JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Writ Petition No.712 of 2019

Muhammad Moinuddin Khan
Versus
District Judge and 5 others.

Petitioner by	:	Mr. Haseeb Shakoor Paracha, Advocate
Respondents by	:	Mr. Riasat Ali Azad Advocate for respondent No. 3 Mian Abdul Razaq Advocate for respondent No.5.
Date of Hearing	:	24.01.2023

ARBAB MUHAMMAD TAHIR, J:- Through the instant writ petition, petitioner namely *Muhammad Moinuddin Khan* impugns orders dated 07.04.2018 and 27.11.2018 passed by the learned Rent Controller and the learned District Judge Islamabad (West) respectively whereby application under Section 12(2) CPC filed by respondent No. 3 namely *Jamshed Khan* against ex-parte eviction order dated 14.10.2011 in favour of petitioner and against respondent No. 4 namely *Yashir Shahzad* (since proceeded ex-parte) was accepted, ex-parte eviction order was set aside, the execution petition was dismissed and revision petition was dismissed.

2. Vide order-in-original dated 07.04.2018, application under section 12 (2) CPC filed by respondent No. 3 *Jamshed Khan* was accepted by observing as under:-

> "11. Admittedly, the petitioner is in possession of shops i.e. demised premises. Petitioner has produced the sale deed of the shops executed in his favour by Abdul Khaliq Zafar on 20.04.2011 as Ex. A3, which prima facie establish that the petitioner is the owner of shops i.e. demised premises. Petitioner has also produced previous owner namely Abdul Khaliq Zafar in support of his version. It is evident that Abdul Khaliq Zafar also deposed that demised premises shops were sold out to the petitioner and petitioner is occupying the same. Resultantly, this issue is decided in favour of the petitioner. "

3. In revision petition, the stance of the petitioner had been to the effect that:-

> "Learned counsel for the petitioner admits that petitioner not owner of disputed property however; his sister was having an agreement to sell with Abdul Khaliq Zafar the original owner. It is pertinent to mention here that contesting respondents had purchased property in question on 20.04.2011 from above said Abdul Khaliq Zafar through registered sale deed which has never been challenged by the petitioner who also did not opt to file the suit for specific performance. Therefore, it is clear that the question in question was obtained on the basis of fraud and misrepresentation."

4. Tersely, the **"suit property"** *(shop bearing No. 2,3 & 4, situated in basement, block 16, Libra market Markaz G-7, Islamabad)* was owned by Abdul Khaliq Zafar (*respondent No. 5*). On **26.01.2008**, respondent No. 4 (*Yasir Shahzad*) filed suit for permanent injunction against the petitioner *Moinuddin Khan* and his sister *Mst. Fatima Aziz* with the prayer to restrain the defendants from dispossessing him from the suit shops without due process of law, and also to restrain them from interfering in his peaceful possession. The said suit, after the statement of counsel for the defendants (petitioner) for adopting proper course, was disposed of having become infructuous vide order dated **02.03.2009** in following terms:-

کونسل فریقین حاضر۔ مدعا علیہ نمبر 1 اصالتا حاضر۔ کونسل مدعا علیہم ایڈوکیٹ شیخ محمد خضر الرشید بیان دینا چاہتے ہیں قلمبند ہوئے۔

برحلف بیان کیا کہ مدعی کو جائے متداویا سے غیر قانونی طریقے سے بیدخل نہ کر ینگے۔ قانونی چارہ جوئی برخلاف مدعی کا حق محفوظ رکھتے ہیں۔ مقدمہ ہذا میں مناسب حکم جاری فرمایا جائے۔

سنکر درست تسلیم کیا۔

حکم: - بروئے بیان کونسل مدعا علیہم دعوٰ ی ہذا مدعی غیرم موثر ہو چکا ہے۔ لہذا مقدمہ ہذا بصیغہ غیر موثر ہونے خارج کیا جاتا ہے۔ مثل بعد از تکمیل و ترتیب داخل دفتر ہوئے۔

