

Order Sheet
IN THE HIGH COURT OF SINDH, KARACHI
Suit No. 553 of 2009

Date	Order with signature of Judge
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Cdr. (Retd) Zahoor Ahmed & another

Plaintiffs

Versus

C. Muhammad Abid & others

Defendants

Date of hearing: 23.02.2018

Mr. Usman Tufail Sheikh, Advocate for plaintiffs

Mr. Mirza Nazim Baig, Advocate for defendants 1(x) to (xiii)

Mr. Sharaf Deen, State Counsel

ADNAN IQBAL CHAUDHRY J. :-

1. Vide order dated 25-11-2013 passed in this suit, common issues in this suit and the connected Suit No. 442/2013 were settled, and vide order dated 5-12-2013 a Commissioner was appointed to record evidence. Vide order dated 11-02-2014 passed in this suit, both suits were treated as having been consolidated. Since then, this suit has been treated to be the leading suit. When issues were settled on 25-11-2013, the parties were directed to file their respective lists of witnesses within 7 days and lists of documents within 60 days. Apparently, the plaintiffs did not do so, nor did they appear before the Commissioner to lead evidence, with the result that vide order dated 11-02-2014 the defendants 1(x) to (xiii) herein (who are the plaintiffs in Suit No.442/2013) were allowed to lead their evidence first, and directions, in the nature of a self-executing order, were given to the Commissioner to expedite the evidence, which directions included the power to close the side of the plaintiff. Thereafter, per counsel for the defendants 1(x) to (xiii), though one of the plaintiffs appeared in person before the Commissioner and received copy of the affidavit-in-evidence of the defendants 1(x) to (xiii), none appeared for the

plaintiffs to cross-examine the said defendants with the result that the Commissioner ultimately closed the plaintiffs' side for cross-examining the said defendants and such report of the Commissioner was taken on record by this Court vide order dated 30-9-2014 ie., the side-closing order was endorsed by this Court, and the case was ordered to be fixed for final arguments. The subsequent order dated 9-2-2017 shows that it was in the year 2016 when the plaintiffs moved CMA No.6300/2016 for reopening their side, which was dismissed for non-prosecution, followed by another CMA No.16096/2016 which too was dismissed for non-prosecution. A third application yet again followed, being CMA No.4002/2017 for recalling the order dated 9-2-2017, which was allowed but subject to cost of Rs.100,000 payable to the defendants 1(x) to (xiii). The order dated 9-2-2017 again detailed measures to ensure that evidence is not delayed further.

2. After cross-examining the defendants 1(x) to (xiii), on 13-9-2017 the plaintiff moved CMA No.12553/2017 under Order XIII Rule 2 C.P.C. read with section 148 C.P.C. for condonation of delay in filing list of witnesses and documents, which lists are annexed to the application. In the said CMA the only reason given for not filing the list of witnesses and documents since 25-11-2013 is that it was due to a "bonafide mistake". In my view that is not "good cause" at all within the meaning of Order XIII Rule 2 C.P.C. and Order XVI Rule 1 C.P.C. Counsel for the defendants 1(x) to (xiii) contended that since the said defendants have already recorded their evidence, the grant of such application at this stage would allow the plaintiffs to improve their case to the prejudice of the defendants' case; and that it is manifest that the application has been made yet again to prolong the proceedings so as to perpetuate their gains from the suit property to the exclusion of the said defendants.

3. Be that as it may, when the list of witnesses and documents annexed to CMA No. 12553/2017 were scrutinized with the assistance of the counsels, the following facts emerged:

(i) All witnesses proposed to be examined by the plaintiffs were acknowledged to be voluntary witnesses, ie., none of them was

proposed to be “called”/summoned through the process of the Court;

- (ii) the Sale Deed sought to be produced by the plaintiffs had already been filed with their plaint and has already been exhibited in the evidence of the defendants 1(x) to (xiii), to which fact the plaintiffs’ counsel conceded. It is not the case of the plaintiffs that they want to produce the original thereof;
- (iii) the Power of Attorney and Sale Agreement sought to be produced by the plaintiffs have already been filed with their plaint, to which fact the plaintiffs’ counsel conceded;
- (iv) the Receipt sought to be produced by the plaintiffs is already on record with the plaint of Suit No.442/2013 (the consolidated suit), to which fact the plaintiffs’ counsel conceded;
- (v) the Heirship Certificate and the Challan sought to be produced by the plaintiffs are already filed with their plaint and have also been exhibited by the defendants in their evidence, to which fact the plaintiffs’ counsel conceded;

