

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI.
Suit No.169/1981

Date	Order with Signature of Judge
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ORDER

Date of hearing : 29.10.2013

Plaintiff : Karachi Port Trust through
Mr. Ahmer Fazeel, Advocate.

Defendant No.1 : Sindh Agricultural Industrial Development Ltd.,

Defendant No.2. : Adamjee Insurance Co. Ltd., through
Mr. Naseemuddin Shaikh, Advocate.

For hearing of CMA No.7828/2006 (U/s. 151 CPC)
For hearing of CMA No.7829/2006 (U/o. XIII Rule 2 CPC)

NAZAR AKBAR, J:- The plaintiff has filed these two application (**CMA No.7828/2006**) and (**CMA No.7829/2006**) on 18.10.2006 for examination of the plaintiff's witness and production of two documents. It is stated by the learned counsel for the Plaintiff that by order dated 5.4.2006 the side of the plaintiff's evidence was closed. However, he has found some further documents, which are relevant and plaintiff intends to rely on them. The said documents were either unavailable or inexistent earlier. Therefore he has good cause for non-production of same at the time of examination of the plaintiff's witness.

2. The Defendant No.2 in their counter affidavit denied the assertion of the Plaintiff and contended that the Plaintiff evidence has been concluded and even evidence of the Defendant No.2 has also been completed. He further contended that the evidence of the Plaintiff was closed on 5.4.2006 and these application were filed in October 2006 i.e after more than six months and have not been

placed in Court for order for well over four years i.e until 01-11-2010 when the copies were supplied to the Advocate of the Defendant No.2. Thereafter the Plaintiff never pressed nor attempted to show any anxiety to get order on these applications. These applications were filed with ulterior motives and mala fide intention to delay the disposal on merit to the maximum. It is further submitted by the Defendant No.2 that the letter of Ministry of Ports and Shipping is a document which came into existence by writing letter by the Plaintiff on 7.10.2006. Regarding the affidavit filed by one Muhammad Younus son of late Usman Jooma, he contends that the averments of the same are vague and ambiguous and without any basis. The affidavit of Muhammad Younus does not disclose as to how and when the Plaintiff contacted him. All these allegations / averments are misconceived and have only be made with "ulterior motives" to delay the case and improve the quality of evidence of Plaintiff which otherwise has not established their case at all.

3. I have heard the learned counsel and perused the record. Since the suit is pending since 1981 and evidence has also been concluded, I felt is necessary to minutely examine the entire order sheet of 32 years before appreciating the contentions of either side on these applications.

4. The perusal of the Court file shows that the issues available at page 173 to 177 were framed as far as back on 24.10.1982 and a list of documents was filed by the Plaintiff on 10.2.1983, whereafter the case was listed for evidence. However, the Plaintiff failed to produce evidence in Court and ultimately after 16 years by consent of the parties Mr. Junaid Farooqi, advocate was appointed

Commissioner for recording of evidence on 14.10.1998 but nobody appeared before the Commissioner and after waiting for another five years on 27.1.2003 the Commissioner appeared in Court and informed that despite his efforts to contact the parties nobody has turned up, therefore, he may be denotified as Commissioner for recording of evidence. Subsequently when Plaintiff failed to produce evidence in Court, the suit was dismissed for non-prosecution by order dated 19.9.2003.

5. However soon after on 18.10.2003 an application under Order IX Rule 9 CPC was filed and it was allowed on **15.12.2004** subject to payment of cost of Rs.10,000/- with specific directions that on 27.1.2005 if Plaintiff failed to produce evidence the order of dismissal of suit shall be revived. The order was:-

On 27.01.2005 when the Plaintiff is directed to produce their evidence positively, failing which the order dated 19.9.03 shall stand revived.

The record reflects that evidence was not recorded on 27.1.2005. However, matter was repeatedly adjourned at the request of Plaintiff on 27.1.2005, 24.3.2005, 06.5.2005, 20.9.2005, 28.10.2005. The suit should have been dismissed on 27.1.2005 in terms of order dated 18.10.2005. However on **8.11.2005** once again subject to payment of cost of yet another Rs.10000/- Plaintiff's affidavit-in-evidence was taken on record with specific order that:-

"In case the cost is not paid affidavit-in-evidence will not be considered".

