

(15)

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Suit No.1303 of 2007

DATE: **ORDER WITH SIGNATURE(S) OF JUDGE(S).**

1. For hearing of CMA No.2625/19 ^{21/6}
2. For Final Arguments.

12.09.2019.

Mr. Javed Asghar, Advocate for the Plaintiff.

M/s. Saadat Yar Khan and Ashraf Yar Khan, Advocates for the Defendant.

1. This application has been filed by Defendant for recalling the order dated 01.02.2019, whereby two CMAs filed by Defendant, being C.M.A. Nos. 5074 and 7490 of 2015 along with CMA No.7190 of 2018, were dismissed. The main reason given in the present Application is that the learned Counsel for the Defendant was busy before the learned Division Bench on that day.

It is submitted that since afore-mentioned CMAs, *particularly*, first two applications were pending, therefore, Defendant did not lead the evidence before the learned Commissioner and consequently, the side of the Defendant was closed on 07.05.2015, against which the above third CMA No.7190 of 2018 was filed. It is further submitted that great injustice will be done to the Defendant, if present Application (C.M.A. No.2625 of 2019) is not granted and the afore-mentioned applications are not restored to their original position because through the above first two applications, the Defendant is seeking permission to bring on record the material documents required in the evidence to prove the case of Defendant. It is further stated that it is a settled rule that cases have to be decided on merits rather than technicalities.

Above arguments are controverted by Mr. Javed Asghar, learned counsel appearing for the Plaintiff. It is firstly submitted that one of the first two applications, that is, C.M.A. No.7490 of 2015 was filed on 12.05.2015, that is, not when the evidence proceeding was being conducted by the learned Commissioner, but after closure of side of Defendant to lead further evidence, that is, on 07.05.2015, as highlighted in the Commissioner's Report dated 23.05.2015, which is available at page-815 of the Court's file. The next submission is that it is wrongly stated by Defendant side that Plaintiff filed objections / Counter Affidavit to the first two applications after three years, but the fact of the matter is, that Counter Affidavits were filed after almost ten months and few weeks, respectively. It is stated that there were no justification for Defendant not to participate in the evidence proceeding and lead his evidence.

Arguments heard and record perused.

The main emphasis of Defendant's counsel for moving first two applications is that certain material documents came into the possession of Defendant at a subsequent stage of proceeding and not earlier. There is no plausible reply to a material factual aspect that one of first two applications, that is, C.M.A. No.7490 of 2015 (filed on 12.05.2015), was in fact filed after the closure of side and not during pendency of evidence proceeding. The Commissioner's Report dated 23.05.2015, has mentioned that due to absence of Defendant's side "on 4 dates of hearing without intimation", has resulted in closure of his side to lead evidence on 07.05.2015.

The simple answer to the main ground of Defendant for not participating in the evidence proceeding, is that the Defendant should have led the evidence and simultaneously also proceeded with the afore-referred Application(s). There is no justification in not appearing before the learned



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Commissioner on an assumption that some application is pending or a party, in the present case the Defendant, intends to file some new application. *Secondly*, no plausible ground or defence has been setup by the Defendant's legal team for filing the application for reopening the side after three long years, which should have been filed forthwith. *Thirdly*, the Defendant's side could not point out any illegality in the order dated 01.02.2019 (sought to be recalled), *particularly*, any error floating on the face of record, which can justify recalling of the said order. In these circumstances, the ~~present~~ application [C.M.A. No.2625 of 2019] cannot be allowed and is dismissed accordingly.

Riaz / P.S.

Judge

For Final Arguments



CA No Sit no. 1305/07

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