

IN THE HIGH COURT OF SINDH, KARACHI
High Court Appeal No. 10 of 2022

PRESENT:

MR. JUSTICE AQEEL AHMED ABBASI
JUSTICE MRS. KAUSAR SULTANA HUSSAIN

Hearing/Priority Case

1. *For hearing of main case.*
2. *For hearing of CMA No.47/2022.*

25.08.2022:

Mirza Sarfaraz Ahmed, advocate for the appellants.

M/s. Neel Keshav & Anwar Ali Tunio, advocates for the respondents.

ORDER

Instant High Court Appeal has been filed by the appellants, against an order dated 14.12.2021 passed by the learned Single Judge in Suit Nos.874/2004 & 716/2008, whereby, according to learned counsel for the appellants, side of the appellants for recording evidence has been closed on the pretext that in view of order dated 12.03.2021, the defendants' witnesses were required to be examined on 20.03.2021 at the given time, and in case of failure the side of the defendants was to be closed.

2. Learned counsel for the appellants has readout the impugned order passed by the learned Single Judge in the aforesaid both Suits and has also referred to the Commissioner's report dated 20.04.2021 referring the matter to the Court, and submitted that on the fateful date, both the witnesses were present, however, only one witness was examined by the Commissioner at the given time, as the other witness was could not reach at 9.30, who however, reached the Consultation Room for recording evidence on the same date at about 11.00 a.m., whereas, his presence was even noted by the counsel for the plaintiffs and the learned Commissioner both, but the learned Commissioner chosen not record his statement, and without closing the side as was being pressed by the learned counsel for the defendant, sent the reference to the learned

Single Judge for further orders. However, the learned Single Judge, instead of directing the Commissioner to record the evidence of said witness, passed the impugned order while mis-interpreting the earlier order already passed in the instant case, according to which, both the witnesses were required to be examined by the Commissioner on the same day, whereas, there was no order by the Court requiring the Commissioner to record the evidence of both the witnesses at the same time. It has been contended by learned counsel for the appellants that both the witnesses are the marginal witnesses of the subject agreement, therefore, they could not have been examined at the same time, whereas, the procedure for recording evidence of such witnesses is that at the time when evidence of one of the witnesses is recorded the other witness is not allowed to be present before the Commissioner recording evidence, so he may not be allowed to improve the case after hearing the questions being put during cross by other side. According to learned counsel, the matter is unnecessarily being lingering on, therefore, requests that impugned order may be set-aside and the remaining witness may be allowed to be examined by the Commissioner on the next date of hearing, which may be fixed by this Court.

3. Conversely, learned counsel for the respondents has opposed such submissions of the learned counsel for appellants and submits that the appellants in order to cause delay and to improve their case did not produce both the witnesses on the given time before the Commissioner, nor made any request for adjournment while disclosing reasonable ground, therefore, they are not entitled for any further concession in this regard. According to learned counsel for the respondents, the learned Single Judge has rightly ordered for closing the side of the appellants as the matters are pending since along, whereas, the appellants want to improve their case. It has been prayed that instant High Court Appeal being devoid of any merit is liable to be dismissed.

4. Heard the learned counsel for the parties, perused the impugned order and the record of the case with their assistance, which reflects that

inspite of the fact that both the witnesses were available on the said date for recording their evidence, whereas, evidence of one of the witness has been recorded by the Commissioner at the given time, when the other witness was present in the Consultation Room on the same day as fixed by the Court, the learned Commissioner could have recorded the evidence of other witness as well thereafter, once he was admittedly present in the Consultation Room. However, the learned Commissioner, instead of recording the evidence of other witness, without closing the side of the appellant, referred the matter to the learned Single Judge, who has passed the impugned order on the pretext that both the witnesses were directed to be examined at the same time, and further drew an inference that the appellants were not willing to get the evidence of both the witnesses recorded on the said date. We may observe that if the learned Commissioner would have made an attempt to record the evidence of second witness, and in case of refusal by such witness to record his evidence only then the side of the appellants could have been closed. However, in the instant case, it appears that no such effort was made by the Commissioner, nor the second witness or his counsel appears to have refused to record the evidence on the fateful date. Accordingly, in order to avoid further delay in the instant case, impugned order to this extent is hereby set-aside, with the directions to the learned counsel for appellants to produce their second witness before the learned Commissioner on 17.09.2022 at 11.00 a.m., when evidence of such witness shall be recorded. However, it is clarified that if, on the said date and given time, the witness of the appellants does not appear for recording evidence before the learned Commissioner, the side of the appellants will be treated as closed without further orders.

Instant High Court Appeal stands disposed of in the above terms along with listed application.

JUDGE

JUDGE