgment debtor cannot be allowed to go on expedition to venture another remedy for the same malady, which though available was not invoked, Respondent-tenant cannot be given premium to go on venturing one after another remedy. Permitting such course would be nothing but abuse of the process of law and would amount to encourage multiplicity of proceeding, which cannot be approved. Accordingly, this petition is converted into appeal and allowed."

20. It would seem that the Petitioner at the time of discovering the execution application in respect of:

- (i) the fallacies in the institution of the proceedings viz the capacity of the trustees to institute the proceedings,
- (ii) the production of the trust deed, and
- (iii) the misjoinder of parties

had parallel remedies available to him i.e. either to move the application under sub-section (2) of Section 12 of the Code of Civil Procedure, 1908 or to move an application under clause (b) of Sub-Section (1) of Section 20 of the Sindh Rented Premises Ordinance, 1979 and Section 47 of the Code of Civil Procedure, 1908. The Petitioner elected to file the application under sub-section (2) of Section 12 of the Code of Civil Procedure, 1908 which was dismissed by the VIIIth Rent Controller Karachi East on 19 November 2019 **and against which order no appeal was preferred within the period prescribed in Section 21 of the Sindh Rented Premises Ordinance, 1979.** As no appeal had preferred by the Petitioner, the District & Sessions Judge Karachi (East) has correctly held in his order dated 13 April 2023 that the appeal as maintained in FRA No. 41 of 2022 and FRA No. 42 of 2022 against the order dated 19 November

2019 was barred. The Petitioner having not exercised his right of appeal within the time prescribed in Section 21 of the Sindh Rented Premises Ordinance, 1979, the Petitioner cannot repaginate the same issues in two new applications as has been attempted by him; this course of action is clearly prohibited under the doctrine of election as articulated by the Supreme Court of Pakistan.

21. The sole issue that would remain to be considered would be the one additional ground that was taken by the Petitioner in his application under Section 47 of the Code of Civil Procedure, 1908 that notices were not served on the Petitioner in accordance with Order V of the Code of Civil Procedure, 1908. This to my mind has also been dealt with by the Supreme Court of Pakistan in **Trading Corporation of Pakistan vs. Devan Sugar Mills Limited**¹³ when while considering the principles of constructive res judicata applicability to an application that had been filed by a tenant under sub-section (2) of Section 12 of the Code of Civil Procedure, 1908 in proceedings under the Sindh Rented Premises Ordinance 1979 has held that:¹⁴

“ ...Where a judgment debtor fails to raise all objections as may be available at the time when execution was resisted by invoking one out of few other available remedies then he is precluded by his conduct to raise any such objection, and all such objections and challenges, if any, will be deemed to have been raised and decided against him. After exhausting one of the remedies under section 12(2) C.P.C. against the order striking out defence, judgment debtor cannot be allowed to go on expedition to venture another remedy for the same malady, which though available was not invoked, Respondent-tenant cannot be given premium to go on venturing one after another remedy. Permitting such course would be nothing but abuse of the process of law and would amount to encourage multiplicity of proceeding, which cannot be approved.”

The Petitioner having failed to raise the issue of notice not having been served in accordance with law in his application under sub-section (2) of Section 12 of the Code of Civil Procedure, 1908 and which ground could

¹³ PLD 2018 SC 828

¹⁴ *Ibid* at pg. 837

have been taken by him in that application, is therefore prohibited under the doctrine of constructive res judicata from raising this issue at a belated stage in the application moved by him under Section 47 of the Code of Civil Procedure, 1908.

22. While, I am in agreement with the District & Sessions Judge Karachi (East) that the applications were not maintainable for the reasons as I have stated above, I also note that the District & Sessions Judge Karachi (East) has held that an appeal against the order of the Rent Controller in execution proceedings are not maintainable under Section 22 of the Sindh Rented Premises Ordinance, 1979. In this regard, it is noted that the District & Sessions Judge Karachi (East) in his order dated 13 April 2023 relied on a decision reported as **Jurio Mal vs. Nanik Ram**¹⁵ wherein while deciding a petition against an order dismissing an Execution Appeal, it was held that:¹⁶

“ ... it has also been rightly held by the appellate court **that in the above circumstances** no appeal lies against the order passed by executing court under section 22 of the Sindh Rented Premises Ordinance.”

(Emphasis is added)

Regrettably, it is noted that the headnote as produced in the law report states:

“ ... No appeal laid against order passed by Executing Court under S. 22 of Sindh Rented Premises Ordinance, 1979.”

