

## ORDER SHEET

**IN THE HIGH COURT OF SINDH AT KARACHI**

Suit No.1314 of 2005

DATE

ORDER WITH SIGNATURE OF JUDGE

For hearing of CMA No.7821/2017 (U/O 9 Rule 9 CPC)

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23.11.2017.

Mr. Noor Nabi Unar, Advocate for Plaintiff.

Mr. Khawaja Shamsul Islam, Advocate for Defendant.

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This is an Application under Order 9 Rule 9 CPC for recalling of Order dated 21.03.2017, whereby, the instant Suit was dismissed for want of evidence.

Learned Counsel for the Plaintiff submits that the absence on such date was beyond control as the Plaintiff and he both were unwell and therefore the matter could not be attended and was dismissed. He further submits that necessary medical documents and certificates have been annexed with this application as well as separately through statement and on these grounds the application be allowed and Suit be restored. He has also relied upon the maxim, that "nobody should be condemned unheard". In support he has relied upon the cases reported as **2004 YLR 471** (*Sardar Muhammad Ashiq Dogar v. Federation of Pakistan through Secretary and another*), **PLD 1981 SC (A J & K) 47** (*Malik Iftikhar Ahmed v. Ali Asghar and another*), **2004 CLC 1266** (*Khurshid Alam and another v. Al-Khair Gadoon Limited*), **2000 MLD 1809** (*Muhammad Ayub v. Lahore Development Authority and others*) and **PLD 1987 Supreme Court 304** (*Pakistan and others v. Public at Large and Others*).

On the other hand, learned Counsel for the Defendants opposes the listed application on the ground that there is a continuous default on the part of the Plaintiff, who has never shown any interest in proceedings with this matter for leading his evidence as Issues were settled on 29.10.2007, whereas, subsequently on numerous dates including 23.4.2015, 5.5.2015 and 20.05.2015 none was in attendance and thereafter the present Counsel was engaged and again on the last two consecutive dates the Plaintiff and his Counsel were called absent and therefore, the Suit was rightly dismissed for want of evidence. He further submits that the said order is in fact an Order under Order 17 Rule 3 CPC, which can be appealed and therefore listed application under Order 9 Rule 9 CPC is misconceived as the Suit was not dismissed for non-prosecution. In support he has relied upon the case reported as **2015 SCMR 1401 (*Rana Tanveer Khan v. Naseer-ud-din and others*)**.

I have heard both the learned Counsel and perused the record. On 21.3.2017, the following Order was passed:-

**"None present for the plaintiff nor any intimation received. Same was the position on the last date of hearing i.e. 22.2.2017 and the following order was passed:-**

**"None present for the Plaintiff nor any intimation received, whereas, the witness is also called absent. As a last and final chance, adjourned to 21.03.2017 with a note of caution that if the Plaintiff does not proceed with the matter on the next date, appropriate orders will be passed."**

**Today again nobody is in attendance nor any intimation received. In the circumstances, instant Suit is dismissed for want of evidence."**

The order as above was passed on the ground that on 22.2.2017 neither anybody was in attendance nor any intimation was received. It further appears that though a ground has been raised that on the

fateful day the Counsel for the Plaintiff was unwell, whereas, the Plaintiff was also not feeling well, however, with the listed application as well as subsequently through statement no proper medical certificate to that effect for 21.3.2017 has been placed on record. Insofar as the Plaintiff's illness is concerned the medical record pertains to the year 2016 and cannot be considered for his absence on 21.3.2017 when he was supposed to be in attendance and to lead evidence. Even if the Counsel was unwell, the Plaintiff ought to have attended the case and proceeded with his evidence. Moreover, the conduct of the Plaintiff as contended by the Counsel for the Defendant is also not appreciable inasmuch as time and again the Plaintiff and/or his Counsel have failed to attend the Court. This conduct does not lend any support to the Plaintiff's case for exercise of discretion, if any.

Notwithstanding the above it may also be noted that the Suit was listed for evidence to be led on behalf of the Plaintiff. Since admittedly no evidence was led, there was nothing left in the Suit to proceed further and therefore, the Suit was dismissed. The question that whether the Plaintiff ought to have appealed the said order, is not relevant for the present purposes.

In view of the observations recorded hereinabove, as the record reflects that the Plaintiff has not shown any serious efforts to proceed with this matter, in the circumstances, listed application is dismissed as the Plaintiff has failed to make out any case for exercising any discretion in his favour.

J U D G E