

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal 410 of 2022

DATE	ORDER WITH SIGNATURE OF JUDGE
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1. For order on office objection at "A"
2. For hearing of CMA No.825/2023
3. For hearing of CMA No.4237/2022
4. For hearing of main case.
5. For hearing of CMA No.4103/2022

20.03.2023

Mr. Abid S. Zuberi advocate for the appellant along with Mr. Ayan Mustafa Memon, Advocate

Mr. Kafeel Ahmed Abbasi, Additional Advocate General Sindh alongwith Mr. Nisar Ahmed Shaikh, Project Manager, Local Government Department (Respondent No.4).

1. The Government of Sindh – Local Government Department, respondent no 2 herein ("Govt"), is undertaking infrastructural development work, being construction / widening of a road, Shahrah e Noor Jahan between Abdullah College to Qalandria Chowk near North Nazimabad Karachi ("Road") and vide its letter dated 16.09.2022 called upon the appellant, a public listed utility company, to address the issue of electrical cables appurtenant to the Road. In response, the appellant required the respondent to pay the estimated cost of its projected endeavors and in the meanwhile required that the respondent cease the infrastructure development project.

2. In furtherance of the foregoing, the appellant filed Suit 1653 of 2002 seeking an amount of Rs. 399,452,190/- from the Govt¹. Vide CMA 16243 of 2022, the appellant sought the respondent to be restrained from *inter alia* relocating the relevant electrical cables, hence, ceasing the Road project; as an interim measure, pending adjudication of the suit. The learned Single Judge dismissed the interim application vide order dated 02.12.2022 ("Impugned Order") and the present appeal has been preferred there against. It is considered illustrative to reproduce the pertinent observations from the Impugned Order herein below:

¹ Per prayer clause in Suit 1653 of 2022.

“4. Thus, as narrated above, there is a stalemate. The K-Electric is not willing to shift or align its underground electric cables until it is paid the cost estimated, and the Defendants are not willing to pay such cost stating that they are not liable. In the meanwhile, construction of a main road lies in limbo to the inconvenience and risk of the public. Documents filed today show that one worker at the site has already been electrocuted, but was fortunate to survive.

5. Clause 3.1.1 of the Consumer Service Manual on which the K-Electric relies to claim shifting costs from the Defendants reads as follows:

“3.1 RELOCATION OF DISTRIBUTION FACILITY 3.1.1 Due to Public Works If, for public improvement such as road construction, street widening, grading, excavating sidewalk spaces, or for other reasons DISCO has to move distribution facilities from the existing position or new facility is to be provided for improvement of the system, the shifting/relocation/addition of the facility shall be carried out at the cost of the sponsoring agency.”

‘Sponsor’ is defined by clause 2(8) of the National Electric Power Regulatory Authority Eligibility Criteria for Consumers of Distribution Companies, 2003 to mean “a person, entity, Government development agency, developer of real estate or a housing society situated within the service territory of a DISCO and which sponsors the development of a Sponsored Dedicated Distribution System for the supply of power in a specified area or a specified group of consumers”. „Sponsored Dedicated Distribution System” is defined by clause 2(ix) the said Eligibility Criteria to mean “a system to be developed by a Sponsor for an area where a Common Distribution System does not exist and is required to be developed for provision of electric service.” A similar definition exists in clause 1.4(65) of the Consumer Service Manual itself.

6. From the above it appears firstly that the ‘sponsoring agency’ in clause 3.1.1 of the Consumer Service Manual refers to the sponsor of a Sponsored Dedicated Distribution System. It is not the case of K-Electric that electric cables underneath the public road being constructed were laid by it as a Sponsored Dedicated Distribution System. Secondly, the „Consumer Service Manual” is defined in Rule 2(xxviii) of National Electric Power Regulatory Authority Licensing (Distribution) Rules, 1999 to mean “the manual of instructions developed by the licensee and approved by the Authority (NEPRA) detailing instructions and guidance to the consumers”. Clause 1.2 of the Manual itself makes it applicable to „consumers”. Therefore, I do not see how K-Electric can compel a non-sponsoring Government Department constructing a public road to make payment under the Consumer Service Manual. Learned counsel then submits that on previous occasions as well, while undertaking development projects in the city, Government Departments usually pay the K-Electric for shifting underground or overhead electric cables. While that may be so, however, where the Government contracts the services/expertise of K-Electric for shifting electric cables whilst undertaking public projects, that is apparently independent of the Consumer Service Manual and is completely different from saying that said Manual is enforceable at law against the Government where it is not acting as a consumer.

