

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

R.F.A. No.73 of 2012
Israr Ahmed Afzal
Versus.
Haji Muhammad Azram and another

Date of Hearing: 03.05.2016
Appellant by: Sardar Shabbir Hussain, Advocate
Respondent No.1 by: Raja Muhammad Aleem Khan Abbasi,
Advocate

MIANGUL HASSAN AURANGZEB J:- Through the instant Regular First Appeal, the appellant, Israr Ahmed Afzal, impugns the order dated 29.11.2012, passed by the Court of the learned Civil Judge (West), Islamabad, whereby, the appellant's suit for declaration, cancellation of deed dated 25.06.2003, and permanent injunction, was dismissed under Order XVII, Rule 3 of the Code of Civil Procedure, 1908 ("C.P.C.").

2. The records shows that on 17.03.2008, the appellant filed the said civil suit. respondent No.1 (Haji Muhammad Azram), contested the suit by filing a written statement on 20.06.2008. respondent No.2 (Capital Development Authority) filed its written statement on 06.07.2009. On 22.02.2011, respondent No.1, filed an application under Order VII, Rule 11 C.P.C. seeking the rejection of the plaint. Vide order dated 21.09.2011, the learned Civil Court dismissed this application. On the same very date (i.e. 21.09.2011), the learned Civil Court framed the issues. Thereafter, the case was adjourned on several occasions for the appellant's evidence. To be precise, on 15.11.2011, 26.01.2012, 28.03.2012, 19.07.2012, 03.10.2012, the case was adjourned for the appellant's evidence. On 05.06.2012, and 23.11.2012, the case was adjourned due to a strike being observed by the members of the Bar. It appears that between 03.10.2012 and 20.11.2012, the case was transferred from the Court of Mr. Humayun Dilawar to the Court of Ms. Ambreen Iqbal Chaudhary, Civil Judge (West), Islamabad. On 20.11.2012, the learned Civil Court issued notice '*parvi*' to the parties. As mentioned above, on 23.11.2012, the counsel for the parties could not tender appearance because of a

strike. On the next date of hearing (i.e. 29.11.2012), the clerk of the learned counsel for the appellant informed the learned Civil Court at 8:15 a.m. that the learned counsel for the appellant will appear at 11:00 a.m. The case was again called at 12:00 p.m. and no one appeared on behalf the appellant. Consequently, the learned Civil Court dismissed the suit by invoking the provisions of Order XVII, Rule, 3 C.P.C. The said order dated 29.11.2012, is reproduced herein below:-

"29-11-2012.

8:15 Clerk counsel for plaintiff present

Counsel for defendant present

Clerk counsel for plaintiff requested that the senior counsel will appear at 11:00 am.

12:00 Nemo for plaintiff.

Counsel for defendant along with defendant present.

No one appeared on behalf of plaintiff. Defendant along with his counsel is present before this Court. Perusal of order sheet reveals that vehemently so many opportunities have been given to plaintiff for recording of evidence. Now in interest of justice, as the matter is direction suit under the auspices of NJP, so after giving opportunities the suit is dismissed under O. 17 R (3)."

3. The said order dated 29.11.2012, has been impugned by the appellant in this Regular First Appeal.

4. Learned counsel for the appellant submitted that the impugned order dated 29.11.2012, is not in accordance with the law; that at no stage was the appellant cautioned by the learned trial court; that in the event, the evidence is not produced, the penal provision of Order XVII, Rule 3 C.P.C. would be invoked; that on the earlier date of hearing i.e. 23.11.2012, a general strike was being observed by the members of the Bar, therefore, the non-appearance of the appellant and his counsel was not deliberate or contumacious; that as the issues had been framed, the learned trial court, should have decided the case on merits instead of simply dismissing it; that when the appellant's suit was dismissed under Order XVII, Rule 3 C.P.C., a civil revision petition was pending against the order of the learned Civil Court dismissing respondent No.1's application under Order VII, Rule 11 C.P.C.; that adjournments had been granted by the learned Civil Court in routine and not on specific requests of the appellant; that the learned Trial Court, on account of the absence of the appellant and his counsel from the court on 29.11.2012, should have dismissed the suit for non-prosecution by invoking the provisions

of Order IX, C.P.C. rather than applying the penal provisions of Order XVII, Rule 3 C.P.C. In making his submissions, the learned counsel for the appellant placed reliance on the following case law:-

