ORDER SHEET
IN THE HIGH COURT OF SINDH
CIRCUIT COURT MIRPURKHAS

Civil Revision Application No.S-181 of 2024
(Ghulam Hyder Vs. Chagan and others)

DATE ORDER WITH SIGNATURE OF JUDGE

Date of hearing and Order 15.08.2024

Mr. Sikandar Ali Kolachi, advocate for the applicant
Mr. Muhammad Sharif Solangi, Assistant A.A.G.
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O R D E R

Adnan-ul-Karim Memon, J. The applicant Ghulam Hyder has filed this Civil Revision Application against the Order dated 6.12.2023 passed by the learned District Judge, Tharparkar at Mithi in Civil Appeal No.23 of 2023 whereby his appeal was dismissed and the Judgment dated 28.8.2023 and decree dated 29.8.2023 passed by the learned Senior Civil Judge-1 Mithi in F.C Suit No.65 of 2020 was maintained wherein his F.C Suit was dismissed under Order XVII Rule 3 CPC due to non-production of evidence, an excerpt of the Judgment dated 28.08.2023 is reproduced as under;

> "As a result of my findings on the above issues, wherein, both the parties have failed to adduce their evidence, hence, order 17(3) CPC will definitely come into play in the matter, which is reproduced as under:-
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> "Court may proceed notwithstanding either party fails to produce evidence, etc. -- here any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of this 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", therefore, the suit of the plaintiff is hereby dismissed under Order 17 Rule 3 CPC, with no order as to costs. Let such a decree be prepared within seven days.

2. The brief facts of the case are that the applicant/plaintiff filed F.C Suit No.65 of 2020 before the learned Senior Civil Judge-I Mithi for declaration, specific performance of contract, mandatory & permanent injunction with the narration that the agricultural land bearing survey No.97 admeasuring 10-26 acres, situated in Deh/Makan Koonbhario, Tapo

Khario Ghulam Shah, Taluka Islamkot, district Tharparkar, was sold out by the respondents/defendants No.1 to 3 to the applicant/plaintiff on 01.07.2018 through sale-agreement, out of which Rs. 2,62,000/- were paid to the respondents/defendants No.1 & 2 while Rs.85,000/- were paid to the respondent/defendant No.3 and it was unanimously decided that since the pipeline passed from Na-Kabuli land bearing No.190 (10-00 acres), as such, compensation thereof would be payable to the applicant /plaintiff whereas the respondents/defendants No.1 to 3 would have no concern and survey No.190 which is a Na-Kabuli land, would be cultivated by the applicant/plaintiff for the time being till registry of suit land. It is averred that the applicant/plaintiff paid entire price of sale of suit land to the respondents/defendants No.1 to 3, who delivered the possession of suit land to him on the said date along with all possessory rights, such as Mohaga rights, Panidhore, etc., and since then he is in its peaceful possession and enjoying its produce. It is asserted that in the sale agreement, it is very much mentioned that whenever the applicant/plaintiff would deem it fit, he can get the suit land mutated/entered in his name in the revenue record and the respondent/defendant No.1 would be ready to get it mutated in his name in his presence. It is further stated that by virtue of sale agreement, the appellant/plaintiff became the exclusive and absolute owner of the suit land and the sale became complete as envisaged under section 53,53-A & 54 of the Transfer of Property Act and since that time, the applicant/plaintiff had been cultivating the suit land peacefully and was enjoying its produce without any disturbance or hindrance from any corner, however, he had been approaching the respondents/defendants No.1 to 3 for getting the suit land mutated in his name, but he by showing one or other pretext, was keeping him on false hopes, solaces & promises. It is alleged that even he took away the compensation of pipelines from Engro company as is apparent from the notice published in the newspaper invited by the Acquisition Officer, Thar Coal, Tharparkar at Mithi. It is further asserted that in the light of the agreement between the appellant/plaintiff as well as respondents/defendants No.1 to 3, the cheques in respect of pipelines were to be handed over/delivered to the applicant /plaintiff, but the respondent/ defendant No.1 was paid an

