

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit Nos.326/2016, 330/2016, 354/2016, 355/2016 and 356/2016

Date Order with signature of Judge

10.02.2016

M/s. Salahuddin Ahmed and Nadeem Ahmed, Advocate for plaintiff in suit No.326/2016
Mr. Rehman Ghous, Advocates for plaintiff in suit No.330/2016
Mr. Umar Awan Advocate for plaintiffs in suit Nos.354 to 356/2016
Mr. Munir-ur-Rehman, Advocate for Defendant No.1 i.e. Karachi Water and Sewerage Board (KW& SB) alongwith its Managing Director Misbah Uddin Farid.

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By the dint of this order I intend to decide applications under Order XXXIX Rule 1 and 2 CPC *separately* filed in captioned suits.

2. Precisely, relevant facts are that plaintiffs filed constitution petition with regard to water hydrants before the Division Bench of this Court, wherein ad-interim injunction was granted but at later stage same were disposed of with directions that since the issue relates to factual controversy, hence petitioners/plaintiffs shall approach original jurisdiction of this Court, however, ad-interim injunction was extended upto today i.e. 10.02.2016.

3. At the outset learned counsel for the plaintiffs contended that defendant No.1 without any justification intend to close the hydrants owned by the plaintiffs on the plea that same are illegal and there is direction of the apex Court for closure of all illegal hydrants. It is further contended that the plaintiffs, with the approval of the competent authority (defendants), entered into a contract; paid millions of rupees and pursuant to that these hydrants on main pipe lines of defendant No.1 were allowed to be operated; impugned action of the defendants is against the natural

justice; defendant No.1 is not competent to cancel the contracts without hearing the plaintiffs; same is against the principle of *audi alteram partem* (no one shall be condemned unheard). Learned counsel for the respective parties also emphasize on certain documents while showing the correspondence between the plaintiffs and the defendants with regard to approval of subject matter hydrants. A consent decree was also referred to advance the case for grant of injunction.

3. In contra Mr. Munir-ur-Rehman present with Managing Director of KW & SB (defendant No.1) contends that under the direction of apex Court hundreds of hydrants including question were closed by defendant No.1 but due to ad-interim injunction granted in petitions and subsequently in suits, plaintiffs are operating the same. It is further contended that in last year in the month of June and July when there was emergent situation because of heat wave some parties were hired to run the hydrants to cope up the situation but basically it is a prime duty of defendant to provide water to all citizens of Karachi; it is further pointed out that these six hydrants are installed on main lines, therefore, due to shortage of pressure, defendant No.1 is unable to provide water supply to the areas as required.

4. Heard and perused the record.

5. After careful consideration to the contentions raised by the learned counsel for the respective parties and meticulous examination of available record it appears that in all five matters issue is one and same that plaintiffs claim their hydrants to be legal and act of defendant no.1 regarding closure thereof as *illegal* because defendant No.1 has received huge amount and has entered into a contract with the plaintiffs which (*contract*) by design is on the basis of BOT hence plaintiffs could not be deprived of their legal right. It is also emphasized that the order of the apex Court in no way is applicable in these suits as matter relates to the enforcement of contract, which

requires evidence, thus such adjudication could not be weighed by the apex Court.

6. I would take up the plea of *decree* first. Needless to say that in existence of a decree the proper remedy for breach or its enforcement lies before the court, passing the decree and not through *separate suit*. However, a careful examination of record shows that in suit No.326/2016 copies of suit No.1043 of 2011 alongwith application under Order 23 Rule 3 CPC and decree in terms of compromise have been appended. Relevant portion of the consent decree is as under:-

- “1. That the Plaintiff has agreed to pay an amount of Rs.16,702,400/- (Rupees Sixteen Million Seven Hundred two thousand and four hundred) to Defendant No.1 in respect of the connection shifting charges at Sarhad Suppliers Hydrant, Korangi-1600 Road, Karachi, which his (is) under the control of Hydrants Services/Tankers Operation wing of KW& SB.
2. That the Plaintiff has already paid Rs.1,16,00,000/- in advance at the time of tender in respect of above connection which will be deducted from the amount agreed as Rs.16,702,400/- thus, the plaintiff has agreed to pay balance amount of Rs.51,00,000/- to Defendant No.1.
3. That the Plaintiff shall pay the balance amount Rs.51,00,000/- to the Defendant No.1 in monthly installments of Rs.50,000/- to Defendant No.1.
4. That Defendant No.1 undertakes to restore the water connection at Sharhad Suppliers Hydrant, Korangi-16000 Road, Karachi immediately after passing the order on this application.”

