

JUDGMENTSHEET
HIGH COURT OF SINDH, KARACHI

IInd Appeal No. 72 of 2016

APPELLANTS : Perviz Shah Gillani and another
 through Mr. Muhammad Rashid,
 Advocate

RESPONDENTS NOS.
 1 TO 4

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DATE OF HEARING : 05.08.2016

DATE OF JUDGMENT : 05.08.2016

JUDGMENT

Muhammad Humayon Khan, J: This second appeal under Section 100 CPC is filed against the Judgment and Decree dated 12.07.2016 passed by the learned VIIth Additional District Judge, Karachi-East, in Civil Appeal No.01 of 2015, whereby, the learned Additional District Judge dismissed the appeal of the appellants and upheld the Judgment and Decree dated 25.11.2014 passed by the learned IXth Senior Civil Judge, Karachi- East, in Suit No. 577 of 2011.

2. The relevant facts of the case in nutshell for the disposal of this appeal are that the appellants filed suit for specific performance of contract against the respondents Nos.1 and 2 on 27.04.2011. The respondents Nos. 1 and 2 filed their written statement on 26.11.2011, wherein, they denied the case of the appellants. On 03.03.2012, the learned Senior Civil Judge framed issues in the instant suit with the directions to the parties to file list of witnesses and documents, if any, within seven days. The respondents Nos.1 and 2 filed their list of

witnesses and documents on 08.03.2012 but the appellants failed to file the said list. The instant suit was fixed for evidence of the appellants on 20.03.2012, when the appellants and their advocate were absent and in the interest of justice, the instant suit was adjourned to 11.04.2012, when again they remained absent and the instant suit was adjourned to 02.05.2012, when again the appellants and their advocate were absent and accordingly the instant suit was dismissed for non-prosecution. However, the learned advocate for the appellants on the same day appeared in late hours and moved an application for restoration of suit, which was fixed for hearing on 13.02.2013 but the said application was dismissed in default as the appellants and their advocate were absent. The appellants filed CMA No. 03/2013, which was allowed by the learned Vth Additional District Judge, Karachi-East, by Order dated 17.04.2014 with direction that both parties should appear before the Trial Court on 30.04.2014. On 30.04.2014, the appellant No.1 was present and Mr. Syed Safdar Ali, advocate, filed vakalatnama on his behalf and verbally requested for adjournment. Subsequently, the appellants filed two applications under Order 6 Rules 17 CPC and under Order 13 Rule 2 CPC. On 16.08.2014, the appellants again changed their advocate and Mr. Muhammad Rashid, Advocate, filed vakalatnama on behalf of the appellants. On 09.10.2014, the learned Senior Civil Judge dismissed the said application under Order 6 Rule 17 CPC and allowed the said application under Order 13 Rule 2 CPC. During this entire period, the appellants did not record any evidence. On 22.11.2014, the appellant No.1, who is also attorney of the appellant No.2 appeared in witness box but their advocate verbally submitted that he may be given some

time to withdraw his vakalatnama and thereafter he submitted application for withdrawal of vakalatnama, which was allowed. At the relevant time, the appellant No.1 was present in witness box but left the Court room and after sometime appeared and verbally requested to give him some time to engage advocate. Again he left the Court and did not appear even to obtain next date of hearing. However, in the interest of justice the case was adjourned to 25.11.2014 for evidence of appellants. On 25.11.2014, the appellants were absent without any intimation and therefore the learned Senior Civil Judge proceeded under Order 17 Rule 3 CPC and dismissed the suit by Judgment dated 25.11.2014. Against which, the appellants filed Civil Appeal No. 01 of 2015, which was dismissed by Judgment dated 12.07.2016. Against the concurrent finding of both the Courts below, the appellants filed this second appeal.

3. I have heard the learned counsel for the appellants and perused the record.

4. The learned counsel for the appellants contended that both the Judgments of Courts below are contrary to law on the ground that the provisions of Order 17 Rule 3 CPC are not attracted to the facts of the instant suit. He further submitted that it is a well settled law that the matter should be decided on merits and not upon technicalities. He finally submitted that it is a fit case for remand with an opportunity to the appellants to lead evidence. In support of his arguments, the learned counsel for the appellants relied upon the following case-laws:-

- i) Qutab-ud-Din Vs. Gulzar and 2 others (PLD 1991 Supreme Court 1109);
- ii) Mst. Hamida Begum Vs. Mst. Husain Akhtar (1992 CLC (Lahore) 2515);
- iii) Mst. Nazima Batool alias Nazim Batool Vs. Sabar Ali Shah (2004 CLC (Lahore) 1175).

