JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD

R.F.A. NO. 91 OF 2015

Multi Professional Co-Operative Housing Society

Versus

M/s AGECO Private Limited

Appellant by : Mr. Muhammad Wajid Hussain Mughal, Advocate.

Respondent by : Mr. M. Shahid Shahzad, Advocate.

Date of Hearing : 12-5-2025.

SAMAN RAFAT IMTIAZ, J.-

1. This Appeal has been filed by the Appellant/Plaintiff [Multi Professional Co-Operative Housing Society] to challenge the Order and Decree dated 6-4-2015 ("**Impugned Order and Decree**") passed by the learned Civil Judge, 1st Class, (West) Islamabad **("Trial Court")**, whereby the Appellant/Plaintiff's right to produce evidence has been struck off and the Suit for Recovery of Damages (**"Suit"**) filed by the Appellant/Plaintiff against the Respondent/Defendant [Messers AGECO (Pvt.) Limited] has been dismissed under Order XVII, Rule 3, C.P.C for want of evidence.

2. The facts of the case, as per the Memo of Appeal, are that an Agreement dated 2-3-2010 (**"Agreement"**) was executed between the Appellant/Plaintiff and the Respondent/Defendant for the supply and installation of solar lights along with solar panels, batteries, etc. in Sectors F-17, B-17, and E-11, Islamabad. According to the Appellant/Plaintiff the solar panels, lights, and batteries installed by the Respondent/Defendant were defective and not in accordance with the terms and conditions of the Agreement. As a result the Appellant/Plaintiff filed a Suit for Recovery of Damages amounting to Rs.28,845,101/- along with profit/compensation at the rate of 15% per annum against the Respondent/Defendant before the Trial

Court. The Respondent/Defendant filed a written statement denying the allegations levelled by the Appellant/Plaintiff.

3. Issues were framed and the case was fixed for the Appellant/Plaintiff's evidence. However, despite a number of opportunities granted to the Appellant/Plaintiff to adduce evidence the Appellant/Plaintiff failed to do so, which resulted in the passing of the Impugned Order and Decree. The Impugned Order notes that the case was fixed for evidence of the Appellant/Plaintiff subject to cost as last opportunity along with notice under Order XVII, Rule 3, CPC yet no one turned up for the Appellant/Plaintiff and that the Appellant/Plaintiff has failed to produce his evidence without reasonable justification therefore the Appellant/Plaintiff's right to produce evidence is struck off and suit is dismissed for want of evidence. Hence, the instant Appeal has been filed before this Court.

4. The learned counsel for the Appellant pointed out that on 20-1-2015 none was present on behalf of the Appellant/Plaintiff yet the Trial Court has issued notice under Order XVII, Rule 3, CPC, which was erroneous as such notice cannot be issued in the absence of the parties. The learned counsel further submitted that on 20-1-2015 as well as on 24-2-2015 the order sheet records that the matter is being adjourned as per request without specifying as to whose request. He argued that the Appellant/Plaintiff's right to lead evidence could not be closed under Order XVII, Rule 3, CPC unless the case was adjourned on the previous date at the request of the Appellant/Plaintiff. Similarly, he pointed out that none was present on behalf of the Appellant/Plaintiff on 6-4-2015 therefore the Trial Court could not have passed the Impugned Order and Decree under Order XVII, Rule 3, CPC and that, at the most, the Trial Court could have proceeded under Order XVII, Rule 2, CPC whereby the suit may be disposed of in one of the modes directed in that behalf by Order IX, CPC and as such the Suit of the Appellant/Plaintiff could have been dismissed under Order IX, Rule 8, CPC. The learned counsel for the Appellant explained that such course of action was not only the correct mode to be adopted under the circumstances as per law but would have also given the Appellant/Plaintiff the right to seek restoration under Order IX, Rule 9, CPC. He argued that even otherwise the Appellant/Plaintiff's Suit has been dismissed

vide the Impugned Order and Decree without passing of judgment whereas even if Order XVII, Rule 3, CPC is invoked a judgment is to be passed on merits. He relied upon *Sheikh Khurshid Mehboob Alam Vs. Mirza Hashim Baig and another,* 2012 SCMR 361 and *Muhammad Jamil and others Vs. Mst. Inayat Begum,* 2012 YLR 2658.

5. On the other hand, the learned counsel for the Respondent/Defendant pointed out that the Appellant/Plaintiff had been given more than 20 opportunities to produce evidence and fine was imposed twice as such the Impugned Order and Decree according to him does not suffer from any illegality.

