

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**Present:**

Mr. Justice Mushir Alam  
Mr. Justice Faisal Arab  
Mr. Justice Sajjad Ali Shah

**Civil Petition No.60-K of 2018**

Against the judgment dated  
04.12.2017 passed by the High  
Court of Sindh at Karachi in  
Const.P. No.S-1862 of 2016.

Trading Corporation of Pakistan

**Petitioner(s)**

***VERSUS***

Devan Sugar Mills Limited and others

**Respondent(s)**

For the Petitioner(s) : Mr.M. Sarfraz Metlo, ASC  
Mr.K.A. Wahab, AoR

For the Respondent(s) : Mr.Khalid Javed Khan, ASC

Date of Hearing : 05.09.2018

**JUDGMENT**

**Mushir Alam, J-**. Instant matter arises out of impugned judgment dated 04.12.2017 whereby order passed by the learned Executing Court/VIth Senior Civil Judge, Karachi South dated 01.11.2016 and learned Additional Sessions Judge Vth, Karachi South in appeal dated 9.11.2016 concurrently dismissing the application under section 47 CPC was set aside and case was remanded to the learned Executing Court to decide the application afresh.

2. In nutshell it appears Appellant filed ejectment proceedings against the respondent-tenant on the ground of personal requirement and default in the payment of rent with effect from 1.8.2008. Learned Rent Controller under section 17(8) of the

Cantonment Rent Restriction Act, 1963 passed tentative rent order directing the Respondent-tenant to deposit the arrear of rent amounting to Rs.23,755,482/- within 30 days from the date thereof and future monthly rent on or before 5<sup>th</sup> of each month. It appears that the rent as per tentative rent order was not deposited that led to the filing of an application under section 17(9) of the Act, *ibid* to seek striking off the defence. Learned Rent Controller Karachi, Cantonment on verification of the record that no rent having been deposited in terms of tentative rent order as noted above; struck off the defence and as a consequence respondent-tenant was directed to vacate the demised premises comprise of Tower-A 8<sup>th</sup> Floor, Block-A, Finance & Trade Centre (FTC), main Shahrah-e-Faisal, Karachi within 30 days vide order dated 17.05.2011, which order was not challenged in appeal, attained finality.

3. On failure of the respondent-tenant to vacate the tenement, the Appellant herein filed Execution Application No.40/2011. After service, the respondent-tenant on 07.12.2011 filed an application under section 12(2) CPC detailing facts and grounds, which according to the tenant led them to believe that terms of ejectment order have been varied, as the rent was being received in instalments, which led them to believe that the Appellant-land lord have waived its right to seek eviction. The application was contested and dismissed through a detailed order dated 07.08.2012 (available at page 117 of the paper book), which order was maintained by the High Court in Constitution Petition No.S-923 of 2012 through the detailed judgment dated 19.08.2016 (available at page 117 of the paper book), which order attained finality.

4. The Respondent instead of vacating the tenement, on 14.10.2016 chose to make another application under section 47 read with section 151 CPC without disclosing that earlier an application under section 12(2) CPC on substantially similar facts and grounds was also dismissed by the Executing Court, which was maintained by the High Court as noted in preceding paragraph.

5. The application under section 47 CPC read with section 151 CPC was dismissed by the learned executing Court/6<sup>th</sup> Senior Civil Judge, South Karachi vide order dated 01.11.2016 (available at page

71 of the paper book), which order was maintained by the Additional Sessions Judge-V, Karachi South in Civil Revision No.156 of 2016 vide order dated 09.11.2016, (though such order is appealable under section 104(1)(ff) CPC no appeal was filed), against which the respondent preferred Constitution Petition No.S-1862 of 2016 before the High Court. The learned bench of the High Court in consideration of reasons set down in paragraphs No.24 and 25 of the impugned judgment remanded the case to the learned executing Court; which read as follows:

*"24. The reason of discussing the aforesaid judgments in respect of section 47 and order 21, Rule 2 of Civil Procedure Code is to ascertain that the criteria, reasoning and rational of deciding two applications one under section 12(2) and the other under section 47 of Civil Procedure Code are different and distinct and reasoning of the earlier cannot overlap the reasoning of later.*

*25. The executing Court while deciding application got influenced by the findings of earlier round in respect of an application under section 12(2) CPC in CP No.923/2012. Findings of the trial Court and Appellate Court should have been based on rationale as to whether there was any compromise to adjust or satisfy the decree to make it unexecutable? Whether there was any compromise between them in respect of a question arising out of suit/application i.e. arrears of rent and eviction? Whether maintenance claim in draft compromise or correspondence was extraneous to the "question arising out of pleadings" hence the trial Court can exercise jurisdiction in terms of Section 47 CPC? Whether an alleged compromise can "still" be certified by the Court under Order 21, Rule 2 CPC, executing the decree excluding the issue of maintenance charges or any other issue not arising out of pleadings?"*

It was, concluded by the learned bench of the High Court that *"ousting the petitioner from availing their remedy, which they could have before executing Court amounts to denial of fair trial"* and set aside orders dated 9.11.2016 and dated 01.11.2016 passed by Vth ADJ

Karachi (s) and VIth Sr. Civil Judge respectively the case was remanded to executing Court for passing appropriate order.