On the other hand, it is to be noted that the list of witnesses envisaged under Order XVI Rule 1 C.P.C. is for those witnesses who are proposed to be called/summoned through the process of the Court, and not for voluntary witnesses. Similarly, the list of documents envisaged under Order XIII Rule 1 C.P.C. is for those documents which are “..... *not already been filed in Court.....*”. When confronted with the above provisions, the plaintiffs’ counsel conceded that the plaintiffs need not have moved CMA No. 12553/2017. This gave cause to the defendants’ counsel to assert again that the application is again one, in a series of many, moved just to prolong the matter, and that the since the plaintiffs now propose to examine as many as 5 witnesses (all voluntary witnesses), this only goes to reinforce the said design of the plaintiffs.

4. In the circumstances aforesaid, and given the past conduct of the plaintiffs, I queried the plaintiffs’ counsel on the relevancy of the witnesses (voluntary witnesses) proposed to be examined by them. In reply, he submitted that the witness mentioned at serial No.1 of the list is a plaintiff, the witness at serial No.2 manages the suit property

on behalf of the plaintiffs, the witnesses at serial No.s 3 and 4 were present at the time of the disputed sale agreement and will testify to that effect, and the witness at serial No.5 is one of the attesting witnesses to the disputed sale agreement. While the defendants' counsel conceded to the examination of the witnesses mentioned at serial No. 1, 2 and 5, he took exception to the witnesses at serial No.s 3 and 4 by submitting that they find no mention in the pleading of the plaintiffs; that the disputed sale agreement does not mention them as attesting witness; and that have been introduced for the first time only to drag the evidence. The fact that the witnesses at serial No.s 3 and 4 of the list find no mention in the pleadings of the plaintiffs, and that the disputed sale agreement names others and not them as attesting witnesses, this much was admitted by the plaintiffs' counsel, and nothing else was shown by him to demonstrate the relevancy of the witnesses at serial No.s 3 and 4 of his list. Therefore, I am inclined to agree with the defendants' counsel that the witnesses at serial No.s 3 and 4 (namely, Faizullah and Abdul Haq Jamal) are not relevant to the plaintiffs' case. More importantly, since the evidence they propose to give is to the execution of the disputed sale agreement, which admittedly bears the names of other persons as attesting witnesses, the oral evidence of Faizullah and Abdul Haq Jamal as to the execution of the disputed sale agreement would be no proof of it until it is proved under Articles 78 and 79 of the Qanoon-e-Shahadat Order, 1984, the more so when it is not the case of the plaintiffs that the attesting witnesses to the disputed sale agreement cannot be found. Therefore, in exercise of powers under Article 131 of the Qanoon-e-Shahadat Order, 1984, I hold that the evidence proposed to be given by Faizullah and Abdul Haq Jamal as plaintiffs' witnesses is not relevant and not admissible. Such finding is independent of the fate of CMA No.12553/2017 (which is decided *infra*) as in my view Article 131 of the Qanoon-e-Shahadat Order, 1984, can be invoked by the Court also to put a check on evidence proposed to be brought through voluntary witnesses, so as to ensure that the parties do not lead irrelevant evidence (with whatever designs), which is the very essence of the said Article.

5. In view of what has been discussed in paras 1 to 3 *supra*, I conclude that not only is CMA No.12553/2017 misconceived, it is also frivolous, moved by the plaintiffs only to prolong the evidence. It is therefore dismissed while imposing a cost of Rs. 40,000/- on the plaintiffs, payable by them jointly or severally, to the defendants 1(x) to (xiii). However, except as held in para 4 *supra*, and save as any further order of this Court, the plaintiffs will be entitled to lead their evidence by way of affidavits-in-evidence, which shall be filed in one go with the Commissioner within 10 days from the date of this order with a copy in advance to the defendants. Needless to state that any document produced by the plaintiffs will be subject to proof and that the defendants will have an opportunity to lead evidence in rebuttal. The measures ordered on 11-02-2014 and 9-2-2017 for expediting the evidence stay intact.

JUDGE

Date: ____-3-2018