6. I have heard the arguments of the learned counsels and perused the record with their able assistance.

7. The essential point for determination involved in the instant appeal is whether it is Rule 2 or Rule 3 of Order XVII, CPC that is to be invoked by the Trial Court where the plaintiff not only fails to produce evidence or to cause the attendance of his witness or to perform any other act necessary for the further progress of the suit for which time has been allowed but also fails to appear on the day to which the hearing of the suit is adjourned.

8. To this end, I have examined the record minutely which shows that issues were framed on 15-1-2013. Thereafter, the matter was fixed on 13-2-2013, 20-3-2013, and 22-5-2013 when the Appellant/Plaintiff's representative/counsel was present but not the evidence and as such the matter was adjourned for the production of the Appellant/Plaintiff's evidence. It bears emphasis that on 22-5-2013 last chance was given for production of evidence. Similarly, on 26-6-2013 the counsel of Appellant/Plaintiff was not present as such the matter was adjourned for production of evidence at the request of the Appellant/Plaintiff's representative and cost of Rs. 500/- was also imposed upon the Appellant/Plaintiff. Yet on 10-12-2013 none was present for the Appellant/Plaintiff and the matter was adjourned for the last time once again in the interest of justice. On 22-1-2014 the matter was adjourned once again at the request of the Appellant/Plaintiff's representative for the Appellant/Plaintiff's evidence. Thereafter, on 19-02-2014 counsels for both the

parties were present but the matter was adjourned as requested, however, the order does not specify as to whose request. On 3-9-2014 matter was adjourned at the request of the Appellant/Plaintiff's counsel for the production of the Appellant/Plaintiff's evidence for the last time. On 17-4-2013, 14-10-2013, 26-3-2014, and 17-12-2014 matter was adjourned due to strike or because the presiding officer was not available. Whereas, on 10-5-2014, 19-6-2014, 15-10-2014, 19-11-2014, 20-1-2015, and 24-2-2015 principal counsel for neither party was present. The orders do not specify at whose request the matter was adjourned. Be that as it may, matter was adjourned and last chance was given on each of those dates (except 15-10-2014 and 19-11-2014) for production of evidence and cross-examination. Moreover, the order dated 19-11-2014 also records that the matter is fixed for payment of costs of Rs. 500/- and a notice under Order XVII, Rule 3, CPC was also issued on the last two dates of hearing. Finally on 6-4-2015 the Impugned Order and Decree was passed.

9. Nonetheless, the Appellant has argued that the essential pre-conditions for the invocation of Rule 3 were not satisfied on 6-4-2015 and at best the Trial Court could have applied Rule 2 of Order XVII, CPC. Let us see what the essential conditions are.

Necessary conditions for invoking Order XVII, Rule 3, CPC

10. According to the scheme of law Order IX, CPC provides the consequences of non-appearance of the parties on the first date of hearing[1] whereas Order XVII, CPC is attracted to adjourn dates of hearing[2]. Rule 1 thereof allows the Court to grant adjournment and also empowers the Court to impose costs as occasioned by the adjournment, as it thinks fit. However, adjournments cannot be demanded as a matter of right[3]. The Court may grant time and adjourn the matter if sufficient cause is shown[4]. While some adjournments are the consequences of force majeure, most are not[5]. To cater to the latter, Rule 1 is followed by Rules 2 and 3 which provide the Courts with a

[1] *Abdul Ghani Vs. Aurangzeb*, 1984 CLC 424
[2] *Mst. Arifa Amjad Vs. Abbas Tayyab Dar*, 1990 CLC 1743
[3] *Lutfullah Virk Vs. Muhammad Aslam Sheikh*, PLD 2024 SC 887
[4] *Ibid.*
[5] *Moon Enterprises CNG Station, Rawalpindi Vs. Sui Northern Gas Pipeline Limited*, 2020 SCMR 300

course of action to check misuse and abuse[6]. Since these rules are germane to the discussion at hand, the same are reproduced hereunder for ease of reference:

> ***Order XVII***
>
> ***1…***
>
> ***2. Procedure if parties fail to appear on day fixed.*** *Where, on any day to which the hearing of the suit is adjourned,* ***the parties or any of them fail to appear, the Court may proceed to dispose of the suit*** *in one of the modes directed in that behalf by Order IX* ***or make such other order as it thinks fit****.*
>
> ***3. 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 witness, 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.****"* [Emphasis added].

