

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
II-Appeal No. 07 of 2019

Date Order with signature of Judge

1. For orders on office objection.
2. For hearing of CMA No. 502 of 2019.
3. For hearing of main case.

20th January 2020.

Mr. Zia-ul-Haq Makhdoom, advocate for appellant.

Salahuddin Panhwar, J:- *At the outset,* learned counsel for the appellant contends that impugned judgments are against the settled principle of civil administration of justice; defendants were declared *ex parte* and directions were issued to submit *ex parte* proof, which was submitted and appellant was examined by the trial Court; appellant produced pay orders in favour of builder with regard to purchase of flat; ample evidence was produced before trial court but it was held that he failed to examine marginal witnesses, hence both the Courts below decided the issue against the appellant. Appellant is ready to produce marginal witnesses before the trial Court. Besides, counsel contends that appellant was under impression that since defendants have been declared *ex parte* with direction to submit *ex parte* proof, therefore, appellant was not aware about the legal consequences that case can be decided otherwise despite his examination and production of pay orders in favour of defendant.

2. No doubt, trial court and appellate court are *not* only competent but *legally* obliged even in *ex-parte* proceedings to do the *justice* which always requires *judicial care* and *caution*, on basis of legal appraisal of available material. In the case reported as *East & West Steamship Co. v. Queensland Insurance Co. (PLD 1963 SC 663)* the Honourable Supreme Court held:-

'There can be no doubt of the duty of the Court to ensure, even when proceeding *ex parte*, that its decision is in accordance with the facts, which should be ascertained with as much care as is possible in the absence of any contesting party.'

Thus, *legally* the plaintiff, even in *ex parte* proceedings, would continue under an obligation to discharge his obligations (*prove case*) and not upon weakness of the opponents. Thus, *normally*, plea of being under wrong impression would never be available to justify one's own failure. The *circumstances*, so pressed, appear to be *little* different as the document (*booking file etc*) are documents of the builder *himself* and he (appellant) claims to be in position to discharge his burden, at all material times. Therefore, it would be appropriate to give an *opportunity* to appellant / plaintiff to discharge his burden which, however, shall be tested on settled touch-stone. Further, it may also be added that the Courts are also competent to call and examine witness (Order XVI r 14) which exercise should be exercised as and when administration of justice so demands. Since plaintiff is ready to produce marginal witnesses or other witness in order to establish his case, thus it would be in the interest of justice to allow an opportunity against knock out of claimed *bona fide* mistake of counsel. Accordingly, I hereby set aside both judgments passed by the trial court, as well appellate court remand the case back to trial court. The appellant would be at liberty to produce the marginal witness or other witnesses and trial Court would be competent to examine the issue after issuing notices against the defendant afresh and provide opportunity to all the parties as provided under the law.

Appeal disposed of accordingly.

J U D G E