amount of Rs.76,000/- through cheque by the Engro Department thereby they had broken the undertaking and fleeced the amount of applicant/plaintiff intentionally. It is also alleged that on 12.07.2020 at about 10-00/11-00 A.M when the applicant /plaintiff was busy in the suit land where the respondents /defendants No.1 to 3 with 10/12 other unknown persons came over there with hatchets & Lathis, they restrained the applicant/ plaintiff from cultivating the suit land and asked him that they want to sell the same to 3rd person. It is also alleged that they also issued him threats to vacate the suit land; otherwise, they would not allow him to cultivate the suit land at any cost. It is further alleged that the respondents/defendants No.1 to 3 were/are deliberately avoiding registering the sale-deed in favor of applicant/plaintiff before the Sub-Registrar, Mithi, and due to his malafide intention & ulterior motives, he intends to sell the suit land to 3rd person despite of executing the sale-agreement, receiving the consideration amount so also handed over possession of the suit land to the applicant/plaintiff, hence he filed the present suit before the trial court with the following prayers:

> a) To declare that the suit land was rightly sold by defendants No.1 to 3 to the plaintiff in the sum of Rs. 2,62,000/- and the plaintiff has legal & vested right in the suit land as being purchaser of it under an agreement to sell dated 01.07.2018 executed by the defendant No.1.
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> b) To declare that defendants No.1 to 3 avoiding their lawful obligation by executing registered sale-deed in favor of the plaintiff and negotiations with strangers is illegal, void, and malafide, particularly when the plaintiff has already paid the entire money for consideration of the sale agreement.
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> c) Direct defendants No.1 to 3 to perform their part of the agreement by executing the registered sale-deed of his share (suit land) in the above survey numbers in favor of the plaintiff and in case of failure of the defendants No.1 to 3, then the Nazir of this honorable court be deputed for such purpose.
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> d) Direct defendants No.1 to 3 to deliver/hand over the amount of pipeline cheque to the plaintiff received from him (defendants No.1 to 3) from the Engro Department.
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> e) Direct defendant No.5 not to register the sale deed in respect of the suit land in the name of any other person except the plaintiff.
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> f) Grant permanent injunction against the Mukhtiarkar (Revenue) Islamkot restraining and prohibiting him from issuing clearance certificate to the defendants No.1 to 3 in respect of the suit land in the name of 3rd party except the plaintiff.
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> g) Grant permanent injunction against the defendants No.1 to 3 restraining and prohibiting him from selling, mortgaging, disposing,

> leasing, or alienating the suit land to anybody else in any manner excepting the plaintiff or interfering in the peaceful possession of the plaintiff over the suit land in any manner themselves or through their men, agents, relatives, friends or by any other means directly or indirectly.
> h) Cost of the suit may be awarded to the plaintiff
> i) Grant any other relief that this honorable court deems fit and proper.

3. The private respondents were served and filed their written statement, while objecting to the maintainability of the suit and denying all adverse allegations against them in plaint, added that they neither received any sale amount of suit land from the applicant/plaintiff as alleged nor they sold out the suit land to him under sale-agreement No.96 dated 01.07.2018, the same is false, bogus & fraudulent document whereas the LTI affixed on the said agreement of one Harish witness Raho could be verified through handwriting expert as same is bogus one. According to them, the applicant/ plaintiff never approached them for any purpose, however, the respondents/defendants being lawful owners of the suit land, had every right to sell the suit land to any person. According to them, no valuable rights of the applicant/plaintiff were/are accrued in his favor in respect of suit land and no cause of action had arisen to the applicant/plaintiff to file the present suit. According to them, the applicant/plaintiff is not entitled to grant of any relief, as he did not come with clean hands for seeking relief and filed the present suit with his malafide intention just to usurp the suit land based on forged, fictitious, bogus and managed sale-agreement. They prayed for the dismissal of the suit being meritless and not maintainable. The respondents/defendants No.4 & 5 did not file their written statements; consequently, they were debarred from filing written statements by the trial court. The trial court framed issues. Then the matter was fixed for evidence of the applicant/plaintiff's side, but he avoided leading his evidence while his counsel moved frequent adjournment applications, which were being allowed by the trial court, but despite of that the applicant/plaintiff didn't lead evidence till last date of hearing, resultantly, the trial court closed the evidence side of both the parties per order sheet dated 28.08.2023. Thereafter, the learned trial court dismissed the suit of the appellant/plaintiff under order 17 Rule 3 CPC, vide impugned judgment & decree dated 28.08.2023 & 29.08.2023 respectively. Accordingly, the

