

Order Sheet
IN THE HIGH COURT OF SINDH AT KARACHI
Suit No. 379 of 1980

Water And Power Development Authority

Versus

Shaikh Gulzar and Another

1. For Orders on a Commissioner's Report dated 16 March 2023.
2. For Hearing of CMA No.13395/2022.

Plaintiff : Represented by Mr. Ahmer Fazeel, Advocate.
Defendant No.1 : Nemo
Defendant No.2 : Represented by Mr. Taha Ali Zai, Advocate & Mr. Fawwad Syed, Advocate
Date of hearing : 23 October 2023 and 2 March 2024

ORDER

MOHAMMAD ABDUR RAHMAN, J. By this order I will be disposing of a Commissioner's Report dated 16 March 2023 and CMA No. 13395 of 2022 being an application under Order XVI Rule 1 read with Section 151 of the Code of Civil Procedure, 1908 that has been maintained by the Defendant No.2 seeking to condone the delay made by it in filing it's List of Witness and List of Documents.

2. This Suit has been maintained by the Plaintiff for the sum of Rs. 25,262,826.31 alleging breach of contract that has purportedly made by the Defendant No.1. The Defendant No. 2 is an insurance company and has issued an insurance guarantee in favour of the Plaintiff to underwrite any losses that may be suffered by the Plaintiff arising from a breach on the part of the Defendant No. 1 of its obligations to the Plaintiff under a contract.

3. An affidavit of documents filed, on behalf of the Defendant No. 2, on or around 30 March 1982 confirming that they have only following documents in their possession:

“ ...

Part – I

Original letter ref: GPS/79/530 dated 17.09.1979 from WAPDA Plaintiff addressed to the Defendant No.2

Original letter ref: GPS/79/531 dated 18.09.1979 from WAPDA Plaintiff addressed to the Defendant No.2

Original letter ref: GPS/79/532 dated 18.09.1979 from WAPDA Plaintiff addressed to the Defendant No.2

Office copy of letter dated 22.12.1979 from Defendant No.2 to the Plaintiff

Original letter dated 24.12.1979 from WAPDA Plaintiff addressed to the Defendant No.2

Office copy of letter dated 31.12.1979 from Defendant No.2 to the Plaintiff

Original letter dated 13.12.1980 from Plaintiff to Defendant No.2

Office copy of letter dated 22.1.1980 from Defendant No.2 to Plaintiff

Part – II

Originals of the copies mentioned at serial Nos.4,6, 10 and 11 which are in possession of the Plaintiff.”

4. The Defendant No. 2 had also appended the following documents with its Written Statement and which are indicated as hereinunder:

- (i) *Advance Payment Bond No. HO-ENG-BOND-CORP-KE-97/6/78 dated 25-6-1978 in sum of Rs.38,40,902.50;*
- (ii) *Advance Payment Bond No. HO-ENG-BOND-CORP-KE-99/6/78 dated 25-6-1978 in sum of Rs.34,06,603;*
- (iii) *Performance Bond No. HO-ENG-BOND-CORP-KE-98/6/78 dated 25-6-1978 in the sum of Rs. 33,28,485 in respect of Contract NO. GDU-3-108 dated 29-6-1976;*
- (iv) *Performance Bond No. HO-ENG-BOND-CORP-KE-110/6/78 dated 25-6-1978 in the sum of Rs. 19,85,100 in respect of Contract NO. GDU-3-108 dated 29-6-1976.”*

5. It seems that the matter has not been contested by the Defendant No.1 and whose opportunity for recording evidence has lapsed without the Defendant No. 1 recording any evidence. Needless to say, as a consequence of such an omission on the part of the Defendant No. 1, the Defendant No.2 is prejudiced inasmuch as the breach of the obligation having not been defended the liability to pay on the insurance guarantee would prima facie have to be honoured by it.