دستخط انگریزی سول جج۔

5. Subsequently, on **17.01.2011**, petitioner *Moinuddin Khan* filed an ejectment petition against respondent No.4 *Yasir Shahzad* claiming himself as owner of the suit property which was decreed ex-parte vide Judgment and Decree dated **14.10.2011.**

6. It is significant to note that the suit property stood transferred in the name of respondent No. 3 *Jamshed Khan* through registered sale deed dated **20.04.2011** from *Abdul Khaliq Zafar*, respondent No. 5 (original owner). On **20.01.2012** said *Jamshed Khan* filed suit against the original owner *Abdul Khaliq Khan* and petitioner *Moinuddin* wherein on 05.04.2012 respondent No. 5 *Abdul Khaliq Khan* (original owner) got recorded statement to the effect that he had no objection if the suit of the plaintiff/ respondent No. 3 *Jamshed Khan* was decreed, however subsequently learned counsel for the plaintiff/respondent No.3 *Jamshed Khan* got recorded his statement to the effect that there was no need to proceed further with the suit which may be dismissed as withdrawn with an exception to file it again by exercising their legal right, if need be. On the said statement, the suit was dismissed as withdrawn on **20.01.2015.**

7. On having knowledge of the ex-parte order of eviction dated 14.10.2011 in favour of petitioner *Moinuddin Khan* and against respondent No.4 *Yasir Shahzad,* on **06.10.2016**, *Jamshed Khan* respondent No. 3 filed application under section 12(2) CPC wherein original owner *Abdul Khaliq Khan*, once again got his statement recorded on 11.11.2016 in favour of respondent No. 3 *Jamshed Khan* and vide first impugned order dated 07.04.2018, the learned Rent Controller, Islamabad-West, accepted the application under section 12(2) CPC, set-aside the ex-parte eviction order and also dismissed the execution petition. The petitioner assailed the said order through Revision Petition, which was dismissed vide order dated 27.11.2018 passed by the learned District Judge, Islamabad-West.

8. As per stance of the learned counsel for the petitioner, the document i.e. agreement to sell in favour of petitioner and his sister for all intents and purposes is a title document for which it is not mandatory to

seek specific performance, that respondent No. 4 Yasir Shahzad recognized the claim of the petitioner as being owner of the suit property; that there was no collusion between petitioner and Yasir Shahzad who litigated for four long years and that the original owner *Abdul Khaliq Zafar* sold and sub allotted the suit property to the petitioner who retains status as such in terms of the Islamabad Multi-unit Buildings (Sub Division) Regulations, 1999.

9. On the other hand, learned counsel for the respondents 3 & 5 repelled the above submissions and prayed for the dismissal of the instant writ petition with costs throughout.

10. Heard the learned counsel for the parties and gone through the record with their able assistance.

11. It is an admitted position that the suit property originally belong to respondent No. 5 *Abdul Khaliq Zafar* but was not arrayed as party either before the learned lower forums or before this Court. It was so observed by this Court in order dated 28.07.2022 and on the direction, Abdul Khaliq Zafar and CDA was arrayed as respondent No. 5 & 6 respectively.

12. The status of respondent No.4 as being the real owner of the suit property was recognized by the petitioner before the learned Revisional Court and before this Court as well as reveals through *Para (c) and (f)* of the GROUNDS of the instant writ petition. The litigation that commenced about 14 years ago has not yet reached to final conclusion. Neither the petitioner nor the respondent No. 4 *Yasir Shehzad* had arrayed the original owner *Abdul Khaliq Zafar* as party initially in the suit filed by respondent No. 4 *Yasir Shahzad* in January, 2008 and subsequently eviction petition filed by the petitioner in January, 2011. This aspect, on the face of it, lends supports to draw conclusion that the petitioner and the respondent No.4 *Yasir Shehzad* had been *hand in glove* to get the orders in their favour regarding the suit property without impleading the original owner *Abdul Khaliq Zafar* Respondent No.5 as party and that, too, on the basis of an

agreement to sell for which admittedly, the petitioner never ever opted to seek specific performance of the said agreement.

