

# IN THE HIGH COURT OF SINDH, KARACHI

Present

Mr. Justice Aqeel Ahmed Abbasi  
Mr. Justice Zulfiqar Ahmad Khan

## HCA No.283 of 2018

Mst. Nasira Khaleeque Khan & others ..... Appellants  
Versus  
Muhammad Laiq Khan Hamdam & others ..... Respondents

Appellants : In person  
Respondent No.1 : Through Mr. Muhammad Aqil, Advocate  
Respondent Nos.2 to 3 : *Nemo*  
Respondent Nos.4 to 7 : Through Mr. Saifullah, AAG  
Date of hearing : 16.12.2019  
Date of order : 16.12.2019

## JUDGMENT

**Zulfiqar Ahmad Khan, J:-** The instant High Court Appeal has been preferred against order dated 22.05.2018 passed by the learned Single Judge of this Court in Suit No.1286 of 2010 (Mrs. Nasira Khaleeque & others v/s. Muhammad Laiq Khan Hamdam & others), whereby suit of the plaintiffs was dismissed for want of evidence.

2. Succinctly, facts of the case are that the suit was filed on 27.05.2010 and issues were framed on 24.10.2014, wherein Mr. Mansoor Shaikh, Advocate was appointed as Commissioner for recording evidence of the parties with direction to conclude the Commission within a period of three months from 22.11.2014 and plaintiffs (present Appellants) were directed to file their affidavits-in-evidence before the Commissioner on the aforesaid date too. However, the Appellants failed to file their affidavits-in-evidence and interim report was filed by the Commissioner on 24.12.2014 with the request that his appointment as Commissioner may be withdrawn. Again, by order dated 05.08.2015 Raja Aftab Ahmed, Advocate was appointed as Commissioner for recording of evidence with directions to

complete the evidence within four months. However, the Appellants could not lead their evidence before the Commissioner either. Thereafter by order dated 10.03.2016, Commissioner's time for recording evidence was enlarged for a further period of three months. On 31.05.2016 the Commissioner informed the Court through his report that the Appellants despite notices dated 01.04.2016 for appearance on 14.04.2016 did not turn up and he also requested that his appointment as Commissioner may be withdrawn.

3. With this conduct, initially, the suit was dismissed for want of evidence on 30.04.2018 with a short order, however before the said order could be signed, the Plaintiff No.6 (Appellant here) appeared in person and the learned Single Judge was pleased to recall the order and adjourned the suit to 22.05.2018 after having noted the conduct of the Plaintiff as under:-

*"...This is how the plaintiff has twice frustrated the possibility of recording of her evidence. After such a long time she could not be given additional time of production of evidence, however, since she is present in Court and her evidence cannot be recorded because I have already called the case in her absence and passed the above order and the lawyers for the other side have left. Therefore since the order for dismissal of suit for want of evidence was not signed the case is again adjourned for recording of evidence of the plaintiff No. 6, if at all she wishes to record her evidence on the next date of hearing. Even if she failed to appear in Court on the next date of hearing for production of evidence, no further time will be given to her. Issue notice to the counsel who were present earlier and again formal notice to Ms. Seema Khaleeqe also be sent for 22.05.2018, so that there should be no confusion on next date."*

4. As scheduled, the matter came up for hearing on 22.05.2018 for evidence of the plaintiff. Notice as per the order dated 30.04.2018 was sent to the Plaintiff also (so that there remains no confusion about the next date) which returned served on 21.05.2018. However, on the fateful day, the Plaintiff No.6 (the present Appellant) appeared in the Court and took the stand that she could not have the evidence recorded as she wishes to engage a counsel. Being cognizant of the previous conduct and the order passed on the previous date, the learned single Judge dismissed the suit for want of evidence. Full text of the order is reproduced hereunder:

*“Plaintiff No. 6 Ms. Seema Khaleeqe is present in person, who even today is unable to proceed with her evidence and seeks adjournment on the ground that she may engage Counsel. The order of previous date speaks volumes as to the delay caused in this matter and is explicit on the point that no further time will be allowed. Indeed, on that date itself, this Suit had been dismissed, but the order was then recalled by way of a final opportunity in view of subsequent appearance of the Plaintiff. In the given circumstances, it is apparent that ample opportunity has been afforded to the Plaintiff, which has not been availed, and that no further indulgence is warranted in this matter. Accordingly, in view of the foregoing, the instant Suit is dismissed for want of evidence.”*

5. Before us the Appellant No.6 appeared in person (again) and while narrating all her past experiences with the Suit and various applications filed therein, denied that she has caused any delay in the recording of evidence. She, in particular submitted that the notice for the hearing scheduled on 22.05.2018 only reached her on 21.05.2018 (a day before) thus she could not arrange a counsel, hence not in a position to lead evidence.

6. Learned counsel for the respondent after narrating past conduct of the Plaintiff (as summarized in the earlier part of this judgment) submitted that under Order 17 Rule 3 CPC and the dictum laid down by the Hon’ble Supreme Court in the cases of **Rana Tanveer Khan v/s Naseer-ud-Din & others (2015 SCMR 1401)** and **Sufi Ghulam Mohyuddin v/s. Khushi Muhammd & 2 others (1997 SCMR 924)** argued that once a case has been fixed for recording of evidence and a party requests for adjourning the matter to a further date(s) for the purposes of adducing evidence and if it fails to do so on the next date provisions of Order 17 Rule 3 are attracted, especially when adequate opportunities have been availed and caution was also issued. A request was made to dismiss the instant appeal. Learned AAG also echoed same views.

