

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

**Suit No.750 of 2016**

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**DATE            ORDER WITH SIGNATURE OF JUDGE**  
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**Present:-**

**Mr.Justice Muhammad Ali Mazhar**

**Syed Farukh Mazhar.....Plaintiff**

**Versus**

**SGS Headquarters & others.....Defendants**

**For hearing of CMA No.13637/2017.**

Date of Hearing: 20.12.2017.

M/s. Khawaja Shams-ul-Islam, Imran Taj & Shahzad Mehmood, Advocates for the Plaintiff.

M/s. Mansoor Ahmed Shaikh & Jawaid Raza Advocates for the Defendants.

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**Muhammad Ali Mazhar, J:** The plaintiff has moved this Civil Miscellaneous Application for the appointment of commissioner for recording evidence.

2. The transitory facts of the case are that the plaintiff in the year 1998 took over the charge of Managing Director of the defendant No.2. In the year 2015, the plaintiff completed his silver jubilee with the defendant No.2 and a ceremony was arranged in his honor. However on 14.3.2016 his services were abruptly terminated, therefore, the plaintiff has filed this suit for declaration, permanent injunction, direction, recovery and damages/compensation. The matter was fixed on 02.10.2017 when the issues were settled by this court

thereafter the plaintiff filed this application for appointment of commissioner so that the evidence may be recorded. The plaintiff has prayed for following reliefs:

- i. **Declare the impugned letters of termination dated 14.03.2016 and 21.03.2016 issued by defendant Nos.3 and 4 against the plaintiff to be without any lawful authority and of no legal effect being in violation of Articles 2-A, 3, 4, 8, 9, 10-A, 11, 14, 18 and 27 of the Constitution of Islamic Republic of Pakistan, 1973 as well as Section 4(b) of the Sharia Act, 1991 in as much as also violative of doctrine of legitimate expectation.**
- ii. **Declare that the exercise of powers of termination against the plaintiff by defendant No.3 is void and illegal as it has been passed by a person in excess of the authority conferred upon him under the law.**
- iii. **Declare that the impugned letters of termination dated 14.03.2016 and 21.03.2016 are in violation of Clause 9 and its sub-clauses of the agreement of employment executed between the plaintiff and the defendants.**
- iv. **Declare and direct the defendants to immediately withdraw the termination letters dated 14.03.2016 and 21.03.2016 operating against the plaintiff and direct them to reinstate the plaintiff in service with immediate effect along with back benefits.**
- v. **Permanent injunction restraining the defendants and their agents, employees, subordinates, representatives or any other person(s) acting for and on behalf of the defendants from taking any coercive action against the plaintiff.**
- vi. **Declare that the action of the defendants regarding termination letter dated 14.03.2016 is coram-non-judice, mala fide, without jurisdiction, ultra vires and has no legal entities and to declare that it has never been passed and does not exist for all purposes and intent.**
- vii. **Mandatory injunction suspending the operation of the impugned letters and consequently directing the defendants to immediately reinstate the plaintiff in service.**
- viii. **Money decree granting damages to the tune of Rs.800,000,000 as mentioned in para 41 of the plaint and Rs.600,700,000/- on account of salaries and other fringe benefits, privileges as mentioned in para 40 above, or in the alternative devaluation of the currency together with mark up/interest from the date of its due till its payment.**

3. The learned counsel for the plaintiff argued that this is a case of wrongful dismissal. The issues have already been settled and if the evidence is recorded through commission, no prejudice will be caused to the other party. He referred to an order **authored by me** in the case of **Iqbal M. Hamzah vs. Gillette Pakistan Ltd**, reported

