

Judgment Sheet

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Rev. Application No.S-03 of 2018

Applicant : Chaudhary Tanveer Ahmed, through
Mr. Jamshed Ahmed Faiz, Advocate

Respondent No.1 : Nemo

Respondent No.2 : Shafqat Soomro, through
Mr. Abdul Baqi Jan Kakar, Advocate

Respondents No.3 &4 : Province of Sindh and other, through
Mr. Asfandyar Kharal, Assistant Advocate
General, Sindh

Date of hearing : 24.11.2023

Date of Decision : 11.12.2023

JUDGMENT

ARBAB ALI HAKRO, J.- Through this Civil Revision Application under Section 115, the Civil Procedure Code 1908 ("**the Code**"), the applicant has impugned Judgment and Decree dated 05.10.2017, passed by II-Additional District Judge, Ghotki ("**the appellate Court**") in Civil Appeal No.45 of 2016, whereby, the Judgment dated 18.10.2016 and Decree dated 20.10.2016, passed by Senior Civil Judge, Ghotki ("**the trial Court**") in F.C. Suit No.173 of 2014, through which the suit of the applicant was dismissed under Order XVII Rule 3 of the Code has been maintained by dismissing the Appeal.

2. The brief facts necessary for the decision of the case are that the applicant/plaintiff, Chaudhury Tanveer Ahmed, filed a suit against the defendants for pre-emption before the trial court. The suit aims to pre-empt a sale made through a registered Sale Deed dated 26.3.2014. This sale pertains to an agricultural land bearing C.S No.425 Ward-C, part of Revenue Survey No.836 and 335, measuring 00-01 Ghunta. The land is situated in Deh Odherwali Taluka, District Ghotki. The land was purchased by the defendant No.1/respondent and three others

from the defendant No.2/respondent. The applicant/plaintiff detailed in the plaint how he came to know of the sale mutation that he seeks to pre-empt. He further averred that he is a *Shafi Sharik, Shafi Khalit, and Shafi Jar*.

3. The defendant/respondent No.1 resisted the suit, while submitting his written statement; he controverted the assertions contained in the plaint.

4. Out of the divergent pleadings of the parties the trial Court framed the following issues: -

- i. Whether the plaintiff has got superior right of pre-emption be Shafi-e-Sharik, Shafi-e-Jar and Shafi-e-Khalit?*
- ii. Whether the demands of pre-emption as required under the law are made by the plaintiff?*
- iii. Whether the plaintiff is entitled for the relief as claimed?*
- iv. What should the decree be?*

5. After the trial Court framed the issues, it called upon the plaintiff/applicant to produce evidence. However, the plaintiff repeatedly failed to provide evidence in support of his case. As a result, vide Judgment dated 18.10.2016 and Decree 20.10.2016, the trial Court dismissed the suit under Order XVII Rule 3 of the Code.

6. The plaintiff/applicant, aggrieved by the Judgment dated 18.10.2016 and Decree dated 20.10.2016, filed an appeal before the appellate Court. However, this appeal was dismissed on 05.10.2017.

7. At the outset, learned counsel representing the applicant submits that learned lower Courts have seriously erred by passing impugned judgments and decrees without considering material irregularities and have decided the matter in a hypothetical manner; that the trial court's primary duty is to provide the concerned party with an adequate opportunity to establish its claim by presenting evidence supported by the relevant and necessary document in view of Order XVII Rule 3 of the Code but learned Courts below failed to accomplish

its duty inspite of adjournment applications, where were never objected by other party; that concurrent findings recorded by learned lower Courts are not in consonance of facts and law as well by ignoring the legal position. In the end, learned Counsel for the Applicant has prayed that instant revision application may be allowed by setting aside impugned judgments and decrees passed by both lower Courts. In support of his contention, learned Counsel has placed reliance upon the case laws reported as **PLD 2015 Sindh 58**.