applicant/plaintiff being aggrieved thereof, impugned the said verdict of the trial court in Civil Appeal No.23 of 2023, and his appeal was dismissed vide Judgment and Decree dated 06.12.2023, and now he has approached this court in Revision.

> "In the light of the above discussion, I do not find any illegality, irregularity, impropriety, jurisdictional defect, error, or flaw in the impugned judgment & decree, passed by the trial court which may demonstrate or require justification for the interference of this court, hence the point No.1 is answered accordingly.
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> **Point No.2.**
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> In view of the foregoing discussion on point No.1, by relying on the case law reported in 2020 SCMR 300, the appeal stands dismissed with no order as to costs, while the impugned judgment dated 28.08.2023 & decree dated 29.08.2023 is/are maintained."

4. Touching the core issue, whether this Court in Revisional Jurisdiction can set aside the orders passed by the trial and appellate Court, whereby the plaintiff failed to put his appearance to lead evidence in spite of several opportunities of hearings. Consequently, in such circumstances, this Court, hearing the revisional jurisdiction, which is supervisory, and this Court has to ensure that the trial and appellate courts conform to the parameters of its jurisdiction. In other words, the revisional jurisdiction is meant to rectify; to obviate, forefend and stave off the exercise of jurisdictional errors/defects and the illegalities and/or material irregularity committed by the subordinate court in that regard. While approaching this court in the revisional jurisdiction for the redressal of one's grievance, if the case is covered by section 115, C.P.C. is not a privilege but is a valuable right of an aggrieved party. Such exercise of revisional jurisdiction shall be subject to the rules of discretion, but the matter of approaching the revisional court cannot be relegated to a mere privilege of the court and not a right. The above view is fortified by a five Members Bench of the Supreme Court in the case of *Karamat Hussain and others v. Muhammad Zaman and others* (**PLD 1987 SC 139**) which held that "True the exercise of this jurisdiction by the High Court is discretionary but that does not mean that a revision is not a right but only a privilege". In another case *Muhammad Yousaf and others v. Khan Bahadur through Legal Heirs* (**1992 SCMR 2334**), the Supreme Court concluded that "the exercise of revisional jurisdiction by the High Court is a matter exclusively between the High Court and the subordinate Courts, albeit the parties to the

litigation have a right to bring to their notice the jurisdictional/legal errors as envisaged in section 115 of the C.P.C." This is the apt, the conclusive, and the final enunciation of law on the subject and this was the reason this court vide order dated 31.5.2024 issued notice to the parties to appear and assist this court.

5. In the present case, the question is whether the provisions of Rule 3 of Order XVII CPC can be applied.

6. To dilate upon the subject proposition, it is expedient to have a look at the facts of the case first. It appears from the record that the applicant/plaintiff filed his suit in the trial court through his special attorney which was instituted/filed on 23-07-2020, wherein, a written statement was filed by the private respondents/defendants No.1 to 3 on 02-02-2021. Thereafter, the issues were framed on 16-04-2022, however; after framing of the issues, the matter was adjourned for the recording of evidence which hinges on a period of one (01) year, four months, and 12 days, but the applicant/plaintiff failed to enter in witness box till the day of passing the judgment by the trial court. Not only this, but the applicant/plaintiff's side failed to file his list of witnesses & documents within time, which too were filed on 10.03.2023 after about 10 months & 24 days of framing the issues. The adjournment applications were being moved by the parties and the trial court remained patiently granting adjournment applications, Despite that, the counsel for both the contesting parties on every date of the hearing, failed to proceed with the matter, hence the trial court found no way, exercised the powers vested in it under order XVII Rule 3 CPC.