in **2011 YLR 277 (Karachi)**. In this case the defendants objected to the appointment of commissioner on the ground that suit involved intricate details and other legal issues but the court held that no lucid justification was offered by the defendant to oppose the application as taking steps for early decision in the matter and recording evidence on Commission to save time of parties could not be termed to be erroneous or an act against principle of natural justice. It was in the interest of both the parties if they would have come out of litigation as early as possible. All technicalities had to be avoided unless it was essential to comply with them on the grounds of public policy. The learned counsel further referred to the case of **Mrs. Badar Rahim vs. Hammad Asif Dossani and another**, reported in **2009 CLC 459 (Karachi)**, in which the learned division bench of this court held that Commission for examination of evidence can be issued within the limits provided, however, by consent of the parties Commission can be issued for examination of witnesses even in the matter which is not covered by rule 4 of Order XXVI, C.P.C. Order X, Rule 1A, C.P.C. Normally Commission can be issued for recording of evidence by consent of the parties to decide the case expeditiously. However, if the Court is of the opinion that one of the parties, will be benefited by delaying proceedings, one party is in possession of the property in question enjoying part payment, and by not giving consent for recording of evidence on Commission, in exercise of inherent power can order to record the evidence on Commission. Such directions can be exercised for advancement of justice and should not prejudice interest of one of the parties. Procedural law is meant for advancement of justice and to expedite decision of dispute, rather than to delay grant of right to a party. Principal

object behind all legal formalities is to safeguard the paramount interest of justice and mere technicalities, unless offering an insurmountable hurdle, should not be allowed to defeat the ends of justice. The Civil Procedure Code provides a procedural code with an overriding object to enable Court to deal with cases justly to provide justice to the parties according to law within a reasonable timeframe to meet requirement of Article 37(d) of the Constitution of Pakistan.

4. The learned counsel for the defendants argued that according to Article 10-A of the Constitution, the defendant is entitled to fair trial and to be dealt with due process of law which cannot be curtailed. It was further contended by him that evidence should be recorded in the court by a public trial in the normal course of dispensation of justice. The defendant cannot be forced to have their evidence recorded by a commissioner at the behest of the plaintiff and without the consent of the defendants. It was further averred that appointment of a commissioner will be prejudicial and would be illegal and null and void in terms of Article 10-A of the Constitution. The defendants assert their fundamental right to have their evidence recorded in the normal course of a trial by the court as envisaged in Order X (1A) (ii) CPC read with Articles 4 and 10-A of the Constitution. It was further contended that in view of Order X (1A) CPC and particularly Order X (1A) (ii) CPC, a commissioner can only be appointed with the consent of the parties to examine witnesses, admit documents and take other steps for the purposes of trial. The learned counsel referred to the case of **Ishtiaq Ahmed**, reported in **2016 SCMR 943** in which the apex court held that “The right of due process is not

new to our jurisprudence and finds expression in the provisions of Article 4 of the Constitution. This right has been interpreted by this Court in several pronouncements. The case of **New Jubilee Insurance Company v. National Bank of Pakistan (PLD 1999 SC 1126)** summarizes the features of that right very aptly. It is held that the right of due process requires that a person shall have notice of proceedings which affect his rights; such person must be given a reasonable opportunity to defend himself; the adjudicatory tribunal or forum must be so constituted as to convey a reasonable assurance of its impartiality and that such tribunal or forum must possess competent jurisdiction. Insofar as the right of fair trial under Article 10A of the Constitution is concerned in **Suo Motu Case No.4 of 2010 (PLD 2012 SC 553)** that right has been interpreted to ensure the grant of a proper hearing to an accused person by an unbiased competent forum; that justice should not only be done but be seen to be done. The above noted features of this right share attributes associated with the fundamental right of access to justice enunciated by this Court in **Benazir Bhutto v. Federation of Pakistan (PLD 1988 SC 416 at page-489)**, **Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324)** and reiterated in **Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 405 at page-562)**. This right casts on an adjudicatory tribunal or forum a duty to treat a person in accordance with law, to grant him a fair hearing and for itself to be an impartial and a fair tribunal. Upon comparison, the said constitutional conditions requirements expand the principles of natural justice which according to our jurisprudence are treated as inherent rights that underlie the elements of fairness, both in terms of hearing as well as impartiality of the forum”.

He next referred to an unreported order dated 01.09.2015 passed by this court in **HCA No. 230 of 2014 (National Bank of Pakistan vs. Younus Habib & another)**. The learned division bench of this court held that “the Commissioner was appointed for recording of evidence without the appellant’s consent or even issuance of notice. Mr. Mansoorul Arfain did not oppose the proposition that the procedure so adopted in view of order 10 rule 1(A) is not desirable as the Commissioner could be appointed by consent of the parties. In the circumstances, the order impugned to the extent of appointment of Commissioner was set aside”.