Perusal of above it reflects that in para No.1 it is mentioned that defendant No.1 has agreed to receive the amount of shifting charges at “Sarhad Suppliers hydrant, Korangi-16000 road, Karachi”, whereas para-1 of the plaint suit No. 326 of 2016 reflects as under:

“That the plaintiff is the duly licensed operator of a water hydrant situated upon Plot No.327, Malir Nadi, Deh Landhi known as Murghi Khana, National Highway, District Malir, Karachi [hereinafter: “the Murghi Khana hydrant’] in the name of and style of Sarhad Suppliers.”

Thus, it is *prima facie* evident that consent decree and instant plaint reflect that site of the hydrants is different and nowhere in the decree it was mentioned that defendant would transfer the Sarhad hydrants on Malir Nadi, thus such decree, from the face of it, is not strengthening the case of the plaintiff in suit No. 326 of 2016 to establish prima-facie in favour of plaintiffs.

7. I have no hesitation in endorsing that *Chapter X* of Specific Relief Act, 1877 deals with *perpetual injunction* both *temporary* or *permanent*. Therefore, before proceeding any further, I *while judging* peculiar situations would refer to Section 54 of the Act. This vests a discretion in *Courts* to grant a perpetual injunction in cases (namely):-

(a) ...;

(b) where there exists **no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;**

(c) where the invasion is such that **pecuniary compensation would not afford adequate relief;**

(d) where it is probable that **pecuniary compensation cannot be got for the invasion;**

(e)..

8. In the instant matter, the plaintiffs have been seeking injunction while referring to the payment, made to defendant no.1 under a contract. I have no hesitation in saying that if breach, *established* on part of the defendant no.1, the plaintiffs can well ascertain actual damage or damages likely to be caused in result of such breach. Not only this but plaintiffs cannot raise a plea that *pecuniary* compensation, if awarded by Court, cannot be got from defendant no.1. Thus, the *emphasis* with reference to *contract* does not advance the case of the plaintiffs for grant of an injunction because it is not *prima facie* or *balance of convenience* which earn a right for

temporary injunction but *irreparable loss / injury* so insisted by referring cases as (b) to (d) beneath Section 54 of the Act.

9. Be that as it may, the defendant no.1 has been pleading that closing of hydrants, *in question*, have been in result of proceedings pending before Honourable Apex Court while plaintiffs denying application thereof in their case. Such respective stands necessitate a reference to orders passed by apex Court in Human Rights Case No.28963-S/2015 which is placed by Managing Director of defendant No.1 through statement. Para No.2 of the Order dated 29.07.2015 passed in the said case is as under:-

“2. We may also record our displeasure over the management of the Hydrants by the Water Board Department. Mr. Nisar Magsi, Officer Incharge of Hydrants of Karachi is present in Court. According to him, in all there are 24 legal hydrants in Karachi City out which 21 are operational and the remaining three are dysfunctional. When we inquired from him qua the policy under which these hydrants are regulated by the Water Board in Karachi City, he states that there is an SOP, dated 25.08.2009 under which these hydrants are regulated. On our query, as to whether the Tankers which are filled from the said hydrants provide water on their instructions or it is the Tanker Owners, who control the supply of water in Karachi city, he could not offer any plausible explanation, however, placed on record a copy of the contract, entered into between the Karachi Water Board and the Contractors/Tanker Owners. We have gone through the terms of the said contract which prima facie do not reflect that such contracts are serving the residents of Karachi in providing them water facility. In fact, the Water Board appears to have been selling the water through the Contractors (Tanker Owners) and they do not have any scheme to serve the interest of the residents of Karachi. The purpose for creating hydrants was different than the purpose for which the supply of water is being made in Karachi City.”