8. Conversely, learned counsel representing Respondent No.2 contended that learned trial Court has rightly dismissed the suit of the Applicant, which was maintained by learned Appellate Court; that there is no any gross or material irregularity or illegality committed by both Courts below; that the trial Court framed the issues on 30.04.2015 and thereafter matter was fixed for evidence of applicant; however despite of ample chances afforded to him, he failed to appear and gave evidence, hence is not entitled for further opportunity/ chance; that ultimately learned trial Court dismissed the suit under Order XVII Rule 3 of the Code. He prayed for dismissal of instant revision application. He placed reliance on the case of reported as **2003 SCMR 797 & 2005 SCMR 1673**.

9. Learned AAG, while supporting the judgments and decrees passed by both lower Courts, has adopted the arguments advance by learned Counsel for the Respondent No.2 and submits that ample opportunities were afforded to the Applicant by learned trial Court but he constantly failed to appear, hence trial Court has rightly dismissed the suit under Order XVII Rule 3 CPC as any case or proceedings cannot be lingered on for indefinite period, and the decision or verdict must be pronounced by the Courts as it is primary duty of the Courts below to dispense the justice early so that any party may not suffer from erroneous proceedings.

10. The arguments have been heard in detail, and the available record has been meticulously evaluated with the valuable assistance of the learned Counsel for the parties including case law relied upon them. I have also examined the precision and thoroughness of the judgments and decrees of both the lower Courts, providing a fair opportunity for the learned Counsel for the Applicant to convince me about any illegal actions or material irregularities committed by the Courts below in the exercise of their jurisdiction.

11. The record clearly indicates that the trial Court granted the applicant numerous opportunities to present evidence, which the applicant did not utilize. Consequently, due to the lack of evidence, the trial Court dismissed the applicant's suit in accordance with Order XVII Rule 3 of the Code. It is pertinent to refer to Order XVII Rule 3 of the Code, which reads as under: -

"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 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. "

12. Upon careful examination of the aforementioned provisions, it becomes abundantly clear that Order XVII Rule 3 of the Code grants the Court the authority to promptly decide the case if the party, as directed by the Court, fails to present evidence or introduce any material into the record. It is a matter of record that the trial Court framed four issues from the pleadings of the parties on April 30, 2015. The case was adjourned for the applicant's evidence. However, despite being granted the last and final opportunities, the applicant failed to present his evidence. Upon reviewing the record, it is evident that the applicant requested adjournments on approximately 15 dates of hearing i.e. June 09, 2015; June 30, 2015; August 18, 2015; September 08, 2015; September 22, 2015; November 24, 2015; January 12, 2016; February 23, 2016; March 15, 2016; May 10, 2016;

May 31, 2016; August 16, 2016; September 06, 2016; September 27, 2016; and October 18, 2016. On the last three dates (August 16, 2016; September 6, 2016; and September 27, 2016), the trial Court gave the applicant the last and final chance to present his evidence. However, the applicant failed to present his evidence from the time the issues were framed on April 30, 2015, until October 18, 2016, a period of over one year and five months. The case was continually adjourned at the applicant's request to allow him to present his evidence, and he was given multiple final opportunities to do so. Conversely, the applicant's demeanour towards the proceedings indicates that despite ample opportunities, he did not take his case seriously and failed to appear before the trial Court to testify or produce his witnesses, despite the numerous opportunities provided by the trial Court. In such circumstances, the trial Court had no choice but to dismiss the applicant's case under Order XVII Rule 3 of the Code. Therefore, the trial Court, in exercising jurisdiction under Order XVII Rule 3 of the Code, did not commit any illegality. On the contrary, it was entirely justified in dismissing the suit. It is also well established that the law favours the vigilant, not the indolent, who is not serious about pursuing his case. When dealing with the disposal of a suit under Order XVII Rule 3 of the Code, the trial Court's primary duty is to provide the concerned party with an adequate opportunity to establish its claim by presenting evidence supported by relevant and necessary documents. If the party fails to seize such an opportunity, the trial Court is fully competent to decide the suit's fate under Order XVII Rule 3 of the Code.

