Form No: HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

(JUDICIAL DEPARTMENT)

Regular First Appeal No. 04 of 2021

Dr. Aleem Akhter

Versus

Muhammad Athar Shaheen and others.

Petitioner by:	Mr. Muhammad Habib Ullah Khan, Advocate.
Respondents by:	Ms. Zainab Rashid, Advocate for the respondents No. 1 & 2. Respondent No. 3 (deceased). Respondent No. 4, ex-parte. Ms. Mehraj Tareen, Advocate for the respondent No.5. Mr. Shajjar Abbas Hamdani, Advocate for the respondent No. 6.
Dates of hearing:	05.01.2021,14.01.2021,03.03.2021, 21.06.2021,19.07.2021 & 27.07.2021.

TARIQ MEHMOOD JAHANGIRI, J:

Through this Regular First Appeal, the appellant has assailed order and decree dated 12.12.2020 passed by learned Senior Civil Judge-I, West-Islamabad, whereby the suit of the appellant was dismissed under Order XVII Rule 3 CPC, due to non production of evidence.

02. Brief facts of the case are that suit titled as *"Dr. Aleem Akhtar Vs. Muhammad Athar Shaheen and others"* for Declaration, Permanent Injunction and Specific Performance was filed by the appellant before

the learned Civil Court, Islamabad on 19.03.1996, which was dismissed through Ex-parte Judgment and Decree dated 26.02.2004 and the matter was assailed by Dr. Aleem Akhtar / appellant before the Hon'ble Lahore High Court through R.F.A. No. 73/2004 and same was remanded to the learned District Judge, Islamabad by the Hon'ble Lahore High Court due to change of pecuniary jurisdiction. Thereafter, the learned District Judge, Islamabad entrusted the said matter to learned Additional District Judge, Islamabad. Appeal filed by the appellant was allowed and the suit was decreed vide ex-parte Judgment and Decree dated 01.06.2010. Respondent No. 6, Sajjad Ahmed filed an application for setting aside the ex-parte Judgment and Decree dated 01.06.2010 passed by learned Additional District Judge, Islamabad, the said application for setting aside ex-parte Judgment was dismissed by learned Additional District Judge, Islamabad vide order dated 04.11.2016. Feeling aggrieved, the respondent No. 6 / Sajjad Ahmed filed F.A.O. No. 127/2016 before this Court, which was accepted on 23.10.2019 in the following terms:

> ***"For what has been discussed above, instant appeal is Allowed, impugned judgment dated 04.11.2016 is set-aside and the impugned ex-parte judgment and decree***

dated 01.06.2010 is also Set-Aside. However, matter is remanded to the learned Trial Court to give proper right of hearing to the appellant and shall proceed in the civil suit in accordance with law and benefit if any achieved by the respondents through the judgment and decree in question has no legal effect till the final judgment of the civil suit as the matter is now pending before the learned Trial Court".

03. After remand of the case, by this Court, learned Senior Civil Judge-I, West-Islamabad passed the impugned order and decree dated 12.12.2020, whereby the suit of the appellant was dismissed under Order XVII Rule 3, CPC due to non production of evidence. Being aggrieved the appellant filed the instant R.F.A in this Court. Civil Petition No. 699 of 2020 titled as *"Aleem Akhtar Vs. Sajjad Ahmed & Others",* against judgment dated 23.10.2019 passed by this Court, filed by the appellant before the Hon'ble Supreme Court of Pakistan, was dismissed on 01.01.2021 with the direction that instant R.F.A be decided without undue delay preferably within a period of three months.

04. Learned counsel for the appellant *inter alia* contends that no proper opportunity for producing the evidence was provided and the impugned order is

against law and facts of the case; no notice under Order XVII Rule 3, CPC was given rather some forgery / interpolation has been committed in the order sheets of the learned Trial Court, as the words 'last and final' opportunity and notice under Order XVII Rule 3, CPC in the different orders of the learned Trial Court were written after announcing the order in the Court and the said orders are in different handwriting; learned Trial Court has not summoned the witnesses of the appellant / plaintiff in accordance with law; no statement of process server was recorded by the learned Trial Court; learned Trial Court has not appreciated the controversy involved in the matter and failed to appreciate the arguments advanced by the learned counsel for the appellant; the impugned order has been passed in violation of Order VIII Rule 10 and Section 17 of CPC. He further contends that learned Civil Judge has totally ignored the contention of the appellant in its true perspective and decision of the learned Trial Court is the result of mis-reading non-reading of material available on record and has prayed for setting aside the impugned judgment and decree dated 12.12.2020.

