

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No. D-2687 of 2009 A/W
C.P. No. D-2691, 2693 and 2696 of 2009

DATE	ORDER WITH SIGNATURE OF JUDGE.
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Present:

Mr. Justice Aqeel Ahmed Abbasi
Justice Mrs. Ashraf Jahan

Disposed of Matter:

For hearing of CMA No. 22396/2014 (in C.P. No. D-2687/2009)

For hearing of CMA No. 22401/2014 (in C.P. No. D-2691/2009)

For hearing of CMA No. 22402/2014 (in C.P. No. D-2693/2009)

For hearing of CMA No. 22403/2014 (in C.P. No. D-2694/2009)

For hearing of CMA No. 22404/2014 (in C.P. No. D-2695/2009)

For hearing of CMA No. 22405/2014 (in C.P. No. D-2696/2009)

Date of hearing: 25.04.2018.

For the petitioners: Mr. Sami-ur-Rehman, advocate holding brief of Mr. Ali Almani, advocate for the petitioner(s).

For the respondent/
Applicant: Mr. Kashif Hanif, Advocate.

ORDER

AQEEL AHMED ABBASI, J:- Through listed application(s), filed on behalf of respondent under section 12(2), CPC read with sections 114 and 115, CPC, the respondents have sought recalling of order

dated 28.05.2018 (“**impugned order**”), whereby the above petitions were finally disposed of in the following terms:

“Being aggrieved with the Notices issued by the respondents for payment of 5% of the gross revenue earned from the advertisement, the petitioners, through instant petitions have sought following common relief:-

1. *Declare that Regulation 9(7) of the PEMRA (TV/Radio Broadcast Operations) Regulations 2002 has been issued without lawful authority, is ultra vires the powers of the respondents, and is without lawful affect;*
2. *Declare that the impugned notices dated October 22, 2009 and November 3, 2009 are illegal, unjust and void ab initio and quash the same;*
3. *Prohibit the respondents, jointly and severally, from claiming, demanding or recovery payment of 5% or any portion of the gross revenues of petitioner No.1, from demanding submission of its annual audited accounts for the purposes of calculating the aforementioned amount, and from taking any adverse measures against petitioner No.1 as threatened in the impugned Notices.*
4. *Grant cost of the petition;*
5. *Grant any and all other relief(s) that this Honourable Court may deem just and proper in the circumstances of the present case.*

2. *Learned counsel for the petitioner have argued that the amount being charged from the petitioners by the respondents on gross revenue earned from advertisement pursuant to Regulation 9(7) of the PEMRA (TV/Radio Broadcast Operations) Regulations, 2002 is ultra vires to the law, as no such authority to levy or collect surcharge from the petitioners, is available in the PEMRA Ordinance, 2002, nor such authority is delegated or can be delegated to impose such levy through Regulations. It has been further contended by the learned counsel that without prejudice to hereinabove legal position, the impugned Notices issued to the petitioners pertain to the period from September to November 2009, whereas on 12.12.2009, PEMRA Rules, 2009 were enforced and pursuant to Rule 5(2) of the said Rules, such levy appears to have been introduced for the first time. Learned counsel submits that though the petitioners reserve their right to challenge the vires of the relevant Rules including Rule 5(2) of Rules, 2009 in due course of time, however, since the impugned Notices in the instant petitions were issued prior to PEMRA Rules, 2009, therefore, he will confine his arguments to the extent of Regulation 9(7) of the PEMRA (TV/Radio Broadcast Operations) Rules, 2002. Learned counsel submits that even after promulgation of the Rules 2009, such Notices could not be issued to the petitioners for a period prior to introduction of the relevant rule in the year 2009, as no retrospective effect can be given to the newly inserted rule in the year 2009.*

3. *In support of his contention, learned counsel for the petitioners has placed reliance on the following case laws:-*

- i) *1984 CLC 2408 [Karachi] (Hyesons Sugar Mills Ltd. V. Director General / Commissioner, Excise & Taxation and 3 others).*