- i) Sheikh Khurshid Mehboob Alam Vs. Mirza Hashim Baig & another (2012 SCMR 631). In this case, the learned trial court dismissed the plaintiff's suit after he failed to produce his evidence despite being given a number of opportunities. The Hon'ble Supreme Court of Pakistan upheld the judgment of Hon'ble High Court, whereby the judgment dismissed in the suit was set aside primarily because on an earlier occasion, an adjournment for producing evidence was not granted on the plaintiff's request. The Hon'ble Supreme Court observed that *"the consistent view has been that expressed in Qutb-ud-Din Vs. Gulzar ibid by this Court 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."*
- ii) Muhammad Jameel & others Vs. Inayat Begum (2012 YLR 2658). In this case, it has been held at paragraph 6 of the report as follows:-

"6. It is well settled law that while exercising the provision under Order XVII Rule 3, C.P.C., it has to be established from the record that the preceding date has been obtained by such party otherwise his right to lead evidence could not be closed under Order XVII Rule 3 C.P.C. and the perusal of the order dated 17-2-2000 reveals that the case was not adjourned on the request of the learned counsel for the petitioner. It was adjourned in a routine manner without the request of either party, therefore, the learned trial Court had exercised the power under Order XVII, Rule 2 C.P.C. in stricto sensu fashion which is not permissible under the law as adequate opportunity ought to have been provided to the parties, so that the valuable rights of the parties are not trampled on technical grounds."
- iii) Muhammad Sarwar Vs. Abdul Ghafoor (2007 YLR 65). In this case, the trial Court foreclosed the right of the plaintiff to lead evidence by invoking the provisions of Order XVII, Rule 3 C.P.C. and dismissing the suit for want of evidence. The Hon'ble Lahore High Court set aside the judgment and

decree of the trial court primarily because on the date of hearing prior to the dismissal of the suit, the Bar had declared a strike. It was held that the learned Trial Court was not justified in invoking the provisions of Order XVII, Rule 3 C.P.C.

iv) M/s Transtech Ltd Vs. M/s Tabaco Company Ltd (2004 MLD 1242). In this case, the plaintiff had been granted many opportunities to produce his evidence, but on the date on which the suit was dismissed under Order XVII, Rule 3 C.P.C. It was not clear on whose request the adjournment was granted. It was held that the plaintiff's right could not be struck off under Order XVII, Rule 3 C.P.C. on the date which had not been fixed at the request of the defaulting party. Furthermore, it was held that earlier adjournments on the request of the plaintiff would not constitute a valid basis for the closure of his evidence on a subsequent date to which the case had not been adjourned at his request.

5. On the other hand, the learned counsel for respondent No.1 drew the attention of the Court to the order sheet of the learned trial Court to demonstrate that several adjournments had been granted by the learned Trial Court to the appellant to produce his evidence; and that the learned Trial Court had correctly invoked the penal provisions under Order XVII, Rule 3 C.P.C., because the appellant was unable to produce his evidence.

6. Other than the above submissions, the learned counsel for the respondent No.1 raised a preliminary objection to the maintainability of this appeal. He submitted that the appeal is not in accordance with the requirements of Section 96 read with Order XLI, Rule 1 C.P.C., inasmuch as the appeal preferred by the appellant, is not accompanied by a copy of the decree appealed from; that the appeal was only accompanied by the order dated 29.11.2012; that without the decree the appeal was not validly presented; that a Court cannot dispense with the requirement of the law; that the appeal should be dismissed because it was not accompanied by the decree; that the title page and the prayer clause of the appeal show that only the order dated 29.11.2012 was assailed and the decree was left unchallenged; that an appeal

could only be filed against the decree and not just the order/judgment. In making his submissions, the learned counsel for respondent No.1 placed his reliance on the following cases:-

