

ORDER SHEET  
IN THE HIGH COURT OF SINDH,  
CIRCUIT COURT, HYDERABAD.

R.A.No. 155 of 2011

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**DATE      ORDER WITH SIGNATURE OF JUDGE**

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18.09.2013.

Mr. Jagdish R. Mullani, Advocate for applicants.  
Mr. Shoukat Kaka, Advocate for respondent No.1.  
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**MUHAMMAD SHAFI SIDDIQUI, J:-** This is a civil revision application filed in respect of the judgment dated 02.05.2011 passed by 2<sup>nd</sup> Additional District Judge, Shaheed Benazirabad, whereby he allowed the appeal and reversed the judgment and decree passed by Ist Senior Civil Judge, Nawabshah vide judgment dated 10.03.2010 and decree dated 12.03.2010 in F.C. Suit No.392/2010.

2. Brief facts of the case are that respondent No.1/plaintiff filed a suit for declaration, cancellation, possession, mesne profit and injunction against the applicants. The said suit was contested by the applicants and they filed written statement refuting all the contents of the plaint alongwith certain documents. The trial Court was pleased to frame the issues on 12.10.2007 and it is contended that since then the suit was pending for evidence of the plaintiff. Consequently, on account of the failure of respondent No.1/plaintiff to adduce the evidence on the issues framed despite several opportunities including five opportunities which were given as a final chance, the trial Court resorted to the provisions of Order 17 Rule 3 C.P.C. and dismissed the suit on the ground that respondent No.1/plaintiff failed to adduce evidence and / or cause the attendance of his witnesses and also failed to perform act necessary for further progress of the suit and in view of such failure, the trial Court proceeded and found that there is no sufficient evidence in support of the claim of the respondent No.1/plaintiff. Consequently, on account of dismissal of suit Under Order 17 Rule 3 C.P.C, respondent No.1/plaintiff filed appeal u/s 96 C.P.C. and the appellate Court framed the following two points for consideration:-

- “1. **Whether the trial Court has decided the suit properly U/o 17 Rule 3 C.P.C.?**
2. **Whether the appeal is not maintainable on account of deficiency in payment of Court fee stamps?**
3. **What should the judgment be?”**

3. It was contended by learned counsel for the applicants that appellate Court while considering these two points has misdirected himself as the provisions of Order 17 Rule 3 C.P.C. were applicable and that the payment of Court fee at the verge of the final disposal and final arguments in appeal could not be allowed to be paid. Learned counsel submits that appellate Court decided these two points in favour of respondent No.1 and remanded the case. It is contended that provisions of Order 17 Rule 3 C.P.C. were rightly applied by the trial Court and that payment of the Court fee at the stage of final arguments was not permissible under the law as by that time the appeal was already time barred as the payment of Court fee in Court is linked with the date of filing of appeal.

4. Learned counsel for respondent No.1 has filed a statement that respondent No.1 has taken away file from him and consequently he has sent notices through courier service on 02.09.2013. Such notice and courier receipt are annexed alongwith the statement which also shows the next date of hearing i.e. 03.09.2013. Be that as it may, on 03.09.2013 Mr. Shoukat Ali Kaka, Advocate appeared and by consent the matter was adjourned for today. Today again the counsel appeared and said that despite issuance of notices and information given to the respondent No.1, he has not appeared and he has no instructions to proceed with the matter since the respondent No.1 has chosen to remain absent despite having received notices, therefore, I in view of the fact that this is one of the old matter as the suit was filed in the year 2006 and in view of the direction of the Honourable Chief Justice dated 24.06.2013, which is available on record which provides that it is to be heard on daily basis, I proceed with this revision application.

5. I have heard the learned counsel and perused the record.

6. There are two questions involved; first question deals with application of Order 17 Rule 3 C.P.C. and other question deals with payment of Court fee. It is observed by the trial Court that issues were framed on 12.10.2007 and despite framing of issues in 2007, the plaintiff did not come forward to record the evidence or to produce his witnesses. It has been observed by the trial Court that adjournments were granted to the respondent No.1/plaintiff on many occasions and once on payment of cost and on five occasions the adjournments were granted as a last and final chance. These facts were not challenged by respondent in appeal on the contrary it was pleaded that instead of penal provisions, the suit

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should have been dismissed for non-prosecution and that there is no justification to apply Order 17 Rule 3 C.P.C. The Order 17 Rule 3 C.P.C. provides as under:-

*"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 such default, proceed to decide the suit forthwith."*

