

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

RFA No. 156 of 2019

Ghulam Fatima, etc.

Versus

Muhammad Saeed, etc.

Appellants by: Mr. Nadeem Mukhtar Chaudhry, Advocate.

Respondents by: Mr. Muhammad Izzat Khan, Advocate.

Date of Decision: 08.10.2020.

MOHSIN AKHTAR KAYANI, J:- Through this RFA, the appellants have assailed the judgment & decree dated 04.03.2019, passed by learned Civil Judge 1st Class (East), Islamabad, whereby suit for possession and permanent injunction filed by appellants was dismissed for want of evidence in terms of Order XVII Rule 3 CPC.

2. Learned counsel for the appellants contends that suit for possession and permanent injunction was filed on 31.03.2015, whereby issues were framed on 14.10.2016, where-after certain opportunities were granted to the appellants for production of evidence, even last opportunity was granted but due to law and order situation and insecurity of Judges, courts were not working from December to February, 2019, where-after matter was fixed before trial Court on 04.03.2019 when appellants were not present and the trial Court dismissed the suit in terms of Order XVII Rule 3 CPC instead of dismissing the same for non-prosecution.

3. Conversely, learned counsel for respondents contends that number of opportunities were granted to the appellants for production of evidence, even cost was imposed but appellants have failed to produce evidence within time frame despite the fact that notice in terms of Order XVII Rule 3 CPC was also issued and even cost of Rs.1,000/- was imposed.

4. We have heard the arguments and gone through the record.
5. Perusal of record reveals that suit filed by appellants was dismissed for non-production of evidence in terms of Order XVII Rule 3 CPC vide impugned judgment & decree dated 04.03.2019. Record further reflects that appellants were given number of opportunities to produce the evidence, even notice in terms of Order XVII Rule 3 CPC was issued alongwith cost of Rs.1,000/-, however, immediate preceding date from 04.03.2019 reflects the following order:-

Order dated 12.12.2018: Clerk counsel for parties present.
(Presiding Officer is on leave)

Order dated 24.01.2019: Clerk counsel for parties.

Due to insecurity of Judges because of illegal construction of chambers inside the privileged area, judicial work is not possible, so to come up on 04.03.2019.

Order dated 04.03.2019 at 8:39- Present Counsel for defendants.
None for plaintiff.

Be presented again at 10:00 am.

10:10- Present counsel for defendants.

None for plaintiff.

Learned counsel for defendants states that plaintiff is neither appearing nor producing her evidence, therefore, no further opportunity be granted.

Be presented again

Order dated 04.03.2019: Presented again at 02:30 p.m.
Present: Counsel for defendant
None for plaintiff

This is a suit for possession and permanent injunction. Today the matter was fixed for evidence of plaintiff, however despite repeated calls neither the plaintiff appeared before the court neither any plausible reason for non-production of evidence by plaintiff is tendered which shows lack of interest of plaintiff in instant proceedings, therefore, instant suit is dismissed for want of evidence under Order XVII Rule 3 CPC.

Decree sheet be prepared accordingly. File be consigned to record room after its completion and compilation.

6. While considering the above referred orders, it has been observed that appellants were absent on the date when decree was passed in terms of Order XVII Rule 3 CPC, even court was not functional due to insecurity of Judges on

24.01.2019 and Presiding Officer was on leave on 12.12.2018. In such eventuality, it could easily be detected from record that no previous warning was issued on the earlier date i.e. 24.01.2019, therefore, it could not be presumed that due process of warning has been applied. Notice in terms of Order XVII Rule 3 CPC was given to the appellants much prior to the said action, hence, it is the duty of Court to provide fair opportunity and if party so directed to appear has not produced the evidence after warning date the process may be adopted in terms of Order XVII Rule 3 CPC for non-production of evidence, otherwise suit has to be dismissed for non-prosecution.

7. We have also gone through the complete order sheet of the learned Trial Court, which discloses that appellant was given number of opportunities to produce evidence for framing of issues, but the matter was adjourned as parties were in process of reconciliation and the appellant has simultaneously filed an application for submission of list of witnesses in terms of Order XVI Rule 1 CPC, however, when the compromise was not effected outside the Court, the matter was again adjourned for arguments in terms of Order XVI Rule 1 & 2 CPC as reflected from the order sheet dated 26.06.2018, whereafter application was allowed vide order dated 08.09.2018, whereby the complainant party was directed to deposit the diet money in the Nazir office for summoning of witness i.e. IESCO, subsequently the matter was adjourned to 08.10.2018, whereby the summon were issued, matter was again adjourned to 05.11.2018 and the summoned witnesses were not available, whereafter the Presiding Officer was on leave on 12.12.2018. Later on the orders dated 24.01.2019 and 04.03.2019, reproduced above clearly establish that warning in terms of Order XVII Rule 3 CPC was not issued to the appellants and as such sufficient opportunities had not been provided to the appellants to prove their claim, especially when the official witnesses are in process of summoning, even otherwise the case has not

been adjourned on the request of the appellants on the previous date, rather due to insecurity of the Judges as such the right to lead evidence could not be closed in terms of Order XVII Rule 3 CPC. Reliance is placed upon 2012 SCMR 361 (Sheikh Khurshid Mehboob Alam Vs. Mirza Hashim Baig and another), it has also been settled that where adjournment of proceedings on previous date was in routine manner without request of either party, then provisions of Order XVII Rule 3 CPC could not be applied. Reliance is placed upon 2012 YLR 2658 (Muhammad Jamil and others Vs. Mst. Inayat Begum).

8. In view of above discussion, it clearly establishes that the learned Trial Court has not considered the legal requirement of Order XVII Rule 3 CPC in letter and spirit and denied the fair opportunity to the appellant, hence the judgment and decree passed by learned Trial Court is not justiciable from the record as well as in accordance with law, therefore, instant appeal is ALLOWED and impugned judgment and decree dated 04.03.2019, passed by learned Civil Judge, 1st Class (East), Islamabad is hereby SET-ASIDE and matter is remanded back to learned Trial Court with direction to provide two opportunities to the appellants to produce the complete evidence at their own risk and cost.

9. Before parting with the said judgment, it has been observed that instant matter is pending since 31.03.2015, therefore, learned Trial Court seized with the matter is directed to conclude the same on or before 30.06.2021 by all means under intimation to this Court.

(FIAZ AHMAD ANJUM JANDRAN)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 19.10.2020.

JUDGE

JUDGE