

Judgment Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Civil Revision Application No. 231 of 2006

Date	Order with signature of Judge
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Applicants : G. N. Corporation (Pvt.) Ltd. and Allah Bux Khan  
Magsi through his legal heirs, through  
Mr. Jhamat Jethanand Advocate.

Respondent : Mst. Jannat Khatoon, through  
Mr. Qammer Mehmood Baig Advocate.

Date of hearing : 10.03.2014.

**J U D G M E N T**

**NADEEM AKHTAR, J.** – F.C. Suit No.102/2001 was filed by the respondent against the applicants for possession, mesne profits and injunction, which was dismissed by the trial Court under Order XVII Rule 3 CPC vide judgment delivered on 10.03.2005 and decree drawn on 15.03.2005. Civil Appeal No.129/2005 filed by the respondent against the said judgment and decree was allowed on 07.09.2006 by the learned IV<sup>th</sup> Additional District Judge, Hyderabad, by setting aside the same and remanding the matter back to the trial Court with a direction to afford an opportunity to both the parties to lead their evidence and to decide the Suit on merits within a period of three months. Through this Civil Revision Application, the judgment of the learned appellate Court has been impugned by the applicants.

2. The relevant facts of the case are that applicant No.1 announced a housing scheme in the name and style of 'Naseem Nagar Phase III' in Deh Sari Taluka City Hyderabad, and advertised / offered bungalows for sale in the said scheme. A bungalow bearing No.(D-4) 138 measuring 1,000 sq. ft. was booked by the plaintiff on 10.11.1990, the sale consideration whereof was mutually agreed at Rs.265,000.00, including the HBFC's loan of Rs.120,000.00. Provisional allotment order was issued by applicant No.1 in the name of the respondent on 17.11.1990. Applicant No.1 increased the price of the bungalow from Rs.265,000.00 to Rs.315,000.00, and then a further increase of Rs.30,000.00 was demanded from the respondent. Final allotment order in the respondent's name was issued on 03.10.1992 by applicant No.1, who, after receiving the full amount of lease money of Rs.4,950.00 from the respondent, executed the lease deed in her favour which was duly registered with the Sub-

Registrar concerned on 03.10.1992. Thereafter, the bungalow was mutated in the name of the respondent in Taluka Form-II by the competent authority. After all the above, applicant No.1, through its letter dated 24.01.1994, informed the respondent that the total cost of the bungalow had been increased to Rs.415,000.00 ; and, later on it was fixed at Rs.650,000.00. As the respondent did not agree to such increase / demand, her allotment was purportedly cancelled by applicant No.1 through its letter dated 16.09.1995, and she was asked to collect the amount paid by her. Despite repeated requests by her, possession of the bungalow was not handed over to her by applicant No.1.

3. In the above background, the respondent filed F.C. Suit No.102/2001 against the applicants praying that the applicants be directed to put her into vacant and physical possession of the bungalow ; the applicants be directed to pay to her an amount of Rs.145,000.00, or the amount as determined by the Court, as mesne profits from 08.10.1998 till the handing over of the vacant possession of the bungalow to her ; the applicants be restrained from alienating, transferring, or encumbering the bungalow, or from delivering its possession to any third party ; and, the applicants be restrained from recovering any amount in excess to the amount recoverable from her under the agreement between the parties. Written statement was filed by the applicants, wherein they denied the claim of the respondent and insisted that her allotment was cancelled as she had failed to pay the balance sale consideration despite repeated demands and notices.

4. On the basis of the pleadings of the parties, issues were settled by the trial Court on 10.07.2003, and the matter was adjourned to 05.08.2003 for the evidence of the respondent / plaintiff. List of documents and original documents were filed by the plaintiff in advance prior to the next date of hearing, but her evidence could not be recorded on any of the subsequent date due to one reason or the other. Finally, her Suit was dismissed by the trial Court on 10.03.2005 under Order XVII Rule 3 CPC. Being aggrieved with the judgment and decree passed by the trial Court, the respondent filed Civil Appeal No.129/2005, which was allowed by the learned appellate Court on 07.09.2006 through the judgment impugned herein, whereby the judgment and decree passed by the trial Court were set aside and the matter was remanded back to the trial Court with a direction to afford an opportunity to both the parties to lead their evidence and to decide the Suit on merits within a period of three months.