7. I see no reason to disagree with the findings of the trial Court when it applied Order 17 Rule 3 C.P.C. It has been consistently held by the Apex Court that on perusal of the chequered history of the case if this could be ascertained that a party has failed to adduce evidence consistently it could be applied, it is to be examined by the trial Court and appellate Court as to whether the history is such that respondent No.1/plaintiff vigilantly and willfully failed to appear and adduce evidence. There are no findings of the appellate Court in this regard of the historical failure of respondent No.1 who vigilantly, deliberately and willfully remained absent without any explanation despite the fact that cost was imposed and despite the fact that five last chances were availed by respondent No.1. The Honourable Supreme Court in the case of Abdul Shakoor and others v. Province of Sindh Punjab and 4 others reported in 2005 SCMR 1673, observed as under:-

*"Heard Ch. M. Ashraf, learned Advocate Supreme Court on behalf of petitioners and Mr. Abdul Wahid Chaudhry, learned Advocate Supreme Court for respondents and perused the chequered history of the case vigilantly and examined the record with the assistance of learned counsel for the parties. It is worth mentioning that after framing of issues petitioners/plaintiffs were asked to lead evidence but in spite of various opportunities provided on 7.6.1980, 4.11.1980, 17.11.1980, 24.12.1980, 18.1.1981, 10.2.1981, 30.3.1981, 13.4.1981, 12.9.1981, 2.1.1982, 3.5.1982, 28.9.1982, 2.10.1982, 23.1.1983, needful could not be done and ultimately the suit of petitioners/plaintiff was dismissed in view of the provisions of as contemplated in Order XVII, rule 3, C.P.C. which was affirmed by learned District Judge. It is reflective from record that in spite of numerous opportunities given on various occasions the petitioners/plaintiffs failed to produce any evidence to substantiate their claim and thus, the order passed by learned trial Court under Order XVII, rule 3, C.P.C. does not warrant any interference."*

8. Similarly, in the case of Munawar Hussain v. Additional District Judge, Jhelum and 3 others, reported in 1998 SCMR 1067, the Honourable Supreme Court held as under:-

*"We have carefully perused the record and considered above arguments. The entire record speaks for itself. Admittedly petitioner after filing eviction application on 10.6.1992, despite several opportunities neither furnished the list of witnesses nor was able to produce evidence to substantiate his stand till 20.7.1993, when Trial Court directed dismissal of the eviction application by closing the evidence of his side. Bare perusal of order-sheets indicates that even petitioner or his authorized attorney had not appeared before the Court on any of the dates of hearing. Record speaks volumes"*

about petitioner's extraordinary negligence in persuing the case. It was obligatory for the petitioner to have taken effective steps either for producing or summoning the evidence to support his claim of being landlord of the house in occupation of the respondents. Trial Court had shown sufficient indulgence and there does not appear any impropriety or defect for ultimately closing side of the petitioner on account of his consistent failure to produce evidence despite seeking repeated adjournments. The trial Court could not be deemed at the mercy of petitioner or totally helpless to await till petitioner chooses to comply with repeated direction of producing evidence. Thus, conclusion drawn by the High Court and two forums below in rejection of petition for the eviction of respondents filed by the petitioner are substantial, sufficiently convincing and based on sound reasonings. There is hardly any ground which may warrant interference in the impugned judgments."

9. In view of the above precedents, I, therefore, disagree with the findings of the appellate Court as far as the non-application of Order 17 Rule 3 C.P.C. is concerned in view of facts and circumstances of the case.

10. The next point which is decided by the appellate Court is payment of Court fee. The appellate Court in its findings has held as under:-

*"As far as the question of deficiency in payment of Court fee stamps is concerned, the record reveals that appeal was filed without Court fee stamps by appellant though he has supplied the Court fee Rs.2200/- as per valuation in his plaint. The learned counsel for the respondents has never filed objections in appeal during entire proceedings that the appeal has been filed without Court fee stamps. However, at the time of final arguments the plea of deficiency in Court fee stamps was pointed out, therefore, immediately on 28.04.2011 an application U/s 149 C.P.C. filed by appellant which is supported by an affidavit. The ground was raised in above application that through inadvertence, the Court fee stamps could not be paid along with memo of appeal. The notice of this application was given to Advocate for respondents but neither he filed any objections nor any counter affidavit was filed. Thus, the contentions of appellant submitted on oath with regard the deficiency remained unchallenged and rebutted. Since, the required Court fee stamps have been furnished and the deficiency has become complied with, thus, appeal can not be dismissed on this technical ground, therefore, the question of limitation would be irrelevant. Hence, I allowed the permission to keep the Court fee stamps with memo of appeal in the interest of justice presuming that Court fees had been paid. The defect/deficiency therein would stand completely cured."*