7. Heard both the sides and the learned AAG.

8. Admittedly before the trial Court issues were framed on 24.10.2014 on which date Mr. Mansoor Sheikh, Advocate was also appointed as Commissioner for recording of evidence with strict directions

that evidence of the parties could be completed expeditiously. Relevant part of that day's order is reproduced below:-

*“The plaintiffs shall file their affidavits-in-evidence before the Commissioner on the aforesaid date, on which date all the defendants should also be present to receive copies of affidavits-in-evidence of the plaintiffs. The Commissioner, in any case, shall not allow more than one adjournment to either party to postpone the evidence, thereafter on second request of adjournment the Commissioner will straightaway file interim report with an application for urgent hearing in Court so that the side of the defaulting party may be closed for the purpose of evidence/cross examination as the case may be. The learned Commissioner is directed to conclude the commission within a period of three months from 22.1 1.2014.”*

9. It is also evident from the record that the plaintiff failed to complete her evidence and interim report was filed by the commissioner for recording evidence on 24.12.2014 with a request that his appointment as commissioner may be withdrawn. Again by order dated 05.8.2015 Mr. Raja Aftab Ahmed, Advocate was appointed as commissioner for recording evidence with directions to complete the evidence within next four months' time. Again the plaintiff could not lead evidence before the commissioner whereafter through order dated 10.3.2016 commissioner's time for recording evidence was enlarged further period of three months. On 31.5.2016 the commissioner informed the Court through a report that the plaintiff despite notices dated 01.4.2016 and 14.4.2016 did not turn up and he also requested that his appointment as commissioner may also be withdrawn.

10. As evident, from 24.10.2014 till 22.05.2018 while two commissioners were appointed who returned the commission and thereafter the plaintiff chose to have the evidence recorded in the Court, where matter came up for recording of evidence on a number of occasions but in particular on 03.03.2017 Court held that *“Today the matter is fixed for examination of plaintiffs but no one is present nor there is any intimation for such absence. If one the next date of hearing plaintiffs failed to examine themselves or lead evidence then their side to lead evidence will be closed and matter shall be proceeded further. To come up after two*

weeks". On 06.04.2018 Court ordered that *"Since the plaintiff is appearing in person and the case is fixed for evidence. Office is directed to issue specific date and time for recording evidence of the plaintiff"*. Whereafter, matter came up on 30.04.2018 and the fateful date of 22.05.2018.

11. In these circumstances where ample opportunities were given to the plaintiff to record her evidence by commissioners initially and later in the Court and she having chosen not have her evidence recorded, provisions of Order 17 Rule 2/3 are attracted. These Rules are reproduced in the foregoing:

Order XVII

Rule 2. Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

3. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding each default, proceed to decide the suit forthwith.

12. In these defaulting circumstances, keeping in mind the provisions of Order 17 Rule 1(2) which postulates the efficiency in recording of evidence and requires *that once the hearing of evidence has begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded*, the Hon'ble Supreme Court at numerous occasions has held that no concessions be given to the defaulting party. In the case reported as **2014 SCMR 637 (Syed Tahir Hussain Mehmoodi v/s. Agha Syed Liaqat Ali)**, the Apex Court held that *where Order XVII , Rule 3, C.P.C. was duly attracted, the court had no option except to take action in accord therewith*. In the case of Rana Tanveer Khan (ibid) where plaintiff had filed a suit, in which issues were framed and the parties were put to trial and plaintiff on his request availed four opportunities for adducing his evidence and on two such occasions he was cautioned of

next opportunity as being the last one, yet he failed to produce his evidence whereupon the evidence of the plaintiff was closed and the suit was dismissed for the lack of proof, the Apex Court held that *where the party made a request for adjourning the matter to a further date(s) for the purposes of adducing evidence and if it failed to do so, for such date(s), the provisions of Order XVII, Rule 3, C.P.C. could be attracted, especially in the circumstances when adequate opportunities on the request of the party had been availed and caution was also issued on one of such date(s), as being the last opportunity.* In the case of **Sufi Ghulam Mohyuddin (ibid)** where plaintiff who had earlier failed to produce evidence and when on the final date set for that purposes, rather than recording evidence, chose to file application for adding parties and the trial Court closed plaintiff's evidence and dismissed the suit, the Apex Court held that there were no reasons to justify interference and leave to appeal was refused.

13. As evident from the foregoing analysis, the plaintiff who had been given numerous opportunities to record her evidence, failed consecutively and even on the last date when the matter was fixed by Court to a future date in her presence and notice of the date was also served upon her, she instead of proceeding with recording of evidence, pleaded that she may engage a counsel, such a conduct in our humble view, do not warrant any concession nor a lenient view can be taken of these circumstances in the light of the dictum laid down by the Hon'ble Supreme Court referred hereinabove. These were the reasons on account of which through our short order dated 16.12.2019 we chose to dismiss the instant appeal, however with no orders as to cost.

Judge

Judge