The underlined portions are sufficient to show that not only *all the 24 hydrants of Karachi City* but also the *contracts*, entered between the KWB and the Contractors /Tanker Owners, are under discussion in said matter before apex Court and even *certain* specific observations have been made to which this Court can take no *exception*. I also cannot take any exception to direction given by Apex Court in its order dated 23.12.2015 that:

“Secretary Local Government, present in Court, states that he has scrutinized the claims of the contractors of water tankers and find that they are dubious. In this respect the after taking proper steps may reject them and parties would then approach the appropriate forum within Executive Authority. The MD shall further ensure that transportation of water from the hydrants shall be controlled by him as it is administrative matter and he being Head of the department will monitor them. In case any infirmity is noticed in future, MD Water Board will be held personally responsible. MD Water Board shall provide us requisite details of the pending cases in which interim orders are passed by the High Court or Subordinate Courts with their status and in the intervening period he will ensure that all these cases are pursued before the Courts for their expeditious disposal.”

(Underlining is provided for emphasis).

The above underlined portion should leave nothing ambiguous that apex Court has given jurisdiction to examine *contracts* and reject the same *even*. Thus, the Article 189 of the Constitution leaves nothing to make an attempt *even* to escape the same, as held in the case of Mirza Shaukat Baig v. Shahid Jamil (PLD 2005 SC 530) wherein it is held that:

“30.....that the judgments of this Court being apex Court are binding upon the learned High Court in the view of the provisions as enumerated in Article 189 of the Constitution of Islamic Republic of Pakistan which, inter alia, provides that any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or initiate a principle of law shall be binding on all other Courts in Pakistan and the learned Lahore High Court is no exception to it. It is well-entrenched legal proposition that "the ultimate responsibility of interpreting the law of the land is that of the Supreme Court. Therefore any decision of the Supreme Court shall to the extent that it decides a question of law or is based upon or enunciates a principle of law is binding on all other Courts in Pakistan. A decision in suo motu Shariat review petition followed by Supreme Court would be binding on all other Courts in Pakistan. Law declared by Supreme Court becomes the law of the land and is binding not only on all Courts in Pakistan but also on all functionaries of the Government." (PLD 1971 SC 324, PLD 1985 SC 228. It is worth mentioning here that "where a judgment of Supreme Court has become effective as from a specified date, it would be binding not only on High Court's and Courts subordinate to it but also on all other Courts of Pakistan from that date. Therefore, High Court rightly preferred Supreme Court decision over,, decision of Full Bench of High Court. The

decision of Supreme Court cannot be ignored on the ground that certain grounds were not urged before Supreme Court." (PLD 1987 Lah.71, 1981 SCMR 520, PLD 1973 Lah 1). "Apart from the Constitutional obligation imposed upon the Courts even the propriety demands that the Courts must follow such a law without any hesitation. Unless the law so declared is altered or overruled by the Supreme Court itself, the High Court has no option but to follow it." (PLD 1975 Lah. 65, PLD 1964 Peshawar 250)."

(Underlining is supplied for emphasis).

10. Further, since it is an *undeniable* fact that on human rights application, the Hon'ble apex Court has taken cognizance of the issue of the illegal hydrants and same is pending for *final verdict*, therefore, judicial propriety demands that when issue relates to a pending policy and basic fundamental rights matter before the apex Court this Court should refrain from granting an *injunction* which would *in all senses* shall mean to interfere in domain of apex court. Thus, I am of the clear *opinion* that plaintiffs have no case for grant of an injunction hence application s merit dismissal. However, it would be just and proper for plaintiff s to approach the apex Court with all their legal pleas for adjudication, if they feel any grievance from act of defendant no.1 who *prima facie* claiming to have been acting under direction/observation of apex Court.

SAMD

JUDGE