5. Heard the arguments. The learned counsel for the defendant while opposing the appointment of commission, referred to following provisions of C.P.C and the Constitution:

**Order XVIII, Rule 4 C.P.C.**

**4. Witnesses to be examined in open Court.--The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.**

**Order XXVI Rule 1, C.P.C**

**1. Cases in which Court may issue commission to examine witness.--Any court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.**

**Order X-1-A C.P.C**

**A. The Court may adopt any lawful procedure not inconsistent with the provisions of this Code to**

**(i) conduct preliminary proceedings and issue orders for expediting processing of the case;**

**(ii) issue, with the consent of parties, commission to examine witnesses, admit documents and take other steps for the purposes of trial;**

**(iii) adopt, with the consent of parties, any alternative method of dispute resolution including mediation, conciliation or any such other means.”**

**Article 10-A of the Constitution**

**10A. Right to fair trial. For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.**

6. A survey of Order 18 Rule 4 CPC postulates that the evidence shall be taken orally in open court in presence and under the personal direction and superintendence of the Judge. Whereas under Order 26 Rule 1 CPC the court may issue a commission for examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted from attending the court or who is from sickness or infirmity unable to attend it. In contrast, Order 10 (1A) provides that the court may adopt any lawful procedure not inconsistent with the provisions of this Code and sub-clause (ii) provides that the court may issue, with the consent of parties commission to examine witnesses, admit documents and take other steps for the purposes of trial. It is pertinent to point out that Clause 1A to Rule 1 of Order 10 CPC was added by Ordinance XXXIV of 2002 (27.7.2002) with cross reference to Section 89 A C.P.C. in which the court may adopt, with the consent of parties, any alternative method of dispute resolution including mediation, conciliation or any such other means. Much emphasis were made by the learned counsel for the defendants that commission for recording evidence can only be appointed with consent otherwise the evidence should be recorded in court. He further argued that the appointment of commissioner will infringe and transgress the fundamental rights of fair trial envisioned under Article 10A of our Constitution.

7. Prior to the enactment of Civil Procedure Code 1908 on 21.3.1908 as a consolidating and amending Act, there were

three previous codes. The first one was code of 1859 amended three times in 1860, 1861 and 1874. The second code was enacted in 1877 which was also amended in 1878 and 1879. The third code was enacted in 1882, which was amended in 1882, 1888, 1892, 1894 and finally in 1895. The present code is consolidatory law which is primarily a procedural law which may be defined as branch of law administering the process of litigation. The Rules framed in the code are for advancement of justice and should not as far as possible be allowed to operate so as to defeat the ends of justice and for this purpose inherent powers of the courts are saved and resuscitated by virtue of Section 151 CPC. In the case of **Narsingh Das vs. Mangal Dubey and others** reported in **(1883) ILR 5All 163, Syed Mahmood J**, (learned member of the full bench) expressed his views that in the rules of construction applicable to statute like the Civil Procedure Code, the courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law.

8. The function of the court is to do substantial justice between the parties after providing ample opportunity of hearing which is one of the significant components and virtue of fair trial. The court is not servitude or depended upon the archaic and antiquated principles which have acute tendency and leaning to frustrate the dispensation of justice. The precision and exactitude of the Code of Civil Procedure, 1908 were framed keeping in mind a particular era, while observing this, I do not mean that we should get rid of this Act or kept it in shelve but in unison so far as



the matter of procedure, we should not stick to its rigidities and stringencies. As in this case the predominant argument is that the commissioner may not be appointed without consent. We daily appoint commissions by consent and sometime even without consent but in presence of parties. The court is not helpless that in case of no consent, no commissioner can be appointed rather the court has to appreciate and become conscious whether the non-grant of consent is a sequel of some mala fide on the part of the defendant who merely wants to delay the proceedings so that the claim of the plaintiff may be frustrated by efflux of time. The present lawsuit is in the genre of master and servant relationship where the plaintiff on account of his alleged wrongful dismissal/termination knocked the doors of this court for damages/compensation. The issues have been settled by the court. If commission is appointed for recording evidence, it will not cause any prejudice or impairment to the defendants.

