

IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Muhammad Ali Mazhar** and **Agha Faisal, JJ.**

High Court Appeal No. 207 of 2016

M/s. Karachi Water & Sewerage Board & another

Versus

Muhammad Ali Khan

For the Appellant : Mr. Muhammad Iqbal Chaudhry
Advocate.
For Respondent : Ms. Naheed Naz, Advocate
Date of Hearing : 29.05.2018

ORDER

Agha Faisal, J: Through this order we seek to determine an application, being CMA No. 717/2018, preferred on behalf of respondent wherein it has been prayed that the partial decretal amount deposited in Court by the appellant may be ordered to be released to the respondent upon furnishing of requisite security.

2. Ms. Naheed Naz, learned counsel for the respondent, submitted that a suit being Suit No. 23 OF 1993 (“**Suit**”) was filed by the respondent against the appellants and the same was decided in favour of the respondent vide judgment dated 01.06.2016.

3. The aforesaid judgment was assailed by the appellant in the present appeal and a pay-order for Rs. 6,337,455/- was deposited before the Nazir of this Court on 18.01.2018 in order to secure the decretal amount (“**Deposit**”). A copy

of said pay-order along with a copy of order dated 24.01.2018, passed in Execution No.80/2016, recording the receipt of the Deposit was filed herein by the appellant, along with statement dated 16.02.2018.

4. The respondent, vide the application under consideration, sought the release of the Deposit thereto inter alia on the ground of old age, infirmity and dire financial need. It was contended that the original Suit against the present appellant was filed by the respondent back in the year 1993 and despite the respondent having been adjudged to be successful in the said Suit, the fruit of the judgment therein had not materialized for the respondent thus far.

5. Per learned counsel, the respondent was ready and willing to furnish a bank guarantee, in form and substance to the satisfaction of the Nazir of this Court, to secure the release of the amount deposited in the Court thereto.

6. Learned counsel relied upon the case of *Messrs Bundial Bus Service Vs. Mst. Sanjeeda Afzal and others*, reported as 1975 SCMR 203 and drew the Court's attention to the following passage:

"In view of the above, we convert this petition into appeal and allow and further direct that the execution of the order of the learned trial Court is not suspended; but if the respondents deposit the amount awarded by the Arbitrator and made rule of the Court within three months from today, the appellant shall be entitled to withdraw the amount on furnishing of security for refund if the respondents' appeal ultimately succeeds, to the satisfaction of the learned trial Court."

7. Learned counsel referred to another order of the Honourable Supreme Court in the case of *Ch. Altaf Hussain and others Vs. Mirza Azam Beg*, reported as 1983 SCMR 643, wherein it had been held as follows:

"The respondent has obtained money-decree against the petitioners, for recovery of Rs. 29,986 passed by the High Court. The petitioners have pressed for the stay of the execution of the decree pending the disposal of this appeal. We are of the opinion that the petitioners are not likely to suffer any irreparable loss or injury in case he is made to pay the decretal amount to the decree-holder. Their interest can be fully safeguarded by obtaining a suitable guarantee for the restitution of the amount in case they ultimately turned out to be successful in this appeal. In *Dhunjibhoy Cowasji Umrigar v. Lisboa* (1) It was held that a party appealing against a decree,

which directs him to pay money, may obtain stay of execution of the decree, so far as it directs payment, on his lodging the amount in Court, unless the other party gives security for the repayment of the money in the event of the decree being reversed. If such security be given by the successful party, then stay of execution should not be granted. We have, therefore, declined to order the stay of the execution proceedings against the petitioners. However, at the same time, we direct that the decretal amount, if realized, will be paid to the respondent only after he has furnished security to the satisfaction of the execution Court for the restitution of the amount to the petitioners in the event of their success in this appeal.”

8. Learned counsel also relied upon another judgment of the Honourable Supreme Court in the case of *Chairman, Centrally Administered Tribunal Area (CATA) Development Corporation, Peshawar and another vs. Malikzada Muhammad Akbar and 4 others*, reported as 1984 SCMR 181, wherein it was held as follows:

“It being a money decree, the execution of the decree could not have been stayed without ordering either for the deposit of the decretal amount in Court or furnishing security for its payment. There is, therefore, a clear violation of the proviso to rule 8 of Order XLI of the Code of Civil Procedure.

We would accordingly, modify the order and direct that the stay of execution shall be subject to the respondents’ depositing the decretal amount in Court in which case the appellant will be at liberty to withdraw the amount against a Bank Guarantee.”

9. In response to the contentions of the respondent, Mr. Muhammad Iqbal Chaudhry, counsel for the appellant contested the grant of the subject application and drew the Court’s attention to the counter affidavit filed in such regard. It was contended by the learned counsel that the release of the Deposit would prejudice the present appeal as the respondent may lose interest in proceeding with the same.

10. Learned counsel drew the Court’s attention to the order passed in the present proceedings dated 16.02.2018, which is reproduced herein below:

“16.02.2018

Learned counsel for the appellants has filed a statement dated 16.02.2018 along with annexures wherein, it has been stated that the surety of the decretal amount i.e. Rs.6,337,455.00 has been deposited through Pay Order with the Nazir of this Court in Execution No.80/2016.

Statement is taken on record, copy of which has been supplied to the respondent's counsel.

Learned counsel for the respondent submits that either aforesaid amount may be directed to be deposited in favour of respondent or it may be invested in some Government profit bearing scheme.

Learned counsel for the appellants submits that till final decision of instant appeal, the aforesaid amount may be deposited in some Government profit bearing scheme. Order accordingly. Till further order, the aforesaid amount will not be released.

Adjourned to 15.03.2018, when learned counsels for the parties are directed to come prepared and to proceed with the appeal, which may be finally heard and decided at katcha peshi stage. No further adjournment will be granted.”

11. It was contended that the treatment of the amount deposited in the Court by the appellant was virtually consensual and therefore it would be improper to disturb / modify the aforesaid arrangement.

12. Learned counsel relied upon the case of *Haji Banaris Khan and others vs. Central Government through Secretary, Defence and Military Estate Officer and another*, reported as 1986 SCMR 1805 in support of his contentions.

13. We have heard the learned counsel and reviewed the record available before us.

14. In view of the ratio of the judgments of the Honourable Supreme Court, cited before us by the respondent, there appears to be no cavil to the proposition that it is permissible to release the deposited decretal amount to a decree holder, pending adjudication of the appeal, subject to such an arrangement being secured by an appropriate security.

15. The judgment relied upon by the appellant herein, as referred to supra, does not augment the appellant's contentions as the said authority deals with the possibility of a stay of execution of a decree being granted without deposit of security in the event that the judgment debtor is the Government. In the present circumstances it is not the deposit of security that is under consideration as the

same has already been undertaken by the appellant. Therefore, the cited authority is distinguishable in the facts and circumstances herein.

16. We are also not convinced that the order dated 16.02.2018 was a consent order or that it conclusively determined the treatment of the Deposit pending the outcome of the present appeal. The said order merely recorded the contentions of the respective parties. However, the respondent, present in Court, has offered to provide a bank guarantee, to the satisfaction of the Nazir of this Court, in order to secure the release of the decretal amount.

17. For the reasons contained herein the present application is allowed and the Nazir is directed to release the decretal amount to the respondent, subject to submission of a bank guarantee securing the quantum released to the satisfaction of the Nazir, after proper verification in respect thereof. The Nazir shall ensure that the validity of the bank guarantee shall remain intact till the decision in the appeal.

18. It is recorded that the present arrangement shall always remain subject to the final outcome of the present appeal.

JUDGE

JUDGE