5. I have carefully gone through the above-noted case-laws referred to by the learned counsel for the appellants and came to the conclusion that none of them is applicable to the facts and circumstances of this case. In the case of Qutab-ud-Din Vs. Gulzar and 2 others reported in PLD 1991 Supreme Court 1109, the Hon'ble Supreme Court of Pakistan has held that two summoned witnesses of the plaintiff were present but remaining witnesses were not present and the case was not adjourned on the request of the plaintiff and therefore the provisions of Order 17 Rule 3 CPC were wrongly applied. In the case of Mst. Hamida Begum Vs. Mst. Husain Akhtar reported in 1992 CLC (Lahore) 2515, it has been held that the provisions of Order 17 Rule 3 CPC are not attracted specially when some of the plaintiff's witnesses were present and it was the learned Trial Court who did not deem it proper to record their statements and adjourned the case. In the case of Mst. Nazima Batool alias Nazim Batool Vs. Sabar Ali Shah reported in 2004 CLC (Lahore) 1175, it has been held that since adjournment of the case was a routine adjournment, penal action against the plaintiff under Order 17 Rule 3 CPC was not justified.

6. To resolve the controversy in this case, it is necessary to reproduce the provisions of Order 17 Rule 3 CPC as under:-

“Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witness, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.”

7. The provisions of Order 17 Rule 3 CPC have been interpreted in the cases of (i) Industrial Sales and Service, Karachi and another Vs. Archifar Opal Laboratories Ltd., Karachi reported in PLD 1969 Karachi 418, (ii) Syed Tahir Hussain Mehmoodi and others Vs. Agha Syed Liaqat Ali and others reported in 2014 SCMR 637 and (iii) Rana Tanveer Khan Vs. Naseer-ud-Din and others reported in 2015 SCMR 1401, which are fully applicable with full force so far as the facts and circumstances of this case are concerned.

8. In the case of Industrial Sales and Service, Karachi and another Vs. Archifar Opal Laboratories Ltd., Karachi (PLD 1969 Karachi 418), wherein, the learned Division Bench comprising of Mr. Justice Noorul Arfin (as he then was) and Mr. Justice Muhammad Afzal Zullah (as he then was) has held that:

“The next question that arises is whether this order could be passed under rule 3 of Order XVII, C.P.C. The answer, in my view, is in the negative, Order XVII, rule 3, C.P.C. is, in its nature, a penal provision. That provision can be pressed into service for deciding the suit finally on merits, on the proof of default by some party. Some of the conditions to be satisfied before passing an order under that provisions are:-

(a) that the provision being penal, it should be construed very strictly.

- (b) The facts of the case should not, at all, admit for any doubt as to default of the party.**
- (c) The conduct of the party, proved to have committed the default, must not be excusable.**
- (d) No other party, witness or the Court itself should be, in any way, responsible wholly or partly for the default; e.g., if the plaintiff has done all that is necessary for the summoning of the witness and on the failure of the office to issue summons or after service due to negligence of the witness himself, he fails to appear before the Court, it cannot be treated as default of the party summoning the witness.
- (e) The time granted for the performance of any act mentioned in this rule must be a time granted to the party itself on its request and not to a witness, to the other party or by the Court due to its own exigencies relating to Court work or proceedings in that particular case.
- (f) The act for the performance of which the time may have been granted, must be a specified act necessary to further the progress of the suit.
- (g) There should be some material to decide the suit.

If the conditions of this rule are satisfied, then only the Court can proceed to decide the suit; but that decision, if it is to be under this rule, must be forthwith.”

9. In the case of Syed Tahir Hussain Mehmoodi and others Vs. Agha Syed Liaqat Ali and others (2014 SCMR 637), the Hon'ble Bench of Hon'ble Supreme Court of Pakistan comprising of his lordships Mr. Justice Mian Saqib Nisar and Mr. Justice Amir Hani Muslim have held that:

