

IN THE HIGH COURT OF SINDH, AT KARACHI

HCA No.363/2016

PRESENT:

Mr. Justice Munib Akhtar

Mr. Justice Arshad Hussain Khan

Sharafat Ali Vs. Abdul Majeed

Appellant: Sharafat Ali
through Mr. Badrul Alam, Advocate

Respondent: Abdul Majeed
through Ms. Naheed Parveen, Advocate

Date of hearing: 25.04.2017

JUDGMENT

Arshad Hussain Khan, J: This High Court Appeal has been filed by the appellant against the order dated 06.10.2016 passed by the learned Single Judge of this Court in Suit No.527 of 2009, which was filed by the respondent against the appellant, whereby the learned Single Judge granted three applications; (i) application under Order XVI Rules 1 & 2 CPC (CMA No.9952/2016),(ii) application under Order XIII Rules 1 & 2 CPC (CMA No.9953/2016) and (iii) application under Section 151 CPC (CMA No.9954/2016) filed by the respondent.

2. Brief facts leading to the filing of the present appeal as stated therein are that the respondent (plaintiff) filed a suit for recovery of Rs.1,23,00,000/- under the provisions of Order XXXVII of the Civil Procedure Code being Suit No.527 of 2009 against the appellant. It is stated that wife of respondent namely; Mst. Shahjahan Begum is the owner of property viz. Sub Plot No.1 measuring 333.3 Sq. yards, Block-9, KDA, Scheme No.16, Federal 'B' Area, Karachi [said plot]. The said wife of the respondent constructed building consisting of ground + 4 upper floors on the said plot and the appellant throughout remained associated in the said construction work. Further stated that the said wife of the respondent, vide an agreement of sale dated 03.02.2007, had sold out 50% undivided share of the said property i.e. said plot and the building constructed thereon to the appellant for a total sale consideration of Rs.47,80,000/-. It is further stated that the

said wife of respondent, vide another agreement of sale dated 15.12.2008, agreed to sell her remaining 50% undivided share of the said property to the appellant for a total sale consideration of Rs.75,00,000/-. The appellant at the time of execution of said agreement to sell paid a sum of Rs.10,00,000/- to Mst. Shahjahan Begum (wife of respondent) towards the part sale consideration and for the balance sale consideration, the appellant issued twenty-six (26) post-dated cheques to said Mst. Shahjahan Begum in the manner that five cheques were in the name of respondent (husband of Mst. Shahjahan Begum) whereas the remaining twenty-one (21) cheques were blank without inserting the name of payee. It is also averred that Mst. Shahjahan Begum subsequently turned dishonest and in order to avoid the completion of sale transaction under the above said agreement to sell, filed the aforesaid Suit No.527/2009 through her husband, the respondent. In the said suit the appellant was granted unconditional leave to appear and defend the suit. On 12.11.2014, the issues were settled in the suit and list of witnesses and documents were directed to be filed besides, a Commissioner was also appointed for recording evidence. The appellant filed list of witnesses and documents in time, whereas the respondent although filed list of documents in time but he failed to file the list in the specified time. It is also averred that in the suit the respondent initially engaged and appointed Mr. Muhammad Qutubuzzaman Advocate as his counsel and then subsequently engaged and appointed another counsel namely; Tahira Shah Advocate as his counsel and finally on 30.9.2015, the respondent again engaged and appointed three more counsel presently representing the respondent. It is also averred that respondent has not got discharged the *Vakalatnamas* of his former advocates. On the contrary, on the *Vakalatnama* of present counsel, the previous counsel namely; Mr. Muhammad Qutubuzzaman, advocate also signed as a counsel of the respondent. It is also averred that the respondent in support of his case filed his own affidavit-in-evidence and he was duly cross-examined by the counsel of the appellant. It is further stated that the respondent after completion of his cross-examination in order to make up the weakness of his case and to fill up the lacuna and also to nullify the cross-examination, as an afterthought filed the aforesaid three applications. It is further averred that the said applications apart from being false and

incorrect were also belated being filed about one year and eight months after the settlement of issues. The appellant opposed all the said three applications by filing his counter affidavits denying and controverting the assertions and statements made in the said applications and the affidavits filed in support thereof but in reply thereto the respondent did not file any affidavit-in-joinder nor, in any manner, controverted the counter affidavits of the appellant. It is averred that the learned Single Judge by his order dated 6.10.2016 has granted all the aforesaid three applications and ordered for re-examination of the respondent for producing documents and also for summoning of the Bank Managers and production of records. The said order of the learned Single Judge is impugned in the present appeal.