5. Mr. Jhamat Jethanand, the learned counsel for the applicants, contended that the respondent failed to appear before the Court or to produce her evidence despite number of chances given to her by the trial Court. He further contended that even on the date of dismissal of the Suit, she did not appear

before the Court nor did she produce her evidence. He submitted that in view of her said failure, her Suit was rightly dismissed by the trial Court under Order XVII Rule 3 CPC. He further submitted that Rule 3 of Order XVII CPC was fully applicable in the matter as, under the said Rule 3 which specifically deals with such situations, the trial Court had no choice but to dismiss the Suit in view of the respondent's failure to appear or to produce her evidence. It was urged that the learned appellate Court committed a grave error in law by not appreciating the well-settled law on this point. In support of his submissions, the learned counsel relied upon (1) Shahid Hussain V/S Muhammad Akram, 2000 SCMR 1135, (2) Ghulam Qadir alias Qadir Bakhsh V/S Haji Muhammad Suleman and 6 others, PLD 2003 Supreme Court 180, and (3) Abdul Jabbar V/S Mst. Pathani and 9 others, 2004 YLR 2185.

6. On the hand, Mr. Qammer Mehmood Baig, the learned counsel for the respondent, strongly supported the impugned judgment by submitting that neither the provisions of Rule 3 *ibid* were attracted in the matter nor could the Suit be dismissed under the said Rule. He contended that on 26.01.2005 when the Suit was fixed for the evidence of the plaintiff / respondent, her counsel was present, but the presiding officer was on medical leave and the matter was adjourned to 21.02.2005 only due to this reason ; the said date was not given by the Court, but was given by the Reader ; the Reader had no authority to mention in the diary sheet dated 26.01.2005 that the matter was being adjourned to 21.02.2005 "*for same purpose*" ; 21.02.2005 was admittedly declared a public holiday, therefore, the matter came up before the Court on the following day, that is on 22.02.2005, when the respondent's counsel was present ; and on 22.02.2005, the Suit was simply adjourned to 10.03.2005 without any direction to the respondent. It was urged that on 10.03.2005, the respondent's counsel was present before the Court and he filed an application for adjournment, therefore, at most the side of the respondent could have been closed, but the Suit could not be dismissed under Rule 3 *ibid*. It was further urged that in the above circumstances and also as issues had been settled and original documents had been filed by the respondent in support of her claim, the Suit ought to have been decided on merits. In support of his submissions, the learned counsel relied upon the cases of (1) Kamran Co. and others V/S Messrs Modern Motors and another, PLD 1990 Supreme Court 715 (2) Nawsheri Khan V/S Said Ahmed Shah, 1983 SCMR 1092, (3) Industrial Sales and Service, Karachi and another V/S Archifar Opal Laboratories Ltd. Karachi, PLD 1969 Karachi 418, and (4) Mubashir Khan V/S Javaid Kamran alias Javed Iqbal and 8 others, 2007 MLD 1072.

7. I have heard the learned counsel for the parties at length, and have also examined the material available on record as well as the law cited at the bar. The order sheet of 10.03.2005 of the trial Court, when the respondent's Suit was dismissed under Order XVII Rule 3 CPC, contains the following order :

*“Matter called. Plaintiff called absent parties advocate are present, Application for Adjournment moved by Advocate for plaintiff. Order passed thereon. Application dismissed. Judgment passed and announced in open Court suit of the plaintiff stand (!) dismissed U/O : 17 Rule 3 C.P.C. with no order as to costs.”*

The Suit was dismissed under Order XVII Rule 3 CPC vide judgment delivered on 10.03.2005 by the trial Court on the basis of the following observation :

*“ After perusal of case diaries it appears that plaintiff herself not attended the court since last so many hearing (!) but learned counsel for the plaintiff are submitting adjournment application on one or other reason, from the conduct on the part of plaintiff apparently appears that she is not interested or willing to proceed with this matter, she remained fail (!) to perform her duty towards further proceedings of the suit and therefore the provisions of order XVII R.3 CPC are attracted against the case of the plaintiff. .... In view of above discussion, facts and circumstances I have dismissed the suit of plaintiff under order 17 Rule 3 CPC with no order as to costs.”*

8. As copies of the application for adjournment filed by the respondent's counsel before the trial Court on 10.03.2005 and the order passed thereon by the trial Court were not filed by any of the parties, R & P was called by me from the trial Court. It transpired that adjournment was sought on the said date through an application by the counsel on the ground that the respondent was not in contact with him on that date, and it was specifically stated in the application by the counsel that she might be ill on that particular date. Vide order passed on this application on the same day, the said application was dismissed and the Suit was also dismissed by the trial Court under Order XVII Rule 3 CPC on the basis of the above-quoted observation. I have noticed that the original documents and the list thereof filed on 17.07.2003 by the respondent before the trial Court in support of her claim, are still available in the Suit file.

