

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

H.C.A. No.449 of 2018

Date	Order with signature of Judge
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1. For orders on office objection as at 'A'
2. For hearing of CMA 3583/18
3. For hearing of main case.
4. For hearing of CMA 3585/18

Dated: 19.09.2019

Mr. Allauddin Malik for appellant along with appellant.

Syed Waseem Ahmed in HCA No.449/2018 and for respondent No.31 in HCA No.520/2018.

Mr. Nadeem Ahmed for respondents.

Mr. Arshad Tayebaly along with Ms. Sehar Rana for appellant in HCA No.520/2018 and for respondent No.45 in HCA No.449/2018 along with Mr. Shakeel ahmed, Assistant Manager, K. Electric.

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The appellant being aggrieved of orders dated 27.07.2018 and 31.10.2018 has filed this appeal against K. Electric/respondent No.45 who has also filed an appeal in respect of one of the orders i.e. 31.10.2018 which is also fixed today as High Court appeal No.520 of 2018. For the purposes of controversy in relation to payment of undisputed claim of appellant i.e. pensionary benefits and gratuity we have heard the learned counsels which in fact is subject of order dated 27.07.2018 in leading High Court Appeal No.449 of 2018.

On the strength of arguments of counsel appearing for respondent K. Electric, learned Single Judge formed a view that the amount of pensionary benefits and gratuity had been paid/adjusted to the appellant, arrayed as plaintiff No.31 in the suit, in terms of statement dated 25.01.2018. The issue however was further referred to the Commissioner to record evidence to further investigate. Appellant being

aggrieved of it filed this appeal No.449 of 2018. It is the case of the appellant that there is no occasion or reason to refer the matter to commissioner since the amount of gratuity and pensionary benefit was never paid and as conceded by counsel appearing for K. Electric before Hon'ble Supreme Court in Civil Appeal sNo.56-K, 79-K and 80-K of 2012.

The statement that was cited by the K. Electric counsel as acknowledgement is available at page 183 which shows that certain amounts towards house building loan, house building loan interest, welfare loan, welfare loan interest, Eid ul Azha loan, mobile, car loan, salary, income tax which comes to 3.723 Million were deducted out of the undisputed amount i.e. gratuity, leave encashment, notice pay, salary and provident fund which comes to approximately 5 Million out of which the aforesaid loan amount to the tune of Rs.3.723 million was deducted and he was paid a sum of Rs.1.277 million.

We have heard learned counsel and perused the material available on record.

The appellant filed Suit No.815 of 2010 and was able to obtain interim orders regarding his termination. The aforesaid order resulted in continuation of his service and accordingly he was paid salary. The interim order was passed on 27.05.2010 whereby operation of termination letter dated 19.07.2010 was suspended. By virtue of order dated 28.07.2011 CMA No.5422 of 2010 was disposed of finally and the application was allowed and the impugned termination letters were suspended and consequently arrears of salary and other emoluments were ordered to be paid within 15 days. Being aggrieved of it K. Electric filed High Court Appeals before the learned Division Bench of this Court and the Bench was pleased to allow the appeal and the order of the learned Single Judge dated 28.07.2011 was set aside. The order of the Division Bench was impugned in Civil Appeal sNo.56-K, 79-K and 80-K of

2012 where, after hearing the arguments of both the counsels and with their consent, the appeals were disposed of as under:-

“The Trial Court, seized of the original suits instituted by the appellants, shall ensure proceedings in these suits expeditiously by consolidating and framing issues within two weeks from the date of communication of this order. If parties, so agree, the evidence of both the parties will be recorded on commission within next three months and in any case these suits will be proceeded and disposed of finally within six months from today.

Mr. Khalid Javed Khan learned ASC for the respondents has offered for payment of undisputed claim of the appellants as regard the pensionary benefits, gratuity etc. If the appellants so choose, they can avail such benefit, which will be without prejudice to the pending litigation, and subject to the final fate of the suits.”

