

ORDER SHEET  
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD  
IInd No.83 of 2022

DATE	ORDER WITH SIGNATURE OF JUDGE
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1. For hearing of CMA 1791/2022
2. For hearing of main case

20.11.2023

Mr. Salman Ahmed advocate for appellant.  
Mr. Imdad Ali Unar advocate for Respondent No.3.  
Mr. Muhammad Yousuf Rahpoto Assistant AG.

The appellant filed F.C. Suit No.50/2020 before the learned 2<sup>nd</sup> Senior Civil Judge Kotri which was dismissed under Order XVII Rule 3 C.P.C; vide Judgment dated 04.07.2022. Civil Appeal No.38/2022 was filed before 1<sup>st</sup> Additional District Judge Kotri and the same was also dismissed vide Judgment dated 12.09.2022. The operative findings are reproduced herein below:

“8- The perusal of record reveals that the appellant/plaintiff and his counsel remained absent without any intimation on the dates of hearing viz. 23.01.2021, 06.02.2021, 20.02.2021 and 06.03.2021 thus the suit of the appellant/plaintiff was dismissed for non-prosecution. Thereafter, application U/O 9-Rule 9 CPC for restoration of suit was filed, which was allowed on dated 28.09.2021 and the suit was restored at its original position.

9- After the suit was restored to its original position, the issues were framed by the learned trial court on dated 02-04-2022 and thereafter, the matter was adjourned for providing the list of witnesses and documents along with certificate of readiness to produce evidence within seven days as provided under Order 16 Rule-1 (1) CPC with opportunity of filing the affidavits in evidence to both the parties. The perusal of record further reveals that from the date of framing of issues till the pronouncement of the impugned judgment and decree, the appellant/plaintiff failed to provide the list of witnesses and documents and even did not bother to appear before the learned trial court to mark his attendance or adduce the evidence. From the preceding circumstances, it appears that the appellant/plaintiff had no interest to pursue his matter and the learned trial Court has rightly dismissed the suit of the appellant/plaintiff U/O XVII Rule-3 C.P.C without any defect or error, thus, Point No. 1 is answered in ‘negative’. The learned counsel for the appellant/plaintiff is unable to point out any such error of law.

Learned counsel does not controvert the narrative contained in the orders impugned, however, submits that if yet another opportunity is given no further adjournment shall be sought and the suit will be proceeded with. Contrarily, learned counsel for the respondent supports the impugned orders and submit that no case has been made out for any interference under Section 100 CPC.

Heard and perused. The default in proceeding with the suit has been adequately particularized in the respective judgments and the learned counsel articulated no cavil to the narration delineated. The observations / particulars were neither disputed nor any justification endeavored in such regard. Learned counsel clearly remained unable to dispel the preponderant record relied upon to render the findings culminating in the dismissal.

It was never the appellant’s case that the impugned judgments could not have been rendered upon the law / rationale relied upon. The trial court appears to have exercised its jurisdiction and no infirmity in such

regard is manifest. It is trite law<sup>1</sup> that where the fora of subordinate jurisdiction had exercised its discretion in one way and that discretion had been judicially exercised on sound principles the supervisory forum would not interfere with that discretion, unless same was contrary to law or usage having the force of law. It is the considered view of this court that no manifest illegality has been identified in the order/s impugned and further that no defect has been pointed out in so far as the exercise of jurisdiction is concerned of the subordinate forum.

Be that as it may, a second appeal may only lie if a decision is demonstrated to be contrary to the law; a decision having been failed to determine some material issues; and / or a substantial error in the procedure is pointed out. It is categorically observed that none of the aforesaid ingredients have been identified by the learned counsel. In such regard it is also important to advert to section 101 of CPC, which provides that no appeal shall lie except on the grounds mentioned in the Section 100 of CPC. While this Court is cognizant of Order XLI Rule 31 CPC, yet at this stage no case has been set forthwith to entertain the present appeal in view of the reasoning stated above. As a consequence hereof, in *mutatis mutandis* application of Order XLI Rule 11 C.P.C, this appeal is hereby dismissed along with pending application.

Judge

Ali Haider

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<sup>1</sup> Per *Faqir Muhammad Khokhar J.* in *NaheedNusrat Hashmi vs. Secretary Education (Elementary) Punjab* reported as *PLD 2006 Supreme Court 1124*; *Naseer Ahmed Siddiqui vs. Aftab Alam* reported as *PLD 2013 Supreme Court 323*.