

HIGH COURT OF SINDH, AT KARACHI

SUIT NO. 433 OF2000

PLAINTIFF : Mrs. Shabina Aziz
Through Mr. S. Mazhar-ul-Haq Advocate

DEFENDANT : State Life Insurance Corporation of Pakistan
Through Mr. Muhammad Aziz Khan

DATE OF HEARING: 04.09.2013

DATE OF ANNOUNCEMENT:

ORDER

NAZAR AKBAR, J. The Defendant through CMA No. 7439/2010 (Application under Order XIII Rule 4 CPC) seeks issuance of summons to Dr. Najeeb Bashir, FRCP, Consultant Cardiologist or any other Doctor from Aga Khan University Hospital as a Court Witness to verify the letter dated 02.07.1999 written by said Dr. Najeeb Bashir in response to Defendant's letter dated 30.06.1999. It is also prayed in this application that said Doctor or any other Doctor from Aga Khan University Hospital to produce record of patient namely Azizul Haq Butt.

2. The learned counsel for the Plaintiff in his comprehensive counter affidavit has vehemently opposed this application. He has rightly pointed out that the application should not have been filed under Order XIII Rule 4 CPC as the correct provision of law for calling the witness through the Court is Order XVI Rule 1(2) CPC which requires the parties to first file list of witnesses before seeking indulgence of the Court for calling the witnesses. His main thrust of argument is that the application is highly belated and sufficient cause has been shown to call witness.

3. The defendant's counsel has also filed affidavit-in-rejoinder to the plaintiff's counter-affidavit to this application. However,

the rejoinder was merely a rejoinder as nothing has been said in addition to whatever has been stated in support of his application.

4. Learned counsel for the Defendant admits that they have not filed list of witnesses and documents within seven days of framing of issues by the court. To justify their non-filing of list of witnesses and documents, the counsel has referred to para-5 of the affidavit in support of the application. Para 5 of affidavit in support of application contains two reasons for the failure of defendant to file list of witnesses in time. Firstly, they failed as their counsel was not available in court when issues were framed by the court and secondly, the defendant believes that the circumstance they had narrated in an earlier application bearing CMA No. 6064 of 2008 for recalling three different orders against them as well as orders of court dated 12-12-2008 be treated as ground to condone the legal requirement of filing the list of witnesses and documents. He has also drawn my attention to para-5 of their written statement, wherein it is averred that the assured at the time of getting insurance has failed to disclose true facts to the defendants particularly that he was chronic alcoholic abuser for more than 12 years. Lastly it is contended by the defendants that since courts are generally required to decide the cases on merit the defendant through Dr. Najeeb Bashir may be allowed to produce his letter dated 29.10.1999 which in fact was in response to the letter of the Defendants. Similarly record of the hospital of at least 10 years prior to the death of assured AzizulHaque Butt is very material.

5. The issue involved in this application is whether the defendant's request for calling Court witness in the giving circumstances of the case is legal and permissible and whether it would adversely affect the case of the plaintiff. The defendants have not referred to any case law in support of the contention that this application should be granted in the light of any precedent.

6. In the case in hand the record shows that the issues were framed on 4.12.2000 and, therefore, seven days' time as mentioned in sub-rule (1) of Order XVI Rule 1 CPC expired on 11.12.2000 but the defendant not only failed to file the list of witnesses but

stopped attending the Court until his side for cross-examination of plaintiff's witness was closed on 22.3.2007, followed by another order dated 14.4.2008 closing the defendant's side for adducing evidence, and after hearing the arguments of learned counsel for the plaintiff on 21.05.2008 the Court reserved the case for announcement of the judgment/order. Suddenly everything came to the notice of the defendant when after eight years' absence, the defendant on 27.5.2008 came-up with an application under Section 151 CPC (CMA No.6046 of 2008) for recalling of all the aforementioned three orders. The said application was allowed by order dated 12.12.2008 subject to deposit of cost of Rs.50,000/- with the Nazir of this Court within fifteen days. I have purposely referred this application and its order since the order passed on this application has been mentioned in the affidavit filed in support of instant application as one of the grounds for grant of prayer for calling Dr. Najeeb Bashir as Court witness. I am unable to subscribe to the contention of learned counsel for the defendant that the order dated 12.12.2008 provides a ground to the defendant to file an application on 3.6.2010 for summoning a witness to support the case of the defendant. Such contention has been repeated even in the affidavit-in-rejoinder is totally misplaced. Neither in CMA No.6046 of 2008 nor in the order dated 12.12.2008 this Court had examined the question of failure of defendant to file a list of witnesses within seven days from 4.12.2000. Even if by any stretch of imagination the order dated 12.12.2008 has condoned the time for filing the list of witnesses, the defendant should have filed the list of witnesses and documents in 2008. Admittedly, till date no such list has been filed by the defendant and document sought to be produced by the defendant is dated 2.7.1999. This document was not even filed with the written-statement which was placed on record on 23.08.2000. This document was not even mentioned in the written-statement.

7. The other contention of learned counsel for the defendant that defendant has failed to file list of witnesses only because issues were framed by the Court on a date when he was not in attendance too has no force since the learned counsel for the defendant ultimately appeared in Court on 27.5.2008 and came to know that the issues

have been framed on 4.12.2000 in his absence but he has never filed any application for condonation of delay in filing the list of witness nor he filed list of documents which include the document available with the defendant even at the time of filing of written-statement. The record further shows that the deposition of defendant's sole witness Dr. Abdul Wahab Shaikh was recorded on 26.5.2010 and evidence of the defendant ought to have been closed as no other witness was in attendance. On that date for the first time the counsel for the defendant informed the Court that he has instructions from his client to call for medical record from the Agha Khan Hospital Karachi and he will file a proper application within a week's time. Even such request had no backing of law. However, the Court showed indulgence and did not close the side of defendant. The application (CMA No.7439 of 2010) was filed on 3.6.2010 by referring to an incorrect provision of law and unfortunately this application was also dismissed for non-prosecution on 27.11.2012, subsequently restored on the no objection of learned counsel for the plaintiff by order dated 1.2.2013.