11. The application of Order XVII, Rules 2 and 3, C.P.C. has been the topic of much judicial debate. As a result, judicial consensus has been achieved to the extent that the following conditions are considered necessary for the application of Rule 3:

(i) time must have been granted to the party at his instance;

(ii) the time must have been granted to the party to do one of the three things mentioned in the rule viz to produce evidence or to cause attendance of witnesses or to perform any other act necessary for the progress of the suit;

(iii) default must have been committed by the party in doing the act for which the time and adjournment had been granted to it; and

(iv) the Court must decide the suit forthwith which means a decision within a reasonable time under the circumstances.

12. Insofar as the Appellant's argument is concerned that the last order preceding the Impugned Order does not specify that the adjournment was granted at the Appellant/Plaintiff's instance, reference may be made to *Rana Tanveer Khan Vs. Naseer-ud-Din*, 2015 SCMR 1401 whereby it was held that once the case is fixed by the Court for recording the evidence of the party, 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

[6] *Ibid.*

adjourning the matter to a further date(s) for the purpose of adducing evidence and it fails to do so for such dates(s) the provision of Order XVII, Rule 3 can be attracted especially in the circumstances when adequate opportunities at the request of the party have been availed and caution is also issued *on one of such date(s)* as being the last opportunity(ies).

13. In the instant case, the order sheets reveal unambiguously that the matter was fixed by the learned Trial Court for production of the Appellant/Plaintiff's evidence for the first time on 13-2-2013. Therefore, the Appellant/Plaintiff was obligated to adduce evidence without there being any fresh direction by the Court, which the Appellant/Plaintiff failed to do. The matter was adjourned expressly at the request of the Appellant/Plaintiff on at least three dates between 13-2-2013 and 3-9-2014 and on five occasions during such period last chance was given for production of evidence of the Appellant/Plaintiff and cross-examination whereas on one occasion cost was imposed upon the Appellant/Plaintiff. In such background, the fact that the last four orders between 3-9-2014 and when the Impugned Order was passed do not expressly state at whose request the matter was being adjourned is inconsequential. It is evident that the matter was expressly adjourned at the request of the Appellant/Plaintiff's counsel for the production of the Appellant/Plaintiff's evidence for the last time on 3-9-2014 despite which no witness of the Appellant/Plaintiff was present on the following dates and last chance was given on 20-1-2014 and 24-02-2014 for production of evidence and cross-examination yet again, which is sufficient to conclude that it continued to be a case of request by the Appellant/Plaintiff[7].

14. Moreover, the Appellant/Plaintiff has not expressly denied in the memo of appeal that it was not the Appellant/Plaintiff who made such request on those dates. Therefore, the argument raised by the counsel on its behalf that such orders do not record at whose request the matter was adjourned appears to be disingenuous. Thus, the first necessary condition for the application of Rule 3 of Order XVII, CPC stood satisfied, whereas there is no dispute that time was granted for the purpose as stipulated in Order XVII, Rule 3, CPC.

---

[7] *Sh. Zafar Iqbal Vs. Barkat Ali*, PLD 1988 Lahore 311

15. While the Appellant/Plaintiff claimed in the memo of appeal that on most occasions the evidence of the Appellant/Plaintiff was present but could not be recorded due to the absence of the learned counsel of the Respondent/Defendant or strike of advocates, the Appellant/Plaintiff could not establish the same from the record. None of the order sheets of the dates on which the counsel for the Respondent/Defendant was absent or advocates were on strike record the presence of the Appellant/Plaintiff's evidence. In fact, the only date on which the Appellant/Plaintiff's evidence was present was 22-01-2014 when the advocate of the Appellant/Plaintiff was busy before this Court and as such the case was adjourned at the request of the representative of the Appellant/Plaintiff. Therefore, it is abundantly clear that the Appellant/Plaintiff failed to produce its evidence for which purpose time was granted and the matter was adjourned by the learned Trial Court at the request of the Appellant/Plaintiff.

Presence of parties

16. The learned counsel for the Appellant/Plaintiff argued (a) that notice under Order XVII, Rule 3, CPC cannot be issued in the absence of the party concerned whereas none was present on behalf of the Appellant/Plaintiff on 20-1-2015 when notice under Order XVII, Rule 3, CPC was issued; and (b) that the course of action as specified in Order XVII, Rule 3, CPC can only be adopted in the presence of the parties.