9. Rule 3 of Order XVII CPC provides that where a party to a 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, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the Suit forthwith. It is clear from the language of this Rule that the penal provisions thereof cannot be applied against a party

to a Suit unless time has been granted to such party by the Court for any of the purposes specified in this Rule, and despite grant of time by the Court, the said party commits default in performing the act for which time was granted by the Court. The questions that have to be examined and decided in the instant case are, (i) did the case of the respondent squarely fall within the purview and mischief of the penal provisions of Rule 3 *ibid* ; (ii) was any direction for the next date given by the Court to the respondent on the previous date to appear in person, or to cause attendance of her witnesses, or to produce evidence, or to perform any other act necessary to the further progress of the Suit on ; and, (iii) if any such direction was given by the trial Court to the respondent on the previous date, was there any default on her part in complying with the same on the next date when her Suit was dismissed under Order XVII Rule 3 CPC.

10. The record reveals that on 10.07.2003, issues were settled by the trial Court and the Suit was adjourned to 05.08.2003 for the evidence of the plaintiff / respondent. On 17.07.2003, that is prior to the date of her evidence, original documents, on which the respondent was relying, were filed by her in support of her claim along with a list. Perusal of the order sheet of the trial Court shows that the evidence of the respondent could not be recorded as the matter was adjourned on 22 subsequent dates for one reason or the other, including 05.08.2003. Such reasons were, adjournments sought by the respondent's counsel ; absence of either one or both the counsel ; transfer of the presiding officer due to which the Court became vacant ; absence of the presiding officer on account of leave ; and, the date having been declared a public holiday. It is to be noted that the matter was adjourned on eight (08) occasions as the Court was lying vacant due to the transfer of the presiding officer ; on five (05) dates, the presiding officer was on leave ; one date was declared a public holiday ; and, the matter was adjourned with the consent of the parties' counsel on four (04) dates. Out of 22 dates of hearing, the Suit was adjourned on 18 dates either due to the transfer or absence of the presiding officer, or due to public holiday, or with the consent of the parties' counsel. Thus, there were only four (04) dates when adjournment was sought by the respondent's counsel.

11. The Suit was indeed at the stage of the respondent's evidence, however, it is to be noted that the respondent was never directed by the trial Court to appear in person on any date. For the purpose of deciding the controversy involved in this matter, only two dates are relevant and crucial in my humble opinion, which are 22.02.2005 being the date just preceding the date of dismissal of the Suit, and 10.03.2005 when the Suit was dismissed. The Suit was taken up by the trial Court on 22.02.2005 as it was fixed on 21.02.2005 which was declared a public holiday. The order sheet of 22.02.2005 shows that

the parties' counsel, including the counsel for the plaintiff / respondent, were present before the Court ; it was recorded that 21.02.2005 was declared a holiday ; and, the case was simply adjourned to 10.03.2005 "*for same purpose*". On 10.03.2005, the respondent was absent, but her counsel was present and he filed the above mentioned application for adjournment which was dismissed and the Suit was also dismissed under Order XVII Rule 3 CPC.

12. Three vital facts, which go to the root of this case, have emerged from the above. Firstly, on 22.02.2005 the case was not adjourned at the request of the respondent ; secondly, the respondent was not granted time by the trial Court on the previous date (22.02.2005), nor did the trial Court give any specific direction to her on the said date for the next date (10.03.2005), to appear in person, or to cause attendance of her witnesses, or to produce evidence, or to perform any other act necessary for further progress of the Suit ; and thirdly, on the next date (10.03.2005) when the Suit was dismissed under Order XVII Rule 3 CPC, the respondent's counsel was present before the trial Court. This being the position, the respondent's absence on 10.03.2005 could not be treated as a default on her part in terms of Rule 3 of Order XVII CPC. Therefore, the penal provisions of Order XVII Rule 3 CPC were not attracted in her case and her Suit could not be dismissed thereunder due to her absence. This view expressed by me is supported by a very recent case ; namely, *Sheikh Khurshid Mehboob Alam V/S Mirza Hashim Baig and another*, **2012 SCMR 361**, wherein the Hon'ble Supreme Court was pleased to hold that it was the consistent view of the Hon'ble Supreme Court that the evidence of a party cannot be closed under Order XVII Rule 3 CPC for non-production of evidence where the case on the previous date was not adjourned at the request of such party. Moreover, the Suit could also not be dismissed under Order XVII Rule 3 CPC as the respondent was not unrepresented and her counsel was present on the date of dismissal. In this context, reference may be made to *Sardar Muhammad Ibrahim Khan V/S The Azad Jammu and Kashmir Government*, **PLD 1987 Supreme Court (AJ&K) 127**, wherein it was held by the Hon'ble Supreme Court of Azad Jammu and Kashmir that there is ample authority in support of the proposition that when a party appears through counsel and asks for an adjournment, such party must be deemed to have appeared.

