

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

Date	Order with signature of Judge
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Present:

**Mr. Justice Muhammad Ali Mazhar.
Mr. Justice Abdul Maalik Gaddi.**

H.C.A. No. 102 of 2013

Muhammad Sabir Chippa Appellant

V E R S U S

Defence Officers Housing Authority & others.....Respondents

H.C.A. No. 103 of 2013

Muhammad Sabir Chippa Appellant

V E R S U S

Defence Officers Housing Authority & others.....Respondent

H.C.A. No. 104 of 2013

Muhammad Sabir Chippa Appellant

V E R S U S

Defence Officers Housing Authority & others.....Respondent

H.C.A. No. 105 of 2013

Muhammad Sabir Chippa Appellant

V E R S U S

Defence Officers Housing Authority & others.....Respondent

H.C.A. No. 106 of 2013

Muhammad Sabir Chippa Appellant

V E R S U S

Defence Officers Housing Authority & others.....Respondent

H.C.A. No. 107 of 2013

Muhammad Sabir Chippa Appellant

V E R S U S

Defence Officers Housing Authority & others.....Respondent

&

H.C.A. No. 108 of 2013

Muhammad Sabir Chippa Appellant

V E R S U S

Defence Officers Housing Authority & others.....Respondent

01.02.2017:

Mr. Muhammad Sabir Chippa appellant is present a/w his counsel Mr. Khilji Bilal advocate.

Mr. Ejaz Mubarak Khatak advocate for the Respondent No.1

Khawaja Shoaib Mansoor advocate for the Respondent No.2.

None present for the other Respondents.

Muhammad Ali Mazhar, J: In all the aforesaid High Court Appeals, the appellant has challenged the common order dated 18.03.2013 passed by the learned Single Judge of this court.

2. The brief facts of the case are that vide order dated 27.11.2006 the appellant was appointed commissioner to record evidence in Suit Nos. 657, 658, 659, 660, 661, 1484 and 954 of 2004. The learned Single Judge of this court fixed the commissioner fee at Rs. 5000/- per witness to be borne by respective parties. The commissioner was also directed to complete the task within a period of six months. The case of the appellant is that in all seven suits, he diligently performed his role for recording evidence but somehow or the other, the parties sought various adjournments so the task assigned to the appellant lingered on to a considerable length.

3. Learned counsel for the appellant referred to an order dated 11.05.2009 passed by the learned Single Judge of this court in the suits on commissioner's report dated 31.01.2009. In fact, it appears from the above order that the commissioner applied for extension of time, therefore, by consent six months' time was granted for the return of commission with further orders that in case of non-appearance/attendance of any party or their lawyer adjournment shall be granted only after payment of cost of Rs. 3000/- per date of hearing. Learned counsel further argued that since various adjournments were claimed by the parties vice versa, therefore, in terms of the order dated 11.05.2009, they were obliged to pay cost of Rs. 3000/- per adjournment to the commissioner which they failed to pay, therefore, the commissioner/appellant filed a reference in all the aforesaid suits on 31.05.2010 in which he prayed that directions be issued to the Defendants to pay the cost as per directions of this court. This reference/commissioner report was fixed for hearing before the learned Single Judge of this court on 07.02.2011. The order is reproduced as under:-

“For hearing on Commissioner report dated 21.05.2010.

07.02.2011:

None present for the plaintiff.

Mr. Masoodur Rehman holding brief for
Mr. Khawaja Mansoor Ahmed, Advocate for
the Defendant No.2.

Mr. Mohammad Sabir Chippa, Advocate/
learned Commissioner.

This suit has already been dismissed as
withdrawn by order dated 04.6.2010.

The counsel appearing on behalf of defendant
No.2 states that he has not received the
Commissioner report inspite of the direction of this

Court dated 20.12.2010. Learned Commissioner present in Court undertakes to provide the same during course of the day. The parties are directed to pay cost awarded to them within two weeks time.

Sd.
JUDGE”

4. Learned counsel for the appellant further argued that since the directions were not complied with, therefore, the commissioner filed another reference/report on 30.11.2011 which was presented on 01.12.2011 and the matter was placed before another learned Single Judge of this court but the learned Single Judge declined to accept the reference against which the aforesaid High Court Appeals have been filed. Learned counsel for the appellant argued that while passing the impugned order on the report/reference of the commissioner, the attention of the learned Single Judge could not be invited to the earlier order passed by another learned Single Judge in which in fact he directed the parties to pay the cost. Secondly, he argued that once the court allowed the commissioner to impose the cost then there was no occasion to refer to the matter back to the court for seeking any further permission for imposing cost on any defaulting party. Learned counsel also referred to a judgment passed in the case of Abdul Wahid Vs. Settlement and Rehabilitation Commissioner (1986 SCMR 943) according to which, the suit was abated for the sole reason that none had been implead as legal representative of the deceased. While one Muhammad Hanif claiming to have some interest in the property had made an application after the death of Ghulam Farid before the High Court so it was argued by the counsel for the appellant before the Apex Court that the order passed by another learned Single Judge on 18.10.1972 wherein after full discussion on the question of abatement it was held that writ petition had not abated and accordingly the application filed by Muhammad Hanif was dismissed which order was not taken note of another learned Single Judge who

passed the impugned order, whereby, the writ petition was held to have abated. Learned counsel for the appellant relying on this dictum argued that when another learned Single Judge earlier in time passed an order for payment of cost then the second order rejecting the reference is not proper but it shows that the earlier order was not pointed out to the learned Single Judge.