05. Learned counsel for the respondent No. 6 has controverted the arguments raised by learned counsel for the appellant and has stated that numerous

opportunities were provided to the appellant for production of evidence and notice under Section XVII Rule 3, CPC was also issued; the appellant has not complied with the order passed by learned Trial Court and the impugned order and decree has rightly been passed and has prayed for dismissal of the appeal. Learned counsel has relied upon cases reported as ***"2020 SCMR 300 and 2015 SCMR 1401"***.

06. Arguments advanced by learned counsel for the appellant and learned counsel for the respondent No. 6 have been heard and record has been perused with their able assistance.

07. Perusal of record reveals that the judgment and decree dated 01.06.2010 passed in favour of appellant, was set aside by this Court vide judgment dated 23.10.2019, and the case was remanded to the learned Trial Court for deciding the suit afresh by giving proper right of hearing to the parties in accordance with law. Civil Petition No. 669 of 2020 against judgment dated 23.10.2019 passed by this Court in F.A.O. No. 127 of 2016 was also dismissed by the Hon'ble Supreme Court of Pakistan vide Order dated 01.01.2021.

08. After remand of the case, learned trial Court has framed the issues on 24.09.2020 and the case was adjourned to 09.10.2020 for recording of evidence of the appellant / plaintiff. The appellant / plaintiff submitted list of witnesses along with an application for issuance of process of summoning of witnesses on 09.10.2020 and on the same day it was accepted and the case was adjourned to 14.10.2020. On 14.10.2020 lawyers were observing strike and the case was adjourned to 20.10.2020. On 20.10.2020, an order was passed that fresh summons be issued to the witnesses and the appellant / plaintiff was directed to appear on the next date of hearing for recording of evidence and the case was adjourned to 24.10.2020.

09. On 24.10.2020, lawyers were observing strike and witness of the appellant namely Waheed Ahmed was present in Court, who was bound for recording of evidence on the next date of hearing and the case was adjourned to 29.10.2020. On 29.10.2020, witness of the appellant namely Waheed Ahmed was present and informed the Court that due to elections of Supreme Court Bar Association, neither counsel for the appellant / plaintiff nor the other witness are present, again the case was adjourned to 05.04.2020 and it was ordered that the appellant / plaintiff should definitely appear on

the next date of hearing and also to pay expense @ Rs 1,000/- to witness / Waheed Ahmed for the said date and case was adjourned to 05.11.2020. On 05.11.2020, attorney of appellant / plaintiff appeared and stated that learned counsel for plaintiff / appellant is busy before Hon'ble Supreme Court of Pakistan and has requested for adjournment and the case was adjourned to 06.11.2020.

10. It is pertinent to mention here that neither the witness / Waheed Ahmed appeared nor expense was paid to him, in compliance of order dated 29.10.2020 of the learned Trial Court. On 06.11.2020, the witness Muhammad Amjad appeared on the first call but due to non-availability of learned counsel for defendant No. 6 the case was kept pending. Lateron, learned counsel for defendant No. 6 turned up at 09:30 a.m. but neither the witness nor learned counsel for the appellant / plaintiff appeared. Subsequently learned counsel for the appellant / plaintiff appeared with the request for an adjournment on the ground that writ petition bearing No. 617/2019 was fixed before this Court, wherein the witness was directed to appear in person, so the case was adjourned to 12.11.2020 with the direction that ***"plaintiff shall positively bring the witness Muhammad Amjad Mehmood on the***

next date of hearing for recording of his evidence failing which the case shall be dismissed under Order XVII Rule 3, CPC".