17. Insofar as the presence of parties at the time of issuance of notice under Order XVII, Rule 3, CPC is concerned, reference may be made to *Moon Enterprises CNG Station, Rawalpindi Vs. Sui Northern Gas Pipeline Limited,* 2020 SCMR 300 wherein the Supreme Court specified the conditions for the application of Order XVII, Rule 3, CPC. The conditions so stated do not include a specific notice under Order XVII, Rule 3, CPC rather one of the necessary conditions so specified is to issue a specific warning while granting time at the request of a party to adduce evidence that the opportunity being granted is the last and that failure to produce evidence will lead to closure of the right to produce evidence. As noted hereinabove, the Supreme Court in *Rana Tanveer Khan (Supra)* held that caution issued on one of the date(s) on

which adjournment has been granted at the request of the party as being the last opportunity is sufficient to attract Order XVII, Rule 3, CPC.

18. The order sheets show that such warning had been given to the Appellant/Plaintiff on at least two occasions in the presence of the counsel. Moreover, proxy counsel was present on 24-2-2015 when notice, specifically under Order XVII, Rule 3, CPC, was given for the second time. Therefore, Order XVII, Rule 3, CPC was fully attracted in the instant case.

19. Before we consider whether presence of the parties was necessary to adopt the course of action as specified in Order XVII, Rule 3, CPC on the date the Impugned Order and Decree was passed, let us first determine whether the finding of the trial court that none was present on behalf of the Appellant/Plaintiff on such date was correct or not.

20. It may be noted that the Impugned Order records the attendance of the proxy counsel for the Appellant/Plaintiff and of the counsel for the Respondent/Defendant. Yet the learned Trial Court recorded in the Impugned Order that *"no one turned up on behalf of the plaintiff"*.

21. A Full Bench in *Rama Rao Vs. Shantibai,* AIR 1977 Madhya Pradesh 222 expounded on the meaning of appearance of a party as follows:

> *"22. The other main question for our decision is about the meaning of appearance of a party at a hearing in the Court. There can be no doubt that the mere conscious presence of the party himself in the Court for participation therein when the case is called out, whether the party thereafter actively participates at the hearing or not, does amount to appearance of that party at that hearing.* ***In the case of personal presence of the party, it constitutes appearance even when he abstains from appearing after refusal of an adjournment, Thus, in the case of presence of the party which constitutes appearance, even his further withdrawal has no effect and R. 3 is attracted. The difficulty sometimes arises when the party is himself absent and the appearance is through his counsel.*** *In such a situation, the question has to be answered with reference to the extent of the authority of the counsel and his conduct at the commencement of the hearing when the case is called.* ***The real test is whether the counsel has done any act at that hearing of the suit or was his presence merely to inform the Court that he was not duly instructed to appear at the hearing on account of which there is no appearance of the party through him on that date.*** *In such a situation, it would be a question of fact in each case to be answered with reference to the extent of authority of the counsel and the indication of the same given by him to the Court at or before commencement of the hearing when the case is called. It is equally clear that once the counsel has commenced participating at the hearing without indicating that he was not duly instructed to represent the party at that hearing except to seek an adjournment, his subsequent withdrawal when the hearing has commenced will not amount to non-appearance of the party through him. In*

Bhivraj v. Janardhan (AIR 1933 Nag 370) (supra) Niyogi, A. J. C. held as follows: —

*"**It is urged that a pleader was present in Court on behalf of the defendant**. There is nothing in the order sheet to show that he had received instructions to account for the default committed by his client. **His mere physical presence under the circumstances cannot be regarded as equivalent to the presence of the party**."*

(Underlining by us).

***According to this view, unless the counsel is duly instructed for appearance on that date, his mere physical presence cannot be treated as the presence of the party**. Obviously, the mere appearance of the pleader to inform the Court that he was not duly instructed by his client is an act of courtesy rightly extended to the Court and should not jeopardise the interest of the party merely because of this courtesy shown by his counsel to the Court. **The Division Bench in Motilal Joshi v. Mohd. Shafi, (AIR 1956 Nag 179) supra, affirmed this view and held that when a counsel appeared only to request for an adjournment and on its refusal reported 'no instructions', there was no appearance of the party whom the counsel represented**. The conclusion was reached after a review of the authorities on the point till then and the test applied was whether the counsel had acted in any manner for his client at that hearing before reporting 'no instructions'. It was thought that a mere request for adjournment was by itself not an act of participation at the hearing to make it an appearance on behalf of that party. **In our opinion, the test applied as well as the conclusion reached was, correct. A request for an adjournment made prior to the commencement of hearing cannot amount to an act of participation at the hearing since such a request prior to the commencement of the hearing is obviously no part of the hearing and is merely a request not to commence the hearing on that date.** The position, however, would be different if the request for adjournment is made by the counsel after he has done some act which amounts to his participation at the hearing. An act done to constitute appearance at the hearing cannot be nullified nor the appearance resulting therefrom wiped out by a subsequent withdrawal during that hearing. It would be unsafe to attempt any exhaustive list dealing with all such situations since it would be a question of fact in each case to be answered by application of the test whether, the counsel was duly instructed to appear at the hearing or his presence was merely to inform the Court that he was not appearing at the hearing to represent his client and that no act of participation at the hearing was done by him to constitute appearance of the party. ...*