6. Apparently the Defendant No. 2 has now at this very belated stage ,on 14 June 2021, presented a List of Witnesses and List of Documents and which having been

objected to by the Plaintiffs has led the Defendant No. 2, on 7 September 2022, to maintain the application under Order seeking condonation of the delay that had been made by it when it had submitted a List of Witness and a List of Documents. The Plaintiff is now objecting to the belated submission of the List of Witnesses and List of Documents by the Defendant No. 2 as having not disclosed “good cause” to justify the delay in the filing of those documents.

7. Mr. Taha Ali Zai assisted by Mr. Fawwad Syed has entered appearance on behalf of the Defendant No.2 and has contested that the policy of the Court is to not be bound down by technicalities but to allow for condonation of delay so as to permit the matter to be decided on merits. In this regard he relied on the decision of Supreme Court of Pakistan reported in **Muhammad Anwer Vs. Mst. Ilyas Begum**¹ in which it is held that:

“ ... The clear language of Rule 1(1), undisputably stipulates that the parties to a lis are required to furnish the list of witnesses, whom they propose to call either to give evidence or to produce the documents, within seven days of the framing of issues; meaning thereby that the process and the authority of the Court in terms of Order XVI(1), to call and summon the witness by a party, has been made subject to, rather conditional to the list of witnesses which a party is mandated to file in terms thereof; in other words, the power and the machinery of the Court for summoning/calling of the witnesses through the process of Court and law, as is envisaged by certain subsequent relevant rules of Order XVI, C.P.C., can only be invoked if such a list has been provided and not otherwise. From sub-Rule (2), the afore-stated intention of the legislature is fortified and augmented, as a specific prohibition has been placed, preventing a party to call the witnesses and, as per the High Court Amendment-Lahore dated 2-10-2001, even to produce witnesses other than those whose names are mentioned in the list required to be filed under sub-rule (1). Undoubtedly, this is a mandatory provision of law as it entails serious consequences of precluding a party from calling, through aid of law (Court), or even to produce the witnesses if their names do not appear in the requisite list. However, in the same sub-rule (2), a room has been provided to a delinquent party, who either fails to file the list of witnesses at all, or omits a name of the witnesses therein (if filed) to make up its default and delinquency and ask for the indulgence of the Court to summon and produce the witnesses(es), but only after meeting and fulfilling the command of law, [sub-Rule (2)] i.e. "after showing good cause (emphasis supplied) for the omission of the said witnesses from the list"; besides, the authority and power of the Court, in this behalf has been regulated, in that, "and if the Court grants such permission, it shall record reasons for so doing (emphasis supplied)".

5. The question(s) which may therefore further arise for an answer would be, what is a "Good cause"? And how the power should be exercised by the Court? However, before dilating upon the above, I feel it expedient to briefly state the object of the proposition of the noted rule in the context of the amendments brought therein over the period. The original Rule 1 of Order XVI reads as "At any time after the suit instituted, the parties may obtain on application to the Court to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents." However, sub-Rules (1)(2) and (3) were substituted by a Law Reforms Ordinance (Ordinance XII of 1972) whereby requirement of list was mandated and made compulsory by virtue of sub-rules (1)(2). It was further commanded by sub-Rule (2) that a party shall not be permitted to call a witness, through the mechanism of law and/or by the process of Court, if the

¹ PLD 2013 SC 255

name of such witness does not appear in the list so filed. Not only that, on 2-10-2001 sub-Rule (2) was further amended by a Lahore High Court-Amendment and the word "produced" as mentioned above was added thereto.

6. The obvious query therefore should be, as to why the legislature from time to time has been introducing the changes in the said rule, the answer is quite straightforward: firstly, that no one should be taken by surprise in the course of the trial of the suit and the parties, before the commencement of the trial, must be conscious, aware and should be fully prepared, as to what kind of evidence is expected to be given by the witnesses of the opposite side, so that they can make necessary preparations for the cross-examination etc. and secondly; to prevent the concoction and fabrication of the evidence and to make up blatant omission(s) by the litigants during the course of the trial, meaning thereby to bind the parties, to such genuine evidence which was/is available to them at the time of the start of the trial, so that they should not subsequently avail stock and fudged witnesses) to make up, their case(s) and the deficiencies. Thus, the interpretation of the noted provisions of law is required to be made in the context of its object as stated above.

