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Judgment Sheet

IN THE LAHORE HIGH COURT,
MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT

….

Writ Petition No.7718 of 2017.

Mst. Bhagan Bibi, etc.

Versus

Addl. District Judge, etc.

J U D G M E N T.

Date of hearing:	**15.11.2023.**
Petitioners by:	M/s Malik Tahir Shahzad Nonari and Mahar Muhammad Rafique Malana, Advocates.
Respondents #3,5,6,7,by:	Mr. Shafique Ahmad Chaudhry, Advocate.
Respondents No.4a to 4j:	Malik Aftab Abbas Khan, Advocate.

AHMAD NADEEM ARSHAD, J. Through this constitutional petition filed under Article 199 of the *Constitution of Islamic Republic of Pakistan, 1973*, petitioners have called into question the legality and validity of judgments/orders dated 08.10.2015 and 17.12.2015 passed by the Courts below whereby their application under Section 12(2) C.P.C., 1908 was dismissed for want of evidence.

2. Relevant facts forming background of this petition are that respondents No.3 to 7 instituted a suit for specific performance of an agreement to sell dated 21.01.1997 on 06.05.2002 against predecessor of the petitioners namely Bashir Ahmad, Muhammad Siddique Khan and Province of the Punjab. Suit was resisted by the predecessor of the petitioners by filing contesting written statement, however, defendant No.2 Muhammad Siddique Khan filed consenting written statement, whereas, Province of the Punjab also filed contesting written statement. During the pendency of said suit,

on 10.02.2009, it was apprised to the Court that compromise has been effected between the parties, hence, learned Trial Court adjourned the proceedings for 11.02.2009 and on the said date compromising statements of the parties were recorded, compromise deed was brought on record as Exh.C.1 and ownership document of Bashir Ahmad was also brought on record as Exh.P.1. Thereafter, learned Trial Court decreed the suit on the basis of compromise vide judgment & decree dated 23.07.2009.

3. Predecessor of the petitioners namely Bashir Ahmad (*defendant No.1*) filed an application under Section 12(2) C.P.C. on 11.07.2012 and challenged the said compromise decree on the ground of fraud and mis-representation. During the pendency of said application, said Bashir Ahmad expired and petitioners being his legal heirs were brought on record. Respondents No.3 to 7 filed contesting written reply of the application. Learned Trial Court keeping in view divergent stances of the parties framed necessary issues on 10.07.2014 and invited the petitioners to produce evidence in support of their contentions but despite availing numerous opportunities they failed to produce evidence, therefore, learned Trial Court vide order dated 08.10.2015 struck off their right of evidence and dismissed the application for want of evidence. Feeling aggrieved, petitioners filed a revision petition which was dismissed by the learned revisional Court vide judgment/order dated 07.12.2015. Petitioners assailed said orders of Courts below through instant Constitutional Petition.

4. I have heard learned counsel for the parties at length and perused the record with their able assistance.

5. Perusal of record reflects that the learned Trial Court framed the issues on the application of the petitioners on 10.07.2014 and directed the petitioners to produce their evidence. Petitioners were granted 15 adjournments for production of evidence. On three occasions, learned Presiding Officer was not available and on three occasions lawyers were observing strike. Evidence of the petitioners was not available on the said 15 dates and specifically on nine dates

of hearing when Presiding Officer was available and lawyers were also not observing strike and the case was adjourned on the petitioners' request due to non-availability of their evidence. On the preceding date i.e. 03.10.2015 final opportunity with warning was granted to the petitioners. For reference, said order dated 03.10.2015 is reproduced in verbatim as under:

> 03.10.15."
> کونسل فریقین حاضر۔
> کونسل سائل بیانی ہیں کہ آج گواہان نہ آسکے ہیں۔ مہلت کی استدعا ہے۔ کونسل مسئول علیہم اعتراض کرتے ہیں پہلے بھی آخری موقع سائل کو دیا گیا ہے۔ بغرض انصاف مسل ملتوی ہوکر برائے شہادت سائل قطعی آخری موقع سائل بتقرر 08.10.2015 پیش ہووے۔ خبردار کیا جاتا ہے کہ آئندہ گواہان/شہادت قلمبند نہ کروانے کی صورت میں حقِ شہادت سائل ختم تصور ہوگا۔"

Despite this clear-cut warning petitioners did not bother to produce their evidence.

6. Perusal of record reveals that the learned trial Court granted sufficient opportunities before invoking the penal provisions of Order XVII Rule 3 of the C.P.C. In these circumstances, learned trial Court was having the jurisdiction not only under Order XVII, Rule 3 of the C.P.C. but also was having further powers with it in accordance with the Lahore High Court Amendment of Order XVII, Rule 1(3) of the C.P.C., which for ready reference reads as under:-

> *"Where sufficient cause is not shown for the grant of an adjournment under sub-rule (1) the Court shall proceed with the suit forthwith."*

It is clear from the wording of the said Rule that on the failure of a party to produce its evidence or to do any other act necessary for the purpose of the case, for which time had been allowed to him, the Court shall proceed to decide the suit forthwith.