Thus, the counsel appearing for K. Electric Mr. Khalid Jawed Khan conceded that the K. Electric is willing to pay undisputed claim of appellant as regards pensionary benefits and gratuity etc. and if the appellant so chooses they can avail such benefits which will be without prejudice to the pending litigation and subject to final fate of the suits.

Mr. Arshad Tayebaly, learned counsel appearing for K. Electric, submits that this undisputed claim means a claim after deducting the salary which was paid during the period when interim order of learned Single Judge was in operation. Mr. Arshad Tayebaly's stance was that after order of Division Bench the salary amount was unlawful to be retained by them while the pensionary benefits and gratuity was offered. Learned counsel submits that this was on the strength of paragraph 20 of the order passed by learned Division Bench wherein the Bench observed that on the question of irreparable loss and balance of inconvenience interim relief should not have been granted.

While the order was passed by Hon'ble Supreme Court in aforesaid Civil Appeal sNo.56-K, 79-K and 80-K of 2012, it was never addressed that subject pensionary benefits/ gratuity shall be paid after deducting the salary paid to the petitioner during period wherein interim order was

in operation. All that was conceded by K. Electric through Mr. Khalid Jawed Khan was that pensionary benefits and gratuity which are “undisputed heads” shall be offered to be paid to the appellant. The pensionary benefits and gratuity in terms of its status itself was considered undisputed as a whole. Moreover, the salary was paid on the basis of interim order which was confirmed. It is not K. Electric’s case that they/appellant never worked during this period. Since they have worked for K. Electric during intervening period they cannot claim salary back on this count as well. The K. Electric cannot be a judge of their own cause by deducting the amount of salary which was paid on the basis of order of the learned Single Judge. The leaned Division Bench in High Court Appeal No.127 of 2011 etc. never directed the recovery of the amount from these employees. If at all the K. Electric has a claim of recovery in respect of the said period of salary they could have lodged either an independent claim in shape of a suit or a counter-claim in the suit of appellant, which they have failed. In the absence of any lis pending/judicial claim, such amount which was ordered to be paid by this Court cannot be adjusted by K. Electric on its own by an order of the management of K. Electric.

We are also conscious of the fact that in the connected appeal wherein order dated 31.10.2018 is impugned, the learned Single Judge has directed to deposit ex-gratia amount of plaintiff No.31/appellant which was paid to other employees/plaintiffs. Although this amount was paid to the employees who withdrew their suits but this was never considered to be an undisputed amount before Hon’ble Supreme Court. Hence, the subject issue of payment of ex-gratia amount which was ordered to be deposited with the Nazir of this Court shall be considered when the appeals are heard. However, at this stage the said amounts cannot be considered as security in lieu of the pensionary benefits and

gratuity as the appeals are yet to be heard and decided. In case the respondent, who is appellant in the connected appeal succeeds in establishing its case that the order of depositing of ex-gratia amount was unlawful, it will be released to the appellant in connected appeal.

Thus, we deem it appropriate at this stage that the order of learned Single Judge dated 27.07.2018 whereby the subject amount under heads of pensionary benefits and gratuity was left to be decided after recording of evidence was not appropriate and liable to be set aside.

Similarly, in the absence of any claim or counter-claim for the recovery of salary paid during the period interim order was in operation, the amount cannot be directed to be retained by Nazir since respondent/K. Electric cannot have a decree in present proceedings for recovery of aforesaid salary amount. Thus, it ought to be released in terms of order of Hon'ble Supreme Court, as being un-disputed.

The balance amount of pensionary benefits and gratuity either be paid directly to the appellant or be deposited with the Nazir of this Court for its further release to the appellant in this appeal within one week from date of this order.

Since in the connected appeal the amount of ex-gratia was ordered to be deposited we deem it appropriate to direct the office to fix this matter in first week of October for hearing the appeals.

Instant appeal, to the extent of order dated 27.07.2018 stands disposed of in the above terms however shall remain pending to the extent of order dated 31.10.2018.

Judge

Judge