7. In principle, the provision of Order XVII, Rule 3 CPC, is penal and as per the settled law such provisions should be strictly construed and applied, therefore, once the case of delinquent litigant squarely falls within the purview and mischief of the law, then neither any concession should be shown to such litigant nor a lenient favoring him should be resorted to; this should not be permissible done on the touchstone of exercise of the discretionary power of the court and/or on the approach that technicalities of procedure should not be allowed to impede the interest of justice; and/or that litigants should not be knocked out on technical grounds and

that adversarial lis should be settled on merits. If such an approach is liberally followed and resorted to there shall be no discipline in the adjudication of civil litigation and the delinquent whose case though is squarely hit and covered by penal provisions of Order XVII Rule 3 CPC would be given a chance to his advantage and the disadvantage of his opposite side. This is not the spirit of the law at all. It may not be out of place to mention here that to apply and to adhere to the law is not a mere technicality, rather it is a duty cast upon the court as per Article 4 of the constitution of the Islamic Republic of Pakistan, 1973 to do so. Thus, where the order XVII rule 3, CPC is duly attracted, the court has no option except to take action under it. It is settled law that where the last opportunity to produce evidence is granted and the party has been warned of the consequences, the court must enforce its order unfailingly and unscrupulously without exception. Such order in my opinion not only put the system back on track and reaffirm the majesty of the law, but also put a check on the trend of seeking multiple adjournments on frivolous grounds to prolong and delay proceedings without any valid or legitimate rhyme or reason. Similarly, where the court has passed an order granting the last opportunity, it has not only passed a judicial order but also made a promise to the lis that no further adjournments will be granted for any reason, and in such eventuality, the court must enforce its order and honor its promise.

8. In addition to the above, there was no room or choice for the trial court to do anything else. The order to close the right to produce evidence must automatically follow failure to produce evidence despite the last opportunity coupled with a warning. Once the applicant/appellant/plaintiff/petitioner had been granted a final opportunity and had also clearly and unambiguously warned against default and the consequence thereof, he was required to produce evidence on that date and no further time could or should have been granted.

9. On the aforesaid analogy, I am guided by the decisions of the Supreme Court in the cases of *Syed Tahir Hussain Mehmoodi and others V/S Agha Syed Liaqat Ali and others*, ***2014 SCMR 637***, the plaintiff adduced and completed his evidence, while the evidence of the defendants was closed

in terms of Order XVII Rule 3 CPC as they failed to do the needful despite availing considerable opportunities, and ultimately the Suit was decreed against them. They challenged the judgment and decree in appeal, which was dismissed. Civil Revision filed by them before the learned Lahore High Court was allowed to the extent that they were not allowed to adduce any other evidence, except to have their statements recorded. While allowing the Civil Revision to the above extent, it was observed by the learned Lahore High Court that the defendants were not marked absent in the order sheet when Order XVII Rule 3 CPC was invoked, therefore, such omission should not be construed as their absence, rather provided a margin to them assuming their presence. The order of the learned Lahore High Court was challenged in Civil Petition for Leave to Appeal, wherein it was held by the honorable Supreme Court that such an approach was valid and the view formed by the learned Lahore High Court cannot be held to be illegal and unfounded. The petition was dismissed.

10. Further, the Supreme Court in the case of *Ali Muhammad V/S Mst. Murad Bibi*, ***1995 SCMR 773***, held that the request for adjournment of the case made by the defendant was declined, his right to cross-examine was closed, and the decree was passed against him without providing him the opportunity to produce his evidence. He challenged the decree in appeal, which was allowed by the appellate Court, and the matter was remanded to the trial Court for fresh trial under the law by allowing the right of cross-examination to the defendant and then to produce his evidence. The order of the appellate Court was maintained by the learned Lahore High Court, and Civil Petition for Leave to Appeal filed by the plaintiff was also dismissed by the honorable Supreme Court.