13. From the diary sheet and judgment dated 22.02.2005, it appears that while dismissing the Suit under Order XVII Rule 3 CPC, the trial Court was to a great extent influenced by the previous lapses on the part of the respondent. It is well-established that the previous default of a party, if any, is not to be taken note of while considering the question under Rule 3 *ibid* as to whether a party is entitled to grant of further opportunity or not. In this context, reference may be

made to Messrs Raheem Steel Re-Rolling Mills and 4 others V/S Messrs Karim Aziz Industries (Pvt.) Ltd., **1988 CLC 654**. The point that previous default(s) or conduct of a party should not prejudice the merits of his case, is further fortified by two Full Bench authorities of the Hon'ble Supreme Court ; namely, Seth Shivrattan G. Mohatta and another V/S Messrs Mohammadi Steamship Co. Ltd., **PLD 1965 Supreme Court 669**, and Babu Jan Muhammad and others V/S Dr. Abdul Ghafoor and others, **PLD 1966 Supreme Court 461**. In view of the law laid down in the above authorities, I am of the view that once the previous defaults or lapses, if any, on the part of the respondent to produce her evidence were condoned by the trial Court and time was granted to her, the same could not be made the basis of exercising jurisdiction against her under Rule 3 *ibid* on 10.03.2005 ; and, for proceeding against the respondent under the said Rule on the said date, only the default on her part, if any, of any of the directions contemplated in the said Rule were to be judged by the trial Court. The trial Court committed an error in law by dismissing the Suit under Rule 3 *ibid* by taking note of the previous conduct of the respondent.

14. In Muhammad Aslam V/S Nazir Ahmed, **2008 SCMR 942**, the Suit was at the stage of the plaintiff's evidence and last chance had been given to him to produce his evidence. On the relevant date, he did not produce his evidence nor did he appear, but his counsel filed an application for adjournment. The trial Court dismissed the application, closed his evidence by invoking the provisions of Order XVII Rule 3 CPC, and dismissed the Suit with costs. The appeal filed by the plaintiff was allowed by the appellate Court by setting aside the order of the trial Court and remanding the Suit for decision afresh in accordance with law. Civil Revision filed by the defendant against the judgment of the appellate Court was dismissed by the learned Lahore High Court, and the order of remand was maintained. Civil Petition for Leave to Appeal filed by the defendant was dismissed by the Full Bench of the Hon'ble Supreme Court by holding *inter alia* as under :

*“ 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 a specific act by any party to the suit, the next step required to be taken in the suit should be taken. Though the words “forthwith” means without any further adjournment yet, it cannot be equated with the words “at once pronounced 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 added)

In my humble opinion, the above-cited Full Bench authority is fully applicable to the instant case as the facts thereof and the facts of the instant case are identical. In the instant case also, the application for adjournment was dismissed when the Suit was fixed for the plaintiff's evidence ; her Suit was dismissed under Order XVII Rule 3 CPC ; and, the said order of dismissal was set aside by the appellate Court by remanding the matter to the trial Court with a direction to afford an opportunity to both the parties to lead their evidence and to decide the Suit on merits within a period of three months.

15. In Muhammad Haleem and others V/S H. H. Muhammad Naim and others, **PLD 1969 Supreme Court 270**, it was held by the Full Bench of the Hon'ble Supreme Court that there is a distinction between Rules 2 and 3 of Order XVII CPC and it lies in this that Rule 2 would be attracted to a case where the adjournment has been granted generally for one of the purposes mentioned in that Rule, but where the entire evidence has been recorded and the case is posted only for the hearing of arguments, the more appropriate Rule to follow would be Rule 3 and not Rule 2. It was further held that the consensus of judicial opinion appears to be in favour of the view that if it is possible for a Court to base a decision on merits upon the material already brought on the record, it should proceed under Rule 3 of Order XVII and not under Rule 2 ; and, if it is at all possible for a Court to decide the matter as indicated in Rule 3, then it should adopt that course and not dismiss the proceedings for non-prosecution and leave the parties to start a second round of litigation. In the instant case, it is to be noted that the Suit was at the stage of the plaintiff's evidence and the entire evidence had not been recorded, therefore, Rule 3 of Order XVII CPC could not be followed or applied by the trial Court in view of the law laid down by the Hon'ble Supreme Court in this Full Bench authority.

