JUDGMENT SHEET

IN THE HIGH COURT OF SINDH

CIRCUIT COURT, HYDERABAD

Before:
Mr. Justice Miran Muhammad Shah

Civil Revision No. 355 of 2011

Ghulam Hussain (decd.) through his LRs

Versus

Abdul Rahim and others

For the Applicants:	Mr. Muhammad Humayon Khan, Advocate along with Mr. Mangal Menghwar and Mr. M. M. Taha Khan, Advocates.
For the Respondents Nos. 1 & 5:	Nemo.
For the Respondents Nos. 2 to 4:	Mr. Muhammad Yousuf Rahopoto, Assistant Advocate General Sindh.
Date of Hearing:	22-05-2025
Date of Judgment:	27-05-2025

JUDGMENT

Miran Muhammad Shah, J: A civil suit for specific performance of contract and permanent injunction, being F.C. Suit No. 99 of 2005 titled *Ghulam Hussain v Abdul Rahim and others*, was filed by the Applicant, who since deceased is represented through his legal heirs, before the learned Senior Civil Judge-V, Hyderabad. It was dismissed under r. 3 of O. XVII of the Civil Procedure Code, 1908 ("CPC") by the learned Senior Civil Judge vide Judgment dated 10-10-2008 and Decree dated 13-10-2008 ("Trial Judgment"). The Trial Judgment was challenged by the Applicant in Civil Appeal No. 145 of 2008 titled *Ghulam Hussain through his LRs v Abdul Rahim and others* which, too, was dismissed vide Judgment dated 19-10-2011 and Decree dated 25-10-2011 ("Appellate Judgment"), which are now impugned in the present civil revision under s. 115 of the CPC.

2. The grounds advanced in the present civil revision are that the suit filed by the Applicant could not have been dismissed unless and until the conditions provided in r. 3 of O. XVII of the CPC were fulfilled. It has been submitted that one of the conditions precedent to invoking r. 3 of O. XVII is that on the previous date of hearing adjournment must be sought by the party being penalized, however, if a case is adjourned in a routine manner, then this cannot be done. It has also been submitted that the suit could not have been dismissed under the penal provision of r. 3 of O. XVII in early hours and the learned Trial Court has willfully failed to mention the time of the suit being dismissed. Moreover, the revision application states that the Applicant had been suffering from Hepatitis B and C for over a year and he was going through treatment at various hospitals and under various doctors thereby meaning that his absence was not intentional or deliberate but out of *bona fide* circumstances because of which he also passed away during pendency of the civil appeal on 04-01-2011. As regards absence of Mr. Muhammad Humayon Khan, Advocate, from the learned Trial court, it has been submitted that he was indisposed before the learned Additional District Judge, Tando Adam, in his personal case which was fixed for evidence and that an application for adjournment disclosing this reason was provided to the learned Trial Court at about 08:30 AM whereas the suit was dismissed in haste at about 09:00 AM on the fateful day while stating in the adjournment application that the suit had already been dismissed although this was not the case. There are certain grounds on merits of the main case as well. To that end, it is stated that the case concerns the sale of a property on the basis of a registered agreement to sell which is notice to general public and the deceased Applicant had already complied with all the conditions of the sale transaction. It is also stated that the deceased Applicant had also paid balance sale consideration in court which shows that he was definitely interested in pursuing the matter but could not do so out of unprecedented circumstances. The cases of *Mubashir Khan v Javaid Kamran alias Javaid Iqbal* 2007 MLD 1072 and *Faiz Ullah v Ghulam Rasul* 2006 YLR 1206 are also cited.

3. Heard. Perused.

4. Before proceeding further, I find it convenient to reproduce r. 3 of O. XVII:

> **"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 evidence, or to cause the attendance of his witnesses, or to perform any other act necessary for further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith."

2. To state the obvious, the provisions of r. 3 of O. XVII are discretionary in nature as the word "may" has been utilized while permitting a court to "proceed to decide the suit forthwith." For guidance on the distinction between mandatory and discretionary provisions, the case of *Syed Qadar Dad and others v Muhammad Afzal and others* PLD 1997 SC 859 is relevant. There, the Supreme Court was to decide whether r. 24 of O. XLI of the CPC, was a mandatory or a directory provision granted that the word 'may' was used by the legislature. The Court held that the word 'may' used in r. 24 of O. XLI of the CPC made the said provision discretionary and not mandatory. For reference, r. 24, as it then was, reads:

> "24. Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellant Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds."

