JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No.3533 of 2020
Sohail Niaz Gill
Versus
Learned Senior Civil Judge, Islamabad-West and others

Petitioner by:	M/s Khurram Jamshed Chughtai and Yasir Ali, Advocates
Respondents No.5 and 6:	Exparte
Date of Decision:	**16.02.2022**

SARDAR EJAZ ISHAQ KHAN, J:- In 2013, four daughters and a son of Chaudhry Niaz Ahmed Gill filed a suit for declaration, partition, possession, recovery of mesne profits, permanent and mandatory injunction against the public at large, two step brothers, and the CDA. It lingered on at the usual pace until sometime around 2020 it picked up pace and was being heard day to day. Vide the impugned order dated 19.10.2020, the trial court struck off the petitioner's/defendant no.3's (and CDA's as defendant no.4) right to cross-examine one of the plaintiffs' witness, Shahbaz Rana, for repeat non-appearance of defendants no. 3 and 4.

2 The petitioner prays for this Court to set aside the impugned order under Article 199 of the Constitution and to direct the restoration of the petitioner's right to cross-examine Shahbaz Rana (writs of certiorari and mandamus). The impugned order is not appealable. It is also not revisable after the promulgation of the Islamabad Code of Civil Procedure (Amendment) Act, 2020 (Act No.VII of 2020) on 21.02.2020. The petitioner has no alternate remedy.[1]

3 The petitioner's case is best described in ground G of the petition which reads as follows:

> That the Respondent no. 1 did not appreciate the petitioner's conduct which reflects from the order sheet that the counsel for the petitioner remained present almost on each and every date of hearing whereas the no attendance of PWs marked by the Respondent No. 1 for cross-examination, hence interference of this Hon'ble Court is sought. [sic!]

[1] This petition was initially allowed on conclusion of arguments, but while writing the judgment it was discovered that the position was somewhat different on deeper examination of the record. The case was relisted and counsel was heard again.

4 The events immediately surrounding the impugned order are tabulated below:

16.10.2020	Shahbaz Rana produced; none appeared for the defendants, adjourned for 17.10.2020 for evidence.
17.10.2020	Shahbaz Rana produced; none appeared for the defendants. Last opportunity given, else ‘‘right will be struck-off’. Adjourned for 19.10.2020.
19.10.2020	Shahbaz Rana produced; none appeared for the defendants. Referring to the order on the last date, the Civil Court struck-off the defendant no. 3 and 4’s right to cross-examine Shahbaz Rana and adjourned to 20.10.2020 for the remaining evidence of the plaintiff.

5 The petitioner’s counsel has filed with the memo of petition almost all the pleadings in the suit, the orders sheets for about 50 hearing dates, copies of interlocutory orders including for framing of additional issues and even more papers. He wants this Court to absorb eight years of proceedings in the suit just in order to be able to show that the learned trial Court was kinder to the plaintiff than it was to the defendant. He says that because some adjournments in the past were granted at the request of the plaintiff or on some days the defendants’ witnesses were not cross-examined by the plaintiff, it created some sort of a right for the defendant not to show up on three consecutive dates of hearing. The hurdle in the counsel’s way is that, this being a writ petition (even if it were a revision), he faces the filters of the lack, failure, or excess of jurisdiction, illegality or material irregularity while exercising that jurisdiction, before he can ask this Court to supplant the trial Court’s impugned order with an order by this Court. For that to succeed, he has to show that the impugned order was contrary to any law. This he has not been able to do.

6 The impugned order is within the four corners of Order 17 Rules 2 and 3 CPC. The defendant failed to appear on three consecutive dates to which the suit was adjourned, and the Court had the option under Rule 2 of *making such other order as it thought fit* or to proceed *ex parte* under Order 9 Rule 6(1)(a). It also had the option under Rule 3 to *proceed to decide the suit forthwith*. Both Rule 2 and Rule 3 conditions occurred simultaneously. The Court chose the less drastic step of closing the right to cross-examine to the extent of Shahbaz Rana only.

7 I now take a detour lasting up to paragraph 14. Those not interested in the detour may jump straight to paragraph 15. This detour is by way of guidelines by which a trial Court can announce its 'adjournments policy' - if I could use such a term - for *ex-ante* structuring of its discretion under Order 17. These guidelines are not meant to be binding until these are prescribed as rules, if at all.

8 A Court other than the one whose order is impugned in the instant petition might have invoked Order 17 Rule 1(2) to impose costs for adjournment instead of striking out the right to cross-examine the witness. Yet another might have passed an *escalating costs order*, say, by illustration, Rs, 5,000/-, 10,000/- and 20,000/- for the 1st, 2nd and 3rd adjournments, and then on the 4th date passed an order under Rules 2 or 3, depending on the progress of the suit up till then. Section 35-A CPC provides for adjournment costs. The second proviso enables the Court to impose the adjournment costs as the Court may deem fit if it finds contumacy of a party seeking to rely on the first proviso to avoid adjournment costs. In such a case, the limit of Rs. 5,000/-, in my humble view, would not apply. It would be best if the costs of adjournment were prescribed, but that may be some time in coming. Such would be 'costs for the day'. On default in payment of the costs for an adjournment, dismissal of suit, proceeding ex-parte, striking-off the right to lead evidence or to cross-examine for not fulfilling the condition of costs for adjournment on the next date is valid action by the Court[2]. The right of audience on the next date to which the case was adjourned on the previous date with imposition of costs is subject to payment of costs first. In the *Ghulam Haider*[3] *case*, his Lordship Ch. Ijaz Ahmad J., when at the High Court, after discussing precedent, held that:

> It is pertinent to mention here that non-payment of cost of adjournment is material fact, to be considered at the time of setting aside the order passed by the trial Court under which the evidence of the party was closed…. The aforesaid proposition of law is settled since long ago that non-payment of cost may entail penalties prescribed in Order 17, rule 3, C.P.C.

