

IN THE HIGH COURT OF SINDH AT KARACHI

H.C.A NO.173/2015

Present: Munib Akhtar & Yousuf Ali Sayeed, JJ

Appellant: Sajida Yousuf, through Ms. Shabana Ishaque,
Advocate

Respondent No.1 Muhammad Zahid Khan, in person.

Respondent No.2 Mrs. Razia Yousuf, through Mr.Raja Aftab Ahmed
Khan, Advocate.

Respondent No.8 Federation of Pakistan through Mr. Asim Mansoor,
learned DAG.

Respondent No.9 Pakistan Employees Cooperative Housing Society
Ltd, through Mr. Saifuddin, Advocate.

Date of hearing: 13-02-2017.

Date of Judgment:

JUDGMENT

YOUSUF ALI SAYEED, J. This interlocutory appeal emanates from the Order made on 30.04.2015 (the “**Impugned Order**”) in Suit No. 486 of 2012 (the “**Underlying Suit**”) filed under the original civil jurisdiction of this Court, wherein the Respondent No.1 has sought a declaration as to title in respect of an immovable property, as well as consequential reliefs of injunction, possession, cancellation of documents, etc., principally against the Appellant in her capacity as the Defendant No.7.

2. Briefly stated, the sequence of events in the Underlying Suit leading up to the Impugned Order are as follows:

- (a) During the course of the evidentiary proceedings on commission, the side of the Defendant No.7 for cross-examination was closed by the Commissioner on 18.12.2014. Such closure was upheld by the Court vide Order dated 19.12.2014, and the commissioner was directed to complete the remaining evidence as per earlier orders.

- (b) On 07.01.2015, the Appellant filed applications bearing CMA No. 186/15 and 187/15 in the Underlying Suit, whereby she sought to have her side reopened for cross-examining the Respondent No.1, and verifying the signatures on certain documents relied upon by him.
 - (c) Due to absence of the Appellants counsel, these Applications were dismissed for non-prosecution on 03.02.2015, along with the Application for urgent hearing, bearing CMA No. 185/15.
 - (d) On 26.02.2015, the Appellant filed CMA Number 2697/15 in the Underlying Suit under Order 9, Rule 9 read with S.151 CPC, seeking restoration of these three earlier applications, which was followed on 20.03.2015 by CMA Number 4855/15 under S.151 CPC whereby it was prayed that the entire proceedings before the Commissioner appointed by the Court for recording evidence in the Underlying Suit be set aside.
 - (e) Both these Applications were dismissed vide the Impugned Order, hence this Appeal, whereby the Appellant has prayed *inter alia* that “the applications mentioned in CMA No. 2697/15 & 4855/15” (i.e. CMA Nos. 186/15 and 187/15) may be allowed.
3. Whilst considering these Applications and passing the Impugned Order, the learned single Judge noted that in praying for the proceedings conducted by the commissioner to be set aside, the Appellant’s basic contention was that no opportunity had been given to her on merits. It was also noted that certain highly objectionable allegations had been levelled against the learned commissioners, - one of whom is a retired Judge of this Court.

4. From a reading of the Affidavit filed in support of CMA No. 186/15 as well as the subsequent Affidavit in support of CMA No. 4855/15, it appears that these allegations were advanced so as to support the Appellants claim that she was the victim of a “criminal conspiracy” inter se the Respondent No.1 and not one, but two different commissioners who had in turn been appointed by this Court, and that she had thus been deprived of her right of cross-examination.

5. These allegations appear most implausible and it would serve no useful purpose for us to further scandalize the record by reproducing them here. Suffice it to say that learned counsel who now appears on behalf of the Appellant unreservedly extended an unequivocal apology on her behalf, and expecting that such apology has been extended with due contrition we have accepted the same and seen fit to look beyond these indiscretions.