7. It is evident from the record that on the preceding dates, the adjournments were granted on the request of learned counsel for the petitioners with a particular direction specifying an act to be done on the next date of hearing, therefore, the petitioners were bound to do the said act and definitely default in doing so will attract the provisions of Order XVII Rule 3 C.P.C. 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. Guidance is sought from the case law titled "*Maulvi Abdul Aziz Khan v. Mst. Jahan Begum and 2 others"* (**PLD 1971 SC 434**). Same moot point was also observed in case titled "*Shahid Hussain v. Lahore Municipal Corporation*" (**PLD 1981 S C 474**) as well as in case titled "*Executive Engineer, Peshawar v. Messrs Tour Muhammad and sons and 4 others*" (**1983 SCMR 619**) wherein it was held as under: -

> *"This Rule applied where a party who is granted time to perform some act, not only fails to do so but is also absent on the date of which the hearing is adjourned. It is immaterial whether the adjournment was granted at the instance of the party or for other reasons. Where a defendant does not appear at an adjourned hearing, this rules applied irrespective of whether he appeared at the First hearing or not and the Court has to exercise its discretion; its hands are not tied by the previous ex-parte order."*

The august Supreme Court of Pakistan in the case titled "*Syed Tahir Hussain Mehmoodi and others v. Agha Syed Liaqat Ali and others"* (**2014 SCMR 637**), elaborated and guided the situation where the party was present on the day when the penal provision was invoked, wherein it was held as under: -

> *"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 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."*

8. The Hon'ble Supreme Court of Pakistan in a reported case titled "*Rana TANVEER KHAN versus NASEER-UD-DIN and others*" (**2015 SCMR 1401**), observed as under:-

> *"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), 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)."*

It was further held in the said case that: -

> *"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."*

The Hon'ble Supreme Court of Pakistan dealing with the same preposition of law in a case reported as "*MOON ENTERPRISER CNG STATION, RAWALPINDI versus SUI NORTHERN GAS PIPELINES LIMITED through General Manager, Rawalpindi and another*" (**2020 SCMR 300**) also observed as under:-

> *"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."*

It was further held in the said case as under: -

> *"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 (Qati 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."*

9. In the present case the necessary conditions for order XVII Rule 3 C.P.C. to apply were fully met and the learned Courts below correctly used its power to close the right of the petitioners to produce evidence. The petitioners availed almost 15 dates for the production of their evidence including final opportunity and with categorical warning that in case of non-availability of evidence, their right to produce evidence will be closed, which meant that the petitioners were put to notice that if they failed to adduce evidence, action shall be taken against them, but they failed to produce the same and no reasonable ground was propounded for the purpose of failure to adduce the evidence and justification for further opportunity. There is no hard and fast rule that after how many dates the right to produce evidence will be closed. 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.

10. In these circumstance, I am unable to disagree with the findings recorded by both the courts below as learned counsel for the petitioners

has not been able to demonstrate any infirmity, error or flaw in the impugned orders or any illegality, irregularity or jurisdictional defect in the findings recorded by learned courts below that may have furnished any justification or basis for interference in the impugned orders.

11. I have also observed that petitioners filed the instant Writ Petition against orders dated 08.10.2015 and 17.12.2015 on 23.07.2017 which is also hit by principal of *laches* as the petitioners failed to approach this Court within reasonable time of 90-days as explained by the august Supreme Court of Pakistan in case titled *"PAKISTAN INTERNATIONAL AIRLINE CORPORATION and others versus TANWEER-UR-REHMAN and others"* (**PLD 2010 Supreme Court 676**), wherein it was held as under:-

> *"But as far as the rule laid down in these judgments is concerned, it would not be applicable to an ordinary person filing petition by invoking jurisdiction of the High Court under Article 199 of the Constitution and he has to approach the Court within the reasonable time. Although no definition of the expression 'reasonable time' is available in any instrument of law, however, the Courts have interpreted it to be 90 days."*

12. The conduct of the petitioners is not up to the mark and they are not serious in conducting their case vigilantly. Further it has also been settled by the august Supreme Court of Pakistan that if the person invoking the constitutional jurisdiction of High Court is guilty of lethargy, inaction, laxity or gross negligence in suing the case for enforcement of right, it would be justified in non-suiting such person on the principle of *laches*. In this view of the matter, petitioners are not entitled to any leniency.

13. For the foregoing reasons, this petition merits rejection on merits as well as on the principle of *laches*, hence, the same is ***dismissed***.

(AHMAD NADEEM ARSHAD)
JUDGE.

Approved for Reporting:

JUDGE.

*M. Arsalan**