

**IN THE HIGH COURT OF SINDH,  
CIRCUIT COURT, HYDERABAD**

**Revision Application No. 217 of 2018**

Muhammad Saleem ----- Applicant

VERSUS

Haresh Kumar and others ----- Respondents

**Date of hearing** : **28.09.2020**

**Date of decision** : **05.10.2020**

Mr. Shakeel Ahmed Shaikh, Advocate for Applicant  
Mr. Arbab Ali Hakro, Advocate for Respondents 1 to 3, 7 to 10  
Mr. Jai Dev Sharma, Advocate for Respondents 4, 5 and 6.

**ORDER**

**ADNAN-UL-KARIM MEMON, J. -** In this Revision Application under Section 115 Civil Procedure Code, the Applicant has impugned the Judgment and Decree dated 26.9.2018 and 29.9.2018 respectively passed by learned District Judge, Umerkot who while maintaining the Judgment and Decree dated 17.3.2018 and 21.3.2018 respectively passed by learned 1<sup>st</sup> Senior Civil Judge, Umerkot dismissed the Appeal of the Applicant.

2. Brief facts are that the Applicant / Plaintiff filed Suit for Specific Performance of Contract & Permanent Injunction against the Respondents / Defendants in respect of agricultural land admeasuring 510-39 acres situated in deh Gamoori, Tapo Harh Taluka and District Umerkot at the rate of Rs.70,000/- per acre. Per Applicant, he paid Rs.1500,000/- (advance) and the balance amount was agreed to be paid at the time of execution of the sale deed. Such agreement was reduced into writing on 09.07.2013. The cause of action accrued to the Applicant when Respondents No.1 to 10 refused to execute the terms of Sale Agreement. Applicant finding no other way filed F.C. Suit No.109 of 2014 before learned 1<sup>st</sup> Senior Civil Judge, Umerkot praying for direction to the Respondents to execute registered Sale Deed of suit land in favour of the Applicant / Plaintiff at once after accepting the remaining sale consideration, in case of failure, the Nazir of Court be directed to execute the sale deed after receiving the remaining sale consideration. The Respondents filed their written statement and controverted the stance of the Applicant.

3. Based upon pleadings of the parties, learned Trial Court framed the following issues:

1. Whether the suit is not maintainable?
2. Whether the suit is specifically bad for non-joinder and misjoinder of parties?
3. Whether private defendants entered into a contract of sale of suit land with the plaintiff for consideration of Rs.70,000/- per acre?
4. Whether the plaintiff paid Rs.15,00,000/- as earnest money to private defendants and undertook to pay the balance of consideration within two years when defendants No.1 to 10 will execute the sale deed and deliver possession of suit land?
5. Whether an agreement of sale was executed between the plaintiff and private defendants on 09.07.2013?
6. Whether the plaintiff upon seeing a notice in daily Kawish dated 29.10.2014 immediately approached private defendants and offered a balance of consideration and said defendants avoided receiving?
7. Whether the plaintiff again approached private defendants about a week before the filing of the suit, offered balance consideration, and asked for the execution of the sale deed, but they refused?
8. Whether the defendants No.9 and 10 were competent to enter into a contract of sale of their land? if no, its effect?
9. Whether the agreement of sale dated 09.07.2013 is forged, fabricated, prepared in antedates and signatures thereon are spurious? If yes, its effect?
10. Whether the plaintiff is guilty of stealing government records and using it for fabricating agreement of sale?
11. Whether the private defendants are entitled to compensatory costs?
12. Whether the plaintiff is entitled to the relief claimed?
13. What should the decree be?

