ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal No.189 of 2019

Muhammad Usman Farooqui

Versus

Abdul Hafeez

Date	**Order with signature of Judge**

1. For orders on CMA 1045/24
2. For hearing of CMA 1975/21
3. For orders on office objections a/w eply at Ä"
4. For hearing of main case.
5. For hearing of CMA 1369/19

Dated: 21.08.2025

Mr. Muhammad Haseeb Jamali, Advocate for Appellant.
Mr. Muhammad Umer Lakhani, Advocate for Respondent.

-.-.-

MOHAMMAD ABDUR RAHMAN, J Through this appeal, maintained under Section 3 of the Law Reforms Ordinance, 1972 read with Section 151 of the Code of Civil Procedure (Amendment) Ordinance, 1980, the Appellant impugns an order dated 21 March 2019 passed by a Learned Single Judge of this Court on CMA No.14880 of 2016, being an application under Rule 2 of Order XIII read with Section 151 of the Code of Civil Procedure, 1908 that was maintained by the Appellant in Suit No.178 of 2006 seeking to adduce evidence on certain documents and which application was dismissed.

2. Suit No.178 of 2006 has been maintained by the Respondent as against the Appellant seeking Specific Performance on an Agreement for the purchase of Plot No.D-12, Block-2, Karachi Development Authority Scheme No. 5, Karachi, admeasuring 1000 square yards. The suit was presented on 4 February 2006 and was listed for framing of issues on 4 April 2006 and on which date issues were settled by the Court and by which order the Appellant and Respondent were each allowed a period of four weeks to file their List of Witnesses and List of Documents and which were filed by the Appellant on 4 May 2006.

3. After a lapse of four years, an Affidavit-in-evidence was filed by the Respondent on 26 August 2010 and which led the Appellant to maintain CMA No.14880 of 2016 seeking to adduce evidence on the following documents that had not been included by the Appellant in its earlier list of Documents:

(i) Inquiry report dated 22 March 2006;
(ii) Letter of Mr. Raza Hashmi, Advocate dated 15 September 2010;
(iii) Letter of Superintendent Central Prison Karachi dated 17 September 2010; and
(iv) Notice of KBCA dated 11February 2006.

This application was admittedly maintained ten years after the settlement of Issues and six years after the presentation of the Affidavit-in-Evidence by the Respondent and was dismissed by a learned Single Judge of this Court on 21 March 2019 on the grounds that:

(i) there was a delay of ten years in producing these documents; and

(ii) that good cause was not made out for the production of these documents.

4. Mr. Muhammad Haseeb Jamali entered appearance on behalf of the Appellant and stated that the documents that were sought to be adduced in evidence were documents that became available after the presentation of the written statement in Suit No.178 of 2006 and which were not in the custody of the Appellant at the time when the Written Statement was filed. In addition, it is clarified that the documents that were sought to be brought on record did not prejudice the Respondent as evidence had not been recorded in the subject proceedings and that the Appellant was ready and willing to permit the Respondent to withdraw the Affidavit-in-Evidence that was filed by him on 26 August 2010 and to file a new List of Documents, List of Witnesses and Affidavit-in-Evidence, if the Respondent considered it necessary so as to allow for the Respondent to overcome such prejudice. He stated that while the application has been presented with delay, the adjudication of a lis should be on merits and a full opportunity in this regard should be given to both the parties to adduce evidence. He did not rely any case law in support of his contentions.

5. Mr. Muhammad Umer Lakhani entered appearance on behalf of the Respondent and stated that no exception could be taken to the impugned order which had been correctly passed. He maintained that a period of ten years had lapsed as between the date of framing of issues and the presentation of CMA No. 14880 of 2016 and which was undeniably an extraordinary length of time for presentation of the said application. Secondly, he stated that the affidavit in support of CMA No. 14880 of 2016 did not disclose any good cause and which having not been specifically pleaded could not constitute a basis for maintaining such an application. He also did not rely any case law in support of his contentions.

6. We have heard learned counsel for both the parties and perused the record.

7. The provisions of Clause (1) of Rule 1 of Order XIII of the Code of Civil Procedure, 1908 prescribes that:

> " … *(1) The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.*

The rule mandates that both the Plaintiff and the Defendants are bound to ensure that all documentary evidence of every description in their "possession" or in their "power" on which they intend to rely is produced on the date of the first hearing of the suit i.e., being the date on which issues are framed. The purpose behind such a rule is manyfold. First and foremost, it is to allow the Court to consider all the evidence that both the parties are intending to adduce and then settle issues on disputed issues only. Secondly, it is to ensure that neither the Plaintiff nor the Defendant are "caught unaware" as to the case or the evidence being advanced by the other side so as to allow the other the opportunity to properly rebut the evidence being adduced. Thirdly, it is to ensure that proceedings are not unnecessarily delayed by documentary evidencing being adduced in piece meal. Finally, it is to ensure that additional evidence is not adduced belatedly so as to commit a fraud on the proceedings in evidence.