***In our opinion, the conclusion of the Division Bench in Motilal's case, supra, is the correct view on this point.** We find that substantially the same view is taken in Soonderlal v. Goorprasad, (1899) ILR 23 Bom 414, Satish Chandra Mukherjee v. Ahara Prasad Mukerjee (1907) ILR 34 Cal 403 and Basalingappa v. Shidramappa, AIR 1943 Bom 321 (FB). Thus, the meaning of the word "appearance" for the purpose of attracting R. 2 of O. 17 has to be understood in this manner. The other main question stated at the outset is answered by us in this manner."*[Emphasis added].

22. In *Vinod Khanna Vs. Bakshi Sachdev,* AIR 1996 Delhi 32 the Delhi High Court also held that in its view there is no appearance on behalf of a party merely because a pleader who has instructions only to apply for adjournment and not to conduct the suit applies for adjournment on his behalf. Similarly, the Sindh High Court at Karachi held in *Abdul Shakoor Vs. Abdul Rasool*, PLD

1963 Karachi 356 that there would be a default in appearance where the pleader withdraws for want of instructions.

23. Applying the said principles to the case at hand, in my opinion, the learned Trial Court rightly concluded that no one turned up on behalf of the Appellant/Plaintiff, notwithstanding the presence of the proxy counsel who had no instructions other than to request for adjournment, which adjournment was refused.

24. This brings the discussion to the most crucial argument made on behalf of the Appellant/Plaintiff that the course of action as specified in Order XVII, Rule 3, CPC can only be adopted in the presence of the parties. However, there appears to be some conflict of opinion in the judgments with regard to whether the presence of the party is necessary in order to adopt the course of action specified in Rule 3 of Order XVII, C.P.C when all other conditions stand satisfied.

25. In a fairly recent judgment reported as *Lutfullah Virk Vs. Muhammad Aslam Sheikh*, PLD 2024 SC 887 the Supreme Court refused to grant leave to appeal where the trial court closed the right of the defendant to conduct cross-examination, as the defendant marked his presence on the cause list for the day but did not appear at the time fixed for the examination-in-chief of the plaintiff. The Supreme Court noted that the trial court recorded the examination-in-chief of the plaintiff's witnesses and waited till 1 p.m. for the counsel of the defendant to conduct cross-examination, who did not turn up and therefore, the trial court closed the right of defendant to conduct cross-examination as two adjournments had already been entertained by the trial court. In these circumstances, the Supreme Court held that the options available to the trial court were as per Rules 2 and 3 of Order XVII, CPC. The Supreme Court further observed that since the court did not dispose of the suit as per the first part of Rule 2 it could only make such order as it thought fit which was to close the defendant's right to cross-examine the plaintiff's witnesses and that such order also enjoys the protection of Rule 3 of Order XVII, CPC. Thus, the Supreme Court concluded that the trial court rightly exercised the options available to it under Rule 2 and 3 of Order XVII, C.P.C. by closing the

defendant's right to cross-examine the plaintiff's witnesses. The Supreme Court also considered the following hypothetical:

> *"15. There is another aspect of the matter, which warrants our indulgence. Suppose that the present Petitioner, who as the record shows marked his presence in the cause-list on 14.07.2005, had appeared before the Court and requested an adjournment and the said adjournment had been denied and the present Petitioner had refused to participate in the proceedings of the day, that is the Examination-in-Chief.* ***This would again lead to the Court having the options available to it under Rules 2 and 3 of Order XVII of C.P.C., as a party is said to have failed to appear even if he is present in the Court and applies for adjournment, but his application is refused and he does not thereafter participate in the proceedings.***[7] *However, had the present Petitioner remained present to merely witness the proceedings, once his request for adjournment had been declined and he had decided not to partake in the Examination-in-Chief,* ***the Petitioner's presence would amount to participation in the proceedings and thus would only leave the Court to exercise the options available to it under Rule 3 of Order XVII of C.P.C.****"* [Emphasis added].

