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ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
Ist. Civil Appeal No.04 of 2013.

DATE OF HEARING	ORDER WITH SIGNATURE OF HON'BLE JUDGE
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For Hearing of main case.

29.09.2017

Appellant No.1 is present in person.

Mr. Muneer Ahmed Khokhar, advocate for the appellant No.2.

Mr. Akeel Ahmed Bhutto, advocate for the respondent.

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Through this appeal, the appellants have impugned judgment dated. 26.09.2013, whereby the suit was dismissed under Order 17 Rule 3, C.P.C. Appellant No.1 has made his submissions in person whereas the appellant No.2 is represented by Counsel. Both of them submit that on 26.09.2013, the appellant No.1 as well as appellant No.2 were engaged in certain matters listed at S.No.103 & 111 of the cause list before a Division Bench of this Court. It is further submitted that on 26.09.2013, the appellant No.1 was present before the trial Court and had placed on record an adjournment application mentioning therein the Petition Numbers, however, the Court did not appreciate the same as cause list was not annexed. In support of their contention they have relied upon the cases of *Saro Textiles Registered v. Regent Textile Industries Ltd. 2017 CLC 429*, *Muhammad Aslam v. Nazir Ahmed 2008 SCMR 942*, *Government of N.W.F.P v. Tahir Shoaib Rashid Shoaib 1998 CLC 1680*, *Transtech Ltd. V. Pakistan Tobacco Company Ltd. 2004 MLD 1242* and unreported judgment of learned Peshawar High Court in CR. No.54 of 2014 dated 25.04.2016.

On the other hand learned Counsel for the respondent submits that the impugned judgment is correct in law and facts, whereas several chances were given to appellants to lead the evidence but they failed and, therefore, the suit was correctly dismissed under Order 17 Rule 3 C.P.C.

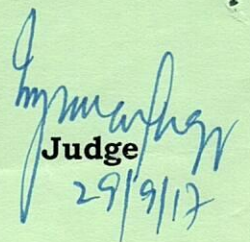
I have heard both the learned Counsel and perused the record. At the very outset on merits of the case, it may be observed that the learned trial Court has seriously erred in law and facts as well, by not appreciating that the both plaintiffs were required to be present in their cases before a Division Bench of this Court. The cause list of 26.09.2013 has been placed on record and, therefore, a valid ground was made

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out for adjournment on the very fateful day. Merely for the fact that in the adjournment application, copy of cause list was not annexed, the adjournment request could not have been refused. If production of cause list was that necessary, then at least a chance ought to have been given to the Plaintiffs for producing the same. It is also noted that plaintiff No.1 was himself present before the Court and, therefore, in such circumstances, the matter could not be termed and called as a case of default. In fact reasonable excuse was placed before the Court to adjourn the matter for the next date instead of passing the impugned order, whereas, the conduct of plaintiff on the fateful day cannot be called as deliberate avoidance to lead evidence.

Even otherwise, Order 17 Rule 3, C.P.C does not provide that when a matter is listed for recording of evidence by any of the parties, the same could ordinarily be dismissed in default. At the most is to close the side of the party who has failed to lead the evidence. In this matter when the plaintiff was himself present before the Court, he could have been asked for appearance in the witness box. Moreover, the Court could have proceeded in terms of Order 17 Rule 2, C.P.C. All this has not been done in this matter and the Court has gone to the extent of dismissing the suit under Order 17 Rule 3, C.P.C. It is settled proposition that the matters are to be decided on merits instead of technicalities and parties are to be allowed to lead evidence in support of their cases. The Hon'ble Supreme Court in the case of *Muhammad Aslam (Supra)* has dealt with an identical situation and has been pleased to hold that when a plaintiff fails to lead evidence on a given date, the Suit cannot be dismissed in terms of Order 17 Rule 3 forthwith and instead resort can be made to Order 17 Rule 2 CPC when the plaintiff is present before the Court. Same principle has been followed in the other cases relied upon on behalf of the Appellants.

In view of hereinabove facts and circumstances of this case the impugned judgment dated 26.09.2013, passed in Suit No.01 of 2010 by IV-Additional District Judge, Larkana, is hereby set aside and the matter is remanded to the said Court for deciding the same on merits. Appeal stands allowed in the above terms.


Judge
29/9/17