- ii) *PLD 2006 Kar. 649 (Messrs. Pioneer Traders v. Province of Sindh and others).*
 - iii) *PLD 2006 SC 528 (Province of Sindh through Secretary, Ministry of Excise and Taxation and others v. Messrs. Azad Wine Shop and others)*
 - iv) *2006 MLD 549 [Karachi] (Raj Kumar alias Raja Gul and others v. Hyderabad Cantonment Board and others)*
 - v) *2006 CLC 15 [Peshawar] (Dilawar Shah Roghani v. North-West Frontier Province through Secretary, Works and Services Department)*
 - vi) *2007 CLD 1092 [Karachi] (United Marine Agencies Pvt. Ltd. And others v. Trustees of the Port of Karachi and others).*
 - vii) *PLD 2010 Kar. 236 (Mst. Ummatullah through Attorney v. Province of Sindh through Secretary Ministry of Housing and Town Planning and others)*
 - viii) *2010 PLC 306 (Messrs. Mutual Funds Association of Pakistan v. Federation of Pakistan through Secretary Ministry of Finance),*
 - ix) *2013 PTD 969 (Messrs. Shahbaz Garments Pvt. Ltd. And others v. Pakistan through Secretary Ministry of Finance and others).*
4. *It has been prayed by the learned counsel that the impugned Notices may be declared as illegal and having been issued without any lawful authority.*
 5. *Conversely, Mr. Zulfiqar Khalid Maluka, learned counsel for the respondent / PEMRA, under instructions, submits that the respondents will not press the impugned Notices, which may be treated as withdrawn. However, it has been contended by the learned counsel that after promulgation of the PEMRA Rules, 2009, proper Notices will be issued to the petitioners in accordance with law for the recovery of the amount as mentioned in the impugned Notices, and if such Notices are still challenged by the petitioners then the respondents shall reserve their right to defend the said recovery of amount for the said period strictly in accordance with law, without prejudice to withdrawal of the impugned Notices under reference.*
 6. *In view of hereinabove candid statement of learned counsel for the respondents / PEMRA, leaned counsel for the petitioner is satisfied and submits that since the impugned Notices are withdrawn the purpose of filing instant petitions is achieved. However, it has been contended by the learned counsel that if fresh Notices are issued by the respondents in respect of same period by raising the same demand, the petitioners reserve their right to seek their remedy in accordance with law and to challenge the legality of such Notices.*
 7. *Since the impugned Notices issued by the respondents to the petitioners for the recovery of 5% of the Gross Revenue earned from the advertisement by the petitioner for the period as mentioned in the impugned Notices have been withdrawn by the learned counsel for the respondents i.e. PEMRA under instruction and the learned counsel for*

the petitioners is satisfied with such candid statement of the learned counsel for the respondent, we do not find it expedient to record our finding on the merits of the case, particularly, when there is no adverse order / notice against the petitioners in view of statement of the learned counsel for the respondent / PEMRA for withdrawal of such impugned Notices.

8. *Accordingly, instant petitions stand disposed off alongwith listed application(s) in the above terms with no order as to costs.”*

2. The only reason as disclosed in the listed application and the accompanying affidavit by the respondent seeking recall of the impugned order is that the counsel representing the respondent at the relevant time, namely, Mr. Zulfiqar Khalid Maluka, was not instructed by the respondents to make a statement that the respondents will not press the impugned notices, which may be treated as withdrawn. Learned counsel for the respondents has argued that disposal of the above petitions vide the impugned Order is based on the statement of the learned counsel who was earlier representing the respondents in these petitions and was not under instructions to make any such statement. Per learned counsel, the respondents wanted disposal of the above petitions on merit and have never issued any instructions for withdrawal of the impugned Notices issued by the respondents. It has been prayed by the learned counsel for the respondent that the impugned Order may be recalled and the petitions may be decided on merits.

3. Such contention of the learned counsel for the respondents is vehemently opposed by learned counsel for the petitioner who submits that the impugned Notices, which were subject matter of the above petitions, were issued without lawful authority and were challenged before this Court by the petitioners by raising legal

grounds which have been duly incorporated in the impugned Order passed by a Division Bench of this Court on 28.5.2014. Per learned counsel, from perusal of the impugned Order it is clear that petitioner had a prima facie case to challenge the impugned Notices and the respondents had nothing to offer in rebuttal, whereas, the above petitions were pending since 2009 and have been finally disposed of in the year 2014 in view of the statement made by learned counsel for the respondents under instructions, whereas, according to the learned counsel for the petitioners, the petitions were not dismissed as withdrawn, on the contrary, the same were disposed of while recording the contentions of both the parties in paras 5 and 6 of the impugned Order. Per learned counsel, no ground whatsoever for recalling the impugned Order has been raised in the listed application(s) or the affidavit(s) filed in support thereof nor the respondents have been able to point out any fraud played on the Court or misrepresentation made by either party. Learned counsel for the petitioner submits that allegations have been leveled by the respondents against their counsel to the effect that that he was not under any instructions to seek withdrawal of instant petitions in terms of the impugned Order. While concluding his arguments, learned counsel submits that since the respondents have failed to point out any instance of fraud and misrepresentation nor could make out a case for recalling the impugned Order or review thereof, therefore, the listed application(s) are totally misconceived in fact and law and are liable to be dismissed with costs.

4. We have heard learned counsel for the parties, perused the record as well as the impugned Order dated 28.5.2014 whereby the

above petitions were finally disposed of. A perusal of the impugned Order shows that the above petitions were not simply dismissed as withdrawn on the basis of statement made by learned counsel for the respondent, on the contrary, the contentions of both the parties have been recorded in detail and the petitions have been disposed of with specific directions, whereas the respondents are at liberty to issue proper notices after promulgation of PEMRA Rules, 2009 in accordance with law for the recovery of the amount as mentioned in the impugned notices.

5. Learned counsel now appearing on behalf of the respondents, was confronted as to whether the respondents have taken any action against the counsel who represented the respondents in the aforesaid petition at the relevant time i.e. 28.5.2014, when the impugned Order was passed, for having made a statement for disposal of these petitions in the above terms without instructions of the respondents. In response to such query, learned counsel appearing for the respondents pleaded no instructions.

6. Keeping in view hereinabove facts and circumstances of the case and the detailed order passed by this Court on 28.5.2014, we are not inclined to entertain such application(s), which appear to have been filed after a period of limitation and do not contain any valid grounds for recalling the impugned Order dated 28.5.2014. Therefore, listed application(s) were dismissed vide our short order dated 25.4.2018 and the above are the reasons for such short order.

Judge

Judge