The observations of the Supreme Court in this regard are very relevant. It held:

> "11. ...The use of the word 'may' indicates that it is not mandatory but is discretionary. The Court in a fit case may decide the appeal on merits without remanding the case to the trial Court. There is no doubt that that the latter course of action curtails the prolongation of the agony of the parties and the Appellate Court should prefer the above course of action. However, the failure on its part cannot vitiate the order of remand particularly when there is a justifiable reason."

When discretion is conferred on a Court, an underlying and implied, even if unwritten, expectation is that such discretion shall be exercised fairly and in a judicious and effectual manner rather than arbitrarily and capriciously. A Court is under legal obligation to first

pass a specific order on the last date of hearing that, in case of failure to appear on the next date of hearing, the provisions of r. 3 of O. XVII will be invoked against the defaulting party. However, in the absence of such a warning, the said provision cannot be invoked, as held in the case of *Faiz Ullah*.

5. The conditions which must exist prior to exercising the discretion vested in r. 3 of O. XVII have been elaborated by a Divisional Bench of this Court in *Industrial Sales and Service, Karachi and another v Archifar Opal Laboratories Ltd., Karachi* PLD 1969 Karachi 418. Some of these conditions, as their Lordships in *Industrial Sales* held, are that:

i. The provisions o r. 3 of O. XVII being penal in nature should be construed strictly.

ii. The facts of the case should not at all admit for any doubt as to the default of the party being penalized.

iii. The conduct of the party being penalized must not be excusable.

iv. No other party, witness or the Court itself should be, in any way, responsible wholly or in part for the default.

v. The time granted for the performance of an act enumerated under the said provision must be at the instance of the party itself and not at the behest of a witness or another party or by the Court itself.

vi. The act of which performance is directed and for which time is granted must be a specified act necessary for the further progress of the suit.

vii. There should be some material to decide the suit.

If these conditions are fulfilled, then only can the penal provision of r. 3 of O. XVII be invoked.

6. A perusal of the record of the present case reflects that, along with the memo of Civil Appeal No. 145 of 2008, not only the medical

certificate of the deceased Applicant but also supporting Affidavits of Mr. Muhammad Humayon Khan and Mr. Mashooq Ali, Advocates have been filed. The Affidavits of both the Advocates are reproduced below:

Mr. Mashooq Ali, Advocate:

"1. That I am working as junior advocate with Mr. Muhammad Humayon Khan advocate.

2. That on 10.10.2008 Mr. Muhammad Humayon Khan had to go to Tando Adam to attend his personal case in the Court of Additional District Judge, Tando Adam, in which he was one of the plaintiff. His case was fixed for evidence and his presence was necessary.

3.That the suit of the appellant was also fixed on 10.10.2008 before learned Vth Senior Civil Judge, Hyderabad for evidence. He therefore gave me an application for adjournment to be moved in the Court of learned Vth Senior Civil Judge, Hyderabad in the suit of the appellant on 10.10.2008 with instructions to move the application on opening of the Court positively.

4. That on 10.10.2009 I moved the adjournment application in the Court of learned Vth Senior Civil Judge, Hyderabad at 8.30 a.m. but he returned it to me and refused to accept it.

5. That I informed accordingly Mr. Humayon Khan at Tando Adam and he told me to repeat the application as the learned judge could not refuse to accept it. I against presented the application for adjournment at 8.45 a.m. before the learned judge. He accepted the application kept it on record and at 9.00 a.m. dismissed the suit.

6. That at about 10.30 a.m. Mr. Muhammad Humayon Khan returned from Tando Adam and met me. I told him what had transpired and how the suit was dismissed, though, I had repeated the adjournment application before dismissal of the suit at 8.45 a.m.

7. That whatever is stated above is true and correct according to my knowledge, belief and information."

Mr. Muhammad Humayon Khan, Advocate:

"1. That I was advocate of the appellant in the lower Court and I continue to be his advocate in appeal.

2. That on 10.10.2008 the suit of the appellant was fixed for final hearing in the Court of Vth Senior Civil Judge, Hyderabad. On the same day i.e. 10.10.2008 my personal suit in which I was one of the plaintiffs (Aftab Khan & Others Vs Government of Sindh & Others) was also fixed for evidence

> before learned Additional District Judge, Tando Adam, where my personal presence was necessary.
>
> 3. That I therefore, gave an application for adjournment to my Junior Mr. Mashooq Ali Advocate to move it early morning in the Court of Vth Senior Civil Judge, Hyderabad as I had to go to Tando Adam, the appellant was also ill with advice for bed rest by his doctor as he was suffering from hepatitis B & C.
>
> ..."