16. A somewhat similar view was taken by the Hon'ble Supreme Court of Azad Jammu and Kashmir in Sardar Muhammad Ibrahim Khan (supra), wherein it was held that if a case falls within the ambit of Order XVII Rule 3 CPC, it is incumbent upon the Court to decide the case on merits, provided there is material on the record to decide the same. In Government of N.W.F.P. through Secretary, C & W and others V/S Messrs Tahir Shoaib - Rashid Shoaib, **1998 CLC 1680**, it was held by a learned Division Bench of Peshawar High Court that Rule 3 of Order XVII CPC is not mandatory in nature ; where there is no sufficient material on the record, Court should adjourn the case to enable the parties to tender their evidence and then to have decided the case on merits ;

the Court should not decide the case summarily as it has to pass a decree which must conclusively determine the rights of the parties ; and, it is now well-settled that the Court while proceeding under Order XVII Rule 3 CPC should record its findings in the case on merits after considering the entire material on the record.

17. I shall now discuss the cases relied upon by the learned counsel for the applicant.

- A. In Abdul Jabbar (supra), the plaintiff failed to appear in Court when the Suit was fixed for his evidence and sent a message about his ailment by filing an application for adjournment. Whereas in the instant case, no message was sent by the respondent / plaintiff, but her counsel was present and he filed the application for adjournment on her behalf. This case is of no help to the applicants as the facts thereof were different. In any case, the same having been authored by a learned Single Judge of this Court, is not binding on me.
- B. In Ghulam Qadir alias Qadir Bakhsh (supra), when the matter was fixed for the plaintiff's evidence, the plaintiff and his counsel were absent and evidence was not produced by him. Due to this reason, his evidence was closed under Order XVII Rule 3 CPC and the Suit was dismissed. With respect to the learned counsel, this case is also not applicable in the instant case as the counsel for the respondent / plaintiff was present before the Court when her Suit was dismissed under Rule 3 *ibid*.
- C. In Shahid Hussain (supra), the plaintiff's Suit for specific performance was decreed ex-parte against the defendant. The application filed by him for setting aside the ex-parte decree was dismissed by the trial Court on the ground that he failed to produce his evidence despite various opportunities. Appeal filed by the defendant was dismissed being barred by time and also on merits. Civil Revision before the learned Lahore High Court and Civil Petition for Leave to Appeal before the honourable Supreme Court filed by the defendant, were also dismissed. Again with respect to the learned counsel, I am of the view that this Full Bench authority is not applicable in the instant case for the simple reason that the facts therein and the facts of the instant case are clearly distinguishable. In the cited authority, defendant had failed to produce his evidence, and due to this reason, ex-parte decree was passed against him after the evidence of the plaintiff had been concluded. Whereas, in

the present case the Suit was at the stage of the plaintiff's evidence, but as her evidence was not available on the relevant date, her Suit was dismissed by invoking the provisions of Order XVII Rule 3 CPC. However, if the cited authority is considered on the premise that Rule 3 *ibid* is applicable to either party, even then the same cannot be applied in view of the law laid down in the Full Bench authority of Muhammad Aslam (supra), which is later in time. More importantly, the order of dismissal of the application for setting aside the ex-parte decree was before the Hon'ble Supreme Court, which was maintained mainly on the ground that the appeal filed by the defendant / petitioner against the order of dismissal of his application was barred by time, and no explanation whatsoever was given by him for condoning the inordinate delay of more than two years. Regarding the applicability of Order XVII Rule 3 CPC, there is no finding or even observation in the above-cited authority.

Learned counsel for the applicants has not been able to cite any law wherein the Suit was dismissed under Order XVII Rule 3 CPC despite the facts that no direction was given to the plaintiff on the previous date and the plaintiff's counsel was present on the date of dismissal ; and, such dismissal was upheld either by High Court or by the Hon'ble Supreme Court.

