

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
SUIT NO. 1224 OF 2001

Date Order with signature of Judge

For Evidence

02.10.2013

Mr. Muhammad Haseeb Jamali Advocate for the Plaintiff

Mr. Mushtaq A. Memon Advocate for Defendants No.1 and 4 to 8

Mr. Basil Advocate for Defendant No.2

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On 26.09.2013, this Court had already ordered for appointment of some other Commissioner for recording of evidence of the parties, since the earlier Commissioner Hon'ble Madam (Retd) Justice Majida Razvi has returned the Commission. It was clarified in the last order that the parties may propose the name of the Commissioner or the Court will decide that who should be the Commissioner in this case. Today, Mr. Mushtaq A. Memon, learned counsel for Defendants No.1 and 4 to 8 has not agreed to suggest any name, he in fact does not want to record evidence on commission. He has placed a Statement at the Bar in writing. He has contended that during cross-examination Plaintiff being lady takes undue advantage and takes time in making replies and repeatedly changes her versions. When the witness was confronted with the photocopy of a document, the same was objected by the other side and therefore, the case was referred back to the Court by the Commissioner.

His other contention is that recording of evidence is function of the High Court and it will result in delay, if this function is assigned to Commissioner. He is also aggrieved by the fact that during this period mother of the Plaintiff has died and with the death of the Plaintiff's mother valuable evidence of Defendant No.1 has been lost. In the statement his last contention is that the parties may not be burdened with additional expenditures over and above the Court fees which has been paid.

Unfortunately, none of the contentions raised in his arguments and placed on record in the Statement at Bar provides a sufficient ground to stop the Court from exercising its inherent power coupled with the powers of Court under Section 75 of the Civil Procedure Code to examine any person through commission.

On 12.05.2004, when issues were framed by consent of all present Hon'ble Madam (Retd.) Justice Majida Razvi was appointed as Commissioner for recording of evidence. On 26.12.2007, the Hon'ble Madam (Retd.) Justice Majida Razvi returned the commission by specifically referring to the attitude of the counsel of the Defendant. The order of the Commissioner dated 26.12.2007 is reproduced as follows:-

“Mr. Haseeb Jamali, Advocate for the Plaintiff alongwith witness and Mr. Mushtaq Memon alongwith Defendant are present. The cross-examination of the witness was commenced, however, the proceeding are suspended because the attitude of the Counsel for the Defendant.”

I have also perused the evidence file and the cross-examination of the Plaintiff. The Plaintiff's examination-in-chief was recorded on 23.09.2006 where after on 14.10.2006 and 08.11.2006, she was partly cross-examined and after few adjournments she was further cross-examined on 08.09.2007 and 29.09.2007. On 26.12.2007, the Plaintiff came in the witness box on 6th occasion when the counsel for the Defendants refused to continue cross-examination and the commission was returned with Report dated 23.02.2008 which was taken on record on 07.11.2008. Relevant part of the Report reads as under:-

“In the circumstances the Counsel for the Defendant refused to proceed further which is clear from cross-examination dated 26.12.2007.

Under the circumstances the Commissioner is unable to proceed in the case and the files and the documents received from the Court are being returned herewith.”

In view of the above facts and circumstances, the grounds to oppose further evidence through some other commissioner are not tenable. The diary sheet from 26.12.2007

the date of return of the commission to this day fully demonstrate that the recording of evidence in Court has resulted in considerable delay, therefore, the contention of Mr. Mushtaq A. Memon, Advocate that the appointment of Commissioner at this stage would result in unnecessary delay has no force. His claim that the death of mother of the Plaintiff has resulted in loss of some important evidence has nothing to do with the appointment of Commissioner for recording of evidence. His last contention that additional burden may not be exerted on his client over and above Court fees too, has no force. It is indeed unfortunate that the value of the Court time seems to have been equated with the nominal fee of the Commissioner and learned Counsel, is of the view that the Court time is far less valuable than the amount of fee to be consumed in recording of evidence on payment of fee.

The Court is already burdened with thousands of cases which are pending since 1975 or even beyond the year 1975. I have checked from MIT-II of this Court about the oldest case pending for evidence, MIT-II has informed that Suit No. 317 of 1975 (J. Tyler & Co. V/s. HBL and others) is the oldest evidence matter. The case in hand was filed in 2001. If the Court has power to save its time by recording of evidence through the Commission, it is expected that the learned counsel appearing for the litigants should facilitate the Court and cooperate with the Commissioners as it is always in their own benefit. Whatever time saved by the Court in recording of evidence, is consumed by the Court in other urgent matters requiring immediate orders in different cases and at the same time it give some space to the Judges in reducing the backlog by pronouncing lengthy judgments in the cases which are ripe for final disposal.

The conclusion of the above discussion is that in continuation of the last order, the Court is obliged to appoint another Commissioner for recording of further evidence in this case from the point where the evidence has been left by Hon'ble Madam (Retd.) Justice Majida Rizvi on 26.12.2007. In the circumstances, Mr. Abdul Aziz Memon, Retired District & Sessions Judge, is hereby appointed as Commissioner for recording of evidence on the identical terms and conditions on which the earlier Commissioner was appointed. He is given ten (10) months further time from the date of communication of this order to complete the commission. It is hereby clarified that the parties shall not be allowed to produce any document during cross-examination which has not been disclosed by them in the list of documents already filed by them in Court pursuant to the Order dated 12.05.2004. Three months' time was given to file list of documents and if such list has not been filed or certain documents were left to be mentioned, the defaulting party should suffer and nobody can be surprised by undisclosed documents to admit or doing it. It is further clarified that the Commissioner may record the demeanor of the witness during the cross-examination as well as the time consumed in answering the questions by the witness.

To come up after recording of evidence by the Commissioner.

JUDGE

Amj/PA