9. The procedure is mere machinery and its object is to facilitate and not to obstruct the administration of justice. The Code of Civil Procedure should, therefore, be considered liberally and, as far as possible, technical objections should not be allowed to defeat substantial justice. A technical construction of sections that leaves no room for reasonable elasticity of interpretation should be guarded against. The Code of Civil Procedure is a body of general law, designed to facilitate justice. It should not be treated as an enactment providing for punishment and penalties. The law of justice should be so constructed as to render justice where reasonably possible. A construction which reduces the statute to a futility has to be avoided. A statute or any enacting provision therein must be so

construed as to make it effective and operative. The rules framed in the Code are for the advancement of justice and should not, as far as possible, be allowed to operate so as to defeat the ends of justice. The distinction between the substantive law and the law of procedure is very narrow one but for the purposes of jurisprudence a distinction is made particularly from the point of view of administration of justice. The hon'ble Supreme Court in the case of **Imtiaz Ahmad vs. Ghulam Ali and others reported in PLD 1963 S.C.382** held that the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy. The English system of administration of justice on which our own is based may be to a certain extent technical but we are not to take from that system its defects. Any system which by giving effect to the form and not to the substance defeats substantive rights is defective to that extent. The ideal must always be a system that gives to every person what is his.

10. The statute law can be either substantive or procedural. The substantive law defines the rights while the procedural law deals mainly with the procedure or remedies. According to Salmond, the law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions *jus quod ad actiones pertinet*. It includes all legal proceedings civil or criminal. All residue is substantive law and relates not to the process of litigation but to its purposes and subject matter. Salmond has given the following points of

distinction between the Substantive Law and the Procedural Law:

- (1) **Substantive law determines the conduct and relations of the parties *inter se* in respect of the matter litigated whereas the procedural law regulates the conduct and relations of courts and litigants in respect of the litigation.**
- (2) **Substantive law deals with the ends which the administration of justice contemplates while the procedural law deals with the means and instruments by which the ends of administration of justice are to be attained.**
- (3) **The question as to what facts constitute a wrong is determined by the substantive law, while what facts constitute proof of a wrong is a question of procedure.**
- (4) **Substantive law defines the rights whereas the law of procedure defines the modes and conditions of the application of one to the other.**
- (5) **Substantive law relates to the matter outside the courts. Whereas the procedural law regulates affairs inside the courts.**

*[Ref: Introduction to Jurisprudence. Third Edition Reprint 2011 by Dr. Avtar Singh & Dr. Harpreet Kaur]*

11. It is quite obvious from the daily cause list at original side of this court that more than sixty cases are being fixed daily before each hon'ble Judge for different purposes. In most of the cases due to numerous miscellaneous applications in the suits, it becomes somewhat difficult for the courts to reach at evidence cases. Even in the regular benches constituted to deal with the old cases, it might be difficult to reach evidence cases after hearing the cases ripe for argument. After settlement of issues, much time is consumed to ripen the cases in the courts calendar for evidence. The cases in the court docket are increasing manifold due to upsurge and outpouring litigation in the diversified fields. So in order to provide swift and expeditious justice, the appointment of commissioner is extremely a vital tool and stratagem to overcome the pendency and to at least curtail the tenure of litigation. Though in one provision as cited above, the commissioner may be appointed by consent, contrariwise, the court has to pay a visit also to the circumstances and situation where

without any lawful justification or rationale the other side is opposing and not agreeing to accord consent for appointment of commissioner.

12. In the case in hand the attitude of the defendants is so obstinate and tenacious in which though a vigorous opposition has been made but without any convincing justification or *raison d'être*. The defendants totally failed to elucidate as to what loss or damage they will sustain if evidence is recorded speedier by means of appointment of commissioner. The law must not become stagnant or archaic while society moves forward. It must be accessible, intelligible and must change with the times responding to the realities of modern life. I am also unable to perceive as to how the fundamental right of fair trial of any person is breached or contravened if he is asked to appear for recording evidence before the commissioner. On the contrary, before the commissioner the parties may appear opportunely on given date and time with their convenience and the evidence is recorded in a congenial environment rather than recording evidence in court with a heavy board where above and beyond the cases fixed for evidence, a large amount of different cases are also being fixed daily with diverse stages.