4. Mr. Shakeel Ahmed Shaikh, learned counsel for the Applicant has argued that learned Trial Court closed the side of the Applicant to produce evidence under Order XVII, Rule 3 of the Civil Procedure Code; that provisions of Order XVII, Rule 3 are discretionary and not mandatory; that prior to closing of Applicant's side, no opportunity to produce evidence was granted; that the impugned judgments and decrees passed by both the courts below are perverse and not in accordance with settled norms and principles of evidence, hence, liable to be set-aside; Learned Counsel

argued that the technicalities must not come in the way to substantial justice; that exercise of discretion should have been in favour of the Applicant; that the case is fit to be remanded back to learned Trial Court for resolving the issues after giving proper chance of adducing evidence to the Applicant; that learned Trial Court has not provided opportunity to the Applicant for production of witnesses and dismissed the Suit and Appeal of the Applicant erroneously; that non production of witnesses by the Applicant was not intentional because the witnesses were out of town; that the material available before the learned Trial Court is sufficient to establish pure / solid case of evidence which could have been proceeded with in order to determine the facts in issue by giving opportunity to both the parties to substantiate their claim; that learned Trial Court failed to reach proper conclusion in the light of material and arguments as referred to in the impugned judgments and decrees; that the impugned judgments and decrees are illegal, unjust, improper and opposed to facts and record and particularly against the settled principles regarding assessment of cause of action; that the impugned judgments are without reasoning, hence not sustainable under the law and liable to be set-aside.

5. Mr. Arbab Ali Hakro, learned counsel for the Respondents has supported the impugned judgments and decrees passed by both the courts below and prayed for dismissal of the instant Revision Application.

6. I have heard learned counsel of the parties and perused the material available on record.

7. It is apparent on the record that the Applicant was afforded several opportunities by the learned Trial Court to lead evidence, but the Applicant failed to comply. Resultantly, learned Trial Court closed the Applicant's right to produce evidence under Order 17, Rule 3 CPC. An excerpt of the judgment dated 17.3.2018 is as under:

**“ISSUE NO.1 TO 12**

The issues of the instant case were framed on 23.05.2015 and since then on account of not proceedings with the matter the suit of the plaintiff was dismissed for want of evidence vide order dated: 25.05.2016. The suit of the plaintiff was restored U/O 9 Rule 9 CPC vide order dated: 07.10.2017 on its original stage of evidence of plaintiff side with cost of Rs. 1000/- and since then plaintiff is again failed to adduce any evidence in this matter despite further cost of Rs. 500/ was imposed upon him. However he paid cost Rs. 1000/- while the cost of Rs.500 is not yet paid such as neither the plaintiff nor his witnesses are in attendance to give the evidence, hence the plaintiff is failed to prove his case while the defendants are also not in attendance & their learned counsels have showing not

shown any intention to adduce their evidence of defendants side. Consequently, the issues No.1 to 12 are replied to be not proved.

### **ISSUES NO. 13**

As the plaintiffs are avoiding to record their respective evidence and linger on the proceeding for an indefinite period on different pretext and dragging the defendants in the instant matter since November 2014 as this Court has no option rather than to dismiss the suit of plaintiffs accordingly above suit of plaintiff stands dismissed U/O 17 Rule 3 CPC as the plaintiffs have been failed to prove their claims as prayed for, there is no order as to costs. Let such decree be prepared in 7 days accordingly.”

8. Against the said decision, the Applicant filed Appeal No. 12 of 2018 before the learned District Judge, Umerkot, who vide Impugned Judgment and Decree dated 26.9.2018 and 29.9.2018 maintained the Order of learned Trial Court. An excerpt of the judgment dated 26.9.2018 is as under: -

“13. In the present case as mentioned above, it is clear from the R & Ps of the trial court that the issues were framed on 23-5-2015, thereafter the suit was dismissed for want of evidence on vide order dated 28-5-2016, thereafter the same was restored vide order dated 07-10-2017 with the condition that appellant/ Plaintiff produce his witnesses on 28-10-2017 but he failed to appear or to produce the witnesses. There are about 8 opportunities were given to the appellant but not a single date the appellant appeared before the trial court till on 17-3-2018 when the learned trial court invoke the provisions of Order XVII Rule 3 CPC. From the record it does not transpire if the appellant was present on the day when his evidence was closed or he asked the court to be examined, this has never been the case of the appellant throughout the proceedings of this case at any stage; as there is no ground set out in the memo of appeal. The Honourable Supreme Court of Pakistan in case of Rana Tanveer Khan Vs. Naseer-ud-Din and others, reported in 2015 SCMR 1401, has held as under:-