7. In my view the said Affidavits could not have been discarded by the learned Appellate Court without giving any conclusive finding thereon. The said Affidavits were filed by two Advocates who were officers of the Court and the same deserved deference. However, they have been ignored in toto by the learned Appellate Court in concluding that a case for interference has not been made out. It is settled law that an affidavit tendered by an advocate explaining the cause of his absence is given respect and may even be treated as sufficient cause. This is especially the case when such contents are not specifically denied by the opposing party. In this regard, in the case of *Abdul Latif v Muhammad Yousuf* PLD 1996 Karachi 365, which was decided by Rasheed A. Razvi J., as he then was, it was held that:

> "...It is also pertinent to observe that the Courts have always attached much sanctity to an affidavit filed by an advocate. The reasons as explained in the affidavit of an advocate are sometimes treated to be 'sufficient cause'."

A similar view is taken in *Fareed Ahmed Janjua v Punjab Smal Industries Corporation* 2012 SCMR 123 and *M. A. Hussain S. Mirza & Co., Dacca v Pakistan Industries Ltd., Karachi* 1989 SCMR 1202.

8. It appears that the learned Appellate Court has not given any weight whatsoever to the reason explained by the Counsel for the Applicants in his and his associate's Affidavits that the senior counsel, Mr. Muhammad Humayon Khan, was indisposed in his personal matter at Tando Adam. The same Affidavits similarly state that the case was dismissed in early hours of the day.

9. Here, I may note that under art. 129(e) of the Qanun-e-Shahadat, 1984, there is a presumption that judicial and official acts have been regularly performed. Therefore, had the learned Trial

Court specified the particular time of dismissal of the suit in its judgment, the Affidavits of counsel would have to be considered with special care and caution. However, in the absence of any specific details in the Trial Judgment, the Affidavits of counsel ought to be believed as there is no competing allegation or story.

10. The learned Appellate Court was also provided with a Medical Certificate dated 20-10-2008 issued by Dr. Jay Kumar, Physician and Surgeon, which reads:

> "This is to certify that Mr. Ghulam Hussain...is under my treatment as a case of Hepatitis B & C from 3.10.8 to 20.10.8 & he still need further treatment & management & bed rest."

From the face of the Appellate Judgment, it appears very clearly that no one appeared from the opposing side to deny the said medical certificate or the affidavits tendered by the advocates. Yet, the learned Appellate Court surprisingly remained oblivious of the same. It is by now a well settled principle of law that where a fact is required to be denied, and it is not denied, then the presumption is that that fact has been admitted. Therefore, in the absence of any denial to the said medical certificate, it must have been considered by the learned Appellate Court, especially in view of the fact that the Applicant passed away during pendency of the appeal.

11. Indeed, if as stated in the medical certificate (which has gone unrebutted), the Applicant was suffering from health issues which ultimately led to his death, then he was infirm and could not have been held to be at fault for not appearing before the learned Trial Court. It is true that the law requires expeditious disposal of cases, and to that end it makes ample provision of discretion in courts to penalize defaulting parties. However, the law does not call for mechanical disposal of cases without regard being given to surrounding circumstances of every matter. Multiplicity of adjournments, however many they may be, is not a ground for penalizing a party, if those adjournments are sought on valid and cogent grounds. For example, and for no other purpose, if a party has sought multiple adjournments but on the last date of hearing that party's close family member dies which is supported through valid certification, then that would of course call for a lenient view

to be taken. Penalization is to be resorted to by a Court only where a party is clearly shown to be defaulting in its duties to the Court and is unable to remain punctual in a matter out of negligence.

12. Even before this Court, service has been done upon the private Respondents, who have not appeared to contest the case of the Applicant. Therefore, I believe they do not have any interest in objecting to the case of the Applicant. The case of the Applicant appears to be an excusable one whereby I am inclined to exercise judicial restraint and leniency in the matter to ensure that the merits and not the technicalities of the case are given precedence.

13. For these reasons, this civil revision is allowed, both the Trial and Appellate Judgments are set aside and the matter is remanded back to the learned Trial Court for deciding the same on merits after notices to all the parties.

14. Since the Respondent No. 5 has been newly added to the case, the Applicant is directed to file amended title before the learned Trial Court and is left at liberty to seek amendment of plaint through a proper application to be decided by the learned Trial Court as per law. The learned Trial Court is directed to decide the suit on merits within three (3) months positively under intimation to this Court. In the meanwhile, the parties shall maintain *status quo* and refrain from creating third-party interest.

15. There is no order as to costs.

JUDGE