13. The Supreme Court of Pakistan has consistently held that if it could be ascertained, on perusal of the chequered history of the case, that a party has failed to adduce evidence consistently, it could be applied, the trial court is required to examine this. The Supreme Court in the case of Moon Enterpriser CNG Station, Rawalpindi vs. Sui

Northern Gas Pipelines Limited through General Manager, Rawalpindi and another (2020 SCMR 300), has held as under: -

“4. We have heard the learned counsel and perused the record. It is unfortunate that the prevailing pattern in the conduct of litigation in the Lower Courts of Pakistan is heavily permeated with adjournments which stretch, what would otherwise be a quick trial, into a lengthy, expensive time-consuming and frustrating process both for the litigant and the judicial system. While some adjournments are the consequences of force majeure, most are not. To cater for the later and to discourage misuse, the C.P.C. through Order XVII, Rule 3 has provided the Court with a course of action that checks such abuse. We now advert to Order XVII, Rule 3, C.P.C., which is reproduced below for ease of reference:-

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 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 each default, proceed to decide the suit forthwith.

5. This court has through a plethora of judgments, settled the law on the aforementioned provision. In Maulvi Abdul Aziz Khan v. Mst. Shah Jahan Begum and 2 others (PLD 1971 SC 434) this court held that:

"It will be seen that this rule applies to a case where time has been granted to a party at his instance, to produce evidence, or to cause the attendance of witnesses or to perform any other act necessary for the progress of the suit and will not apply unless default has been committed by such party in doing the act for which the time was granted."

In the case of Ghulam Qadir alias Qadir Bakhsh v. Haji Muhammad Suleman and 6 others (PLD 2003 SC 180) it was held that failure to produce evidence despite a last opportunity being granted would attract Order XVII, Rule 3, C.P.C. More recently, it was held in the case of Rana Tanveer Khan v. Naseer-Ud-Din and others (2015 SCMR 1401) that:

2. ...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).

6. *A bare reading of Order XVII, Rule 3, C.P.C. and case law cited above clearly shows that for Order XVII, Rule 3, C.P.C. to apply and the right of a party to produce evidence to be closed, the following conditions must have been met:*

- i. at the request of a party to the suit for the purpose of adducing evidence, time must have been granted with a specific warning that said opportunity will be the last and failure to adduce evidence would lead to closure of the right to produce evidence; and*
- ii. the same party on the date which was fixed as last opportunity fails to produce its evidence.*

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.

7. *Turning to the merits of the present case, the record clearly shows that the Petitioner was granted a number of adjournments so that it may produce its evidence. It was on 24.09.2019, that the learned Gas Utility Court allowed the Petitioner one last and final opportunity with a warning that failure to comply would result in its right to produce evidence being closed. The Petitioner, despite the clear warning, failed to produce its evidence on 07.10.2019 and the learned Gas Utility Court closed its right to produce evidence. The Petitioner did however, later on the same day, file an application for adjournment wherein it was stated that the Petitioner's witness was suffering from dengue fever. The learned Gas Utility Court rightly dismissed the application as it lacked both an affidavit and a medical certificate which may have substantiated the grounds of the application. Suffice it to say that we agree with the view taken by both the learned Gas Utility Court and the learned High Court. Once the Petitioner had been granted a final opportunity, and had also clearly and unambiguously warned against default and the consequence thereof, the Petitioner was required to produce evidence on that date as no further time could or should have been granted. In this case the necessary conditions for Order*

XVII, Rule 3, C.P.C. to apply were fully met and the learned Trial Court correctly used its power to close the right of the Petitioner to produce evidence. The learned counsel for the Petitioner has not been able to demonstrate any infirmity, error or flaw in the impugned order that may have furnished any justification or basis for interference in the impugned judgment.”

