

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, MIRPURKHAS

Civil Revision Application No.S-12 of 2023

Applicant: Basit Ahmed son of Zameer Ahmed
Through Mr. Muhammad Asif Zai, Advocate

Respondents: 1.Shakeel son of Shafi Husain,
2. Bilal son of Shafi Husain,
3. Muhammad son of Shafi Husain.

Through Mr. Rana Raheel Mehmood Rajput, Advocate.

Respondents: 4. Mukhtiarkar Revenue, Mirpurkhas,
5. Sub-Registrar, Mirpurkhas,
6. Government of Sindh, through Secretary Revenue,
Sindh Secretariat, Karachi.

Through Mr. Ayaz Ali Rajpar, A.A.G.

Date of order : 26.01.2024

ORDER

Amjad Ali Bohio, J: The applicant/plaintiff has challenged judgment dated 08-07-2023 passed by District Judge, Mirpurkhas dismissing his civil appeal 14/2023 which appeal was filed by him impugning therein judgment passed by Senior Civil Judge-III, Mirpurkhas whereby suit bearing No.19/2021 was dismissed under Order XVII, Rule 3, C.P.C.

2. The facts of case are that applicant purchased shop No.449/9, measuring 11.8 (107) sq. feet in Khisakpura Taluka Mirpurkhas, District Mirpurkhas, from opponents No. 1 to 3 through a written agreement on 18.12.2019, for a total consideration of Rs.90,00,000/-. The applicant paid Rs.45,00,000/- at the time of agreement and was obligated to pay the remaining amount on 18.06.2020. However, due to COVID-19, opponent No. 1 couldn't obtain necessary documents from the Mukhtiarkar and agreed to execute the sale deed after the lockdown. Subsequently, the opponents demanded additional money, leading to the filing of the aforementioned suit.

3. The suit was contested by respondents/opponents No.1 to 3. According to the case diaries of F.C Suit No.19/2021, submitted by the learned counsel for opponent/defendant No.1, issues were framed on 21.04.2022. The applicant/plaintiff was ordered to produce evidence on 12.05.2022, but he failed to appear. Subsequent adjournments were granted due to Eid

holidays on 09.07.2022 and 08.08.2022. On 5.09.2022, the applicant/plaintiff was absent, leading to another adjournment to 26.09.2022, when the Presiding Officer was on leave. The case was then adjourned to 15.10.2022, with both parties were absent. Subsequently, on 29.10.2022, due to the absence of the applicant/plaintiff, the case was adjourned to 21.11.2022, in the interest of justice, despite no adjournment being sought on behalf of the applicant/plaintiff. Consequently, the suit of the applicant/plaintiff was dismissed under Order XVII, Rule 3, C.P.C. vide the impugned judgment dated 21.11.2022. Being dissatisfied with the trial court's decision, the applicant/plaintiff filed an appeal before the District Judge, Mirpurkhas, who also dismissed the appeal through the impugned judgment. Hence, the instant Revision Application was filed, with notices duly served upon the opponents, who appeared through their counsel.

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

5. Having closely scrutinized the case diaries regarding the applicability of the provisions of Order XVII, Rule 3, C.P.C., I have observed that after the framing of issues on 21.04.2022, by the trial Court in the aforementioned suit, it was adjourned for the evidence of the applicant/plaintiff for seven (07) hearings. Out of these, two hearings were declared holidays, and the Presiding Officer was on leave for one hearing. Additionally, the case was adjourned due to the absence of both parties as well as the applicant/plaintiff. The impugned judgment dismissing the aforementioned suit under Order XVII, Rule 3, C.P.C. was passed on 21.11. 2022. Prior to this, on 29.10.2022, the plaintiff was absent, although their counsel was present, and the matter was adjourned in the interest of justice. As per record, no adjournment application was moved on behalf of the applicant/plaintiff on October 29, 2022. Thus, the date of hearing on 21.11.2022 admittedly was not fixed at the request or instance of the applicant/plaintiff.

6. For proper understanding it would be relevant 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)

7. The above provision of law, being penal in nature, is to be strictly construed, and action should only be taken if the party acts contumaciously and despite repeated opportunities, commits any of the defaults enumerated in the said Rule. It is settled law that the evidence of a party cannot be closed under Order XVII, Rule 3, C.P.C. for non-production of evidence where the case on the previous date was not adjourned at the request of such party.