6. Learned counsel for the petitioner has vehemently argued that all grounds as urged by the respondent in his application under section 47 CPC were also raised in its earlier application under section 12(2) CPC, nothing new has been added. It was urged that payment of the rent in piecemeal after the defence was struck off, will not wipe out the consequence of ejectment nor indulgence of the appellant to receive rent, which was otherwise overdue and payable will amount to discharge and or satisfaction of ejectment order. It was next urged that subsequent application under section 47 CPC was hit by principles of constructive *res-judicata* and is otherwise not maintainable.

7. Mr.Khalid Javed Khan, learned ASC for the respondents supports the impugned judgment. It was urged that though concurrent remedies are available to challenge the *ex-parte* order of striking off the defence. It was urged that the remedies under section 12(2) CPC and that under section 47 CPC are separate and distinct, provide different parameters and reasoning to resist the execution proceedings, such remedy could be invoked alternatively successively and exhausting one may not bar the other remedy.

8. Heard the counsels and perused the record. We have examined the contents of the application under section 12(2) CPC 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 CPC on 14.10.2016. We have noted that facts and ground in both set of the proceedings are substantially same. The moment suitor intends to commence any legal action to enforce any right and or invoke a remedy to set right a wrong or to vindicate an injury, he has to elect and or choose from amongst host of actions or remedies available under the law. The choice to initiate and pursue one out of host of available concurrent or co-existent proceeding/ actions or remedy from a forum of competent jurisdiction vest with the suitor. Once choice is exercised and election is made than a suitor is prohibited from launching another proceeding to seek a relief or remedy contrary to what could be claimed and or achieved by adopting other proceeding/action and or remedy, which in legal parlance is

recognized as *doctrine of election*, which doctrine is culled by the courts of law from the well-recognized principles of *waiver* and or *abandonment of a known right, claim, privilege or relief* as contained in Order 2 rule (2) CPC, principles of *estoppel* as embodied in Article 114 of the Qanoon-e-Shahdat Order 1984 and principles of *res-judicata* as articulated in section 11 CPC and its explanations. *Doctrine of election* apply both to the original proceedings/action as well to defences and so also to challenge the outcome on culmination of such original proceedings/action, in the form of order or judgment/decree (for illustration it may be noted that multiple remedies are available against possible outcome in the form of an order/judgement/decree etc. emanating from proceedings of civil nature, which could be challenged/defended under Order 9 rule 13 (if proceeding are *ex-parte*), section 47 (objection to execution), section 114 (by way of review of an order), section 115 (revision), under Order 21 rule 99 to 103 CPC and section 96 CPC (appeal against the order/judgment) etc. Though there is no bar to concurrently invoke more than one remedy at the same time against an *ex-parte* order/judgment. However, once election or choice from amongst two or more available remedy is made and exhausted, judgment debtor cannot ordinarily be permitted subsequently to venture into other concurrently or coexisting available remedies. In a situation where an application under Order 9 rule 13 CPC and also an application under section 12 (2) CPC seeking setting aside of an *ex-parte* judgment before the same Court and so also an appeal is filed against an *ex-parte* judgment before higher forum, all aimed at seeking substantially similar if not identical relief of annulment or setting aside of *ex-parte* order/judgment. Court generally give 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 CPC) and or where one of the proceeding is taken to its logical conclusion than 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 versus 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. versus 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, advertent to merits of case in hands, observation of the learned Revisional Court while attending to the question of second remedy under section 47 CPC after

having failed to get any favourable order on application under section 12 (2) CPC 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 CPC with delay on 14.10.2016 and here is no explanation as to why this application 47 CPC 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 ejectment order, quite a few remedies may be available against such order; namely Appeal under section 24 of the Cantonment Act, 1963, Application under Order 9 Rule 13 CPC, Application under section 12(2) CPC, application under Order 21 Rule 99 to 103 CPC and not the least application under section 47 CPC all such remedies arm the tenant/ judgment debtor to effectively resist ex-parte ejectment 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 ejectment order dated 17.5.2011 but had chosen to invoke provisions of section 12 (2) CPC 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 ejectment order, ventured to invoke Section 47 CPC on substantially same facts and grounds. Even if it is assumed that grounds as available under section 47 CPC to question executability, discharge or satisfaction of ejectment 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) CPC was initially made. Case of the petitioner is squarely covered by explanation IV of section 11 CPC, 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) CPC 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) CPC 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.

13. At the conclusion of hearing, learned counsel for the respondent states, if this Court does not concede to the arguments of the Respondent, may consider giving reasonable time to vacate, as it is old tenancy and subject premises is commercial, learned counsel for the appellant has left the matter for Court to decide. In this view of the matter, nine months' time is granted to the respondent-tenant to



vacate the premises and hand over the peaceful and vacant possession thereof to the appellant. However, subject to payment of regular rent and utility charges. In case of any default, and or failure to hand over vacant and peaceful on or before expiry of period allowed herein, writ of possession, without notice shall be issued with police aid and breaking open the lock.

JUDGE

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**Karachi, the**  
5<sup>th</sup> of Sep., 2018  
Syed Farhan Ali

**Approved for Reporting**