In another case of Abdul Shakoor and others v. Province of the Punjab and 4 others (2005 SCMR 1673), the August Court has observed as under: -

“Heard Ch. M. Ashraf, learned Advocate Supreme Court on behalf of petitioners and Mr. Abdul Wahid Chaudhry, learned Advocate Supreme Court for respondents and perused the chequered history of the case vigilantly and examined the record with the assistance of learned counsel for the parties. It is worth mentioning that after framing of issues petitioners/plaintiffs were asked to lead evidence but in spite of various opportunities provided on 7-6-1980, 4-11-1980, 17-11-1980, 24-12-1980, 18-1-1981, 10-2-1981, 30-3-1981, 13-4-1981, 12-9-1981, 2-1-1982, 3-5-1982, 28-9-1982, 2-10-1982, 23-1-1983, needful could not be done and ultimately the suit of petitioners/plaintiffs was dismissed in view of the provisions as contemplated in Order XVII, rule 3, C.P.C. which was affirmed by learned District Judge. It is reflective from record that in spite of numerous opportunities given on various occasions the petitioners/plaintiffs failed to produce any evidence to substantiate their claim and thus, the order passed by learned trial Court under Order XVII, rule 3, C.P.C. does not warrant any interference.”
[Emphasis supplied]

Similarly, in the case of Munawar Hussain v. Additional District Judge, Jhelum and 3 others (1998 SCMR 1067), the Apex held as under: -

"We have carefully perused the record and considered above arguments. The entire record speaks for itself. Admittedly petitioner after filing eviction application on 10-6-1992, despite several opportunities neither furnished the list of witnesses nor was able to produce evidence to substantiate his stand till 20-7-1993, when Trial Court directed dismissal of the eviction application by closing the evidence of his side. Bare perusal of order-sheets indicates that even petitioner or his authorized attorney had not appeared before the Court on any of the dates of hearing. Record speaks volumes about petitioner's extraordinary negligence in pursuing the case. It was obligatory for the petitioner to have taken effective steps either for producing or summoning the evidence to support his claim of being landlord of the house in occupation of the respondents. Trial Court had shown sufficient indulgence and there does not appear any impropriety or defect for ultimately closing side of the petitioner on account of his consistent failure to produce evidence despite seeking repeated adjournments. The trial Court could not be deemed at the mercy of petitioner or totally helpless to await till petitioner chooses to comply with repeated direction of producing evidence.

Thus, conclusion drawn by the High Court and two forums below in rejection of petition for the eviction of respondents filed by the petitioner are substantial, sufficiently convincing and based on sound reasonings. There is hardly any ground which may warrant interference in the impugned judgments."

14. It is important to note that the applicant's overall behaviour clearly shows that he intentionally and deliberately delayed the proceedings. Despite being given numerous opportunities by the trial Court over a period of more than a year and five months, he failed to present his evidence. As a result, the trial Court had no choice but to decline the adjournment application submitted on behalf of the applicant and in consequence thereof, the suit was dismissed under Order XVII Rule 3 of the Code. Learned counsel for the applicant has failed to show any illegality or material irregularity committed by the trial Court as well as the appellate Court to cause interference in the concurrent findings passed by both the Courts below. The Supreme Court has observed in a plethora of judgments that the jurisdiction of the High Court under Section 115 of the Code is narrower and the concurrent findings could be disturbed only in case of non-assumption or illegal assumption of jurisdiction, or where jurisdiction is exercised illegally or with material irregularity.

15. For the foregoing reasons, both Courts below have properly appreciated the record and correctly dismissed the suit under Order XVII Rule 3 of the Code, as well as the Appeal and the concurrent findings of the Courts below are based on valid reasons. Therefore, the instant Revision application is devoid of merits, which is accordingly **dismissed**.

JUDGE