On the same day another application (CMA No.2181/2005) under Order XIII Rule 2 CPC for production of documents was also allowed subject to payment of additional cost of Rs.5,000/-. The record does not show that order of payment of Rs.10,000/- in delay of filing affidavit-in-evidence and Rs.5000/- for placing the documents on record has even been complied with. Despite non-compliance of order of payment of cost the proceeding continued and ultimately on 5.4.2006 deposition of the Plaintiff's witness was completed and Plaintiff closed his side for evidence. Without payment of Rs.15,000/- as per order dated 08.11.2005 the affidavit-in-evidence and document filed by the Plaintiff cannot be treated as valid evidence for and on behalf of Plaintiff.

6. In fact these applications were presented in Court on 18.10.2006. However, these applications were listed for orders on 01.11.2010 when copies were supplied to the counsel for the Defendant. The record does not show that these applications were ever listed between 12.2.2007 to 1.11.2010 nor any application for urgent hearing was ever filed by the Plaintiff despite the fact that these applications were filed before the start of evidence of the Defendant side.

7. Thereafter on 8.8.2006 copy of the affidavit-in-evidence of the witness of the Defendant No.2 was supplied to the counsel for the Plaintiff and on 27.9.2006 examination-in-chief of the Defendant's witness was recorded in Court and on 07.11.2006 Commissioner was appointed to record cross-examination of the witness of the Defendant. The case continued to be adjourned again and again even before the Commissioner without recording of cross-

examination. Then again on 05.4.2010 this Court fixed the date for cross-examination of the witness with clear observation that in case adjournment is sought, Commissioner shall impose cost of Rs.25,000/- to be paid to the other side by the parties seeking adjournment. After the order dated 05.4.2010 these two applications of the Plaintiff were listed for orders on 01.11.2010 and strangely enough the order sheet has shown these applications as of the year 2010 instead of 2006. However, on 01.11.2010 only copies were supplied to the other side.

8. On 13.12.2010, 14.2.2011 and 24.11.2011 these two applications were listed for hearing but Plaintiff counsel never pressed these applications. Again between 8.8.2011 to 15.1.2013 these applications were not listed and the Plaintiff never cared to check about their non-listing and he himself never filed any application for urgent hearing of these applications during the period of 07 years. The Commissioner for recording of evidence submitted his report on 8.3.2013 and 10.4.2013 when these applications were also listed for hearing but even on these dates the counsel for the Plaintiff instead of pressing his applications sought time to see Commissioner's report and obtain copy of deposition.

9. The pendency of these applications from the date of filing i.e 18.10.2006 till the date of hearing on 29.10.2013 shows that Plaintiff was never serious in disposal of the two applications on merits. Twice list of documents were filed by the Plaintiff, first after framing of issues on 10.2.1983 contains 20 documents and second list of document was fled with an earlier application under Order XIII Rule

2 CPC bearing (CMA No.2181/2005) containing seven more documents but the two documents sought to be produced after conclusion of the evidence of the Plaintiff were not mentioned in either of the two lists of documents filed by the Plaintiff. No plausible justification has been offered that why these documents were not mentioned in the pleadings or list of documents.

10. The analysis of 32 years of case history as summed up hereinabove coupled with un-explained circumstances which prevented the Plaintiff to file these documents with his witness before closing of their side for evidence leaves no room for the Court except to dismiss these applications with cost of Rs.10000/-.

11. While scrutinizing the Court record I find that the Plaintiff was three times taxed with the cost on account of his non-serious attitude to prosecute the case and the record shows that he has not complied with at least one crucial order dated 8.11.2005 when his affidavit-in-evidence was subject to payment of cost of Rs.10,000/- and application under Order XIII Rule 2 CPC was allowed subject to cost of Rs.5000/-. The Plaintiff is a corporate body and Plaintiff should file documentary proof of payment of cost of Rs.15000/- in terms of order dated 08.11.2005 within ONE week of this order. Otherwise his evidence shall not be considered by the Court. If the Plaintiff fails to show from their record that the cost was paid, the Plaintiff should deposit cost of Rs.25,000/- in the office of Nazir of this Court to be appropriated toward the Sindh High Court Clinic within 15 days and earn his right to argue the case on the basis of evidence recorded pursuant to order dated 08.11.2005.

12. The case may be listed for final arguments subject to cost of Rs.25000/- paid by the Plaintiff as observed above. Otherwise this suit should be treated as dismissed for want of evidence in respectful obedience of order of this Court dated 15.12.2004 read with orders dated 08.11.2005.

Karachi

Dated: _____

JUDGE

SM