

ORDER SHEET

THE HIGH COURT OF SINDH AT KARACHI

Suit No.1102, 1219 of 2009
and Suit No.1609 of 2010

DATE

ORDER WITH SIGNATURE OF JUDGE

Suit No.1102/2009

1. For orders as to maintainability of CMA No.12801/2019
2. For hearing of CMA No.12802/2019

Suit No.1219/2009

1. For orders as to maintainability of CMA No.12804/2019
2. For hearing of CMA No.12805/2019

Suit No.1609/2010

1. For orders as to maintainability of CMA No.12798/2019
2. For hearing of CMA No.12799/2019

10.10.2019

Mr. Farukh Usman Advocate for Plaintiff

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All these applications have been filed on behalf of the Plaintiff in respective Suits for recalling of order dated 12.09.2019, whereby, various applications were dismissed for Non-prosecution, including Suit as well, for non-prosecution and for want of evidence. Notice was ordered on these applications and despite being served, no body is in attendance, whereas, Counsel for the Plaintiff pleads urgency.

Counsel for the Plaintiff submits that the order dated 12.09.2019 was passed in absence of the Plaintiff who had no notice of such hearing, whereas, it was fixed for hearing of applications and the entire Suits could not have been dismissed. He further submits that the previous Counsel of the Plaintiff was negligent and had not informed the Plaintiff about discharge of his Vakalatnama as well the next date of hearing; hence, the absence of the Plaintiff was not willful. In support of his contention, he has relied upon the case law reported in **2017 CLC Note 129.**

I have heard the learned Counsel and perused the record. Firstly, it may be noted that on 05.09.2018, learned Counsel then appearing on behalf of the Plaintiff had stated before the Court

that brief has been returned to the Plaintiff, and on that, a direct notice was ordered to be issued to the Plaintiff for the next date. Thereafter, on 15.11.2018, CMA No.14975/2018, was filed by the Plaintiff's Counsel seeking discharge of their Vakalatnama and along with application proper communication addressed to the Plaintiff was annexed to the effect that brief has been returned. The Court observed that Plaintiff had knowledge about discharge of Vakalatnama of their Counsel, and on such basis the said application was allowed and the Vakalatnama of their earlier Counsel was discharged and matter was adjourned with a note of caution that if the case is not proceeded on the next date on behalf of the Plaintiff, appropriate orders would be passed. On 12.09.2019 the matter was fixed before the Court and nobody was in attendance and the following order was passed in Suit No.1102/2010:-

1. For Hearing of CMA No.218/2015
2. For Hearing of CMA No.8087/2009
3. For examination of parties / settlement of issues.

1&2. On 15.11.2018 Vakalatnama of Plaintiff's Counsel was discharged as the brief was returned to the Plaintiff with proper knowledge about such discharge of Vakalatnama. The matter was adjourned on such date with a note of caution that if the Plaintiff fails to proceed further, an appropriate order would be passed. None is present nor any intimation is received. In the circumstances, both these applications are dismissed on account of non-prosecution.

3. The matter is listed for examination of parties under Order 10 CPC, however, the Plaintiff has chosen to remain absent without any justifiable cause. In the circumstances, the Suit stands dismissed for non-prosecution/want of evidence."

On perusal of the record and the observations made hereinabove there appears to be no justifiable ground to recall the order, whereby, applications as well as Suit was dismissed. The only ground, which has been urged by the learned Counsel for the Plaintiff as to the exercise of discretion for recalling of the said order is, that earlier Counsel had failed to properly inform the Plaintiff about these proceedings. Firstly, I am not inclined to accept such arguments for the simple reason that the Plaintiff's Counsel while seeking discharge of his Vakalatnama had placed on record such intimation and therefore, this ground is misconceived. The Plaintiff has by themselves written letter dated 27.8.2018

seeking return of their various case files including the listed Suits, and such files were handed over to the Plaintiff on 4.9.2018 and both these letters as well as acknowledgement was placed before the Court. Therefore, it was the duty of the Plaintiff to engage another Counsel after return of the files or make appearance in person to proceed with the matter. Constant follow up of the case was the responsibility of the Plaintiff after asking the Counsel to return the brief. In that case not even a notice was required to be sent afresh to the Plaintiff as argued. Secondly, the question that the earlier Counsel never communicated the order of dismissal or never informed about the proceedings and its status, it may be observed that the same is a matter between the Plaintiff and its Counsel and for that the Plaintiff is at liberty to seek appropriate remedy; but that cannot be termed as a justifiable ground for recalling the order of dismissal through an application filed by engaging another Counsel. In my view the plaintiff himself ought to have been vigilant to pursue his matter. The Hon'ble Supreme Court in the case of ***Zulfiqar Ali v Lal Din & another (1974 SCMR 162)*** has dealt with this question and has been pleased to observe as under;

“The mere fact that litigant has engaged a Counsel to appear on his behalf does not absolve him of all responsibilities. It was as much as his duty as that of the learned Counsel engaged by him to see that the appeal was properly and diligently prosecuted. It he engaged a Counsel who was lacking in his sense of responsibility to the Court, it is he who should suffer and not the other side.”

Insofar as other ground urged on behalf of the Plaintiff's Counsel to the effect that matter was only listed for hearing of applications and therefore, the entire Suit could not have been dismissed, is concerned, again this is misconceived. The matter was also fixed for examination of parties in terms of Order 10 CPC in addition to the applications which were dismissed separately, and proper order has been passed by the Court due to Plaintiff's absence as he was not available for his examination under Order 10 CPC. In fact the dismissal was for want of examination / evidence insofar as the Suit is concerned, and not for Non-prosecution as presumed. It was done in terms of Order 10 Rule 4 CPC as in default the Court was competent to pass an order against the Plaintiff, which has been done. The listed applications

have been filed in terms of Order 9 Rule 9 CPC, and I am of the view that this provision for recalling of the order is not applicable in the given facts and an appeal ought to have been filed by the Plaintiff against such order. Reliance in this regard may be placed on the case of ***Sewaran Udaji v Munna Moti and Others*** (**AIR 1959 Madhya Pradesh 5**).

In view of hereinabove facts and circumstances of the case I am of the view that the conduct of the Plaintiff does not warrant any interference by this Court as admittedly recalling of any such order of dismissal is dependent on exercise of discretion by the Court on the peculiar facts of a case and in this case, I am afraid the Plaintiff has not been able to make out any case for the Court to exercise any such discretion. Accordingly, all these listed applications are hereby dismissed.

J U D G E

Rafiq/P.A.