6. What then merits consideration is the Appellant’s own conduct during the course of proceedings in the Underlying Suit and whether there was any deprivation of proper opportunity, as has been alleged. Indeed, it appears that whilst considering this very contention on merits, the learned single Judge duly examined the earlier Orders that had been passed in order to take stock of what had transpired. The relevant excerpts of some of these Orders, sequenced chronologically, are as follows:

23.09.2014

In case the defendants No.6 and 7 or their counsel do not appear on the date so fixed and the witness is in attendance, learned Commissioner may close the right of these defendants to cross examine the witness. The matter then to proceed in accordance with law.

30.10.2014

Should the defendant No.7 insist on pressing with these allegations then firstly, the said defendant shall have to be personally in attendance before the Court in support of this application on each date of hearing, secondly shall be liable if his application is dismissed to heavy costs and thirdly if the Court so deems appropriate in facts and circumstances of the case, liable also to proceedings under section 476 Cr. P.C.

20.11.2014

CMA No.14495 of 2014 is allowed, by consent of the parties, and side of defendant No.7 is opened for cross examination subject however, to a condition that defendant No.7 along with his counsel shall appear before the learned Commissioner on 29.11.2014 at 11.00 a.m. failing which the side of defendant No.7 shall remain closed and thereafter the side of defendant No.7 shall not be reopened.

05.12.2014

Today in Court entire set was supplied to the learned Counsel for defendant No.7 along with all annexures and exhibits. He is directed to be present before Commissioner on 18.12.2014 for recording evidence and cross examination of the plaintiff, failing his side will remain closed, in accordance with the earlier order dated 28.08.2014. On 18.12.2014 defendant No.7 shall pay fee of his share to the Commissioner.

19.12.2014

Today the position is same. Learned Counsel for the defendant No.7 has vehemently claimed that he has a right for cross examination that is wrongly deemed to have been closed and may be given chance for cross examination. Unfortunately, this Court can not show any further indulgence to the defendant No.7. The side of the defendant No.7 shall be deemed to have been closed and the remaining evidence if any is to be completed by the Commissioner, as per earlier orders of this Court. Adjourned.

7. From a reading of the aforementioned Orders it is apparent that the Appellant (i.e. the Defendant No.7 in the Underlying Suit) was afforded ample opportunity for cross-examination and was also put on notice as to the consequences of indolence/neglect in that regard in as much as her side was closed previously and then reopened with a note of caution.

8. Be that as it may, these opportunities were squandered, and the right of cross-examination appears to have been gambled in an endeavor to protract the proceedings. That the inevitable conclusion of this gambit came to pass in terms of the closure of the Appellants side for cross yet again is scarcely surprising, and we are afraid that the responsibility for this outcome rests on no one but the Appellant, or at the very least her counsel.

9. Whilst considering the matter we had called for the file of the Underlying Suit and examined the same in order to be able to properly appreciate what has transpired. As there was reference on the record of these proceedings to an earlier appeal bearing HCA No.250 of 2014, due examination was made of that file as well.

10. From the record of the Underlying Suit it appears that subsequent to the filing of CMA Nos. 186/15 and 187/15, the matter has taken on a new dimension as the dereliction shown by the Appellant's earlier counsel went beyond the failure to cross-examine, and extended to a failure to even file an Affidavit-in-Evidence, with the result that her side was closed, the commission concluded and returned executed. The Underlying Suit is accordingly at the stage of final arguments.

11. Furthermore, in terms of HCA No.250 of 2014, the Appellant had sought that the very Order of 28.08.2014 granting the commission for evidence in the Underlying Suit be set aside, albeit that this order had apparently been passed by consent, and had also thereby sought suspension of further proceedings before the commissioner. An examination of the file shows that the said appeal was instituted on 22.09.2014 and first date of hearing was 31.10.2014, when it was simply ordered that notice be issued to the respondents.

12. The matter then came up in Court on 27.03.2015, by which time the evidence in the Underlying Suit had already been concluded. A demonstrable lack of urgency is thus apparent from the record of that case, and it appears that no serious effort was made to pursue the matter by or on behalf of the Appellant. Ultimately, that appeal came to be withdrawn on 17.01.2017.