8. The provisions of Clause (1) of Rule (1) of Order XIII of the Code of Civil Procedure, 1908 are complemented by Rule (2) of Order XIII of the Code of Civil Procedure, 1908 and which permits documentary evidence to

be adduced outside of the prescriptions of Clause (1) of Rule (1) of Order XIII of the Code of Civil Procedure, 1908 and which stipulates that:

> " … *2. No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of rule 1 shall not be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing.*

A literal reading of this rule prescribes that if a document was "in the possession or power" of either a Plaintiff or a Defendant but had not been produced on the "first day of the hearing of the suit" i.e., the date when issues were framed, it can be subsequently received by the Court if "good cause" is shown for the failure to produce the document. Additionally, when the court receives such documentary evidence it is obliged to record its reasons for doing so. What is to be understood from the reading of each of these provisions is that clause (1) of Rule 1 of Order XIII of the Code of Civil Procedure, 1908 does not contain an absolute bar to the production of documentary evidence and only requires documents that are in the "possession or power" of a party and which have not been earlier produced before the Courtin pleadings to be produced on that date. In the event that the documents are neither in the "possession" or the "power" of a party on the "first day of the hearing of the suit" i.e., the date when issues were framed, they can always be produced through an application under Rule (2) of Order XIII of the Code of Civil Procedure, 1908 as that itself would constitute "good cause" for not producing the documentary evidence on that date. ***In addition,*** if the document was in the "possession" or the "power" of a party but was not produced, then the subjective circumstances as narrated in the affidavit in support of application under Rule (2) of Order XIII of the Code of Civil Procedure, 1908 will have to be considered by a Court to determine as to whether such a document should be permitted to being adduced. If permitted, or for that matter if refused, the Court should record its reasons in writing for permitting or refusing permission for adducing such documentary evidence.

9. But what are the factors that a court should consider when determining what is or what is not "good cause" in terms of Rule (2) of Order XIII of the Code of Civil Procedure, 1908? It seems a considerable amount of case law has developed in our Courts to answer this query. In the decision reported as ***Anwar Ahmad vs. Mst. Nafis Bano through Legal***

Heirs[1] the Supreme Court of Pakistan has held that failure to adduce documentary evidence in terms of clause (1) of Rule 1 of Order XIII of the Code of Civil Procedure, 1908 is not fatal and that evidence could be adduced under Rule 2 of Order XIII of the Code of Civil Procedure, 1908. Additionally, in various judgements of this Court reported as ***Messrs Asghar Ali & Bros. vs United Bank Limited,***[2] ***Allah Waryo vs. Muhammad Ramzan and others,***[3] ***Piracha Multipurpose Coporation vs. Province of Sindh and another,***[4] ***Messrs Al Ahram Builders (Pvt.) Limited vs. Pakistan Defence Officer Housing Authority***,[5] ***Messrs Trading Corporation of Pakistan vs Messrs Rahat & Co.,***[6] ***Kohinoor Tobacco Company (Pvt.) Ltd. vs. S.M. Idrees Allawalla,***[7] ***Kashif Anwar vs. Aga Khan University,***[8] ***Jan Muhammad and 6 others vs. Ghulam Farid and 3 others,***[9] ***Haji Abdul Razzak through L.Rs and others vs Muslim Commerical Bank Ltd.***[10] it has been considered that a wide interpretation should be given to the expression "good cause" to mean that when genuine and authentic documents are adduced and which are required to be adduced to permit the Court at arriving at a fair judgement on merit, the documents should be permitted to being adduced in evidence as long as the inability to produce the documents on the first date of hearing is satisfied through cogent reasons and no prejudice is caused to the other side. It has also been held in the decision reported as ***Messrs Liyas Mortine & Associates (Pvt.) Ltd. vs. Muhammad Amin Lakhani and others,***[11] ***Mst. Marium Haji and others vs. Mrs Yasmin R. Minhas and others,***[12] ***Mst. Anwari Begum through Attorney vs. Mst. Asghari Khanum and 7 others***,[13] ***Haji Abdul Razzak through L.Rs and others vs Muslim Commerical Bank Ltd.***[14] that the courts should lean against permitting documents to being produced after evidence has started being adduced as that would clearly be an attempt to fill a lacuna in the evidence and which should be granted only in exceptional circumstances.