11. On 12.11.2020, neither the appellant / plaintiff nor witness appeared rather learned counsel for the appellant / plaintiff made statement that appellant / plaintiff is an overseas Pakistani and the case may be transferred to the designated Court for the cases of overseas Pakistanis, so the file was referred to learned District Judge, Islamabad for the next date and the case was transferred to the Court of Mr. Muhammad Amir Aziz Khan, learned Senior Civil Judge, West-Islamabad. On 14.11.2020, the case was adjourned to 25.11.2020 for recording of evidence of the appellant / plaintiff and ***"final opportunity"*** was provided. On 25.11.2020, at first call no one has put an appearance on behalf of appellant / plaintiff, again case was called at 10:30 but the situation was same, in the late hours learned counsel for the appellant / plaintiff appeared and stated that evidence of the appellant / plaintiff is not available and has requested for adjournment, again **notice under Order XVII Rule 3, CPC was issued** and the case was adjourned to 12.12.2020. On 12.12.2020, evidence of the appellant / plaintiff was not available, so the learned trial Court has

observed that despite availing number of opportunities, the appellant / plaintiff has failed to produce evidence and notice under Order XVII Rule 3 was also issued, hence the impugned order was passed and suit of the appellant / plaintiff was dismissed under Order XVII Rule 3, CPC due to non production of evidence.

12. As far as argument / allegation of learned counsel for the appellant / plaintiff is concerned that some forgery / interpolation has been committed in the order sheets of the learned Trial Court, learned Counsel was asked whether he has filed any complaint before the Hon'ble Chief Justice of this Court, learned District and Sessions Judge or Member Inspection Team for conducting an inquiry etc of his allegations, the learned counsel simply denied that no such proceedings have been initiated.

13. Conduct of the appellant / plaintiff before the leaned Trial Court is that he produced two witnesses namely Waheed Ahmed and Muhammad Amjad Mehmood but despite repeated orders, failed to record testimony of his witnesses, delayed the proceedings on one pretext or the other. Thus his conduct surely denies him the right to claim equity, when he has not come to the Court with clean hands. It is settled law that one who seeks equity must do equity. Reference

may be made to a case titled as "***Muhammad Ali Vs. Province of KPK through Secretary, Elementary and Secondary Education, Peshawar" (2010 SCMR 673)***. Learned counsel has failed to satisfy the Court that the impugned order and decree is erroneous, illegal or unjustified.

14. The August Supreme Court of Pakistan in a case titled as ***"'Moon Enterpriser CNG Station, Rawalpindi Vs. Suit Northern Gas Pipelines Limited, through General Manager, Rawalpindi and another"* (2020 SCMR 300)**, while dealing with a similar question of law pertaining to application of Order-XVII Rule 3 C.P.C has, in unequivocal terms, held that:

> ***"In our view it is important for the purpose of maintaining the confidence of the litigants in the court systems and the presiding officers that where 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 would in our 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. 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 parties to the lis that no further adjournments will be granted for any reason. The Court must enforce its order and honour its promise. There is absolutely no room or choice to do anything else. The order to close the right to produce evidence must automatically follow failure to produce evidence despite last opportunity coupled with a warning. The trend of granting (Akhri Mouqa) then (Qatai Akhri Mouqa) and then (Qatai Qatai Akhri Mouqa) make a mockery of the provisions of law and those responsible to interpret and implement it. Such practices must be discontinued, forthwith".

15. It has been held by the Hon'ble Supreme Court of Pakistan in a case titled as "***Rana Tanveer Khan Vs. Naseer Ud Din and other" (2015 SCMR 1401)***, that:

"Once the case is fixed by the Court for recording the evidence of the party, it is the direction of the court to do the needful, and the party has the obligation to adduce evidence without there being any fresh direction by the court, however, where the 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 a date(s), as being the last opportunity(ies)".

16. For what has been discussed above, suit filed by the appellant was rightly dismissed by the Court of learned Senior Civil Judge-I, West-Islamabad, hence the instant Regular First Appeal is without merits and accordingly **dismissed.**

(TARIQ MEHMOOD JAHANGIRI)
JUDGE

Announced in Open Court on this 03rd day of August, 2021.

JUDGE

Approved for reporting.

Bilal /-