In other words, where the party fails to appear before the Court both avenues under Rule 2 as well as Rule 3 of Order XVII, CPC are available.

26. In reaching such conclusion, the Supreme Court relied upon *Smt Gulab Devi Vs. Smt. Premwati*, AIR 1996 Allahabad 22 which however categorically holds that for the court to proceed under Order XVII, Rule 3, CPC it is essential that the parties are present meaning thereby all the parties to the suit otherwise the Court could proceed under Order XVII, Rule 2, CPC.

27. The Supreme Court in *Lutfullah Virk (Supra)* also relied upon *Vinod Khanna (Supra)* which, in turn, referred to *Rama Rao (Supra)* in which the Full Bench of Madhya Pradesh compared Rules 2 and 3 of Order XVII, CPC in painstaking detail in terms of their phraseology and consequences to conclude that Rule 3 is made for cases in which there is no default in appearance. The relevant discussion is reproduced as follows:

> *"4.* ***The scope of R. 2 being as already stated, it must follow necessarily that the scope of R. 3, O. 17 which follows immediately thereafter cannot be such as to include within its ambit that which falls within R. 2 unless the express language of R. 3 leads to that inevitable result.*** *This follows from the need of strict construction of R. 3 for the reason already stated in addition to the fact that* ***two provisions, one following the other, in this manner would not be enacted to provide for the same situation. Moreover, the use of some words in R. 2 and then their omission in R. 3 must be taken as a deliberate act of the Legislature to indicate its intention of not including within the ambit of R. 3 that which falls within the purview of the words omitted therefrom even though incorporated in the preceding R. 2.*** *In our opinion, all these factors are undoubtedly relevant for determining the comparative scope of R. 3.*

5. In R. 3 we find that the expression "the parties or any of them fail to appear" does not find place which means that these words were deliberately omitted by the Legislature while enacting R. 3 so as to exclude from within its ambit cases of default in appearance of parties or any of them for which provision was already made in R. 2. ***In our opinion, the insertion of the words "the parties or any of them fail to appear" in R. 2 and their omission in R. 3 was a deliberate act of the Legislature intended to indicate the real point of distinction between these two Rules; R. 2 being enacted to provide for all cases where the parties or any of them fail to appear while R. 3 being made obviously for cases where there was no default in appearance of any of the parties but any party at whose instance hearing of the suit had been adjourned earlier fails to perform the act necessary for further progress of the suit. It is for this reason that R. 3 empowers the Court to decide the suit forthwith while R. 2 speaks of disposal of the suit in one of the modes specified. The use of the words "dispose of the suit" in R. 2 as against the words "decide the suit" in R. 3 is obviously another deliberate act of departure in view of the obvious difference between these two expressions. Decision of the suit has necessarily to be on merits bringing about its termination in that Court*** *whereas disposal of the suit may be even by a mode which need not necessarily end the suit, e.g., by an adjournment to another day. In the context, the meaning of 'dispose of' must be different from 'decide'.*

6. ***In our opinion, the construction confining application of R. 3 only to cases where there is no default in appearance of any of the parties is also more reasonable.*** *Where there is no default in appearance, the party at whose instance and for whose benefit adjournment was granted at the previous hearing being present has the opportunity to assign the reason for its failure to perform the act necessary to the further progress of the suit with the result that the Court, if satisfied, need not proceed to decide the suit forthwith in spite of R. 3 being attracted and it may grant a further adjournment.* ***On the other hand, the reason for the party's failure to perform the necessary act being assigned, if the Court is not satisfied with the Same and proceeds to decide the suit forthwith, the material being already present on record, the aggrieved party can assail the correctness and propriety of the Court's action in deciding the suit forthwith, in appeal against that decision. The appellate Court will have the necessary material and the trial Court's finding thereon in the record to enable it to decide the question afresh in appeal.*** *However, if R. 3 be construed to include within its ambit even cases of default in appearance, notwithstanding the contrary indication given by the language used, then the defaulting party will have to be given an opportunity for the first time by the appellate Court to show that its default can be condoned for valid reasons. This is the course suggested in some of the decisions referred by us hereafter which take the view that R. 3 applies even to cases of default in appearance because it is conceded that an opportunity should be given to the defaulting party to satisfy the Court that its default was for valid reasons.* ***At the hearing before us it was conceded that there is no express provision in the Code permitting the appellate Court to adopt such a procedure but it was suggested that this can be done by the appellate Court in exercise of its inherent powers.***