“4. Notwithstanding our refraining to interfere in the matter on account of the above, we are of the candid view that provisions of Order XVII, Rule 3, C.P.C. are penal in nature and as per the settled law such provisions should be strictly construed and applied, therefore once the case of a delinquent litigant squarely falls within the purview and mischief of the law (ibid) then neither any concession should be shown to such litigant nor a lenient view favouring him should be resorted to; this should not even be permissibly done on the touchstone of exercise of discretionary power of the court and/or on the approach that technicalities of procedure should not be allowed to impede the interest of justice, and/or that the litigants should not be knocked out on technical grounds, and that adversarial lis should be settled on merits. If such approach is liberally followed and resorted to there shall be no discipline in the adjudication of the civil litigation and the delinquent whose case though is squarely hit and covered by the penal provisions of Order XVII, Rule 3, C.P.C. would be given a chance to his advantage and to the disadvantage of his opposing side. **This is not the spirit of the law at all. It may not be out of place to mention here that to apply and to adhere to law is not a mere technicality, rather it is duty cast upon the court as per Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 to do so. Thus where Order XVII, Rule 3, C.P.C. is duly attracted, the court has no option except to take action in accord therewith.**

5. In the above context, it may be held that in every case where the action against a delinquent party is imperative and his evidence has to be closed because the case squarely and eminently falls within the mischief of Order XVII, Rule 3, C.P.C., the court while closing the evidence is not in any manner obliged to adjourn the case and require or ask the litigant to appear and examine himself as a witness on a subsequent date. Obviously if the party is present in the court and desires to appear as a witness the

court should not decline his request, rather it shall be appropriate that where the party is present, the court while applying Order XVII, Rule 3, C.P.C. and closing the evidence on a given date should itself ask the party to avail the chance of appearing as his own witness, and should also record such fact in its order (order sheet) that a chance was given to the litigant which has not been availed. However, if this fact is not so recorded by the court though the party was present and sought its examination such party should initially move an application to the court for examination if the case has not yet been decided. But where the case is finally decided a ground should be specifically set in the memo of appeal/revision as the case may be about the presence of the party and asking for the examination, which should be supported by an affidavit of the counsel of the said party to the above effect.”

10. The above referred case-law was followed by the Hon'ble Bench of Hon'ble Supreme Court of Pakistan comprising of his lordships Mr. Justice Mian Saqib Nisar and Mr. Justice Asif Saeed Khan Khosa in the case of Rana Tanveer Khan Vs. Naseer-ud-Din and others (2015 SCMR 1401) and held that:

“Be that as it may, once the case is fixed by the Court for recording the evidence of the party, it is the direction of the court to do the needful, and the party has the obligation to adduce evidence without there being any fresh direction by the court, however, where the party makes a request for adjourning the matter to a further date(s) for the purposes of adducing evidence and if it fails to do so, for such date(s), the provisions of Order XVII, Rule 3, C.P.C. can attract, especially in the circumstances when adequate opportunities on the request of the party has been availed and caution is also issued on one of such a date(s), as being the last opportunity(ies). **In the present case we have seen that the appellant was**

cautioned on two occasions, which means that the appellant was put to notice that if he fails to adduce evidence, action shall be taken.

In the present case, as mentioned above, it is clear from the record that the appellant had availed four opportunities to produce his evidence and in two of such orders (the last in the chain) he was cautioned that such opportunity granted to him at his request shall be the last one, but still on the day when his evidence was closed in terms of Order XVII, Rule 3, C.P.C. no reasonable ground was propounded for the purposes of failure to adduce the evidence and justification for further opportunity, therefore, notwithstanding that these opportunities granted to the appellant were only in a span of about 1 month and 26 days, yet his case squarely fell within the mischief of the provisions *ibid* and his evidence was rightly closed by the trial court. As far as the argument that at least his statement should have been recorded, suffice it to say that the eventuality in which it should be done has been elaborated in the latest verdict of this Court (2014 SCMR 637). **From the record it does not transpire if the appellant was present on the day when his evidence was closed and/or he asked the court to be examined; this has never been the case of the appellant throughout the proceedings of this case at any stage; as there is no ground set out in the first memo of appeal or in the revision petition. Resultantly, we are not persuaded to hold that the provisions of law (Order XVII, Rule 3, C.P.C.) have been wrongly applied to the appellant's case or that he should be given the benefit of the judgment *Muhammad Aslam v. Nazir Ahmed* (2008 SCMR 942). In light of the above, we do not find any merit in this appeal which is accordingly dismissed."**

11. After carefully analyzing the above referred cases, I came to the conclusion that the provisions of Order 17 Rule 3 CPC are, in

nature, penal provisions and to apply the said provisions, the following conditions are to be satisfied:-