3. Upon notice of the present appeal, the respondent filed counter affidavit denying the allegations leveled in the memo of appeal, it is, inter alia, stated that the learned Single Judge while passing the order, impugned in the present proceedings, has allowed re-examination of respondent only to the extent of those documents, which were left out but mentioned in the memo of plaint and summoning the Bank Manager to produce the record, which is relevant for just decision of the case. Further stated that the claims of the appellant relating to the said property are incorrect, false and based on forged documents. Further stated that due to irresponsible and negligent attitude to handle the case (Suit No.527/2009), the respondent was compelled to change his previous advocates from time to time. Further stated that the case of the respondent is pending adjudication since 2009 and could not be concluded due to delaying tactics of the appellant's counsel. Furthermore, the applications were filed in the month of June 2016 whereas the same were decided in the month of October 2016. It is also stated that the cross-examination of the respondent has been reserved and not yet been concluded due to the objections raised by the appellant's counsel in respect of the documents and witnesses, which though were mentioned in the plaint but could not be produced by the previous advocates. The documents, which were intended to be produced through witnesses, are necessary, important and relevant for just determination of controversy involved in the suit. Further stated that the list of witnesses was filed with a mere delay of three (3) days

that too because of the negligence of previous advocate. It is also stated that the suit of the respondent is a summary chapter suit and the defendant denied the claim of the respondent (plaintiff) therefore under the circumstances, bank report is of the utmost importance for just decision of the case on merit. Further stated that the learned Single Judge in the impugned order has clearly mentioned under the term No. (ii) that the appellant (defendant) shall be allowed to cross-examine only to the extent of documents so produced by the respondent (plaintiff). Further stated that the documents viz., agreement of 2002 and the bank report were clearly mentioned in the memo of plaint but the same could not have been produced at the time of examination-of-chief due to the negligence of previous counsel.

4. The learned counsel for the appellant during the course of his arguments while reiterating the contents of memo of appeal as well as affidavit in rejoinder, has contended that the impugned order dated 6.10.2016 passed by the learned Single Judge is not warranted on the facts and law. Further contended that the learned Single Judge while passing the impugned order has failed to consider the material facts that the appellant filed detailed counter affidavits to the applications bearing CMAs 9952, 9953 and 9954 of 2016 and the affidavits in support thereof categorically denying and controverting the assertions and statements made in the said applications, however, in reply thereof, the respondent neither filed any affidavit-in-rejoinder nor, in any manner, controverted the contents of counter affidavits of the appellant. The counter affidavits of the appellant in reply to the said applications of the respondent have thus gone unchallenged and un-rebutted and, therefore, no reliance can be placed on the assertions and statements made in the said applications of the respondent and the facts stated in the counter affidavits of the appellant ought to have been accepted as true and correct. It is also contended that the respondent's present counsel were engaged by the respondent on 30.9.2015, while the applications in question were filed in the month of June, 2016 after completion of cross-examination of the respondent on 16.6.2016. Further contended that in case the previous counsel of the respondent were negligent, the present counsel of the respondent ought to have filed such applications soon after their engagement as counsel in the

suit but the applications were filed by the respondent only after completion of cross-examination of the respondent after realizing the weakness of the case in order to make up the said weakness of his case and to fill up the lacuna and gaps. It is further contended that if the respondent was not satisfied with his previous advocate due to his irresponsible and negligent attitude, which resulted in change of his previous advocates, then his previous advocate should not have signed the Vakalatnama of the present counsel. The said act of the respondent clearly shows that the change of advocate was merely eyewash, with malafide intention to make up the weakness in the case, after completion of cross-examination of the respondent. It is also contended that the applications filed by the respondent were vague and uncertain as the respondent did not disclose or mention in the applications or in the supporting affidavits as to what further document he intended to produce nor mentioned any name of witness whom he intended to produce and examine as witness in the case. It is contended that the respondent failed to disclose any good or sufficient cause, which could justify the grant of his applications.

5. On the other hand, learned counsel for the respondent during the course of her arguments while reiterating the contents of counter affidavit, has contended that the order impugned in the present proceedings is well within the four corners of law and equity, hence does not warrant any interference by this Hon'ble Court in the present appeal. Furthermore, the learned Single Judge while granting the applications of the respondent has allowed the plaintiff to produce only those documents which, though were mentioned in the plaint, however, could not be produced and left out. And further the respondent was allowed only one witness that too the concerned Bank Manager in respect of transaction mentioned in the pleadings. It is also contended that no prejudice will be caused to the appellant in the event the respondent is allowed to produce documents and witnesses as per the directions contained in the impugned order.

