

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

Revision Application No. 296 of 2011
Revision Application No. 171 of 2014

Applicants : Applicant No1 Dr. Itefaq Hussain and
applicant No.11 Kamal (in person).

Respondents : Through M/s Shamsuddin Memon &
Muhammad Jamil Ahmed, Advocates.

The State : Through Mr. Allah Bachayo Soomro, Addl
A.G Sindh.

Date of hearing : 20.03.2023

Date of Judgment : 20.03.2023

JUDGMENT

Muhammad Junaid Ghaffar, J:- Civil Revision Application No.296 of 2011 has been filed impugning judgment dated 17.09.2011 passed in Civil Appeal No.129 of 2010 by Vth Additional District Judge, Hyderabad, whereby judgment dated 17.04.2010 of the 2nd Senior Civil Judge, Hyderabad in F.C. Suit No.151 of 2007 was impliedly set-aside by remanding the matter to the trial Court by imposing cost of Rs.5000/-. It is against imposition of cost that this Revision Application has been filed. Whereas, Civil Revision Application No. 171 of 2014 impugns judgment dated 24.05.2014 passed in Civil Appeal No.248 of 2011 by the 7th Additional District Judge, Hyderabad, whereby judgment dated 14.11.2011 of the 2nd Senior Civil Judge in the above Suit has been maintained through which the suit was dismissed in default under Order 17 Rule 3 CPC.

2. Heard all learned counsel as well as Applicant No.1 Dr. Itefaq Hussain and applicant No.11 Kamal Ahmed appearing in person and so also for various other Applicants. Record perused.

3. Insofar as the judgment / orders impugned in R.A.No.296 of 2011 including that passed by the Senior Civil Judge are concerned, apparently the order of the trial Court on the face of it appears to be against the very provision of Order 17 Rule-3 C.P.C, inasmuch as, the learned trial Court has itself recorded that at least two witnesses were examined on behalf of the

present Applicants.; but despite this, the Suit was dismissed for want of evidence. The relevant observations of the learned trial Court in the first round in this regard reads as under: -

"In the present suit the issues were framed on 5.7.2008 and thereafter the matter was fixed for evidence of plaintiff's side. On 24.10.2009 plaintiffs examined their witness Mohammad Azam at Ex.60. The plaintiffs further examined their witness Tariq Memon at Ex.61 and who has produced attested copy of extract from C.S.No.1139/2, 1139/3, C.S.No.1139/4, 1139/5, order dated 4.6.2004 passed by City Survey Officer Hyderabad, C.S.No.1140/1, of Ward-F and site plan of Ward-F at Ex.62 to 68. The plaintiffs have further examined their witness Assistant Director H.D.A Syed Akhtar Hussain at Ex.70, who produced attested copy of approved plan of Shams Cinema at Ex.71. Thereafter the plaintiffs have failed to adduce their further evidence. Today, up-to 1.30 P.M neither the plaintiffs are in attendance, nor any intimation has been received on their behalf. I, therefore announce Judgement U/O 17 Rule 3 CPC."

4. After observing that at least two witnesses were examined, there was no occasion for the trial Court to dismiss the suit under Order 17 Rule 3 CPC. Since admittedly some evidence was led by the Applicant, the trial Court at the most could have closed the side of the party who has failed to lead the evidence, and then proceed with the Suit in accordance with law. Here in this matter, it is not a case of simplicitor default on the part of the Applicants so as to attract the provisions of Order 17 Rule 3 CPC. Therefore, to that extent this order could not have been maintained even by imposing cost on the Applicants.

5. It further appears that these orders were challenged in the Revision Application before this Court and since no restraining order was operating the Suit was proceeded once again by the trial Court and dismissed by way of judgment dated 17.04.2010 and again the trial Court proceeded on the same premise that since no evidence has been led, therefore, the suit ought to be dismissed under Order 17 Rule 3 CPC. The said judgment has been maintained in appeal on this very ground that the plaintiffs failed to lead their evidence. However, on perusal of the entire record and the judgments in question, it appears that learned trial Court as well as the Appellate Court misdirected themselves in dismissing the suit under Order 17 Rule 3 CPC.

Once two witnesses were examined by the plaintiffs, then at best, after closing the side of the Applicants, the said evidence could have been considered for deciding the suit on merits and not in default under Order 17 Rule 3 CPC. Such conduct on the part of the two Courts below could not be appreciated. Though per settled law, a suit can be dismissed under Order 17 Rule 3 CPC, for want of evidence. However, the use of the words "proceed to decide the suit forthwith" in Order 17 Rule 3 CPC does not by itself mandatorily means to "dismiss the suit forthwith". The Court can still proceed

with the suit notwithstanding that a party has failed to lead evidence, meaning thereby that in case of default to do a specific act by any party to the suit, next step required to be taken in the suit should be taken¹. Unfortunately, both the Courts below have twice acted in a slipshod manner, and without recording or assigning any reasons as to the evidence already available on record, have taken recourse to Order 17 Rule 3 CPC. This procedure in the given facts does not appear to have been correctly adopted.

5. In view of hereinabove the facts and circumstances, since the approach of the Courts below has not been in accordance with law; both these Revision Applications are allowed and judgment(s) impugned therein are set-aside. Matter stands remanded and shall be deemed to be pending before trial Court who shall proceed from the position where witnesses have been partly examined by the plaintiffs. Moreover, the Applicants/plaintiffs are directed to pursue their matter by leading evidence and no unnecessary adjournments be sought. Since considerable time has lapsed during pendency of these Revisions, it is expected that the trial Court will finally decide the Suit preferably within 4 months from today in accordance with law. Let this order be communicated to the concerned trial Court for information and compliance.


JUDGE

Ahmed/Pa