7. Be that as it may, before proceeding with the matter further in the context of answering the propositions herein involved and for the purposes of interpretation of sub-Rules (1) and (2) of Order XVI, C.P.C. and for elucidation of the said question, I would also like to resort to another expression i.e. "sufficient cause" which has been used by the legislature in the provisions of Civil Procedure Code, specially in Order IX, Rule 9 and Order IX, Rule 13 as against the word "good cause" used in Rule 7 of the said Order (IX of C.P.C.); besides Order XLI, Rule 19 thereof. Rules 9 and 13 ibid pertains to setting aside of an ex parte proceedings or the decree on the behest of defendant(s) of a case who must establish a 'sufficient cause' while under Rule 7 supra, the plaintiff whose suit has been dismissed for non-prosecution, should show a good cause for seeking its restoration. The distinction between the two expressions shall be made in the succeeding part of the judgment. Anyhow with reference to the propositions in hand, XVI(2) can validly be bifurcated into two parts, firstly, it has been made incumbent upon a party, rather a duty has been cast upon the delinquent party to show 'good cause' for omission to file the list of witnesses or the name of a particular witness and the second part is meant to regulate the power, authority and the discretion of the Court in relation to the grant of permission.

8. For the purpose of comprehending the first part, it shall be relevant to ascertain the true meaning of the expression "good cause" which according to Black's Law Dictionary Eighth Edition means "A legally sufficient reason. Good cause is often the burden placed on a litigant (usu. By court rule or order) to show why a request should be granted or an action excused.-- Also termed good cause shown; just cause; lawful cause; sufficient cause". Whereas, according to the said dictionary "sufficient cause" bears the same meaning as "good cause" and thus both the words can be held to be considerably analogue and interchangeable expressions, yet as per the precedent law, 'good cause has been construed in wider terms than 'sufficient cause. **Though no hard and fast, and absolute criteria can be set forth, as benchmark, to test, if a case of omission to file the list of witnesses or a name in such list is on account of 'good cause', as it depends upon the facts of each case, however, the party in default has to show a legally sufficient reason, why a request should be granted or the inaction/omission should be excused, in other words, the Judicialconscious of the Court should be satisfied with justifiable reasons.** In any case, a party in default cannot, as a matter of right or as a matter of course without assigning or establishing any good cause for the omission, ask for the calling/summoning or even to produce the witnesses) only on account of a lame excuse/reason and a bald assertion that, it shall be in the interest of justice and/or it shall facilitate the Court in deciding the matter.

9. Applying the afore-stated test to the instant case it shall be seen that good cause is absolutely lacking in this matter, as in the application for the summoning of witnesses filed by the petitioner it is stated:-

This hardly is a reason why the names of the witnesses were not given within the time provided by law in terms of Order XVI, rule 1, C.P.C. and/or it constitutes a good cause within the purview of sub- Rule (2) as interpreted.

10. Coming to the second limb of sub-Rule (2), as noted earlier, not only that the litigant party has to show a good cause for having not either furnished the list of witnesses within time or the omission of the name of such witnesses in the list, but a condition has been imposed and a rider has been placed by law on the exercise, of jurisdiction of the Court and the discretion in that behalf; in other words the Court is not free to grant such permission as per its own whim and caprice and in an arbitrary manner, rather it shall record the reasons for such a permission (emphasis supplied). The condition of recording the reasons obviously is a check on the unbridled and absolute discretion of the Court, which (reasons) should have nexus to the good cause as set out by the delinquent party. At the cost of repetition, it may be mentioned that the Court is not vested with an unrestricted authority and discretion to pass any whimsical direction and capricious order it feels like, but obviously the order allowing the permission has to conform to "those reasons which are justifiable in the eyes of law", which reflects the judicial application of mind by the Court and the disposal of the request in a judicial manner. It may be pertinent to state here that while disallowing the application of the party for summoning the witnesses, the Court is also required to record its reasons."