7. The result of taking the opposite view is, therefore, to unduly stretch the powers of the appellate Court requiring it to adopt a procedure for which there is no sanction in the Code of Civil Procedure and this, we say with the greatest respect, is a situation created by first reading something more in R.3 which it does not contain and which is not even necessary in view of R. 2 making a clear provision for those cases. For the reasons already given, the legislative intent clearly is to apply R. 2 alone and R. 3 to all cases of default in appearance of the parties. ***When disposal of the suit is by one of the modes contained in O. 9, C.P.C., on application of O. 17, R. 2, express remedy is provided to the defaulting party. To cases of default in appearance, R. 3 was not intended apply and it is for this reason that there is no express provision made in the***

Code empowering the appellate Court to counteract a decision made under R. 3 in the absence of a party who can show that there was valid reason for its default in appearance on that date. *In our opinion, the construction of R. 3 so as to include within its ambit cases of default in appearance of a party and then the suggestion that the appellate Court can permit the defaulting party to show in that Court for the first time that there was valid reason to explain its default, in the absence of any express provision in the Code to permit such a course, is merely the creation first of a needless hurdle by reading something in R. 3 which is there and then the further attempt to overcome the same by suggesting a course not provided in the Code. We find it difficult to accept that the Legislature left such loopholes while enacting these provisions. This conclusion is reinforced by the fact that on a plain construction of R. 2, it includes all cases of default in appearance of parties and there is a deliberate departure in phraseology while enacting R. 3 to indicate clearly that cases of default in appearance were not included within R. 3.*

8. ***If we look at the heading of R. 2 and compare the same with that of R. 3, it provides a further indication that R. 2 and not R. 3 was intended to apply to all cases of default in appearance of parties.*** *This inference is reinforced by the fact that the heading of R. 2 is in consonance and not at variance with the enacting part of that Rule. The question is; whether, such use of heading can be made as an aid to construction? In our opinion, a limited use can be made of the heading of R. 2 in order to lend reassurance to the conclusion already reached by us on the basis of the plain words of the enacting part of the provision. In Bhinka v. Charan Singh, AIR 1959 SC 960, the use of the heading of a provision was made for resolving a doubt and it was stated as follows: —*

"Maxwell on Interpretation of Statutes, 10th Edn., gives the scope of the user of such a heading in the interpretation of a section thus, at p. 50:

'The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections. They cannot control the plain words of the statute but they may explain ambiguous words'.

If there is any doubt in the interpretation of the words in the section, the heading certainly helps us to resolve that doubt."

It is this limited use permitted by the Supreme Court that we make of the heading in this case to re-assure ourselves about the comparative scope of the two Rules and to clear the ambiguity, if any. The law permitting this limited use of the heading of a provision continues to be the same and the recent House of Lords' decision in Director of Public Prosecutions v. Schildkamp (1969) 3 All ER 1640 reiterates that the heading of a provision can definitely be used as an aid to construction even though its use is limited.

9. ***The plain and unambiguous language of the two provisions; the deliberate departure made in the phraseology of the two Rules; the undisputed need to construe R. 3 strictly; the consequences which necessarily follow as a result of the construction made and the heading of the two Rules, are factors which lead us without any hesitation to the conclusion that R. 2 applies to all cases of default in appearance of all or any of the parties with the result that R. 3 does not apply to any of those cases. This conclusion also enables the defaulting party to have the order made under O. 9, C.P.C. set aside in the manner provided for that purpose in the Code by showing that there was valid reason for default in appearance on the date fixed****. This is done in the manner prescribed by the Code.* ***We also think that the expression "such other order as it thinks fit" used in R. 2 permits disposal of the suit and not a decision thereof on merits contemplated by R. 3, in a mode other than that provided in O. 9, e.g., by an order of adjournment.*** *A contrary conclusion would result in several needless difficulties. In the first place, that would permit an order of the type contemplated by R. 3 even in the case of a default in appearance of any of the parties which is a construction not acceptable to us for the reasons already*

> *given.* ***That apart, it would permit the making of an order contemplated by R. 3*** *within the ambit of R. 2 itself so that such a construction would render R. 3 superfluous. It is settled that unless it is unavoidable, a construction which renders a provision superfluous must be rejected. All these reasons impel us to take the view that the expression "or make such other order as it thinks fit" used in R. 2 does not include within its ambit a decision falling within the ambit of R. 3.* ***As for R. 3, it follows that this Rule presupposes the presence of all parties and then the failure of the party at whose instance and for whose benefit the hearing was adjourned on the previous date to perform the act necessary to the further progress of the suit****. It is only to this class of cases that R. 3 applies and it has no application to cases falling within the ambit of R. 2. In our opinion, whenever such a question arises, it has first to be seen whether R. 2 applies to the facts of a case since on R. 2 being attracted, the operation of R. 3 would be automatically excluded. It is only when there is no default in appearance of all or any of the parties that the question of applying R. 3 would arise to the facts of a case, provided the requirements laid down in R. 3 are fulfilled."* [Emphasis added].

