ORDER SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA.

Civil Revision No. S- 140 of 2019

Date	Order with signature of Hon'ble Judge

1.For orders on office objection as flag A.
2.For orders on M.A No.07 of 2020.
3.For hearing of main case.

20.8.2020.

Mr. Haji Ahsan Ahmed Memon, advocate files vakalatnama on behalf of appellant which is taken on record.

This civil revision has been filed against judgment dated 28.9.2019 passed in Civil Appeal No.28 of 2019 by IIIrd Additional District Judge, Shikarpur, whereby judgment and decree dated 02.03.2019 passed by 2nd Senior Civil Judge, Shikarpur in FC Suit No.191 of 2016 has been maintained through which the suit of the plaintiff was dismissed under order 17 Rule 3 CPC.

Learned counsel for the applicant submits that the Courts below ought to have given another chance to the plaintiff to lead the evidence as sufficient ground was made out for not producing evidence before the trial Court; hence the order passed by the Court below be set aside and the matter be remanded to the trial Court for deciding the same on merits.

I have heard the learned counsel for the applicant and pursued the record. The applicant had filed suit for declaration, injunction and cancellation of document and after filing of written statement by the defendant No.6, issues were settled and the matter was fixed for the evidence of the plaintiff. Record reflects that time and again the plaintiff was given opportunity to lead the evidence on not less than 13 dates; but the applicant failed to proceed with the matter. He in fact also attempted to get the case transferred from one Court to the other. On neither of the dates and chances provided by the learned trial Court, the Applicant / plaintiff showed his willingness to lead evidence. When confronted learned counsel for the applicant had no satisfactory reply, except the plea that a last chance may be given.

I am afraid such contention is devoid of merits as sufficient opportunity has been granted by the trial Court and after having failed to lead the evidence proper orders have been passed under Order 17 Rule 3 CPC. In the case reported as **Rana TANVEER KHAN v NASEER-UD-DIN and others (2015 SCMR 1401),** the Hon'ble Supreme Court has been pleased to hold that once

a plaintiff has defaulted in leading the evidence, despite sufficient opportunity, then the trial Court would be justified by invoking the provision of Order 17 Rule 3 CPC. The relevant finding reads as under;

> 2. Heard. It has been argued that only within a period of 1 month and 26 days, the evidence of the appellant was closed; besides, the appellant should have been asked by the court to at least have his statement recorded; it is further argued that no direction was issued to the appellant to produce his evidence and thus the case is covered by the judgment of this Court (supra). Before proceeding further, it may be pertinent to mention here that the case Muhammad Arshad (supra mentioned in the leave granting order) by itself is only a leave granting order and is not the enunciation of law by this Court. 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). In the present case we have seen that the appellant was cautioned on two occasions, which means that the appellant was put to notice that if he fails to adduce evidence, action shall be taken. As far as the question that at least the statement of the appellant should have been recorded, suffice it to say that such issue had been considered in the judgment reported as Muhammad Aslam v. Nazir Ahmed (2008 SCMR 942) in which it was held that if the plaintiff was in attendance the court should have allowed him to appear in the witness box so as to get his statement recorded. The above judgment of this Court has been taken into account in the latest pronouncement of this Court in Syed Tahir Hussain Mehmoodi and others v. Agha Syed Liaqat Ali and others (2014 SCMR 637) in which similar question was involved, and though other evidence of the delinquent party was closed, but it was argued that the statement of plaintiff/defendant at least, should be allowed to be recorded; and it was held as under: -
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> > "5. In the above context, it may be held that in every case where the action against a delinquent party is imperative and his evidence has to be closed because the case squarely and eminently falls within the mischief of Order XVII, Rule 3, C.P.C., the court while closing the evidence is not in any manner obliged to adjourn the case and require or ask the litigant to appear and examine himself as a witness on a subsequent date. Obviously if the party is present in the court and desires to appear as a witness the court should not decline his request, rather it shall be appropriate that where the party is present, the court while applying Order XVII, Rule 3, C.P.C. and closing the evidence on a given date should itself ask the party to avail the chance of appearing as his own witness, and should also record such fact in its order (order sheet) that a chance was given to the litigant which has not been availed. However, if this fact is not so recorded by the court though the party was present and sought its examination such party should initially move an application to the court for examination if the case has not yet been decided. But where the case is finally decided a ground should be specifically set in the memo of appeal/revision as the case may be about the presence of the party and asking for the examination, which should be supported by an affidavit of the counsel of the said party to the above effect."

