

ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI  
Suit No.635 of 2000

DATE	ORDER WITH SIGNATURE OF JUDGE
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1. For hearing of CMA No.12257/2014.
2. For orders on Commissioner Report dated 28.11.2013.

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07.11.2016.

Mr. Aminuddin Ansari, Advocate for the plaintiff.

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1. Through this application, the plaintiff has prayed that this Court may be pleased to pass a Judgment and Decree under Order 12 Rule 6 CPC as defendant No.1 inspite of being served has failed to file any written statement and has been declared ex-parte vide Order dated 03.11.2003. Learned Counsel for the plaintiff submits that since the averments, as stated in the plaint, have gone unchallenged, therefore, the same amounts to admission and this Court can pass judgment and decree on such admission. Learned Counsel has read out Order 12 Rule 6 C.P.C. and has contended that the law is very clear and provides ample authority to the Court for passing such judgment and decree at any stage of the proceedings where admissions of fact have been made, either in the pleadings, or otherwise. Per Learned Counsel the use of word "or otherwise" in Order 12 Rule 6 CPC is relevant in the present Suit, wherein, no written statement has been filed by defendant No.1 and consequently whatever has been stated in the plaint is admitted. In support of his contention learned Counsel has relied upon the case reported as **2004 CLC 1019**

**(Col. ® Syed Mukhtar Hussain v. Chairman, Federal land Commission Islamabad and 3 others)**

I have heard the learned Counsel for the plaintiff and perused the record. Insofar as, the contention of the learned Counsel for the plaintiff to the effect that non-filing of written statement on behalf of the defendant amounts to an admission on the basis of which this Court can pass judgment and decree is concerned, I am not inclined to agree with such contention for the simple reason that non-filing of written statement would not amount to any admission as contemplated under Order 12 Rule 6 C.P.C enabling this Court to examine the same and pass a judgment and decree thereof. Mere debarring the defendants from filing written statement does not *ipso facto* disentitles the defendants to proceed further in the Suit, including cross-examination of the plaintiff's witness as and when the witness comes for his examination-in-chief, including arguing before this Court either on an application or at the time of final disposal. Moreover, the Court in such matters, wherein, the defendant has been declared ex-parte and remains absent even in the evidence and at the time of final arguments, has to be more cautious and is required to see the evidence led on behalf of the plaintiff and can also come to the conclusion, notwithstanding defendant's being ex-parte, that the Suit is liable to be dismissed or may pass any appropriate order. Therefore, the contention so raised on behalf of the plaintiff appears to be misconceived.

When Ex-parte proceedings are being carried on, Court has an additional burden and duty cast upon it, to ensure that the ends of justice are met and the interest of the party who has not

been able to defend its case for any reason whatsoever, shall be protected and must be dealt with in accordance with law. The Court is required to examine the affidavit in evidence filed in such proceedings and to see that the contention so raised is supported by evidence and supporting material or not. It is the duty of the Court to see whether the Plaintiff is entitled to the relief being claimed and if yes, then to what extent. The Suit cannot be decreed as prayed in such matters, until and unless the Court is satisfied in this regard. Moreover, in this case it appears that listed application has been filed at an early stage without even filing of any Affidavit in Ex-parte proof. Reliance in this regard may be placed on the case of ***Nisar Ahmed & another Vs. Habib Bank Limited (1980 CLC 981) and Messers Al-Pak Ghee Mills through Managing Partner Vs. Zeeshan Traders through Proprietor (2008 CLC 120)***

Insofar as, the case law relied upon by the learned Counsel for the plaintiff is concerned, it would suffice to observe that firstly the same has been passed in respect of deciding a Constitutional petition and not a Civil Suit which has somewhat different parameters in ascertaining the facts while deciding a legal question under the writ jurisdiction. This again is notwithstanding the fact that even otherwise; the judgment relied upon has been passed by the learned Lahore High Court and is merely persuasive in nature and not binding on this Court.

Reliance in this regard may also be placed on a judgment of the Hon'ble Indian Supreme Court in the case reported as ***Balraj Taneja and another v. Sunil Madan and another (AIR 1999 SC 3381)*** wherein the Court while considering a circumstance when

written statement was not filed by the defendant, held that the court is duty bound to adjudicate even in the absence of complete pleadings or in the presence of pleadings of only one party. Relevant observations are :--

"As pointed out earlier, the court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the court. In a case, specially where a written statement has not been filed by the defendant, the court should be a little cautious in proceeding under Order VIII, Rule 10, C.P.C. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of the court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the court may, in its discretion, require any such fact to be proved" used in sub-rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order VIII".

For the sake of repetition I must reiterate that in a case where written statement has not been filed, the Court should be a little more cautious in proceeding under Order VIII, Rule 10, C.P.C. (or for that matter under Order 12 Rule 6 CPC as contended on behalf of the plaintiff, which otherwise is surely not relevant in the given facts) and before passing a judgment, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment and decree could not possibly be passed without proving of the facts so pleaded in the plaint. It is only when the Court for recorded reasons is fully satisfied that there is no fact which needs to be proved, the Court can conveniently pass a judgment and decree against the defendant

who has not filed the written statement.

In view of hereinabove facts and circumstances of the case, on 7.11.2016 this application (CMA No.12257/2014) was dismissed by means of a short order while imposing cost of Rs.5000/- to be deposited in the Sindh High Court Clinic and these are the reasons thereof.

J U D G E

Ayaz P.S.