

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Irfan Saadat Khan
Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition D-1463 of 2018

Syed Iftekhar-ul-Hassan Petitioner
Versus
Province of Sindh and others Respondents

For Direction:-

1. For order on CMA No.34252 of 2018. (12-2)
2. For order on CMA No.34253 of 2018. (Stay)
3. For hearing of CMA No.28543 of 2018. (Contempt)

Date of hearing: 14.11.2018

Mr. Malik Naeem Iqbal Advocate for the Petitioner.
Mr. Naveed-ul-Haq Advocate, for the Respondent-KDA
Mr. Shahriyar Mehar, AAG.

ORDER

Adnan-ul-Karim Memon, J: This Court vide Judgment dated 13.08.2018 decided the controversy between the parties with regard to the issue of voluntarily retirement of the Petitioner with the following observation:-

“14. The judgment in the subsequent case of State Life followed the said principle that an option for early retirement may not be enforced if the said option is retracted prior to any order having been passed thereupon by the competent authority. The judgment in the case of Registrar Lahore applied the same principle of law in the context of a resignation and expounded that the same could be withdrawn or recalled before its acceptance by the competent authority.

15. It is borne from the Reply / counter affidavit filed on behalf of the Respondent Nos. 2 & 3 that KDA accepted the retirement of the Petitioner on 16.01.2018, vide the Impugned Order. It is thus clear that the Petitioner’s request for the recall of his request was submitted prior to the acceptance of the said request for voluntary retirement by the competent authority. It is also supported by the

record that on the day after the requisition was recalled the Petitioner was suspended and hence it could be reasonably inferred that in doing so the KDA acquiesced to the continuing tenancy of the Petitioner's employment, as the it was admitted that the said action was taken to restrain the Petitioner from exercising the rights and obligations of his office. It is also an admitted fact that KDA did not release any benefit to the Petitioner pursuant to the voluntary retirement scheme (or otherwise) upon passing of the Impugned Order or at any time thereafter.

16. Therefore, in application of the ratio expounded by the successive pronouncements of the honorable Supreme Court cited supra to the present facts and circumstances, it is the considered view of this Court that the Impugned Order is unsustainable in law as the same was rendered despite the prior recall of the requisition for voluntary retirement by the Petitioner.

17. In view of the reasoning and rationale delineated supra this Constitution Petition is allowed and the Impugned Order is hereby declared void ab-initio and set aside”.

2. The aforesaid Judgment was assailed before the Hon'ble Supreme Court of Pakistan in Civil Petition No. Nil-K of 2018 and the same is stated to be pending before the Hon'ble Supreme Court.

3. On 02.10.2018, Respondent filed an application under order XXXIX Rule 1 & 2 CPC (CMA No. 34253 of 2018) for restraining the Petitioner from harassing and / or putting pressure upon the Secretary KDA. In the meanwhile, Respondent also filed an application under section 12(2) read with section 151 CPC, on the ground that the Judgment passed by this Court in the aforesaid matter has been procured by the petitioner by misrepresentation of facts and fraud. At the very outset we asked from the learned counsel as to how this application is maintainable before this Court when he has already assailed the judgment before the Honourable Supreme Court and has taken all the grounds which are taken in the listed application.

3. In reply to the query Mr. Naveed-ul-Haq, learned counsel for the Respondent No. 2 has submitted that the request for voluntary retirement of the Petitioner stood duly accepted by the KDA thus the present petition was not maintainable, however he in his abortive attempt justified his action that the judgment passed by this Court was procured by the Petitioner on the basis of misrepresentation and suppression of true facts of the case. He next added that the Respondent-KDA while making deliberations on preparation of the Civil Petition for Leave to Appeal before the Hon'ble Supreme Court, it was revealed to them that an entry dated 19.01.2018 in the outward dairy register being maintained by the KDA, the letter dated 19.01.2018 regarding withdrawal of voluntarily retirement was received, which was delivered by Petitioner; that letter dated 19.01.2018 was not available with Respondent Department/KDA and the Petitioner had taken the entire relevant record with him; that the letter dated 19.01.2018 and a so-called Note Sheet dated 03.01.2018 seeking withdrawal of request for voluntary retirement was manufactured and manipulated in order to mislead this Court; that the fabrication can easily be understood by comparing a Note sheet dated 03.01.2018 apparently issued and received on 04.01.2018 with the office of KDA; that this letter dated 19.01.2018 was fraudulently concealed from the consideration of this Court; that the Petitioner has been involved and/or pre-occupied with his private law firm under the name of "Maxim Law Associates" and abhorred the service under KDA; that Note Sheet is a brief summary or an extract from some document for a ready reference and is meant to use as an internal record of the Department; that this fabrication can easily be understood by comparing a Note sheet dated 03.01.2018 apparently issued and received on 04.01.2018 with the office of the KDA;