“(b) Civil Procedure Code (V of 1908)—

--O. XVII, R.3—Failure to produce evidence—Plaintiff failing to produce evidence despite being put on notice/cautioned by Trial Court—Effect—Right of evidence closed by Trial Court—Once the case was fixed by the Court for recording the evidence of the party, it was the direction of the court to do the needful, and the party had the obligation to adduce evidence without there being any fresh direction by the Court—However, where the party made a request for adjourning the matter to a further date(s) for the purposes of adducing evidence and if it failed to do so, for such date(s), the provisions of O. XVII, R.3, C.P.C. could be attracted, especially in the circumstances when adequate opportunities on the request of the party had been availed and caution was also issued on one of such date(s), as being the last opportunity—In the present case, the Plaintiff-

appellant had availed four opportunities to produce his evidence and was cautioned on two such occasions, which meant that he Plaintiff was put to notice that if he failed to adduce evidence, action shall be taken against him—When evidence of Plaintiff was closed in terms of O.XVII, R.3, C.P.C, no reasonable ground was propounded for the purpose of failure to adduce the evidence and justification for further opportunity, therefore, notwithstanding that such opportunities granted to the Plaintiff were only in a span of about 1 month and 26 days, yet his case squarely fell within the mischief of the provisions of O.XVII, R.3, C.P.C and his evidence was rightly closed by the Trial Court—Appeal was dismissed accordingly.”

9. I now advert to Order XVII, Rule 3, C.P.C., which is reproduced below for reference: -

“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 his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding each default, proceed to decide the suit forthwith.”

10. In my view, order XVII, Rule 3 C.P.C. applies when time has been granted to a party to produce evidence or to cause the attendance of witnesses or to perform any other act necessary for the progress of suit and will not apply unless default has been committed by such party in doing the act for which the time was granted. The aforesaid proposition is supported by the decisions of the Honorable Supreme Court in the case of Ghulam Qadir alias Qadir Bakhsh v. Haji Muhammad Suleman and 6 others (PLD 2003 SC 180). Recently, in another case, the Honorable Supreme Court in the case of Rana Tanveer Khan v. Naseer-Ud-Din and others (2015 SCMR 1401) held that once the case is fixed by the Court for recording the evidence of the party, it is the discretion of the court to do the needful and the party must adduce evidence without any fresh direction of the court. However, where a party makes a request for adjourning the matter to a further date(s) for the purposes of adducing evidence and if it fails to do so, for such 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 date(s), as being the last opportunity.

11. A bare reading of Order XVII, Rule 3, C.P.C. and the 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 be met:

- i. at the request of a party to the suit to adduce evidence, time must have been granted with a specific warning that said the opportunity will be the last and failure to adduce evidence would lead to the closure of the right to produce evidence; and
- ii. the same party on the date which was fixed as the last opportunity fails to produce its evidence.”

12. In my view, where last opportunity to produce evidence is granted and the party has been warned of the consequences, the court must enforce its order unfailingly without exception. Such order would in my opinion not only put the system back on track and reaffirm the majesty of law but also put a check on the trend of seeking multiple adjournments on frivolous grounds to prolong proceedings without any valid or legitimate reason. On the aforesaid proposition, I am fortified by the decision rendered by the Honorable Supreme Court in the case of *Moon Enterpriser CNG Station, Rawalpindi Vs. Sui Northern Gas Pipeline Limited & another* (2020 SCMR 300).

13. The learned counsel for the Applicant has not pointed out any infirmity or error in the impugned judgments and decrees passed by both the courts below that may have justified interference.

14. For the reasons recorded above, I do not find any merit in this Revision Application, which is accordingly dismissed with no order as to costs.

JUDGE