8. Plaintiff's counsel opposes this application on the ground that the Defendants at a very late stage have filed this application without showing a "good cause" for calling / summoning the witness as the defendants have never filed the list of witnesses after framing of the issues. In support of his proposition the plaintiff has relied upon the following cases:-

- 1) *KHURSHID ALI AND OTHER VS. SHAH NAZAR (PLD 1992 Supreme Court 822)*
- 2) *PROVINCE OF PUNJAB AND OTHERS VS. MALIK IBRAHIM AND SONS AND ANOTHER (2000 SCMR 1172)*
- 3) *MST. MUSARRAT BIBI AND OTHER VS. TARIQ MAHMOOD TARIQ (1999 SCMR 799)*
- 4) *MUHAMMAD UMAR MIRZA VS. WARIS IQBAL AND OTHERS (1990 SCMR 964)*
- 5) *MST. MANZOOR FATIMA AND OTHERS VS. MAZHAR HUSSAIN SHAH AND OTHERS (PLD 1988 Supreme Court AJ&K 35)*

- 6) *MIAN MUHAMMAD HAFIZ VS. AZIZ AHMED (1980 SCMR 557)*
- 7) *MUHAMMAD KHALID VS. MST MEHMOODA KHANNUM (2008 YLR 1871)*
- 8) *IQBAL PAREKH AND OTHERS VS. KARACHI BUILDING CONTROL AUTHORITY (2008 CLC 1334)*
- 9) *STATE LIFE INSURANCE CORPORATION OF PAKISTAN AND ANOTHER VS. JAVED IQBAL (2011 CLD 948)*

Only 1999 SCMR 799 is the relevant one. In this case the Hon'ble Supreme Court has been pleased to hold that the failure to file list of witnesses is not mere a technicality, it amounts to violation of natural justice of the opposing party since the other side should have knowledge of witnesses of his rivals to prepare cross-examination in advance. The principle laid down by the Hon'ble Supreme Court in 1999 SCMR 799 has been followed / referred by this Court in 2008 YLR 1871 AND 2003 CLC 1334. These three citations were more than enough but the counsel has relied on nine case laws. Out of nine case-laws, five were totally out of context, not a single line has even a passing reference to support the case of plaintiff. It is indeed a matter of great concern that there has been a complaint of overwork in the Judiciary which is one of the basic obstacles in the administration of justice. It is not for the Courts alone to administer justice and ensure that the justice is not denied on account of inordinate delay in disposal of cases. It is equal responsibility of each and every lawyer appearing in Court that they should not consume the time of the Court out of proportionate to the issue in hand on the date of hearing. Had the counsel for the plaintiff not supplied copies of nine case-laws which include out of context five case law of the Hon'ble Supreme Court, this very order could have been passed at least two weeks earlier. A very valuable time of the Court has been consumed in reading of the case-laws which were not relevant. This, on the part of lawyers, is one of the major contributing factor in delaying administration of justice. It is expected that the counsel while presenting the case of their respective clients, they

should be brief and to the point as it will help save time of the Courts which in turn will again be utilized by the Courts in disposal of their other cases particularly the old cases of more than three decades.

9. The provisions of Order XVI Rule 1 CPC are mandatory. The use of the word “**shall**” both in Sub-rule (1) giving time frame of seven days to the party to file list of witnesses after settlement of issues is re-emphasised in sub-rule (2) with a prohibition that the party “**shall not**” be permitted to call witnesses other than those in the said list except with the permission of the Court on showing “good cause” for the omission of the said witnesses from the list. The time limit is an essential requirement of Order XVI Rule 1 CPC for seeking any relief with respect to summoning and attendance of Court witness. Limitation of seven days is imposed so that the other side should be well aware of possible evidence expected in the case to meet it in rebuttal. In case, such limitation is allowed to be flouted with impunity, the parties will keep on surprising each other by introducing witnesses and documents in evidence. It will not be against the merit either. In fact, after seven days of framing of issues, on failure to file list of witnesses a statutory right is accrued in favour of opposite party that even if evidence is available with a party such evidence shall not be used by the party having such evidence in their possession. This right is analogized to the right of parties under Section 3 of the Limitation Act, 1908. Rights survived but remedy is extinguished. Evidence may be available but its effect is barred after seven days of framing of issues by the Court. Therefore, not only the “good cause” has to be shown by the delinquent party for calling a witness through the Court but at the same time the applicant is required to explain the delay in disclosing the name of witness. The failure of party to explain delay would disentitle him from getting the relief. Therefore, it would be against the spirit of the provisions of law to casually condone the time limit given in sub-rules (1) of Order XVI Rule 1 CPC in the name of doing justice on merit.

10. The conclusion of above discussion is that the defendant not only have failed to advance a cogent reason for their failure to file list of witnesses within seven days from 4.12.2000 but they have also failed to give a satisfactory explanation about the delay in making this application for calling the Court Witness from Agha Khan Medical College Hospital. Consequently, this application has no merit, which is dismissed.

Karachi:

Dated:

JUDGE