18. Regarding the cases relied upon by the learned counsel for the respondent, with respect to him, two of them are not relevant to the facts of the instant case. The case of Kamran Co. (supra) relied upon by him pertains to non-compliance of the provisions of Order XVII Rule 5 CPC that when the Presiding Officer is absent, the ministerial officer of the Court shall hand over to the parties a slip specifying the other date fixed for proceedings. In the instant case, the Presiding Officer was not absent on 22.02.2005 and the next date, when the Suit was dismissed, was given by the Court and not by the ministerial officer. Therefore, this case is not relevant to the facts and circumstances of the instant case. Likewise, the case of Nowsheri Khan (supra) relied upon by him, wherein it was held that the Reader of the Court is not competent to fix the case for hearing, is also not relevant. In Mubashir Khan (supra), relied upon by him, the Suit was dismissed by invoking the punitive provisions of Order XVII Rule 3 CPC as the plaintiff was absent and had failed to produce his evidence. Appeal against the said order was allowed as the plaintiff had not been called upon to appear as his own witness ; his counsel, who was present, had not been required to produce whatever oral / documentary evidence available with him ;

a counter Suit by the defendant was also pending ; and, the trial Court did not notice that an application for transfer and consolidation of both the Suits was pending. The last cited case is relevant to the present case, as in the present case also the respondent had not been called upon to appear as her own witness, and her counsel had not been required to produce whatever oral / documentary evidence available with him when the Suit was dismissed under Order XVII Rule 3 CPC.

19. The case of Industrial Sales and Service, Karachi and another V/S Archifar Opal Laboratories Ltd., Karachi, PLD 1969 Karachi 418, relied upon by the learned counsel for the respondent is more relevant and important. In the cited authority, a learned Division Bench of this Court was pleased to hold that Order XVII Rule 3 CPC is, in its nature, a penal provision, and the same can be pressed into service for deciding the Suit finally on merits on the proof of default by some party ; and, some of the conditions to be satisfied before passing an order under the said provision 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.”*

It was held in the above case by the learned Division Bench of this Court that if the conditions of Rule 3 of Order XVII are satisfied, only then can the Court proceed to decide the Suit ; but that decision, if it is to be under the said Rule, must be forthwith. The parties in the cited case had already submitted

their documents which were yet to be exhibited and proved. It was held that there is ample authority on the point that Rule 2 of Order XVII CPC cannot be availed for deciding any substantial question on merits by invoking the conditions mentioned in Rule 3 of Order XVII.

20. In view of the above discussion and the law discussed above, it follows that in order to attract the penal provisions of Rule 3 of Order XVII CPC, time must have been granted by the Court to the party for doing any of the acts mentioned therein on the next date ; time must have been granted by the Court at the request of the defaulting party ; and, the party must be in default on the next date in complying with the direction given to him by the Court at his request. It further follows that if the time has not been granted by the Court on the previous date at the instance of the party, against whom order is required to be made, then the punitive provisions of Rule 3 *ibid* would not be applied against such party though in default on the next date. In the instant case, it cannot be said by any stretch of imagination that the date on which the Suit was dismissed under Order XVII Rule 3 CPC, was ever given at the instance of the respondent, or any direction was given to her on the previous date to do any of the acts mentioned in Rule 3 *ibid* on that date, or the respondent committed default on that date in complying with any such direction. Therefore, the provisions of Rule 3 *ibid* were not attracted to the facts of the case in my humble opinion. Previous conduct of the respondent and the mere fact that last opportunity was granted to her on some previous date to produce evidence, was not sufficient to apply the punitive provisions of Rule 3 *ibid* against her on the relevant date.

21. After giving due consideration to the submissions made by the learned counsel and examining the material on record with their able assistance, I am of the considered opinion that the judgment and decree passed by the trial Court were unsustainable in law, which were rightly set aside by the learned appellate Court. Revisional jurisdiction can be exercised only in case of non-assumption or illegal assumption of jurisdiction, or where jurisdiction is exercised illegally or with material irregularity. By all standards, I have found the impugned judgment in accordance with law, which does not require any interference by this Court. Accordingly, this Civil Revision Application is dismissed with no order as to costs.

22. Before parting, it may be observed that the learned appellate Court had directed the trial Court on 07.09.2006 to afford an opportunity to both the parties

to lead their evidence and to decide the Suit on merits within a period of three months. However, this litigation has consumed a considerable time, and because of the stay granted in these proceedings, the matter could not proceed before the trial Court. The trial Court is directed to comply with the direction of the learned appellate Court in letter and spirit. The office is directed to send the R & P back to the trial Court for compliance.

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