8. In the instant matter, it is evident from the record that the matter was not adjourned on the previous date of hearing at the request of the applicant/plaintiff. The case was adjourned in a routine manner, as is apparent from the perusal of the case diary dated 29.10.2022. Accordingly, the provisions of Rule, 3 of Order XVII, C.P.C. apply to cases where time has been granted to the party at their instance to cause the attendance of witnesses or duly perform the act necessary for the progress of the suit. For action to be taken under these provisions, a request for adjournment should have been made by the party. The learned Senior Civil Judge-III, Mirpurkhas, on the previous date of passing the impugned judgment, did not adjourn the case at the request of the applicant/plaintiff, as discussed above, therefore, in the instant matter, the adjournment on the last date of hearing was not moved in writing or requested orally on behalf of the applicant/plaintiff, but rather, it was adjourned in a routine manner. Hence, the provisions of Rule, 3 of Order XVII, C.P.C. were not applicable in this case. The main factors to be considered while invoking the above provisions have been emphasized in the case of *Changaz Khan*¹ as follows:

"It is settled law that evidence of a party cannot be closed under Order XVII, Rule 3, C.P.C. for non-production of evidence where the case on the previous date was not adjourned at the request of such party. For the application of Rule 3 the following

¹ Changaz Khan v. Mian Khan and 2 others (2022 CLC 1960)

conditions must co-exist:-

- i. Adjournment must have been granted to the party at his request;*
- ii. It must have been granted to it for the purposes mentioned in the rule 3;*
- iii. The party who has taken the time defaulted in doing the act - for which he took the time from the court;*
- iv. The party must be present or deemed to be present before the court;*
- v. That there must be some material on record for decision of the case on merits and;*
- vi. That the court must decide the suit forthwith that is within a reasonable time"*

9. The record reflects that the trial Court frequently adjourned the case, whether in the presence or absence of the parties, and no adjournment application was filed on behalf of the applicant/plaintiff. The case diary dated 29.10.2022, does not indicate that the case was adjourned even on oral request of the applicant/plaintiff to 21.11.2022, when the impugned judgment and decree were passed under the provisions of Rule, 3 of Order XVII, C.P.C. Record reveals that the applicant/plaintiff was absent without intimation on 29.10.2022, while his advocate was present. Accordingly, in such circumstances, the procedure available to the trial Court was to dismiss the suit for non-prosecution as provided under Rule 8, Order IX C.P.C. as held in the case of *Ahlian Moori Payeen*², which reveals the following:

"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."

² *Ahlian Moori Payeen through representative and others v. Ghulam Muhammad and 7 others* (2010 CLC 902)

10. Apparently, the trial Court passed the impugned judgment and decree hastily, without affording a fair and proper opportunity to the applicant/plaintiff. Notably, not a single opportunity was granted to the applicant/plaintiff with specific directions to produce his evidence. This failure to provide adequate opportunity for presenting evidence and making arguments contravenes the principles of natural justice and due process. This issue is underscored in the case of *Muhammad Ameen*³, which emphasizes the importance of affording litigants the opportunity to present their case and be heard on the merits, as under:

“It is settled principle of law that courts are sanctuaries of the rights of the litigant persons brought before them and should leave no stone unturned in discharge of their duty conferred upon them by statute. They should not hesitate in exercising powers to do real and substantial justice. It is common connotation that justice hurried means justice buried. Even otherwise justice demands that the valuable rights of the parties need to be agitated upon merits rather than dismissing the matter on technical grounds. In this connection wisdom is drawn from the reported judgment of the Hon'ble Supreme Court of Pakistan reported in 2001 SCMR 159”

11. It is well-established legal principle that where the law requires a certain action to be performed in a specific manner, it must be adhered to strictly, as deviation from the prescribed procedure is impermissible. This principle is succinctly captured in the case of *Muhammad Yousaf*⁴, wherein it was held that no one should attempt to surpass the wisdom of the law.

12. In light of the foregoing discussion, I have concluded that the Courts below have committed material irregularities in passing the impugned judgments and decrees. Therefore, I hereby accept the Revision Application and remand the case to the trial Court for a decision on merits strictly in accordance with the law. It is further directed that the parties should appear before the trial Court on 14.02.2024, and that the matter be decided within four months

³ Muhammad Ameen vs. Collector Land Acquisition/Deputy Commissioner District Diamer and 5 others (2020 CLC 1486)

⁴ Muhammad Yousaf v. The State (2003 P.Cr.LJ 347)

without unnecessary adjournments. The parties shall bear their own costs.

JUDGE

Faisal