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[2] 2005 CLD 192
[3] 2001 MLD 1603

9 The concept of two to three adjournments with costs is also supported by section 26A CPC added vide the Code of Civil Procedure (Amendment) Act, 2020, for filing a written statement. The foregoing are only guidelines that, if followed, would underscore a structured exercise of discretion by the trial Court which in all likelihood will not be interfered with by a supervisory Court absent manifest error. Until the costs regime is streamlined by rules, the supervisory Courts continue to undertake a subjective exercise of reviewing the exercise of discretion in the particular facts of each case, and it is not far-fetched to say that one supervisory Court may come to a conclusion different from another on the same facts surrounding a penal order on an adjournment, but this would be a less likely outcome with escalating costs orders. It goes without saying that where the adjournment is occasioned not on account of a party's conduct but by a circumstance attributable to the Court itself, then the escalating costs order will not operate for that date. For this to work, the trial Court's adjournment order should contain the minimum particulars: (i) the nature of the proceedings that have taken place on the date, (ii) specify the next date, (iii) give reasons for adjournment, and (iv) specify the proceedings that are to be taken on the adjourned date. Many a time the adjournment orders do not specify these particulars, which gives occasion for a contumacious delay to a party seeking to benefit by delay by resort to the higher forums. A watchful combination of escalating costs orders and adjournment orders with the four particulars above will minimize the frequency of challenges to orders of trial Courts under Order 17 and will substantially reduce the prospects of success for those that do pass the initial scrutiny at the admission stage by the supervising Court.

10 In my humble view, much controversy has arisen by reading the Rules under Order 17 on occasions as mutually exclusive, when they are not. In some cases, as the instant one, the act specified for further progress of the suit (Rule 3) could not take place because of the absence of a party (Rule 2). The application of Rule 1 is not excluded in the circumstances enumerated in Rule 2 or Rule 3; the language used in all the three Rules for the action to be taken by the Court in the events enumerated therein is permissive, and that is for a good reason. Therefore, a Court resorting to Rule 1 to impose costs in situations enumerated in Rule 2 or Rule 3 instead of limiting itself to the actions expressly stated in the latter two Rules

would be acting quite within the four corners of Order 17. An escalating costs order may compensate the plaintiff to some extent and also avoid the delay (almost one year in this case) due to an appeal or a writ.

11 There is a deluge of writ petitions arising out of orders passed by trial Courts under Order 17. Not only these clog the roster, they delay the progress of the trial until the High Court has passed a judgment after notices, appearances of respondents (often with adjournments) and arguments. In my humble view, much of this can be avoided by resorting to escalating costs orders. An escalating costs order will send a clear signal to the litigants as to how far the trial Court will go – for a cost – before resorting to the more extreme steps of closing the evidence or like penal actions. It would above all streamline the examination by the higher appellate or supervisory forums where the onus would be heavy on the contesting party to show that the order for dismissal or closing of evidence was uncalled for even after the escalating costs were paid. The rote defence of the decision to be taken on merits would be almost non-existent in such cases.

12 It may be that on a subsequent date, there are genuine reasons for not being able to progress with the suit. The onus will be on the party claiming the genuine reason. If one were to seek a rubric to capture the substantial variety of tests in the case law, it would be the test of *contumacy*. But the party claiming a genuine reason on an adjourned date will still remain liable to pay the costs for the previous adjournment - see *Ghulam Haider* above. If the contumacy persists beyond the last few cost-based adjournments, the trial Court's actions stipulated in Rules 2 and 3 would be unimpeachable, provided care is taken in choosing the right action. The foremost difference between Rules 2 and 3 lies in the stage the suit has reached. If there isn't sufficient material on record for the Court to render a decision, the Court can move under Rule 2[4]. If recording of evidence has begun and there is sufficient material on record for the Court to render a decision, then the Court is to proceed under Rule 3[5] - see *PLD 1969 SC 270; 2008 SCMR 942*.

13 The overriding takeaway from the foregoing discussion is this: the most-cited principle in appeals and writs that a case should be decided on

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[4] or pass an order for costs under Rule 1 where an escalating costs order is not passed earlier.
[5] ibid.

merits is displaced where a party's own contumacious conduct stands in the way of the application of that principle, and that the Court has available to it the tool of costs for adjournment under Rule 1 which may be used with an increasing order of severity for a few occasions preceding the more severe orders of closing the right to evidence of a party and the like under Rules 2 and 3 of Order 17.

14 The office is directed to forward a copy of this judgment to the learned Member Inspection Team (MIT) so that it can be shared with the learned judges of the District Courts.

15 Returning to the case at hand from paragraph 6, and finding none of the ingredients (see para 5 above) calling for upsetting the impugned order, I **dismiss** this petition.

16 The **award of costs** is to follow the event: it is in favour of the respondents. If the respondents 2 to 4 wish to recover their costs, they may file a bill of costs signed and sworn before an oath commissioner as to its truth and accuracy. The sworn bill of costs is to be deposited with the Deputy Registrar (Judicial) and put up before the Court in chambers for assessment and award. They have 30 days to do so.

(SARDAR EJAZ ISHAQ KHAN)
JUDGE

Imran

Approved for reporting