IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Revision Application No. S-110 of 2021

Applicant(s):	Abdul Jabbar through Mr. Shahnawaz Vaseer, advocate.
Respondent No.1:	Irshad Begum Dharejo through Mr. Zulfiqar Ali Arain, advocate.
Respondents No.2 to 5:	Through Mr. Mehboob Ali Wassan, Assistant Advocate General
Date of hearing:	25.11.2021
Date of decision:	25.11.2021

O R D E R

KHADIM HUSSAIN TUNIO, J.- Through instant revision application filed under Section 115 CPC, the applicant has impugned the judgment dated 28.08.2021, in Civil Appeal No.62 of 2020 Re- Irshad Begum Vs. P.O Sindh and others, passed by the learned IInd Additional District Judge Ghotki, whereby the learned Judge set aside the judgment dated 13.02.2017 and decree dated 15.02.2017, passed by the learned Senior Civil Judge Ghotki in F.C Suit No. 82/2015 whereby the suit of the respondents/plaintiffs was dismissed u/o XVII Rule 3.

2. Precisely, facts involved in the matter are that the respondent Irshad Begum Dharejo filed a First Class Suit No. 82 of 2015 *(Re- Irshad Begum versus Province of Sindh and others)* against the applicant Abdul Jabbar who is her brother involving the property passed onto them by their late father who expired without a will. After the death of their father, late Ali Nawaz Khan Dharejo, on 22.05.2001 the applicant and respondent enjoyed joint possession of the land until the marriage of the respondent who then started to reside with her husband. After some time, the applicant allegedly claimed possession of the whole land by bringing on record a fraudulent gift deed

having S. No. 945 and Registration No. 822 dated 27.12.1995. The respondent/plaintiff then approached the applicant/defendant for settling in the matter, but her requests were of no avail, whereafter First Class Suit No. 82 of 2015 was filed for declaration, cancellation and permanent injunction. Various issues were framed by the learned trial Court from the pleadings of the parties and the suit was on its track for recording of evidence of the plaintiff's side. The plaintiff and her counsel then remained absent when the trial Court dismissed the suit of the plaintiff u/o 17 Rule 3 CPC while observing as follows:-

> *"It appears that plaintiff did not come forward to give evidence either oral or documentary inspite of having been afforded with numerous opportunities, since 19.10.2015, hence the above issues are answered as not proved.*
> *Consequently, suit of plaintiff is dismissed U/O 17 rule 3 CPC with no order as to costs."*

3. The judgment passed by the learned trial Court, dismissing the suit u/o XVII Rule 3, was then challenged by the plaintiff through Civil Appeal No. 62 of 2021 wherein the respondent/appellant claimed that she was seriously ill on numerous dates when the recording of evidence was fixed and her counsel had also misinformed her which led to her absence, but she was present on the initial date when her evidence was not recorded. The learned Appellate Court, after consent of all involved parties, set aside the impugned judgment and decree and remanded the matter to the trial Court for recording of evidence and decision on merits and the applicant/defendant was paid costs of Rs. 5,000/-.

4. Learned counsel for the applicant Abdul Jabbar primarily argued that the appeal of the respondent was hopelessly time-barred by almost 14 months; that the respondent/plaintiff remained absent on many dates and still did not get her evidence recorded, whereafter the suit was rightly dismissed by the learned trial Court u/o XVII Rule 3. He therefore prays that the impugned judgment passed by the learned Appellate Court be set aside and the judgment and decree passed by the learned trial Court be restored. In support of his contentions, he has cited the case law reported as

PLD 2007 SC 560, 2009 CLC 56, 2009 CLC 561, 2010 CLC 14, 2010 SCMR 342, 2010 PLC 519, 2010 SCMR 1370, 2010 YLR 507, 2010 CLC 830, 2010 MLD 163, 2010 MLD 554, 2010 CLC 734, 2010 MLD 978, 2012 CLC 4 (Sindh) and ***2012 CLD 1994 (Sindh),***

5. Learned counsel for the respondent No. 1 Irshad Begum on the other hand has contended that the suit was initially fixed for recording of respondent/plaintiff's evidence on 25.11.2016, but the presiding officer was on leave the same day and the matter was adjourned to 14.12.2016 when the respondent/plaintiff was absent due to misinformation from her council; that the respondent/plaintiff is an old aged lady and has been seriously ill for some time and therefore could not attend the Court on the dates set the Court and also due to miscommunication between her council, she was not informed of the dates many times; that the judgment dated 13.02.2017 and decree dated 15.02.2017 passed by the learned trial Court are not on merits and no chance of fair trial was provided to the respondent/plaintiff; that the impugned judgment and decree passed by the learned trial Court is arbitrary, superfluous and non-speaking one; that the adjournment on the last date of hearing before dismissal of the suit was not due to the absence of the plaintiff and her counsel but because of a work suspension; that the impugned judgment and decree passed by the learned trial Court is based upon surmises and conjectures and has been passed without applying judicial mind; that valuable rights of the respondent/plaintiff were seriously prejudiced by dismissing the suit u/o XVII Rule 3; that it is settled law that technicalities should not come in the way of dispensing of justice; that the judgment passed by the learned Appellate Court is a legal one and was passed with consent of all involved parties and does not require any interference.

