

IN THE SUPREME COURT OF PAKISTAN  
(Appellate Jurisdiction)

Present:

MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL  
MR. JUSTICE QAZI MUHAMMAD AMIN AHMED

Civil Petition No.264-P/2010

(On appeal from the judgment dated 25.3.2010 passed by the Peshawar High Court, Peshawar in C.R.No.164/2008).

Hasham Khan & others

...Petitioners

Versus

Haroon ur Rashid & others

..Respondents

For the petitioners: Qazi Jawad Eshanullah, ASC

For the respondents: Mr. Zia ur Rehman, ASC

Date of hearing: 28.6.2021

JUDGMENT

MAZHAR ALAM KHAN MIANKHEL, J.- A suit for declaration filed by the Petitioners (Plaintiffs), in which evidence of *Patwari Halqa* and ADK was recorded, was dismissed by the learned Civil Judge-II, Tangi vide Order dated 9<sup>th</sup> January, 2007 invoking the provisions of Rule 3 of Order XVII of the Code of Civil Procedure, 1908 ('CPC') without assigning/discussing any reason for such dismissal. Such a dismissal was upheld by the Appellate Court and then by the Peshawar High Court, Peshawar in Civil Revision vide Judgment dated 25<sup>th</sup> March, 2010, impugned herein before this Court through instant Civil Petition for Leave to Appeal.

2. We have heard the learned counsel for the parties and have gone through the record of the case.

3. Perusal of the record reveals that on failure of the Petitioners to comply with the Orders of the Court regarding production of their remaining evidence, the Trial Court, by invoking the provisions of



Rule 3 of Order XVII of the CPC, struck off their right to adduce evidence and straight away dismissed the suit without even touching merits or available evidence on the record. For ready reference relevant portion of the Order dated 9<sup>th</sup> January, 2007 is reproduced below -

"Moreover, the instant case was instituted on 3-09-2003. Since then the plaintiff[s] were given numerous opportunities to produce their evidence as it is evident from the order No.28 dated 26-9-2006 and order No.29 dt: 7/11/06 and order No.30 dated 5/12/2006 but the plaintiffs despite numerous opportunities and notice under order XVII rule 3 of CPC. failed to produce their evidence, therefore, the plttfs: right of producing evidence is hereby struck off by order XVII rule 3 of CPC and as the plttfs; miserably failed to produce evidence as per their contention, therefore, the Plaintiffs suit is dismissed".

4. A look at the above order would make it clear that the learned Judge while announcing the Order, appears to be very much influenced with the words "proceed to decide the suit forthwith" in the relevant provision of the CPC i.e. Rule 3 of Order XVII. For ready reference Rule 3 *ibid* is reproduced herein-below:-

**"(3) Court may proceed notwithstanding either party fails to produce 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 this witness, 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".**

5. The perusal of the above said provision of the CPC would reveal that "to decide the suit forthwith" does not mean to decide or dismiss



the suit there and then. The law on the subject has become established and explained time and again by this Court but we have noted that its application and appreciation by the Courts below still goes with a bit of confusion. The Court, while going to implement the provisions of Rule 3 *ibid* can take time to go through the available record and then decide the matter. Even, in case of failure of a party to comply with the Order within the contemplation of above said provision of law, the Court can ask the failing party to record its statement and then to proceed with the matter. In such like situation, if the failing party is Plaintiff, who records its own statement, then Court can ask the other party/Defendant for defence/rebuttal evidence.

6. We in the given circumstances, are left with no alternate but to convert this Petition into Appeal, allow the same subject to payment of costs of Rs.20,000/- (twenty thousand rupees) on the Petitioners, payable to the other side, and remand the case to the Trial Court to decide the case within a period of three months positively by proceeding even on day to day basis as the matter pertains to the year 2003.

Islamabad,  
28<sup>th</sup> June, 2021  
Sarfraz /-  
"Not approved for reporting"