Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD (JUDICIAL DEPARTMENT)

Writ Petition No. 1830 of 2021.

M/s Muhammad Naeem Khan and sons and others

Versus

SME Bank Limited and another.

S.No. of order/ proceeding	Date of order/ proceeding	Order with signature of Judge and that of parties or counsel where necessary.
(02)	01.06.2021	Touqeer Hafeez Abbasi, Advocate for the petitioner / applicant.

C.M. No. 2243 of 2021.

This is an application seeking permission to place additional documents on record. The application is allowed subject to all just and legal exceptions.

C.M. No. 2244 of 2021.

Exemption sought for is allowed subject to all just and legal exceptions.

Main Case.

Petitioners have invoked the writ jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 with the following prayer;

> ***"It is, therefore, respectfully prayed that the instant petition may kindly be accepted and impugned dated 19.11.2020 may graciously be set aside and petitioners may kindly be allowed to adduce the evidence.***
> ***Any other relief, which this honorable court deems fit and proper in the circumstances of the case, may also be granted".***

02. Succinctly stated the facts of the case are that, the respondent No. 1 / SME Bank filed a suit for recovery of Rs. 1,383,395.57 by way of sale of mortgaged property and other moveable and immovable assets of the petitioners / defendants on 13.12.2011 before Judge Banking Court, Rawalpindi, which was subsequently transferred to Judge Banking Court, Islamabad. Petitioners filed petition for leave to defend, which was accepted unconditionally on 14.07.2012, on the same date issues were framed and the plaintiff of the suit / respondent No. 1 was directed to produce the evidence, thereafter the evidence of respondent No. 1 / SME Bank was concluded on 29.01.2013.

03. The case was adjourned to 05.03.2013 for production of the evidence of petitioners / defendants of the suit, thereafter, many opportunities were provided but the petitioners / defendants have failed to produce the evidence.

04. Vide order dated 03.09.2019, last opportunity for production of evidence was provided to the petitioners / defendants in the suit. It was also mentioned in order dated 03.09.2019 that in case of non-production of evidence, provisions of Order-XVII Rule 3, CPC will be invoked and the case was adjourned for 16.10.2019. On 16.10.2019, evidence was not produced and counsel for petitioners submitted fresh Power of Attorney and the case was adjourned for 11.11.2019. Again the evidence was

not produced and the learned trial Court in its order dated 18.02.2020 has mentioned that numerous opportunities have been provided for production of evidence but the same has not been produced, so notice under Order-XVII Rule 3, CPC was issued and lastly the case was adjourned for 19.11.2020, but the evidence was not produced by the petitioners.

05. On 09.11.2020, learned Judge Banking Court, Islamabad by invoking the provisions of Order XVII Rule 3 CPC has struck off the right for producing evidence of the petitioners / defendants and the case was adjourned for 06.11.2020 for arguments on the main case.

06. Learned counsel for the petitioners vehemently argued that learned Banking Court has failed to exercise its jurisdiction in accordance with law, valuable rights of the petitioners have been jeopardized and the learned trial Court has dealt with the case in a hasty manner without providing opportunity for producing evidence as required under the law. The learned trial Court instead of providing opportunity to petitioners for producing their evidence has struck off the right of defense under Order-XVII Rule 3, CPC. He has further contended that the law favours adjudication on merits rather than on technicalities, hence the impugned order dated 19.11.2020, is liable to be set aside.

07. I have heard the arguments of learned counsel and perused the record.

08. It is provided under Section 22(6) of Financial Institution (Recovery of Finances), Ordinance 2001 that, *No appeal, review or revision shall lie against an order accepting or rejecting an application for leave to defend, or any interlocutory order of the Banking Court which does not dispose of the entire case.*

09. That in order to invoke the constitutional jurisdiction of this Court, the petitioners have to show their bona fide for approaching this equitable Court with clean hand. In this regard the August Supreme Court of Pakistan has laid down the law in a case titled as *"Raunaq Ali V. Chief Settlement Commissioner"* (PLD 1973 SC 236) and following the dictum, the August Apex Court has in a case titled as "*Secretary to the Government of the Punjab, Forest department, Punjab Lahore V. Ghulam Nabi"* (PLD 2001 SC 415), reiterated that;

> ***"Therefore, High Court is not bound to grant relief to a petitioner simply because he was legally entitled to it, if the grant of such relief is immoral, unfair or against the dictates of good conscious and fair play. It hardly needs any elaboration that High Court is not obliged to press into service its Constitutional jurisdiction in every case in which illegality or void action or order is impugned. The court is to see, whether the grant of relief prayed for will foster the cause of justice or will it perpetuate injustice. If the Court finds that in a given***

case though the action taken by the authority is illegal but setting aside of such an illegal action would result in miscarriage of justice instead of advancing the cause of justice, the Court may decline to press into service its constitutional jurisdiction."

In view of the above settled principle of law, the conduct of the petitioners before the trial Court, is that despite repeated orders they were unable to record the testimony of their witnesses, delayed the proceedings on one pretext or the other for many years.

10. Thus, their conduct surely denies them the right to claim equity, when they have not come to the equitable Court with clean hands. It is settled law that constitutional jurisdiction is always discretionary in character and it is also settled principle of law that one who seeks equity must do equity. Reference may be made to case titled as *"Muhammad Ali V. Province of KPK through Secretary, Elementary and Secondary Education, Peshawar"* (2010 SCMR 673).

11. The August Supreme Court of Pakistan in a case titled as *"'Moon Enterpriser CNG Station, Rawalpindi V. Suit Northern Gas Pipelines Limited, through General Manager, Rawalpindi and another"* (2020 SCMR 300), while dealing with a similar question of law pertaining to application of Order-XVII Rule 3 C.P.C, has in unequivocal terms, held that:

"In our view it is important for the purpose of

maintaining the confidence of the litigants in the court systems and the presiding officers that where last opportunity to produce evidence is granted and the party has been warned of the consequences, the court must enforce its order unfailingly and unscrupulously without exception. Such order would in our opinion not only put the system back on track and reaffirm the majesty of the law but also put a check on the trend of seeking multiple adjournments on frivolous grounds to prolong and delay proceedings without any valid or legitimate rhyme or reason. Where the Court has passed an order granting the last opportunity, it has not only passed a judicial order but also made a promise to the parties to the lis that no further adjournments will be granted for any reason. The Court must enforce its order and honour its promise. There is absolutely no room or choice to do anything else. The order to close the right to produce evidence must automatically follow failure to produce evidence despite last opportunity coupled with a warning. The trend of granting (Akhri Mouqa) then (Qatai Akhri Mouqa) and then (Qatai Qatai Akhri Mouqa) make a mockery of the provisions of law and those responsible to interpret and implement it. Such practices must be discontinued, forthwith".

12. As the opportunity for producing evidence to the petitioners was provided for the first time on 05.03.2013 and the impugned order, whereby the right of the petitioners to produce evidence is struck off was passed on 19.11.2020 i.e. after about more than 07 years and that too by providing last and final opportunity as well as by issuing notices under Order-XVII Rule 3 CPC. Hence, impugned order is well reasoned which have been passed after providing sufficient opportunities of producing evidence to the petitioners.

13. For the reasons stated hereinabove, this Court finds that the present petition does not merit acceptance. Hence, the same is dismissed, in limine.

(TARIQ MEHMOOD JAHANGIRI)
JUDGE

Bilal /-