13. Learned counsel for the Appellant concedes her inability to argue against the position on record and accepts that undoubtedly there was a serious dereliction in duty on the part of the Appellants earlier counsel, who has since expired. Learned counsel further states that whilst she does not condone the manner in which the defense of the Underlying Suit had been conducted, she submits however that the endeavor of the Court should, as far as possible, be to adjudicate matters on merit so to do complete justice between the parties and that a party ought not to be unduly penalized for the omissions of counsel, especially in a case such as that at hand where the Appellant will be unable to seek recompense for such dereliction. Learned counsel also extends her assurance that having also taken on the brief in the Underlying Suit, she will ensure that the right of cross-examination is availed on behalf of the Appellant in a timely manner if a final opportunity is afforded in that regard.

14. The Respondent No.1, who appears in person, has vehemently opposed the Appeal. He submits that the side of the Appellant was rightly closed after affording numerous opportunities and there is no equity in favour of the Appellant for the same to be reopened.

15. Having examined the matter in some detail, we are of the view that whilst the conduct of the Appellant's defense in the Underlying Suit, the consequences of resultant delay could initially perhaps have been appropriately mitigated through imposition of costs rather than divestiture of the right of cross-examination and outright dismissal of CMA Nos. 186/15 and 187/15 for non-prosecution on 03.02.2015, which was the very first date that these applications came up in Court.

16. Accordingly, we are inclined to allow the Appellant a final opportunity to cross-examine the Respondent No.1's witnesses and to lead her evidence, subject however to payment by the Appellant of costs of Rs.50,000/- to the Respondent No.1 and a fee to the learned Commissioner of Rs.10,000/- for each witness of the Respondent No.1 proposed to be cross-examined on behalf of the Appellant as well as Rs.25,000/- for each witness to be examined from the Appellant's side. This will be without prejudice to the evidence already on record in as much as the cross-examination, if any, will take place on the basis of the examinations as already stands recorded and such documents as may have been exhibited.

17. In an endeavour to obviate the prospect of further controversy arising during the course of evidence, we hereby direct as follows:
 - (a) Within 7 working days of the date of the Judgment, the Appellant shall deposit the amount of Rs.50,000/- imposed by way of costs with the Nazir of this Court, and within this timeframe shall also deposit with the Nazir the aggregate amount of fee payable to the learned Commissioner computed on the basis specified hereinabove. The aggregate fee amount shall be paid by the Nazir to the learned Commissioner at his written request, and the costs payable to the Respondent No.1 may be released on application upon completion of the evidence.

- (b) Subject to deposit as per sub-para (a) above, the Nazir shall, within 3 working days, intimate the learned Commissioner accordingly.
- (c) The parties shall convene before the learned Commissioner on a date to be fixed by the learned Commissioner with prior written notice to them and their respective counsel, on which date the learned Commissioner shall fix a future date for cross-examination and allow a single opportunity to the Appellant to cross-examine the Plaintiff and his witnesses on that future date.
- (d) On the date fixed for cross-examination the Appellant must, if she intends to lead any evidence, file the affidavits of her witnesses with the learned Commissioner, and subject to such filing the learned Commissioner will then fix yet another date again at least two weeks ahead, on which future date the evidence of the Appellant's witnesses shall be recorded and cross-examination may take place or be scheduled accordingly.
- (e) It would be the responsibility of the Appellant and Respondent No.1 to present themselves and their witnesses for examination or cross-examination as the case may be on the dates so fixed and in case of default having been committed by either party on the said dates, the learned Commissioner shall be at liberty to proceed with the matter in accordance with law.
- (f) For further execution of the Commission in the above terms, the Deputy Registrar (O.S.) is hereby directed to forthwith communicate a copy of this Judgment to the learned Commissioner, Justice (R) Nadeem Azhar Siddiqui, and to deliver the evidence file of the Underlying Suit to the learned Commissioner as per his instructions.

18. This Appeal is thus allowed to the extent of the Appellant being allowed a final opportunity to cross-examine and to lead evidence strictly subject to the terms imposed.

JUDGE

JUDGE

Karachi
Dated _____