- i) Abdul Shakoor & others Vs. Province of Punjab & four others (2005 SCMR 163). In this case, the Hon'ble Supreme Court upheld a judgment and decree dismissing a suit for non-production of evidence by the plaintiff in spite of having availed fourteen adjournments for such a purpose.
- ii) Sufi Ghulam Mohyuddin Vs. Khushi Muhammad and two others (1997 SCMR 924). In this case, the Hon'ble Supreme Court upheld the judgment and decree passed by the learned Trial Court by invoking the provisions of Order XVII, Rule 3 C.P.C. on account of the plaintiff not producing his evidence despite availing six opportunities for the said purpose.
- iii) Shahid Hussain Vs. Lahore Municipal Corporation (PLD 1981 SC 474). In this case, after making reference to Order XVII, Rule 3 C.P.C. the Hon'ble Supreme Court held as follows:-

"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. As such an order dismissing the suit under Order XVII, Rule 3 C.P.C., would be deemed to be a judgment on merits, unlike an order under rule 2 of the said Order.This view is clearly supported by the language of rule 3, of Order XVII read with the definition of 'Decree' in Section 2(2), C.P.C. Under Order XVII, Rule 3 C.P.C., the Court is required, on the failure of the party to do the needful, to proceed to decide the suit forthwith. As such, the decision is obviously an adjudication in which the Court conclusively determines the rights of the parties with regard to matters in controversy in the suit between the parties and that is why it has been held to operate as res judicata between them, barring an other suit relating to the same controversy."

- iv) Sardar Muhammad Irshad Khan vs. Muhammad Akram and five others (2008 CLC 1009). In this case, the Hon'ble High Court of Azad Jammu & Kashmir after making reference to Order XLI Rule 1 CPC held as follows:-

"It is evident from the above referred law that the memorandum of appeal in the High Court must be accompanied by three documents viz. Copies of the judgment and decree appealed from and copy of the judgment of the Court of first instance, the Court can dispense with the copy of judgment of either the trial Court or the Appellate Court. So far as the copy of decree

appealed from is concerned, the Court has no power to dispense the copy of decree for the reason that an appeal is basically preferred against a decree and not against a judgment, unless, of course, the judgment itself amounts to a decree."

- v) Government of Pakistan Vs Messrs Hassan Khan (2003 YLR 1686). In this case it has been held at paragraph 7 of the report as follows:-

"7...Another ground for dismissal of the appeal was that the copy of the decree-sheet had not been annexed with the memo of appeal till the same was dismissed. The provisions of Order 41, Rule 1, C.P.C. makes it compulsory for memo of appeal to be accompanied by copy of decree appealed from and a judgment upon which it was founded. The filing of decree-sheet alongwith the memo of appeal is mandatory and failure to abide by the provisions of Order 41, Rule 1, C.P.C. would render the appeal incompetent."

- vi) Sardar Muhammad Vs Muhammad Razman and 7 others (2006 YLR 1858). In this case, the decree sheet had not been filed along with the memo of appeal against the judgment and decree of the trial court. The decree had inadvertently been filed along with another appeal. It was held by the Hon'ble Lahore High Court that the non-filing of the decree along with the memo of appeal due to inadvertence was a mere irregularity which was curable. Furthermore, it was held that the appellate court should have allowed the appellant to rectify this mistake. Dismissal of the appeal on this sole ground being hyper technical was improper and unjust.

7. In rebuttal, learned counsel for the appellant submitted that when the appeal was filed in this Court, the Office raised an objection to the effect that the appeal was not accompanied with the copy of the decree; that the said objection was raised by Diary No. 11743, by the Assistant Registrar (Institution) of this Court; that after the certified copy of the decree was obtained by the appellant, the same was filed; and that the objection raised by the learned counsel for the respondent No.1 was hyper technical, and liable to be spurned. In support of his submissions, learned counsel for the appellant placed reliance on the following case:-

Manzoor Hussain Vs. Zareeda Bi & seven others (2013 CLC 1186). In this case, it was held that a decree is originated and founded upon the judgment and if the judgment is set aside, the decree cannot sustain. It was also

held that the courts have to do substantial justice and should not throw a party out of court in technicalities, and that Section 96 C.P.C. does not provide that mere omission in the prayer to set aside a decree makes an appeal incompetent.