11. Additionally, the Supreme Court in the case of *Sheikh Khurshid Mehboob Alam V/S Mirza Hashim Baig and another*, ***2012 SCMR 361***, held that it was the consistent view of the Hon'ble Supreme Court that the evidence of a party cannot be closed under Order XVII Rule 3 CPC for non-production of evidence where the case on the previous date was not adjourned at the request of such party. Moreover, the Suit could also not

be dismissed under Order XVII Rule 3 CPC as the respondent was not unrepresented and her counsel was present on the date of dismissal.

12. In *Sardar Muhammad Ibrahim Khan V/S The Azad Jammu and Kashmir Government*, ***PLD 1987 Supreme Court (AJ&K) 127***, it was held by the Hon'ble Supreme Court of Azad Jammu and Kashmir that there is ample authority in support of the proposition that when a party appears through counsel and asks for an adjournment, such party must be deemed to have appeared. It is well-established that the previous default of a party, if any, is not to be taken note of while considering the question under Rule 3 *ibid* as to whether a party is entitled to grant further opportunity or not. In this context, reference may be made to *Messrs Raheem Steel Re-Rolling Mills and 4 others V/S Messrs Karim Aziz Industries (Pvt.) Ltd.*, ***1988 CLC 654***. The point that previous default(s) or conduct of a party should not prejudice the merits of his case, is further fortified by two Full Bench authorities of the Hon'ble Supreme Court; namely, *Seth Shivrattan G. Mohatta and another V/S Messrs Mohammadi Steamship Co. Ltd.*, ***PLD 1965 Supreme Court 669***, and *Babu Jan Muhammad and others V/S Dr. Abdul Ghafoor and others*, ***PLD 1966 Supreme Court 461***.

13. In *Muhammad Aslam V/S Nazir Ahmed*, ***2008 SCMR 942***, the Suit was at the stage of the plaintiff's evidence and the last chance had been given to him to produce his evidence. On the relevant date, he did not produce his evidence nor did he appear, but his counsel applied for adjournment. The trial Court dismissed the application, closed his evidence by invoking the provisions of Order XVII Rule 3 CPC, and dismissed the Suit with costs. The appeal filed by the plaintiff was allowed by the appellate Court by setting aside the order of the trial Court and remanding the Suit for a decision afresh under the law. Civil Revision filed by the defendant against the judgment of the appellate Court was dismissed by the learned Lahore High Court, and the order of remand was maintained. Civil Petition for Leave to Appeal filed by the defendant was dismissed by the Full Bench of the Hon'ble Supreme Court by holding *inter alia* as under :

> **"***It may be pointed out here that though under Order XVII, rule 3, C.P.C. it has been provided that where sufficient cause is not shown for the grant of adjournment the Court may proceed to decide the suit forthwith but the words used in the*

> *provision in question "proceed to decide the suit forthwith" do not mean "to decide the suit forthwith" or "dismiss the suit forthwith". The said rule simply lays down that the Court may proceed with the suit notwithstanding either party fails to produce evidence etc. meaning thereby that in case of default to a specific act by any party to the suit, the next step required to be taken in the suit should be taken. Though the words "forthwith" means without any further adjournment yet, it cannot be equated with the words "at once pronounced judgment", as used in Order XV rule 4 C.P.C. where, on the issuance of summons for final disposal of the suit either party fails, without sufficient cause to produce the evidence on which he relies.*"

14. In *Muhammad Haleem and others V/S H. H. Muhammad Naim and others*, ***PLD 1969 Supreme Court 270***, it was held by the Full Bench of the Hon'ble Supreme Court that there is a distinction between Rules 2 and 3 of Order XVII CPC and it lies in this that Rule 2 would be attracted to a case where the adjournment has been granted generally for one of the purposes mentioned in that Rule, but where the entire evidence has been recorded and the case is posted only for the hearing of arguments, the more appropriate Rule to follow would be Rule 3 and not Rule 2. It was further held that the consensus of judicial opinion appears to be in favor of the view that if a Court can base a decision on merits upon the material already brought on the record, it should proceed under Rule 3 of Order XVII and not under Rule 2; and, if it is at all possible for a Court to decide the matter as indicated in Rule 3, then it should adopt that course and not dismiss the proceedings for non-prosecution and leave the parties to start a second round of litigation.