6. I have heard the learned counsel for the parties and perused the material available on the record.

7. Since the question of the appeal being time-barred is concerned, it would be pertinent to discuss the same before indulging into a discussion

on merits. At the very outset, it is observed that when the base order is an illegal one and was full of material illegalities and irregularities, the bar of limitation on the appeal is of no consequence. In this respect, reliance is placed on the case of ***Muhammad Aslam Zia (*PLD 1958 SC 104*)***, wherein it has been observed that:-

> "And if on the basis of a void order subsequent orders have been passed either by the same authority or by other authorities, the whole series of such orders, together with the superstructure of rights and obligations built upon them, must unless some statute or principle of law recognizing as legal the changed position of the parties is in operation, fall to the ground because such orders have as little legal foundation as the void order on which they are founded."

8. Now coming to the point of dismissal of the suit under order XVII Rule 3. Before discussing the necessary points, it would be advantageous to refer to the relevant provisions attracted to the dismissal of the case within Rule 2 or 3 of Order XVII, which are reproduced hereunder:-

ORDER XVII: ADJOURNMENTS

Rule 2. **Procedure if parties fail to appear on day fixed.** Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf of Order IX or make such other order as it thinks fit.

Rule 3. **Court may proceed notwithstanding either party fails to produce evidence, etc.** 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.

9. It may be mentioned here that under Order 17, Rule 3, C.P.C., the Court providing any party to produce its evidence or to cause the attendance of a witnesses or to perform any other act necessary for the progress of the suit for which time was allowed, if fails to produce evidence or to perform that act for which time was allowed, may proceed to decide the suit forthwith. It may also be mentioned that the decision should be on merits. The application of the above Rule is in the nature of an exception to the general provisions contained in Rule 2 which applies to the cases where

the adjournment is generally granted not for specific purpose, while this Rule applies where the adjournment is granted for any of the purposes mentioned in the rule. The other distinction is that Rule 2 of Order XVII, C.P.C. applies where the party fails to appear at the hearing but Rule 3 even applies where a party is present but has committed any of the defaults mentioned in the rule. The provision of Rule 3 of Order XVII, C.P.C. applies to the cases where time has been granted to the party at his instance to cause the attendance of witnesses or duly perform the act which is necessary for the progress of the suit. For taking action under the provisions request for adjournment should have been made by the party. The referred Rule provides that where any party to the suit to whom time has been granted fails to produce his evidence or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit. The Rule applies to the cases where party to whom adjournment was granted on his own request to produce witnesses. In the present case and as established from the record, the adjournment on the last date *i.e. 10.02.2017* of hearing was not specifically sought by the plaintiff/respondent, rather it was due to the absence of both parties on account of work suspension. Even if the adjournment before that one *i.e. dated 25.01.2017* is considered where "last chance" was accorded to the party, the same could not be said to have been given to the respondent/plaintiff at their instance.

10. Even otherwise, if the trial Court decided to proceed with the suit of the respondent/plaintiff under Rule 3 of Order XVII, it was bound to examine the material available on record and if there was none, to move on beyond examination of evidence of plaintiff, not out rightly dismiss the suit. In the case of ***Muhammad Aslam v. Nazir Ahmed*** **(2008 SCMR942)**, the Hon'ble Apex Court has been pleased to observe that:-

> "It may be pointed out here that though under Order XVII, rule 3, C.P.C. it has been provided that where sufficient cause is not shown for the grant of adjournment the Court may proceed to decide the suit forthwith but the words used in the provision in question **"proceed to decide the suit forthwith" do not mean "to decide the suit forthwith" or "dismiss the suit forthwith". The said rule simply lays down that the Court may proceed with the suit notwithstanding either, party fails to produce evidence etc. meaning**

> **thereby that in case of default to do a specific act by any party to the suit, the next step required to be taken in the suit should be taken.** Though the word "forthwith" means without any further adjournment yet, **it cannot be equated with the words "at once pronounce judgment,** as used in Order XV, rule 4, C.P.C. ' where, on issuance of summons for final disposal of the suit either party fails, without sufficient cause, to produce the evidence on which he relies".
>
> ***(emphasis supplied)***

11. The learned trial Court simply decided the case, bereft of any merit which seriously prejudiced the respondent/plaintiff in her case especially when her valuable right was involved against her own brother involving the land left behind by their father, therefore mere technicalities cannot be allowed to defeat such valuable interests. Moreover, the judgment passed by the learned Appellate Court was with consent of all involved parties too. Resultantly, impugned judgment passed by the learned Appellate Court is not illegal and was upheld and instant revision application was dismissed through short order dated 25.11.2021. These are the reasons for the same.

JUDGE