

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, MIRPURKHAS
Civil Revision Application No.S-25 of 2023

Present:

Mr. Justice Amjad Ali Bohio

Applicants: 1. Anwaruddin s/o Pathal
2. Ahmed s/o Haji Anwer
3. Sukaruddin s/o Haji Anwer and
4. Haider Bux s/o Pathal
Through their special attorney Dodo s/o
Anweruddin Nohri
Through Mr. Haresh Chander, Advocate

Respondents: 1. LRs of respondent No.1 Muhammad Moosa
2. Qurban Ali
3. L.Rs of respondent No.3 Muhammad Essa
4. Dr. Pirbhulal s/o Neembraj and
5. Mani Shankder s/o Neembraj.
Through Mr. Kanjimal Meghwar, Advocate.
6. Mukhtiarkar Revenue, Chhachro,
7. Mukhtiarkar (Estate) Chhachro.
8. The Assistant Commissioner, Chhachro.
9. The Deputy Commissioner, Tharparkar at Mithi.
10. The Additional Commissioner, Mirpurkhas.
11. Government of Sindh to be served through
Secretary, Board of revenue, Hyderabad.
12. Sub Registrar, Mithi.
13. The Registrar, Micro Filming Officer, Mirpurkhas
Through Mr. Ayaz Ali Rajpar, A.A.G.

Date of hearing : 07.02.2024

Date of order : 19.02.2024

ORDER

Amjad Ali Bohio, J: Applicants/plaintiffs have impugned the judgment and decree dated 30.08.2023, passed by the learned District Judge/Model Civil Appellate Court, Tharparkar @ Mithi through which their civil appeal No. 08/2023 was dismissed, which was filed to challenge the judgment and decree dated 08.04.2023, passed by the learned Senior Civil Judge-II, Mithi for dismissal of suit No. 01/2020 under Order XVII, Rule 3, C.P.C.

2. Brief facts of the case are that the appellants/plaintiffs instituted above numbered suit seeking declaration and cancellation of several entries, including entry No.86-A as fraudulent and false by the Mukhtiarkar, Chhachro, and entry No.91-A of Deh Form-II of Chhachro town. They also sought the cancellation of registered sale-deed

No.187/2015, MFR No.262/6357 dated 19.03.2015, registered sale-deed No.188/2015 MFR No.262/635 dated 19.03.2015, and permanent injunction against the respondents/defendants. The appellants/plaintiffs claimed ownership of Sikni plots bearing Nos. 1316 (50 x 50 = 2500) sq.ft., 1317 (50 x 50 = 2500) sq.ft., 1318 (50 x 50 = 2500) sq.ft., 1319 (50 x 50 = 2500) sq.ft., 1337 (50 x 50 = 2500) sq.ft., and 1338 (50 x 50 = 2500) sq.ft. in Chachro town, Deh/Tapo, and Taluka Chachro, referred to as "Suit Plots". These plots were originally in the name of different applicants/plaintiffs and had been sanctioned and mutated in their names. The appellants/plaintiffs alleged that during the Indo-Pak war in 1971, the records of Taluka Chachro were destroyed, and although reconstructed in 1979-80, the records of the suit plots were reconstructed in 1994. They alleged that the father of respondents/defendants No.1 to 3, namely Qazi Sulleman, of colluding with the Mukhtiarkar to fraudulently mutate the suit plots in the respondents' names without proper notice or order of cancellation. The appellants/plaintiffs further claimed that the father of respondents/defendants No.1 to 3 sold the suit plots to respondents/defendants No.4 & 5 through registered sale-deeds without delivering possession. They asserted that the transactions remained incomplete as neither the suit plots were under the possession of respondents/defendants No.1 to 3 nor handed over to respondents/defendants No.4 & 5. In 2017, respondents/defendants No.4 & 5 attempted to forcibly occupy the suit plots, but their intervention prevented them from succeeding. Upon gaining knowledge of such facts, the special attorney of the appellants/plaintiffs obtained copies of relevant documents from the office of Mukhtiarkar (Rev) Chhachro and filed F.C Suit No.159/2017, which was later withdrawn with permission to file fresh suit. Hence, the appellants/plaintiffs filed the above suit.

3. Heard the counsel for both parties and reviewed the record.

4. It is apparent from the record that the applicants filed an application under Order XVI, Rule 1 and 2, C.P.C., requesting the summoning of official witnesses to produce important records essential for proving their pleadings. This application was indeed granted by the trial Court, as indicated by the

order dated September 24, 2022. However, upon examination of the case diaries from pages 137 to 141 accompanying the present appeal, it is observed that there is a lack of explicit directions from the Court regarding the issuance of summons in accordance with the aforementioned order dated September 24, 2022. Instead, the case was merely adjourned for the evidence of the plaintiffs' side. Furthermore, it is noted that the trial Court neglected to take cognizance of the deposit of costs/process fee for summoning witnesses by the applicants. It is well-established law that the trial Court is obligated to secure the attendance of witnesses, even utilizing its own authority, rather than penalizing the applicants for any shortcomings in this regard. The reliance in this regard is placed upon in case of Mubashir Khan v. Javed Kamran alias Javaid Iqbal and 8 others (2007 M L D 1072).