15. A some what similar view was taken by the Supreme Court of Azad Jammu and Kashmir in *Sardar Muhammad Ibrahim Khan V/S The Azad Jammu and Kashmir Government*, ***PLD 1987 Supreme Court (AJ&K) 127***, wherein it was held that if a case falls within the ambit of Order XVII Rule 3 CPC, it is incumbent upon the Court to decide the case on merits, provided there is material on the record to decide the same.

16. In the case of *Industrial Sales and Service, Karachi, and another V/S Archifar Opal Laboratories Ltd., Karachi*, ***PLD 1969 Karachi 418***, the learned Division Bench of this Court was pleased to hold that Order XVII Rule 3 CPC is, in its nature, a penal provision, and the same can be pressed into

service for deciding the Suit finally on merits on the proof of default by some party; and, some of the conditions to be satisfied before passing an order under the said provision are:-

> "*(a) That the provision being penal, it should be construed very strictly.*
>
> *(b) The facts of the case should not, at all, admit for any doubt as to the default of the party.*
>
> *(c) The conduct of the party, proved to have committed the default, must not be excusable.*
>
> *(d) No other party, witness, or the Court itself should be, in any way, responsible wholly or partly for the default; e.g., if the plaintiff has done all that is necessary for the summoning of the witness and on the failure of the office to issue the summons or after service due to negligence of the witness himself, he fails to appear before the Court, it cannot be treated as default of the party summoning the witness.*
>
> *(e) The time granted for the performance of any act mentioned in this rule must be a time granted to the party itself on its request and not to a witness, to the other party, or by the Court due to its exigencies relating to Court work or proceedings in that particular case.*
>
> *(f) The act for the performance of which the time may have been granted, must be a specified act necessary to further the progress of the suit.*
>
> *(g) There should be some material to decide the suit.*"

17. It was held in the above case by the learned Division Bench of this Court that if the conditions of Rule 3 of Order XVII are satisfied, only then can the Court proceed to decide the Suit; but that decision, if it is to be under the said Rule, must be forthwith. The parties in the cited case had already submitted their documents which were yet to be exhibited and proved. It was held that there is ample authority on the point that Rule 2 of Order XVII CPC cannot be availed for deciding any substantial question on merits by invoking the conditions mentioned in Rule 3 of Order XVII. evidence of the plaintiff had been recorded and the defendants' evidence was closed under Order XVII Rule 3 CPC as they did not bring their witnesses, and the Suit was decreed in favor of the plaintiff. The word "decide" the Suit forthwith used in Rule 3 of Order XVII CPC means according to the dictionary "settle (question, issue, dispute) by giving

victory to one side; give judgment (between, for, in favor of, against), bring judgment, making up one's mind". It was held in the case of *Islamic Republic of Pakistan V/S Abdul Wali Khan*, ***PLD 1976 Supreme Court 57***, that the word "decision" means judicial determination under evidence before the Court. The law requires that the court has to decide the Suit which means that the material and evidence brought on the record is to be considered to decide the Suit, and it is not proper to decree the suit straightaway without examination of evidence brought on the record.

18. In *Ghulam Qadir alias Qadir Bakhsh V/S Haji Muhammad Suleman and 6 others*, ***PLD 2003 Supreme Court 180***, when the Suit was fixed for the plaintiff's evidence, the plaintiff and his counsel were absent and evidence was not produced by him. Due to this reason, his evidence was closed under Order XVII Rule 3 CPC, and the Suit was dismissed. It was held that the trial Court while exercising jurisdiction under Order XVII Rule 3 CPC did not commit any irregularity.

19. From the survey of the aforesaid case law on the subject, I find in this case, the necessary conditions for Order XVII Rule 3 CPC to apply were fully met and the learned trial court correctly used/exercised the power to close the right of both the parties to produce evidence. Besides the approach of the trial court was appreciated by the appellate court in its logical conclusion which is within the parameters of law and does not call for further deliberation on my part.

20. In view of the foregoing discussion, this Revision Application is dismissed with no order as to costs.

21. These are the reasons for my short order dated 15.8.2024 whereby the instant Revision Application was dismissed.

JUDGE

Ali Sher