that this letter dated 19.01.2018 was fraudulently concealed from the consideration of this Court and instead the so called Note sheet dated 03.01.2018 carrying a lot of discrepancies including flow of signature and style of affixing date in comparison with the same note sheet allegedly received on the next date 04.01.2018 with the office of KDA and both the Note sheets were made part of record of the instant Constitutional Petition. He lastly prayed for recalling the judgment passed by this Court and dismiss the petition with cost.

5. We have heard the learned counsel for the respondent-KDA on the listed applications and perused the material available on the record.

6. We have noticed that the Respondent-KDA has impugned the Judgment dated 13.08.2018 passed by this Court in the aforesaid matter before the Hon'ble Supreme Court and the matter is still pending adjudication before the Hon'ble Supreme Court.

7. We have also scrutinized the listed applications at serial No.1 and 2 filed by the Respondent-KDA. We have noticed that prima-facie the grounds offered by the Respondent-KDA are not tenable under the law for the simple reason that they have taken all the pleas before the Hon'ble Supreme Court of Pakistan in the aforementioned CPLA, which is pending adjudication, therefore, it would not be fair to dilate upon any further on the issue of voluntarily retirement of the petitioner. So far as the fraud and misrepresentation of the facts are concerned, the learned counsel for the respondent-KDA was heard at length on 07.08.2018 and the matter was reserved for judgment and decided the matter on 13.08.2018 on merit, therefore, we do not see any tangible ground to

interfere in the decision rendered by this Court on the purported plea of fraud and misrepresentation to take action under Section 12(2) CPC. At this stage the Petitioner has pointed out malice on the part of Respondent-KDA warranting interference of this Court to take action against the alleged contemnors under Article 204 of the Constitution, who have failed and neglected to comply with the judgment passed by this Court dated 13.08.2018.

8. It is seen from the record, as discussed supra that all the issues now agitated in the application under Section 12(2) CPC were very much available with the said respondent while arguing the case before the Court, hence we do not see any fraud and misrepresentation played by the Petitioner with this Court. Moreover, the grounds as agitated in the application under Section 12(2) CPC also appears to be an afterthought on the part of the respondent since while arguing the present application the learned counsel for the respondent has duly admitted that some points have surfaced while preparing CPLA before the Hon'ble Supreme Court of Pakistan which also proves that these points are nothing but an afterthought and could not be considered to be valid and cogent grounds available with the Respondent to file the present application under Section 12(2) CPC by claiming that fraud and misrepresentation has been played by the Petitioner. We have also noted that no plausible explanation has been furnished as to who precluded the Respondent from agitating the points now raised in the present application at the time of final disposal of the matter. No explanation in this aspect also is available with the learned counsel for the Respondent (KDA).

9. In view of the facts and circumstances of the case and for the reasons alluded above, we are not satisfied with the grounds taken by

the Respondent-KDA that the Judgment dated 13.08.2018 passed by this Court has been procured by misrepresentation of facts / committing fraud upon this Court by the petitioner. Since the Judgment dated 13.08.2018 passed by this Court is impugned before the Hon'ble Supreme Court of Pakistan in Civil Petition No. Nil-K of 2018. Therefore, at this juncture, prima facie, Respondent has failed to make out a case under section 12(2) CPC for initiating action against the Petitioner; however, it is subject to final adjudication by the Hon'ble Supreme Court. The listed applications bearing (CMA No. 34252 & 34523 of 2018) are dismissed with cost of Rs. 25,000/- to be deposited by the Respondent-KDA in the High Court Clinic fund.

Adjourned to 04.12.2018.

JUDGE

Karachi
Dated:-14.11.2018.

JUDGE

Shafi Muhammad P.A