5. The suit was contested by respondents/defendants No.1 to 5. According to the case diaries of F.C Suit No.01/2020, submitted by the learned counsel for the applicants/ plaintiffs, issues were framed on 22.03.2021 and later on the suit adjourned for thirty three (33) hearings, out of which the applicants/plaintiffs have sought adjournments on 21 hearings, whereas on remaining hearings the matter was being adjourned due to Covid-19; Presiding Officer was on casual leave and filing of applications u/o XIII Rule 1 & 2, C.P.C, and under Order XVI Rule 1 & 2, C.P.C, by the applicants/plaintiffs, which were allowed. Since the applicants/ plaintiffs' suit was dismissed under the provisions of Order XVII, Rule 3, C.P.C., hence it would be appropriate to re-produce Order XVII, Rule 3, C.P.C., as under:

3. Court may proceed notwithstanding either party fails to produce his 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".

(emphasis supplied by me)

6. The record indicates that on 8.04.2023, the applicants/plaintiffs were absent without providing any intimation, although their advocate was present and had submitted an adjournment application. However, the trial Court chose to invoke the provisions of Rule 3, Order XVII, C.P.C., instead of

dismissing the suit for non-prosecution as stipulated under Rule 8, Order IX C.P.C. In the case of Ahlian Moori Payeen (2010 CLC 902), it was held that the appropriate course of action for the trial Court in such circumstances should have been to dismiss the suit for non-prosecution under Rule 8, Order IX C.P.C. This ruling establishes a precedent for cases where parties fail to appear without proper justification, and the trial Court is required to follow the procedure outlined in Rule 8, Order IX C.P.C. The relevant excerpt is reproduced as under:

“The provision of Order XVII, Rule 3, C.P.C. would reflect that such provisions are permissive and discretionary in nature and are not mandatory. Where a party fails to produce evidence, the Court may close its evidence and to decide the suit forthwith. It is the requirement of law that such discretionary powers should be exercised on the basis of recognized principles of administration of justice. It is clear from the record that on the eventful day, the petitioners were not present before the Court and in a situation like that, the proper course of action provided by the Code of Civil Procedure is the dismissal of suit of non-prosecution under Rule 9 of Order IX of C.P.C. In absence of petitioners, the application of penal provision of Order XVII Rule 3, C.P.C. seems not to be proper and justified under the law.”

7. The trial court, in passing the impugned judgment, was tasked with the examination of the documentary evidence available on record, which it failed to do. While it is evident that the presiding officer diligently proceeded with the suit as transpired from the case diaries available on record, the negligence of the applicants/plaintiffs is apparent. They failed to present their evidence for about twenty one (21) hearings, as discussed earlier. Due to the repeated absence of the applicants/plaintiffs, the proper course of action for the trial court would have been to dismiss the suit for non-prosecution under Order IX, Rule 9, C.P.C. This is because, in the absence of the applicants/plaintiffs, the penal provision of Order XVII, Rule 3, C.P.C., is deemed improper and unjustified. This interpretation is supported by legal precedent, which underscores the importance of dismissing a suit for non-prosecution when parties repeatedly fail to appear and present their case, as mandated by Order IX, Rule 9, C.P.C.

8. The statement accurately captures a fundamental legal principle: adherence to prescribed procedures is essential in law, and any deviation from these procedures is impermissible. This principle ensures fairness, consistency, and predictability in legal proceedings. In the case of Muhammad Yousaf, it was emphasized that parties should not try to circumvent or go against the wisdom embedded in legal statutes and procedures. This underscores the importance of respecting and following established legal norms and processes to uphold the integrity of the legal system.

9. Based on the discussion provided, it is evident that the applicants/plaintiffs displayed a lack of interest in presenting their evidence and unnecessarily sought adjournments during the proceedings. The trial Court should have granted these adjournments while imposing reasonable costs to keep the applicants/plaintiffs alert in proceeding with the suit. However, it is noted that the trial Court did not impose any costs despite the repeated adjournments sought by the applicants/plaintiffs.

10. Therefore, in light of these circumstances and in order to ensure that the decision is made on the merits of the case, I hereby accept the revision application, subject to the condition that the applicants/plaintiffs must pay costs of Rs.20,000/= (Rupees Twenty thousand only) to the contesting private respondents. Additionally, the case is remanded with directions to the trial Court to decide the matter within four months without unnecessary adjournments so as to ensure adjudication or disposal of the suit in accordance with law.

JUDGE

“Saleem”