To my mind this headnote in the law report does not correctly state either the *ratio decidendi* of the decision nor does it correctly state the law. The learned Judge who had decided the matter had indicated in the judgment that “***in the circumstances***” of the case the appeal was not maintainable against the order passed by the executing court. This finding has been misstated in the headnote of the law report as stating that section 22 of

¹⁵ 2018 CLC 1082

¹⁶ *Ibid* at pg. 1087

the Sindh Rented Premises Ordinance 1979 prohibits an appeal from being maintained as against any order that is passed by the executing court in rent proceedings.

23. Section 22 of the Sindh Rented Premises Ordinance, 1979 reads as under

“ **Final order** passed under this Ordinance shall be executed by the Controller and all questions arising between parties and relating to the execution, discharge or satisfaction the order shall be determined by the Controller and not by a separate suit.

Explanation:- In the execution proceedings relating to the order of ejection, no payment, compromise or agreement shall be valid unless such payment, compromise or agreement is made before or with the permission of the authority passing the order.”

Section 21 of the Sindh Rented Premises Ordinance, 1979 which confers the right to file an appeal states that :

“ 21. (1) Any party aggrieved by an **order, not being an interim order, made by the Controller** may, within thirty days of such order, prefer an appeal to the District Judge having Jurisdiction in the area where the premises in relation to which the order is passed

1-A. On such appeal being preferred, the District Judge may hear it himself, or refer it for disposal to an Additional District Judge.

1-B. The District Judge may recall an appeal referred to an Additional District Judge and either hear it himself to refer it for disposal to another Additional District Judge.

1-C. The appellate authority, may, at any stage of appeal attempt to effect a compromise between the parties.

1-D. The appellate authority may, where it deems fit, before passing a final order allow the tenant to continue his tenancy subject to payment of enhanced rent fixed by the authority.

1-E. On the application of a party and after notice to the other party and after hearing such of them as desire to be heard, or on its own motion without such notice-

(a) the appellate authority may at any stage withdraw any application pending with a Controller and transfer the same for disposal to any other Controller;

(b) the High Court may at any stage withdraw any appeal pending with any appellate authority and transfer the same for disposal to any other appellate authority competent to dispose of the same.”.

(2) The appellate authority may pending the final disposal of the appeal, grant injunction staying further proceedings or action on the order of the Controller:

Provided that no injunction shall be granted if the appeal has been preferred from the order under section 14.

(3) The appellate authority shall, after perusing the record of the case and giving the parties an opportunity or being heard and, if necessary, after making such further enquiry either by himself or by the Controller, make an appropriate order, which shall be final.”

(Emphasis is added)

24. As is apparent Section 21 of the Sindh Rented Premises Ordinance, 1979 permits any person who is a “party” to proceedings before a rent controller to prefer an appeal under that section as against any “order not being an interim order”. No exception having been made in Section 21 of the Sindh Rented Premises Ordinance, 1979 that an appeal could not be preferred from an “order” on an application under Section 22 of the Sindh Rented Premises Ordinance, 1979 i.e. in execution proceedings it would logically follow that a “party” to those execution proceedings would therefore have a right prefer an appeal under Section 21 of the Sindh Rented Premises Ordinance, 1979 against such an “order not being an interim order”. This right was also recognised by the Supreme Court of Pakistan in **Messrs Bambino Limited vs. Messrs Slemor International Limited and Another**¹⁷ wherein it was held that”

“ As regards the second contention that no appeal lay from the order passed by the Rent Controller in execution of the order of ejectment it may be stated that a plain reading of section 21 of the Sind Rented Premises Ordinance, 1979 shows, that such an order not being an interim order, was appealable before the High Court. There is, therefore, no substance in this contention as well.”

¹⁷ PLD 1983 SC 155

25. The Appeal that was maintained by the Petitioner was therefore correctly dismissed by the District and Sessions Judge Karachi (East) as not being maintainable:

- (i) in respect of the order dated 19 November 2019 as being barred having been filed after the time limit as prescribed in Section 21 of the Sindh Rented Premises Ordinance, 1979 for filing such an appeal having lapsed; and
- (ii) in respect of the order 29 January 2022 as being barred under the provisions of Section 11 of the Code of Civil Procedure, 1908

and which findings are sustained by this Court. The Petitions not being maintainable were dismissed by me on 3 May 2023 and the foregoing are the reasons for the dismissal.

Karachi;
Dated; 29 May 2023

JUDGE

Nasir P.S.