13. Record further reveals that the original owner *Abdul Khaliq Zafar* Respondent No.5 alienated the suit property in favour of the respondent No. 3 *Jamshed Khan* through the registered sale deed dated 20.04.2011 but neither the petitioner nor the respondent No. 4 *Yasir Shahzad* ever challenged the said registered sale deed in favour of respondent No. 3 *Jamshed Khan* who, on the other hand, in order to get declare his claim genuine, in January, 2012 filed a suit against the original owner *Abdul Khaliq Zafar* Respondent No.5 and the petitioner, wherein the original owner got recorded his statement on 05.04.2012 testifying alienation of the suit property in favour of respondent No. 3 *Jamshed Khan*. The latter, on getting knowledge of the ex-parte eviction order, again filed an application under Section 12 (2) CPC in October, 2016 against the petitioner wherein the original owner *Abdul Khaliq Zafar* Respondent No.5 again on 11.11.2016 got his statement recorded in favour of the respondent No. 3 *Jamshed Khan*.

14. The proceedings highlighted above, on the face of it reflects that it is a case of abuse of the process of the Court. Initially in the year 2008, respondent No. 4 filed suit for permanent injunction against the petitioner and his sister with claim of having lawful possession of the suit property without impleading its real owner as party. Both respondent No. 4 *Yasir Shahzad* and the petitioner contested for the suit property without having any title of it in their name. Again in 2011, the petitioner filed ejectment petition against the respondent No. 4 *Yasir Shahzad*, without impleading the real owner *Abdul Khaliq Zafar* Respondent No.5 as party. The non-impleadment of the original owner by the petitioner and the respondent No. 4 *Yasir Shahzad* in their respective claims of having possession and title, on the face of its reflects foul play and an attempt to deprive the original owner from his valuable property which aspect cannot be ignored and left un-checked.

15. The respondent No. 5 *Abdul Khaliq Zafar* entered appearance twice to authenticate transfer of the suit property in the name of respondent No. 3 *Jamshed Khan* and thus the original owner too was burdened with frivolous litigation and an injury to his valuable property on the basis of false and vexatious litigation. The respondent No. 3 *Jamshed Khan* had to file an application under section 12(2) CPC for getting the ex-parte eviction order set aside while he had to contest for the revision petition filed by the petitioner and the instant writ petition, thus, was unnecessarily dragged in litigation by the petitioner.

16. The litigation, frivolous, vexatious and speculated, unduly burdens the Courts giving artificial rise to pendency of cases which in terms clogs the justice system and delays the resolution of genuine disputes. Such litigation is required to be routed out of the system and one of the ways to curb such practice of instituting frivolous and vexatious cases is the imposition of costs. The spectre of being made liable to pay actual cost should be such as to make every litigant think twice before putting forth a vexatious claim or defense before the Court. These costs in an appropriate case can be over and above the normal costs which include costs of the time spent by the successful party, the transportation and lodging, if any or any other incidental cost besides the amount of the Court fee, process fee and lawyers fee paid in relation to the litigation. The imposition of costs under Article 10-A of the Constitution as it not only discourages firvolous claims or defences brought to the Court house but also absence of such cases allows more Court time for the adjudication of genuine claims. The purpose of awarding costs at one level is to compensate the successful party for the expenses incurred to which he has been subjected and at another level to be an effective tool to purge the legal system of frivolous, vexatious and speculative claims and defences. The costs are a weapon of offence for the plaintiff with a just claim to present and shield to the defendant who has been unfairly brought into Court. Reliance is placed upon the latest pronouncement of the Hon'ble Apex Court dated 12.01.2023, in the case of ***"Qazi Naveed ul Islam v. District Judge Gujrat,etc (CP No. 3127/2020"*** .