6. We have heard the learned counsel for the parties and have also perused the material available on record.

From the perusal of record, it appears that the respondent filed a suit for recovery of amount under summary chapter against the

appellant and contested the suit initially by filing leave to defendant application and after its grant, by filing written statement. Issues were settled and evidence was started, however, the respondent, immediately after completion of his cross-examination, filed three applications being; (i) CMA No.9952/2016, seeking permission to file the list of documents and witnesses (ii) CMA No.9953/2016, seeking permission to file additional documents/main documents and (iii) CMA No.9954/2016 seeking directions to call the report from the concerned bank in respect of amount debited from the respondent's (plaintiff) account. The perusal of the aforesaid CMAs shows that the respondent through the said applications sought open-ended reliefs. Counter affidavits and rejoinder affidavits in respect of the said CMAs were exchanged between the parties. The learned trial court after hearing the counsel for the parties, vide its order 06.10.2016, allowed all the three applications of the respondent in the terms mentioned in the impugned order, which for the sake of ready reference is reproduced herein.

“06.10.2016

M/s. Naheed Parveen, advocate for the Plaintiff.

Mr. Badar Alam, advocate for Defendant.

1 to 3. Through listed applications the Plaintiff seeks to bring certain documents on the record which are otherwise born from the pleadings i.e. plaint. Plaintiff was dissatisfied with the performance of earlier counsel and therefore, he has changed the counsel. The record shows that certain basic thing which ought to have been done by the previous counsel being legal requirement has been left out. The previous counsel was not vigilant that is why side was closed and many of the instructions given by the Plaintiff had not been complied by the previous counsel. The evidence of the Plaintiff has not been concluded. The technicalities cannot come in the way of adjudication on merits. Therefore, all the three applications are allowed in the following terms:-

- (i) Plaintiff will be reexamined by the commissioner only for the purpose of producing the document which were left out but mentioned in the memo of plaint and no further statement about claim of Plaintiff will be allowed to be taken on record.
- (ii) Defendant shall be allowed to cross-examine only to the extent of document so produced by the Plaintiff.
- (iii) Banking transaction regarding the dispute were mentioned in the pleadings since these are official document of the bank, the Plaintiff is within his right to produce evidence of the bank Manager.
- (iv) Concerned Bank Managers shall be summoned by the Commissioner and they shall produce the relevant documents within four weeks.

- (v) The Commissioner for recording of further evidence of Plaintiff shall be entitled for fresh fee and fee of each witness of banks.

On completion of evidence of Plaintiff the Commissioner should examine witnesses of Defendants within two months subject to payment of Commissioner's fee already ordered.

Sd/-Judge”

[Underlining is to add emphasis]

7. It is well-settled that the principal object of legal formalities and procedural provision is to safeguard the interest of justice, and the procedural provisions, unless insurmountable, should not be allowed to defeat the ends of justice; the prescribed procedure, which is used always for the purpose of doing justice between the parties, should not come in the way of doing substantial justice; the most important duty of the Court of law is to do justice between the parties and in the absence of any express power, normally relief to a party should not be refused on technical grounds; and, civil courts, being courts of both law and equity, should dispose of cases on merits rather than on technical considerations. In this regard, reliance can be placed on the case of Anwar Khan v. Fazal Khan, (2010 SCMR 973).

8. In the present case, the respondent through the subject CMAs (applications) sought permission from the court to produce further documents and to examine concerned Bank Manager through the process of court of law in respect of transaction relating to subject controversy and to bring on record the real facts and official record of the bank for just and proper decision of the case. As valuable rights of the parties are involved in the case, hence, equity and administration of justice demand that the controversy between the parties may be decided on merits instead of technical ground.

9. From the perusal of the impugned order, it also appears that the learned Single Judge, having conscious of law and facts, while granting the subject applications, restricted the respondent to get himself re-examined only for the purpose of producing those documents, which though were mentioned in the memo of plaint but could not be produced were left out, it is clearly mentioned in the impugned order that no further statement about claim of plaintiff will be allowed to be taken on record. As regards the calling and examination of witness is

concerned, since the claim of the plaintiff is based on the negotiable instruments relating to banking transaction, details whereof are mentioned in the pleadings, and further the evidence has not yet been concluded, therefore, the Plaintiff has rightly been allowed to produce evidence of the Bank Manager. Furthermore, the appellant will have sufficient opportunity to establish his stance in the case through his evidence, which has not yet been started, hence no prejudice will be caused to the appellant in the event the respondent produces documents and examine Bank Manager under the terms of the impugned order.

10. The upshot of the above discussion is that we do not find any illegality and / or any infirmity in the impugned order, hence the present appeal being devoid of any merit is dismissed.

JUDGE

JUDGE

Karachi;
Dated:

*Jamil***