8. Mr. Ahmer Fazeel, who entered appearance on behalf of the Plaintiff, has contested this application on the ground that aside from the statutory prescriptions of Order XVI Rule 1 of the Code of Civil Procedure, 1908 having not been complied with as the Plaintiffs evidence has already been concluded, he is personally prejudiced as he while recording his evidence had no sight of the List of Documents and List of Witnesses that are now being attempting to be produced by the Defendant No.2 and which being produced after his evidence had been concluded could well be contrived to counter his evidence. He contended that the reasons given for the delay in presenting those documents do not constitute good cause for permitting the delayed presentation and prayed for the application to be dismissed.

9. I have heard both Mr. Ahmer Fazeel and Mr. Taha Ali Zai and have perused the record.

10. The provisions of Sub-Rule (1) Rule 1 of Order XIII of the Code of Civil Procedure, 1908 prescribes that:

“ ... (1) *The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, **and which has not already been filed in Court**, and all documents which the Court has ordered to be produced.*”

The documents that are mentioned in the List of Documents that has been submitted by the Defendant No. 2 on 14 June 2021 have already been appended to the Written Statement and had “already been filed in Court.” It would naturally follow that in terms of Sub-Rule (1) Rule 1 of Order XIII of the Code of Civil Procedure, 1908 there was no

need for the Defendant No. 2 to have filed a List of Documents as these documents had already been filed along with the Written Statement and of which the Plaintiff has notice. That being the law, there was no need for the Defendant No. 2 to have maintained CMA No. 13395 of 2022 or to show “good cause” for any delay in filing of the List of Documents and clearly the Plaintiff cannot be prejudiced in any manner as he has already got sight of those documents.

10. In respect of the List of Witnesses, the provisions of Order XVI Rule 1 of the Code of Civil Procedure, 1908 prescribes that:

“ ... (1) Not later than seven days after the settlement of issues, the parties shall present in Court a certificate of readiness to produce evidence along with a list of witnesses whom they propose to call either to give evidence or to produce documents.

(2) A party shall not be permitted to call witnesses other than those contained in the said list, except with the permission of the Court and after showing good cause for the omission of permission, it shall record reasons for so doing.”

Admittedly, the Defendant No. 2 had not submitted a List of Witnesses in the time period as mandated by the provisions of Sub Rule (1) of Rule 1 of Order XVI of the Code of Civil Procedure, 1908. I have perused the List of Witnesses that was submitted by the Defendant No. 2 on 14 June 2021 and which indicate the names of two managers of the Defendant No. 2 who will be presenting evidence on behalf of the Defendant No. 2. On this basis the “good cause” that is sought to be shown by the Defendant No. 2 is that it being a limited company, it is constrained to adduce evidence through its officers and even if it had submitted a List of Witnesses in 1984, in all likelihood, its officers who would have been mentioned in that List of Witnesses would no longer be working with the Defendant No. 2 today and it would have had to maintain an application, not dissimilar to the application under order, praying for the substitution of those witnesses. Interestingly, a similar situation was faced by the Plaintiff who when adducing its evidence realising that its witness had left its employment had made a representation to the Court to allow for the substitution of such a witness and which was granted by this Court vide its Order dated 6 December 2005. In the facts and circumstances, in equity, I see no reason as to why not to grant the same indulgence to the Defendant No. 2 as, keeping in mind that the Suit has been pending for 44 years and even if the Defendant No. 2 had submitted its List of Witnesses those Witnesses would have had to have been substituted by the same persons indicated in the List of Witnesses dated 14 June 2021 and who are now being sought to be produced by the Defendant No. 2. The Application therefore must be granted.

11. For the foregoing reasons, CMA No. 13395 of 2022 is granted in terms that the List of Documents and the List of Witnesses each dated 14 June 2021 are both taken on to the record of this Court and the Plaintiff is permitted to adduce evidence on the basis of those List of Witnesses and List of Documents. The Commissioners Report dated 16 March 2023 is also disposed of with directions to the Learned Commissioner to complete the evidence within a further period of three months.

Order Accordingly.

JUDGE

Karachi dated 9 March 2024

Nasir