5. On the contrary, learned counsel for the Shell Pakistan limited argued that all the suits have already been dismissed as withdrawn and the suits before the commissioner were at the verge of recording evidence of the plaintiff only so the witnesses of Shell Pakistan limited never appeared in the witness box, therefore, question of nonpayment of cost does not arise. Secondly, he argued that before the learned Single Judge nothing was placed to show that commissioner ever imposed the cost on any party while granting adjournments in the diary sheet of the commissioner.

6. Learned counsel for the D.H.A. submits that sometimes the learned commissioner remained unavailable to conduct the commission so the parties cannot be held responsible for all adjournments. He further argued that no adjournment was sought by the DHA as the matter was at the stage of recording evidence of the plaintiff and he further argued that in these appeals, the DHA is a Performa party as no cost has been claimed by the appellant against the DHA.

7. The bone of contention is roaming around the order dated 11.05.2009, whereby, the learned Single Judge allowed to impose the cost against the adjournment at the rate of Rs. 3000/- per adjournment which the respondents allegedly failed to pay. In the earlier reference dated 31.05.2010, the learned commissioner mentioned some dates to show that adjournments were sought by the parties without payment of cost so when this reference was placed before the learned Single Judge, on 07.02.2011 the directions were issued to the

parties to pay the cost awarded within two weeks' time but when the compliance was not made, the commissioner moved another reference in which similar details were jotted down. However, the learned Single Judge vide impugned order dated 18.03.2013 declined to accept the reference. The order do show that the commissioner/appellant was asking Rs.3,36,000/- i.e. the cost of 16 adjournments per suit, however, the reasons to decline the reference in the impugned order are as under:-

“Counsel for the defendant says that no specific order whatsoever was passed by the Commissioner imposing cost and if the cost had to be imposed it would have been on the plaintiff.

Perusal of the reference reflects that Commissioner is asking for payment of Rs.3,36,000/- i.e. cost of 16 adjournments at Rs.48,000/- in each suit, which total comes to Rs.3,36,000/-. I do not feel it appropriate to allow this reference, as the Commissioner ought to have referred the matter to the Court in case plaintiff did not cross-examine the defendant's witnesses. Reference consequently is declined.”

8. To our understanding that vide order dated 11.05.2009, the commissioner was allowed to impose cost then there is no further legal obligation to refer the matter to the court for seeking further permission rather than the proper course was to impose cost in the diary sheet by the commissioner at the time of allowing the adjournment on the request of any party either on oral motion or in writing. The learned counsel for respondent No.2 also concedes that while passing the impugned order, the earlier order dated 07.02.2011 escaped the attention of the learned single Judge, so it was not clear before his Lordship whether any order for imposing cost was passed earlier or not.

9. Be that as it may, the crucial question is to see as to whether the commissioner imposed the cost and also recorded in the diary sheets or not? It appears to us that while passing the impugned order by the learned single Judge, the parties failed to invite the attention of the hon'ble Judge to the order dated 07.02.2011 passed in the suits whereby the parties were directed to pay the cost within two weeks. However, due to noncompliance of this order, the commissioner instead of filing application for implementation of the order, moved another reference which was declined by the learned single Judge through impugned order. It is also crucial point that no appeal was filed against the order dated 07.02.2011 by any party impugning the directions for the payment of cost. At this juncture we would like to observe here that at present two orders are at variance and both were passed on commissioner's report, therefore, in order to provide reasonable opportunity of hearing to the appellants as well as the respondents on this particular point i.e. "the payment of cost and its imposition", we feel it appropriate to set aside the impugned order and refer back the matter to learned single Judge to decide the matter afresh after issuing notices to the plaintiffs, defendants and the commissioner in all disposed of suits. The learned counsel for the appellant pointed out annexure A/6 available at page 26 dated 29.06.2011 which was written by learned counsel for the Respondent No.2 to the appellant for the settlement of his claim of cost and he was offered Rs.45,000/- as full and final settlement of his claim. When this letter was confronted to the learned counsel for the Respondent No.2, he argued that it was one time offer given in the year 2001 which was not accepted by the appellant, thereafter, he filed a reference. Though we are remanding the matter back to the learned Single Judge (O.S.) according to roster to decide the reference afresh in the meanwhile we also direct the learned counsel for the Respondent No.2 to use his good office and if any reasonable amount may be offered to the appellant he may consult the same with the management of Shell Pakistan Limited and also

place the offer, if any, before the learned Single Judge at the time of hearing of the reference which will be without prejudice to the contention as may be raised on merits by the respondents.

Appeals are disposed of accordingly. We expect that learned single Judge (O.S.) will decide the reference in the aforesaid disposed of suits within a reasonable time.

Judge

Judge

Aadil Arab