11. It appears from the record that the appeal was filed without Court fee stamps by respondent No.1/plaintiff. The appeal was filed in the year 2010 and perhaps at the time of arguments, such Court fee was paid by moving an application U/s 149 C.P.C. No doubt the time for payment of Court fee could be extended in terms of Section 149 C.P.C. but such time should not be carried away beyond the period of limitation prescribed for filing appeal. The discretion of extending the time for filing the Court fee is to be exercised judicially and in consideration of the fact that such late payment of Court fee beyond the period of limitation prescribed to file an appeal, would render the appeal itself as time barred. The

provisions of Section 149 C.P.C. cannot be allowed to be used for condonation of time after the period of limitation expired. Such relaxation in payment of Court fee beyond the period of limitation would amount to making the provisions of Limitation Act as infertile. Reliance is placed on the case of Mst. Safia Siddiq v. Haji Fazal-ur-Rehman and 2 others, reported in 2009 CLC 262 and the case of Assistant Commissioner and Land Acquisition Collector, Badin v. Haji Abdul Shakoor and others, reported in 1997 SCMR 919. It has been held by the Honourable Supreme Court in the case *ibid* as under:-

*"This is a petition for leave to appeal against the judgment dated 18.10.1992 passed by a learned Single Judge of the High Court of Sindh in First Appeal No.42 of 1990, filed by the petitioner against the judgment dated 13.8.1990 of the learned Hnd Additional District Judge, Badin, in Land Acquisition Suit No.1 of 1985, modifying the Award by inter alia increasing the amount of compensation for the land acquired from Rs.40,000 per acre to Rs.1,00,000 per acre, dismissing the same for the following reasons:-*

*"In view of the above discussion, it can be concluded that the present appeal was instituted with deficit court-fee stamp and the appellant being negligent and his conduct being contumacious, there existed no reasons to show any indulgence to him and allow the time. The subsequent payment of court-fee stamp beyond the period of limitation would not render this appeal as properly instituted.*

*I would accordingly hold the appeal to be barred by limitation under Article 156 of the Limitation Act. There is no need to go into merits of the case. Accordingly, the appeal is dismissed with no order as to costs."*

*The above application was allowed subject to all just exceptions. According to the learned counsel for the petitioner, factually the petitioner deposited the deficit court-fee on 21.3.1991. Be that as it may, when the above appeal came up for hearing before the learned Judge in Chamber, inter alia the question of deficit court-fee and its effect was agitated. The learned Judge in Chamber dismissed the above appeal for the reasons stated in the abovequoted portion of the impugned judgment. The petitioner has, therefore, filed the present petition for leave to appeal.*

*The question in the above Siddique Khan's case was the interpretation of the above provision and in that context, various observations have been made. There is no doubt that section 107, C.P.C. confers same powers on an Appellate Court which are enjoyed by the Court of original jurisdiction in respect of suits. In other words, if a trial Court rejects a plaint on the ground of failure to supply requisite court-fee without complying with the requirement of above clause © of Rule 11 of Order VII, C.P.C., an Appellate Court can call upon the plaintiff to supply the requisite stamp fee within the time to be fixed by it, but there is no such requirement under Order XLI or any other provision of the C.P.C. relating to filing of an appeal. If an appellant files an appeal with the deficit court-fee, the Appellate Court under section 149, C.P.C. can extend the time and if time is so extended, the question of limitation will not arise but if the Appellate Court finds that the appellant is guilty of contumacy or he acts in a positive mala fide manner in regard to deficient court-fee, it may decline to exercise discretion on that ground in favour of the appellant. The above legal position has not been changed by above Siddique Khan's case even in respect of the suits.*

*In the present case, the petitioner had filed first appeal against a money decree. There does not exist any doubt as to the question of payment of court-fee, as it is to be paid ad valorem on the decretal amount. But the*

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*petitioner, in spite of the above clear legal position, opted to file the appeal with Rs.10 court fee. Even after the objection was raised by respondents Nos.1 and 2, the petitioner in the above-quoted para.7 of the rejoinder, took the plea that no court-fee was payable though after the expiry of more than one month, he paid the deficit court-fee as a measure of abundant caution. In our view, the learned Judge in Chamber was justified in concluding that the petitioner was negligent and his conduct was contumacious and there existed no reason to show any indulgence to him to extend the time. We do not find any infirmity in the impugned judgment. Leave is, accordingly, refused."*

12. Thus in the light of the judgment referred above, the appellate Court has decided the question of payment of Court fee against the principles laid down by Honourable Supreme Court and has allowed the respondent No.1 to pay the Court fee at the time when appeal itself was barred by limitation. Needless to mention that date of the payment of Court fee at the appellate stage is reckoned as a date of filing of appeal itself unless such time is extended by the Court under the law. Such delay in filing the appeal and Court fee cannot be condoned u/s 149 C.P.C. nor it is permissible under the law. Apart from that no legitimate explanation was given or available as to why the respondent No.1 deposited such Court fee after the period of limitation.

13. This being the position, I do not agree with the observation of appellate Court thus the impugned judgment 02.05.2011 passed by 2<sup>nd</sup> Additional District Judge, Shaheed Benazirabad is hereby set aside and this revision application is allowed in the above terms.

*Sd - Muhammad Shafiq Siddique*  
*Judge.*