8. We have heard the learned counsel for the contesting parties and have perused the record with their able assistance.

9. We first propose to deal with the preliminary objection raised by the learned counsel for respondent No.1 that the appeal filed by the appellant was not accompanied by a copy of the decree and on this score, the appeal was liable to be dismissed; and that as the appellant had not prayed for the decree to be set aside, the decree could not be set aside by this Court.

10. Order XLI, Rule 1 C.P.C. reads as follows:-

"1. Form of appeal. What to accompany memorandum—(1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded."

11. As mentioned above, order dated 29.11.2012 was passed by the learned Civil Court, whereby the appellant's suit was dismissed by invoking the provisions of Order XVII, Rule 3 C.P.C. The record shows that the appellant applied for the certified copy of this order on 29.11.2012. The certified copy of this order was prepared and delivered on 30.11.2012. The instant appeal was filed by the appellant on 22.12.2014. On its filing, office raised objections, vide Diary No.11743/2012. One of the objections was that a copy of the decree sheet had not been filed along with the memorandum of appeal. On 22.12.2012, the appellant had applied for a certified copy of the decree dated 29.11.2012. The certified copy of the said decree was prepared and delivered to the appellant on 22.12.2012. On 24.12.2012, the copy of the decree was filed with the memorandum of appeal, and the office objection stood cured. This shows that the appeal was filed within the limitation period. The mere fact that the title page and the prayer-clause of the appeal show that the appellant did not seek the setting aside of the decree dated 29.11.2012, but only the order dated 29.11.2012, in our view is of no consequence and an

objection in this regard by the respondent No.1 is hyper technical in nature. The decree is based on the order dated 29.11.2012. But for the said order, the decree would not have been passed. The appellant had also rectified the defect of not accompanying the decree with the memorandum of appeal. Hence, we are in no doubt that the appeal was competently filed.

12. Now as regards the dismissal of the suit by invoking the penal provisions of Order XVII, Rule 3 C.P.C., the order sheet shows that on 23.11.2012, the case was adjourned to 29.11.2012, not on the specific request of the appellant, but because a strike was being observed by the Bar on 23.11.2012. Earlier adjournments granted to the appellant for producing his evidence could not form the basis for closure of the appellant's evidence by invoking the provisions of Order XVII, Rule 3 C.P.C., because the case was not adjourned to 29.11.2012 on the appellant's request. Reliance in this regard can be placed on the law laid down in the cases of Messrs Transtech Ltd Vs. Messrs Tobacco Company Ltd (2004 MLD 1242), and Javaid Akhtar Nawaz Vs. Mehr Kabir (1990 CLC 1122).

13. The learned Trial Court had framed issues on 21.09.2011. The learned Trial Court instead of simply dismissing the suit ought to have gone through the plaint and the written statement and at least attempted to give its findings on merits. This is an additional reason why we feel that the impugned Order and decree dated 29.11.2012 should be set aside and the matter be remanded to the learned Trial Court for adjudication of the suit on merits. The Hon'ble Islamabad High Court in the case of Pakistan Telecommunication Company Limited (PTCL) and others Vs. Mst. Naima Ayub and others (2013 CLC 1191), quoted and relied upon the judgment of the Hon'ble Supreme Court in the case of Muhammad Aslam (2008 SCMR 942), wherein it was held that the phrase, "proceed to decide the suit forthwith", and the words "proceed to decide the suit forthwith" do not mean "to decide the suit forthwith" or "dismiss the suit forthwith". A Court may proceed with the suit notwithstanding either party failed to produce evidence, meaning thereby that in case of default to do a specific act by any party to the suit, the next step required to be

taken in the suit should be taken. The word "forthwith" means without any further adjournment yet it cannot be equated with the words "at once pronounce the judgment".

14. In view of the above, the instant appeal is allowed and the impugned Order and decree dated 29.11.2012, is set aside, and the matter is remanded to the learned Civil Court. The appellant is directed to appear before the learned Civil Court and produce his evidence on 06.06.2016. The appellant is cautioned not to seek any adjournment in the case. Office shall send the copy of this judgment to the learned Trial Court for intimation.

(AAMER FAROOQ)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2016

(JUDGE)

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*