17. This Court in the case of ***Edwin Coe LLP v. Naseim Ahmed Sarfraz (2022 CLC 1064)*** has summarized the scope of section 35(1)(i), (ii) and (iii) and section 35-B of CPC, after surveying the case law on the subject as follows:

1. The award of actual cost of litigation under section 35(1)(ii) of CPC is a mandatory requirement to uphold the right of the winning party to be indemnified.
2. For filing of the cost of litigation statement under section 35(1)(i) of CPC guidance can be sought from para 15 above, till such time that a form for such purpose is prescribed.
3. The cost of litigation statement ought to be filed on a proposed basis upon commencement of the proceedings and supplemented by a final statement at the culmination of the proceedings, reflecting actual cost incurred together with receipts and proof of payment of fee to counsel.
4. The right to recover actual cost of litigation in a proceeding before a court belongs to the party and not to the party's attorney.
5. The court ought to award the actual cost of the litigation reasonably incurred in view of the subject matter and legal work involved in the proceedings, when undertaken by a conscientious attorney of like experience.
6. The court ought not sit in judgment over the attorney fee when such fee, as paid by a party, falls within the zone of reasonability and ought to have been in the contemplation of the litigating parties in view of the nature of the litigation. But the court would allow partial indemnity of the attorney's fee if the actual fee were (i) found to be unreasonable and disproportionate to the work involved, and (ii) result in creating a possible barrier for public-atlarge to accessing the justice system.
7. A court ought to require the parties to file their cost of litigation statements as mandated by section 35(1)(i) of CPC, but non-filing of such statement ought not be a ground for not awarding cost of litigation as reasonably and objectively determined by the court to be payable to the winning party.

8. Any party may seek to address brief arguments before the court on its proposed cost or the reasonability or lack of proportionality of the costs claimed by a contesting party, and it is for the parties themselves to avail such opportunity prior to the conclusion of the proceedings to benefit from their Article 10A rights as guaranteed by the Constitution.
9. Other than creating a statutory right for the winning party to recover actual cost of litigation in legal proceedings, the object of the Cost of Litigation Act, 2017, is to discourage litigation, encourage settlements, prevent abuse of court process through false and vexatious claims, pleas, prayers and arguments, and encourage reasonable behavior on part of the parties prior to and during the proceedings. To realize such public purpose, a court ought to use its power under sections 35(1)(iii) and 35-B of CPC to penalize dishonesty, falsity and vexatious behavior.
10. The costs provided for under section 35 of CPC are limited to costs in relation to proceedings before the court awarding such costs.

18. Having examined the case from every angle, it can safely held that the petitioner has repeatedly abused the Courts in order to fulfill his evil design of grabbing valuable property of respondents 3 & 5 by repeatedly filing vexatious and frivolous claims in various Courts not only wasting the precious time of the Courts but also causing anguish and pain to the other party that unnecessarily, unfairly and prolonged litigation brings. The respondents 3 & 5 have filed their respective cost of litigation statements in terms of Section 35 (1) (i) CPC whereby the respondent No. 3 had incurred an amount of. Rs. 910000/- and respondent No. 5 Rs. 240000/- respectively in terms of the cost of the litigation.

19. In view of above, the instant writ petition is dismissed with costs of Rs. 1150000/- which shall be deposited by the petiotner in the trial Court for payment to respondent s3 and 5 namely *Jamshed Khan* and *Abdul Khaliq Zafar* within three months from the date of this judgment. The respondents 3 & 5 shall be entitled to get an amount of. Rs. 910000/- and respondent No. 5 Rs. 240000/- respectively out of the costs imposed upon the petitioner. In case the petitioner failed to deposit the amount of cost

with the prescribed period, the same shall be recovered from the petitioner as a money decree with 10% monthly increase and the costs of the execution proceedings shall also be recovered in addition thereto.

(ARBAB MUHAMMAD TAHIR)
JUDGE

Announced in the open Court on **___.01.2023**.

JUDGE

ISLAMABAD │ .02.2023
APPROVED FOR REPORTING

//Kamran//*