7. In the facts presented, this is not a case of aerial cables visible before commencement of construction, but where underground electric cables were discovered after the excavation. Separate from licenses granted under the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997, the license to lay down or place electric supply lines for conveyance and transmission of energy is granted by the Provincial Government under section 3 of the Electricity Act, 1910. The procedure for breaking of streets (includes roads) to lay electric cables is also dealt with by the Electricity Act, 1910, section 13 whereof envisages that before doing so, the licensee (in this case, K-Electric) shall give prior notice to the person responsible for repairing the street (in this case, the Provincial Government) along with a section and plan of the proposed works for approval.

8. Thus far, nothing has been placed on the record by the K-Electric to demonstrate that the electric cables now unearthed had been laid by it pursuant to any plan/approval duly granted under the Electricity Act, 1910. Therefore, there is force in the submission of the project manager that since these cables were unknown, the costing of the road could not factor in the shifting of such cables, and resultantly, the Defendants cannot be compelled to pay the K-Electric for the same. Under the circumstances, the K-Electric has not been able to make out a prima facie case for restraining the completion of the road. The balance of convenience is also in favor of the Defendants and the public for whom the road is intended. Therefore, the listed applications are dismissed.”

3. Per appellant's learned counsel, the Impugned Order ought to be set aside and the Govt be restrained in the manner sought vide CMA 16243 of 2022. The crux of the appellant's arguments was that Clause 3.1.1 of its Consumer Service Manual ("CSM") stated that relocating costs of its facilities be borne by the sponsoring agency.

4. Per learned Additional Advocate General, the appeal against the interim order was unmerited as the construction of a main artery serving the city of Karachi could not be left in limbo, to the manifest detriment of the general public. It was insisted that the appellant had stationed exposed electrical cables along the Road and the same not only hindered the infrastructural development but also posed a grave risk to the general public.

2. Heard and perused. We are cognizant that the appellant's suit, primarily seeking a money decree, remains pending and the outcome thereof would determine whether the appellant is entitled to the amount claimed or otherwise. The issue agitated before us is solely with respect to the order passed in an interim application, therefore, the solitary point for determination, framed in pursuance of *Order XLI Rule 31 of the Code of Civil Procedure 1908*, is:

"Whether the relocation of the electrical cables along the Road should be restrained, ostensibly having the effect of frustrating the infrastructural development project with respect to the Road, pending adjudication of the money claim of the appellant against the respondent no. 2 in Suit 1653 of 2022."

5. The learned Single Judge was required to adjudicate the competing claims of the respective parties, while rendering the order in an interim application, *primarily* upon the anvil of irreparable loss, balance of convenience and prima facie case. Therefore, on the said touchstone it was to be determined whether or not the relocation of exposed electrical cables appurtenant to the Road be restrained, jeopardizing an entire civil infrastructural development project and endangering lives, pending adjudication of the suit. The Impugned Order concisely catalogued the pertinent facts and relevant law and concluded that no case was made out to grant the restraint sought.

6. The appellant's suit is primarily for a money decree and the said claim is against the Government. It was never the appellant's case that if the suit was decreed in its favor then denial of the interim orders sought would preclude the appellant from realizing the benefit sought.

7. The entire argument of the appellant was built around Clause 3.1 of the CSM and the said contention was duly considered by the learned Single Judge. Whether the said clause merely guides the appellant under material circumstances or has any binding effect upon persons other than the appellant shall be determined by the competent court in finally determining the suit, however, even upon independent perusal of the said clause no case could be made out to predicate the frustration of an entire civil infrastructural development project pending such adjudication.

8. It is gleaned from the Impugned Order that the learned Single Judge apportioned greater weightage to the public interest of completion of the civic infrastructural project as opposed to the claim of a corporate entity seeking to secure an amount that it may become entitled to, should the final determination of the suit be rendered in its favor.

9. Speaking for the Supreme Court, *Ajmal Mian CJ* observed in *Muhammad Zaman*² that interim orders, of a competent court, would only merit interference to obviate a miscarriage of justice. In the present facts and circumstances the appellant's learned counsel have remained unable to demonstrate any such infirmity in the Impugned Order meriting interference.

10. It is observed that while the appellant remains duly entitled to agitate its monetary claim in the suit, however, no case has been made out to restrain the infrastructure development project with respect to the Road in the interregnum. Therefore, the question framed for determination supra is answered accordingly and in the negative.

11. Therefore, we are of the considered view that no interference is merited in the Impugned Order, which is hereby maintained and upheld. The present appeal is found to be devoid of merit, hence, dismissed along with all pending applications.

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Amjad/PA

² *Islamic Republic of Pakistan vs. Muhammad Zaman Khan & Others* reported as 1997 SCMR 1508.