13. The annotations of a book *Judicial Reflections of Justice Bhagwati*, 2008 Edition, accentuate that the judiciary has to devise new methods, forge new tools and innovate new strategies for the purpose of reaching social justice to the common man. It must abjure reactive approach and adopt a proactive role. It must respond to the demands and urges of the large masses of people for social justice, and by adopting a creative and activist approach, it

must mould and develop the law and bring it closer to the people so that the rule of law becomes meaningful and social justice a reality for them. Today a vast revolution is taking place in the judicial process; the theatre of the law is fast changing and the problems of the poor are coming to the forefront. The Court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning.

14. In the case of **M/s United Bank Limited vs. M/s Plastic Pack (Pvt.) Ltd. and others, reported in 2012 CLC 229, (D.B Judgment authored by me)** the court while dilating upon the niceties of Section 151 CPC, held that “The Court has also inherent powers under Section 151, C.P.C., to make such orders, as may be necessary for the ends of justice and to prevent the abuse of the process of the Court. These are all enabling provisions; the powers thereunder can be exercised by the Court to cover ostensibly impossible situations, for complete dispensation of justice, for which C.P.C. has been designed, but despite the best efforts of the draftsman, to cater for all possible situations, if it is found lacking in meeting some eventualities, the Court can act *ex delicto justitiae*, supply the omission in the procedure, adopt methodology, for effectually carrying out the purpose in view.” In the case of **Falah-ul-Momineen Trust vs. V.P. Abdullah**, reported in **PLD 1970 Karachi 179**, the court held that the legislature has in the Civil Procedure Code provided for all possible eventualities and to such matters which were not foreseen at that time, a provision like section 151, C.P.C. was enacted to empower the Courts to meet such an unforeseen

eventuality. Apart from section 151, C.P.C. the Court has also inherent power to take all steps to execute its own mandates and orders as this power flows from the Jurisdiction itself. The support for this view can be had from the following passage on page 136 of Corpus Juris Secundum, Volume 21: -

**“While a Court may be expressly granted the incidental powers necessary to effectuate its jurisdiction, a grant of jurisdiction, in the absence of prohibitive legislation, implies the necessary and usual incidental powers essential to effectuate it, and subject to existing laws and constitutional provisions, every regularly constituted Court has power to do all things that are reasonably necessary for the administration of justice within the scope of jurisdiction and for the enforcement of its judgments and mandates.”**

15. At this moment, I feel like to quote a famous expression that the **“law is made for man and not man for the law”**. In the event of an undue opposition and antagonism voiced against the appointment of commissioner without any substance or the objection seems to have been raised apparently to delay the proceedings as I get the picture in this case, the court in this particular scenario, may exercise inherent powers conferred by means of Section 151 C.P.C and appoint the commissioner. The purpose of this residuary section is to tackle and handle some particular situations where this tool can be effectively used for the dispensation of the justice. So far as the element of cost is concerned, the parties may bear the costs for their respective witnesses subject to its adjustment at the time of final determination of this lis which arrangement seems to be quite fair and suitable.

16. As a result of above discussion, Ms. Rukhsana Ahmed advocate is appointed commissioner to record evidence of the parties. The parties are directed to file their affidavit in evidence along with documents if any. The learned commissioner shall conclude the evidence preferably within

a period of three months. No undue or unnecessary adjournment will be allowed and in case of default, the learned commissioner may also close the side of defaulting party. The commissioner fee shall be Rs.15,000/- per witness which will be paid by the parties for their respective witnesses. However it is clarified that the payment of fee shall be subject to the adjustment in the cost of the suit at the time of final determination. The name of learned commissioner has been chosen from the "List of Commissioners" circulated by the Additional Registrar (O.S) to the Court Associate (Reader). If anybody has any objection to the selection of commissioner's name for recording evidence, he may file application for suggesting any other name within seven days failing which no objection shall be entertained at least to the initial appointment. Application is disposed of accordingly.

Karachi:-

Dated. 23.2.2018

**Judge**