

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
R.A. No. 119 of 2016.

Date Order with signature of Judge

1. For orders on office objection.
2. For hearing of CMA No. 826 of 2017.
3. For hearing of CMA No. 9841 of 2016.
4. For hearing of main case.

20th February 2020.

Mr. Haider Waheed, advocate for applicant.
Mr. Jawwad Rizvi, advocate for the respondent.

Heard learned counsel for the respective parties.

2. Precisely relevant facts are that respondent [plaintiff in suit] filed suit for declaration and permanent injunction, applicant [defendant in suit] were served, however they failed to file written statement within stipulated period though time was extended; on their failure suit was decreed by judgment dated 14.3.2013; such order was challenged in Civil Appeal which was dismissed in non-prosecution, however, application under order 9 rule 9 CPC was preferred at belated stage and that was also dismissed as time barred.

3. At the outset, learned counsel for the applicant contends that on similar grounds many cases were filed with regard to installation of Mobile Towers wherein issue was decided in favour of the Tower companies, whereas, counsel for the respondent while relying upon case law reported as 2002 CLC 533, 2012 CLC 1290, 2013 YLR 741, PLD 2014 (Sindh) 114 and 2015 MLD 24 contends that impugned judgments recoded by both courts below are in accordance with law. At this juncture, it would be conducive to refer relevant paragraph of judgment passed by the trial Court which is that:-

“The defendant was served and Mr. Syed Majid Ali, Advocate filed statement on behalf of the defendant on 11-12-2012. Perusal of record shows that since 11-12-2012 till to date i.e. 7 date of hearing viz 11-12-2012, 20-12-2012, 12-01-2013, 22-01-2013, 12-02-2013, 06-03-2013 and 14-03-2013, neither any defendant’s official was appeared nor written statement was filed. Record further reveals that Mr. Syed Majid Ali, Advocate, who appeared on behalf of the defendant under what capacity and power has filed the adjournment applications without filing the Vakalatnama/power on behalf of the defendant.

Heard the learned advocate for the plaintiff and perused the R & Ps of the case. The order 8 rule 10 CPC provides procedure when party fails to present written statement called for by the Court. The provision provides that where any party, from whom a written statement is so required fails to present the same within time fixed by the Court, the court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit."

It would also be convenient to refer relevant portion of the judgment passed by the appellate court, which is that:-

"From perusal of the record it appears that this civil appeal was received by way of transfer from learned A.D.J-V, Karachi East at the stage of arguments. It further appears from the record that several last chances were given but appellant counsel chosen to remain absent therefore, this Court passed the order dated 24.02.2016 thereby dismissed this civil appeal, for non-prosecution. It further appears that after passing of said order, appellant side remained quit but on 06.05.2016, an application under order 9 rule 9 CPC was filed without seeking condonation of delay in filing of the same to which, this Court passed the order directing the learned counsel to argue on limitation aspect. After passing of that order, learned counsel for the appellant preferred an application under section 5 of the limitation act read with section 151 CPC on 13.08.2016. In the accompanied affidavit, at para-3, appellant had disclosed that he had no knowledge about the order dated 24.02.2016 and he came to know the same after receiving notice sent by counsel for the respondent. This content of para-3 of the affidavit reflects that appellant admitting his negligence that he had no contact with his advocate. In para-6, it is further disclosed that previous counsel did not intimate the fat (fate) of the case or his non-availability in Pakistan, appellant would have definitely appeared in the matter and defend it. This content has been mentioned without disclosing the reason as to why appellant was quit and was not contacting his counsel to know that fat of this case. This clearly shows that he was not vigilant; therefore, he remained quit and did not contact with his counsel. On this score, learned counsel for the respondent has submitted that law and equity help those which are diligent and vigilant in the prosecution laxity and lack of proper prosecution by a party cannot be condoned by the Court unless party satisfy the Court with sufficient cause. This argument of learned counsel for the respondent, in the present scenario, requires consideration on the ground that firstly there is no sufficient cause with the appellant for condonation of delay in filing instant two applications, secondly, from the judgment of learned trial Court it appears crystal clear that same attitude was being displayed at the trial Court; therefore, learned trial Court, finding no other option, pronounced the judgment against the appellant."

5. Perusal of both courts' judgments shows that defendant was declared exparte but there was no direction that plaintiff shall file exparte

proof or lead evidence. Further, it shows that merits of the suit were not considered by both Courts below merely due to failure of filing of written statement by the defendant and the suit was decreed on the same day. The Order VII of the Civil Procedure Code is procedural one which is aimed to compel the defendant to file his pleading (written statement) within period, provided by the procedure but the failure thereof (procedure) should not *normally* be used as a sword to deprive the defendant from his valuable right to say his case which, *otherwise*, is in line with universal principle of **'nobody should be condemned unheard'**. The status and the application of the Order VII of the Code is **'procedural'** one, as held in the case of Kailash v. Nanhku & others (2005) 4 SCC 480 (AIR 2005 SC 2441) , reaffirmed in case, reported as 2013 SCMR 137 (*Supreme Court of India*) holding therein that:

“The purpose of providing the time schedule for filing the written statement under Order VIII, rule 1, CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the court to extend the time. Though the language of the proviso to Rule 1, Order VIII, C.P.C. is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. **The provision being in the domain of the procedural law, it has to be held directory and not mandatory.** The power of the court to extend time for filing the written statement beyond the time schedule provided by Order VIII, Rule 1 C.P.C. is not completely taken away”
(*Underlining has been supplied for emphasis*)

Further, the penal consequences, arising out of said procedural law, are directory in nature and not mandatory which is evident from the use of the word **'may'** in the Rule-10 of the Order-VIII of the Code.

5. It is settled principle of law that courts are bound to adjudicate the issue on merits even in *ex parte* proceedings, civil court was under obligation to examine the contents of plaint, provide chance of leading evidence to the plaintiff as well as to provide an option to the defendant to cross-examine the witnesses and even hear the defendant who was debarred, who was competent to argue the case, but in questioned judgments no such exercise was undertaken and suit was decreed as prayed. Accordingly, impugned judgments recorded by both courts below are *ab intio void* therefore, are set aside; case is remanded back to the trial Court to proceed after providing an opportunity to the defendant to file written statement and after framing the issues in accordance with law. This exercise shall be completed within three

months after receipt of this order. Accordingly, bank guarantee as received by this Court pursuant to order dated 06.02.2017 is hereby released.

JUDGE

SAJID