---

[1] 2005 SCMR 152
[2] 1987 CLC 504
[3] 1990 CLC 1877
[4] 1992 CLC 1627
[5] 2003 CLD 1497
[6] 2005 CLC 1305
[7] 2013 CLC 1789
[8] 2013 YLR 2294
[9] 2014 MLD 1141
[10] 2016 YLR 2197
[11] 1999 MLD 3018
[12] PLD 2003 Karachi 148
[13] 2009 MLD 1279
[14] 2016 YLR 2197

10. In this context we have considered the contentions of both Mr. Muhammad Haseeb Jamali and Mr. Muhammad Ali Lakhani. The contentions of Mr. Muhammad Haseeb Jamali are that at the time when the transaction is alleged to have occurred, the Applicant was confined in Central Jail, Karachi. To prove this fact, the documents that are being requested to being adduced are listed as hereinunder:

(i) Inquiry report dated 22 March 2006;
(ii) Letter of Mr. Raza Hashmi, advocate dated 15 September 2010;
(iii) Letter of Superintendent Central Prison Karachi dated 17 September 2010; and
(iv) Notice of KBCA dated 11 February 2006.

Now, the letter of Mr. Raza Hashmi dated 15 September 2010 is a letter seeking a clarification from the Superintendent Prison as to whether the Appellant was permitted to visit any person other than family members during the period of his detention in Central Prison. The response in the form of the Letter of the Superintendent Central Prison, Karachi dated 17 September 2010 is being adduced to prove that the Appellant in fact did not have such permission and did not meet the Respondent. The remaining two documents i.e., the Notice of the Karachi Building Control Authority dated 11 February 2006 is an official document issued by that statutory body while the Inquiry Report dated 22 March 2006 is a document that is being adduced from the record of a court. Firstly, to our mind, the Notice of the Karachi Building Control Authority dated 11 February 2006 and the Inquiry Report dated 22 March 2006 each being official documents issued by statutory bodies, we really cannot see any reason for not permitting each of those documents from being adduced as they simply clarify actions taken by each of those public bodies at a given time and we cannot see how prejudice would be caused to the Respondent by these two documents being adduced in evidence. The remaining two documents i.e., the letter of Mr. Raza Hashmi dated 15 September 2010 and the response in the form of the Letter of the Superintendent Central Prison, Karachi dated 17 September 2010 are more problematic. The reason for this is that on the day that the issues were settled, it was clearly in the power of the Appellant to adduce documentary proof of the Appellants detention and the record of the persons he met while he was detained in Central Prison. The delay that has been caused in bringing forward this evidence would generally lead to a conclusion that the evidence that was being adduced was arranged in

connivance with the prison officials so as to prove that there was no meeting as between the Appellant and the Respondent so as to rebut the existence of the Agreement altogether. However and very interestingly when the plaint is compared with the Affidavit in Evidence a distinction occurs as between the pleadings in the Plaint and the Affidavit in Evidence as no where in the Plaint is it pleaded that the Agreement for sale of the Subject Proeprty was concluded while the Appellant was detained in Central Jail, Karachi but which is now the plea in the Affidavit in Evidence. While, it is noted that this is the defence of the Appellant in his Written Statement and as evidence has as of yet not commenced being recorded, we do not think that producing such officials along with their record even at this belated stage would constitute a fraud as it is well within the capacity of the Respondent to cross examine the officials on the documents so as to contradict the evidence that is being produced.

11. In this context and having considered the order dated 21 March 2019 passed by a Learned Single Judge of this Court on CMA No.14880 of 2016 in Suit No.178 of 2006 we do believe that the interpretation cast by the Learned Single Judge of this Court on the expression "good cause" was unduly restrictive and which prevented the real issues in the Suit from being determined. However, we do feel that the introduction of these documents into evidence will prejudice the Respondent to the extent that he has already filed his List of Documents, List of Witnesses and his Affidavit in Evidence and which would not have factored in these documents. As such while we are inclined to allow this application so as to permit the real issues in Suit NO. 178 of 2006 being determined on merit, we do understand that by doing so the right of the Respondent to rebut such evidence may also be impacted and the Respondent should also have a right to contradict such evidence that is being introduced at this belated stage.

12. As such for the foregoing reasons we are the opinion that the order dated 21 March 2019 passed by a Learned Single Judge of this Court on CMA No.14880 of 2016 in Suit No.178 of 2006 suffered from irregularities and cannot be sustained and which is set aside. Consequentially, CMA No. 14880 of 2016 is allowed with permission to both the Appellant and the Respondent to adduce evidence de novo by appearing the IInd Senior Civil Judge Karachi South who is now seized of this matter and who shall permit the Appellant and the Respondent to each file a new List of Documents and List of Witnesses and shall also permit the Respondent to withdraw his old

Affidavit in Evidence and produce new Affidavits in Evidence of all of his witnesses. There shall however be no order as to costs.

Judge

Judge