- (a) the record shows, without any doubt, the default of the party to lead evidence;
- (b) the conduct of the party, proved to have committed the default, must not be excusable;
- (c) once the case of a party falls within the purview and mischief of law, than, neither any concession should be given nor a lenient view favouring him should be resorted to;
- (d) if the case is squarely falls within the mischief of Order 17 Rule 3 CPC, the Court is not, in any manner, obliged to adjourn the case and require the party to appear and examine himself as a witness on the subsequent date;
- (e) if the party was cautioned on last occasion, that means that he was put to notice that if he fails to adduce evidence, action shall be taken;
- (f) where the provisions of Order 17 Rule 3 CPC are attracted, the Court has no option except to take action in accordance with the provisions of Order 17 Rule 3 CPC;
- (g) the decision should be forthwith and on merits of the case.

12. In view of the above discussion, it is necessary and essential to discuss the conduct of the appellants, which I have already discussed in details in paragraph-2 hereinabove but few important factors are reproduced herein below in order to show that the provisions of Order 17 Rule 3 CPC have been correctly applied by the Courts below in the present case:-

- a) the instant suit was fixed for evidence of the appellants/plaintiffs on 20.03.2012, 11.04.2012 and 02.05.2012, when the

appellants and their advocate continuously remained absent and ultimately the instant suit was dismissed for non-prosecution on 02.05.2012;

- b) restoration application was filed but the same was also dismissed in default due to non-appearance of the appellants and their advocate on 13.02.2013;
- c) by Order dated 17.04.2014 passed in CMA No. 03/2013, the learned Additional District Judge while allowing the appeal directed the parties to appear before the Trial Court on 30.04.2014;
- d) On 22.11.2014, the appellant No.1, who is also attorney of the appellant No.2, appeared in witness box but did not record his statement for the reasons already recorded by me in paragraph-2 hereinabove. However, the instant suit was adjourned to 25.11.2014 for evidence of the appellants/plaintiffs as last chance;
- e) on 25.11.2014, the appellants were absent without any intimation and therefore the learned Senior Civil Judge proceeded under Order 17 Rule 3 CPC and dismissed the instant suit forthwith by Judgment dated 25.11.2014;
- f) appellants filed first appeal but no specific ground was pleaded to show any cause reasonable or otherwise for not recording evidence on 22.11.2014 and non-appearance on 25.11.2014;
- g) appellants' first appeal was dismissed by the learned Additional District Judge vide Judgment dated 12.07.2016;
- h) subsequently, the appellants filed this second appeal, the facts and grounds pleaded in this appeal are totally inconsistent with the facts and grounds pleaded in the memo of first appeal.

13. In the facts and circumstances of this case, I hold that this case is identical to the case of RanaTanveer Khan Vs. Naseer-ud-Din and

others (2015 SCMR 1401) and hence I came to the conclusion that the learned Senior Civil Judge has rightly decided the instant suit by correctly applying the provisions of Order 17 Rule 3 CPC and the learned Additional District Judge has rightly dismissed the appeal of the appellants.

14. No other substantial ground or material has been brought on record, on the basis whereof, it could be said that both the courts below have committed any legal error in deciding the matter.

15. To attract the provisions of Section 100 CPC, the appellants have to satisfy this Court that the Court subordinate to this Court has:-

- a) based its decision contrary to law or some usage having the force of law;
- b) failed to determine some material issue of law or usage having the force of law;
- c) committed a substantial error or defect in the procedure provided by CPC or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

As per Section 101 CPC, no second appeal shall lie except on the above-noted grounds as mentioned in Section 100 CPC. My view is fully supported by the cases of (i) Madan Gopal and 4 others Vs. Maran Bepari and 3 others (PLD 1969 Supreme Court 617), (ii) Mst. Nishadah Begum and 3 others Vs. Muhammad Ayub Khan (PLD 1988 Supreme Court (AJ &K) 203), (iii) Mst. Kapoori and 4 others Vs. Man Khan and 6 others (1992 SCMR 2298), (iv) Abdul Rashid Vs.

Bashiran and another (1996 SCMR 808) and (v) Haji Sultan Ahmed through Legal Heirs Vs. Naeem Raza and 6 others (1996 SCMR 1729).

16. The learned counsel for the appellants has not been able to satisfy me that this second appeal under Section 100 CPC is maintainable in law in view of the embargo contained in Sections 100 and 101 CPC.

17. In view of the above discussion, this second appeal alongwith the listed application was dismissed in limine by short Order dated 05.08.2016 and the above are the reasons for the said short order.

J U D G E