In the present case, as mentioned above, it is clear from the record that the appellant had availed four opportunities to produce his evidence and in two of such orders (the last in the chain) he was cautioned that such opportunity granted to him at his request shall be the last one, but still on the day when his evidence was closed in terms of Order XVII, Rule 3, C.P.C. no reasonable ground was propounded for the purposes of failure to adduce the evidence and justification for further opportunity, therefore, notwithstanding that these opportunities granted to the appellant were only in a span of about 1 month and 26 days, yet his case squarely fell within the mischief of the

provisions ibid and his evidence was rightly closed by the trial court. As far as the argument that at least his statement should have been recorded, suffice it to say that the eventuality in which it should be done has been elaborated in the latest verdict of this Court (2014 SCMR 637). From the record it does not transpire if the appellant was present on the day when his evidence was closed and/or he asked the court to be examined; this has never been the case of the appellant throughout the proceedings of this case at any stage; as there is no ground set out in the first memo of appeal or in the revision petition. Resultantly, we are not persuaded to hold that the provisions of law (Order XVII, Rule 3, C.P.C.) have been wrongly applied to the appellant's case or that he should be given the benefit of the judgment Muhammad Aslam v. Nazir Ahmed (2008 SCMR 942). In light of the above, we do not find any merit in this appeal which is accordingly dismissed.

In the case reported as **Syed TAHIR HUSSAIN MEHMOODI and others V Agha Syed LIAQAT ALI and others (2014 S C M R 637),** the Hon'ble Supreme Court has again taken the same view and the relevant finding is as under;

4. Notwithstanding our refraining to interfere in the matter on account of the above, we are of the candid view that provisions of Order XVII, Rule 3, C.P.C. are penal in nature and as per the settled law such provisions should be strictly construed and applied, therefore once the case of a delinquent litigant squarely falls within the purview and mischief of the law (ibid) then neither any concession should be shown to such litigant nor a lenient view favouring him should be resorted to; this should not even be permissibly done on the touchstone of exercise of discretionary power of the court and/or on the approach that technicalities of procedure should not be allowed to impede the interest of justice, and/or that the litigants should not be knocked out on technical grounds, and that adversarial lis should be settled on merits. If such approach is liberally followed and resorted to there shall be no discipline in the adjudication of the civil litigation and the delinquent whose case though is squarely hit and covered by the penal provisions of Order XVII, Rule 3, C.P.C. would be given a chance to his advantage and to the disadvantage of his opposing side. This is not the spirit of the law at all. It may not be out of place to mention here that to apply and to adhere to law is not a mere technicality, rather it is duty cast upon the court as per Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 to do so. Thus where Order XVII, Rule 3, C.P.C. is duly attracted, the court has no option except to take action in accord therewith.

5. In the above context, it may be held that in every case where the action against a delinquent party is imperative and his evidence has to be closed because the case squarely and eminently falls within the mischief of Order XVII, Rule 3, C.P.C., the court while closing the evidence is not in any manner obliged to adjourn the case and require or ask the litigant to appear and examine himself as a witness on a subsequent date. Obviously if the party is present in the court and desires to appear as a witness the court should not decline his request, rather it shall be appropriate that where the party is present, the court while applying Order XVII, Rule 3, C.P.C. and closing the evidence on a given date should itself ask the party to avail the chance of appearing as his own witness, and should also record such fact in its order (order sheet) that a chance was given to the litigant which has not been availed. However, if this fact is not so recorded by the court though the party was present and sought its examination such party should initially move an application to the court for examination if the case has not yet been decided. But where the case is finally decided a ground should be specifically set in the memo of appeal / revision as the case may be about the presence of the party and asking for the examination, which should be supported by an affidavit of the counsel of the said party to the above effect.

In view of hereinabove facts and circumstances of the case in hand and the law settled as above, I do not find any illegality or infirmity or exercise of any jurisdiction which was not vested in the Court below; therefore, no discretion can be exercised under Section 115 CPC to dislodge the findings of the Court below. Accordingly, this civil revision being misconceived is hereby dismissed in limine, with pending application(s), if any.

JUDGE

20/8/2020

D/O Matter

Directions

1- For orders on CMA No. 897/2022 (U/A)
2. For orders on CMA No. 896/22 (U/S 151 CPC)

D/O matter

Directions:

1. For orders on CMA No. 896/22 (U/S 151 CPC)