28. The difference between an order passed under Rule 2 of Order XVII, CPC and that passed under and Rule 3 thereof and their consequences has also been explained by the Supreme Court of Pakistan in *Shahid Hussain Vs. Lahore Municipal Corporation*, PLD 1981 SC 474 as under:

> *"7. ...*
>
> *1t is clear from the wording of the said rule that on the failure of a party to produce its evidence or to do any other act necessary for the purpose of the case, for which time had been allowed to him, the Court shall proceed to decide the suit forthwith.* ***As such an order dismissing the suit under Order XVII, rule 3, C.P.C., would be deemed to be a judgment on merits, unlike an order under rule 2 of the said Order.*** *Reference may be made to Rahim Bux and 2 others v. Mst. Nazir Khanum and another (1980 CLC 595) and Nlla v Punun (AIR 1936 Lah. 385).* ***This would, therefore, operate as res judicata between the parties barring the maintainability of the second suit on the same issue,*** *Har Dayal v. Ram Golam (AIR 1944 Oudh 39- AI R 1936 Lah. 385). As held by Shadi Lal, C. J., in Gal Chand v. Kaka Ram (AIR 1927 Lab. 562)* ***remedy against such an order would be an appeal against the decree.*** *This view is clearly supported by the language of rule 3, of Order XVII read with the definition of `Decree' in section 2(2), C.P.C.* ***Under Oder XVII, rule 3, C. P. C., the Court is required, on the failure of the party to do the needful, to proceed to decide the suit forthwith. As such, the decision is obviously an adjudication in which the Court conclusively determines the rights of the parties with regard to matters in controversy in the suit between the parties and that is why it has been held to operate as res judicata between them, barring any other suit relating to the same controversy.*** **"** [Emphasis added].

29. Similarly, the Lahore High Court explained in *Muhammad Jamil Vs. Mst. Inayat Begum*, 2012 YLR 2658:

> *"7. ...*
>
> *The Court has been empowered to exercise the jurisdiction either under Order IX or any other provision of law, so the Court has been restrained to exercise the power as provided under Order IX and vis-a-vis under Order XVII Rule 3*

> *C.P.C., as it conflicts the jurisdiction of the Court and the scheme of law and in both the cases different and independent remedies have been provided under the law.* ***When the Court exercises the power under Order IX and dismisses the suit for non-prosecution, then the same Court has the jurisdiction to recall it under Order IX Rule 4 C.P.C., whereas, if the suit has been dismissed for the non-compliance of the order of the Court, the provision of Order XVII Rule 3 C.P.C. would come in motion and is deemed to be a judgment on merits and remedy against the said judgment is an appeal against the decree. Therefore, the law has specifically barred the Courts to exercise both the powers simultaneously, hence the order impugned cannot be lawfully maintained.***
>
> *8. The legislature has deliberately made the reference to Order IX and not to Rule 3 of Order XVII C.P.C. and power of the Court to pass such other order as it deems fit is relatable to the case in which some material on record is available in the form of evidence, Rule 3 should have been deserted by falling back to Order IX. Reliance is placed on Syed Haji Abdul Wahid and another v. Syed Sirajuddin (1998 SCMR 2296) and Muhammad Haleem and others v. H. H. Muhammad Naim and others (PLD 1969 SC 270). Therefore, it is concluded that in absence of the petitioners and any evidence on the file, provisions of Order XVII Rule 3, C.P.C. were inapplicable and instead Rule 2 of the same order was attracted, thus, had to be applied by the Courts below."* [Emphasis added].

30. Indeed, the Supreme Court cautioned in *Syed Tahir Hussain Mehmoodi Vs. Agha Syed Liaqat Ali*, 2014 SCMR 637 that the provisions of Order XVII, Rule 3, CPC are penal in nature and as per settled law such provisions should be strictly construed and applied.

31. To sum up, the case for mandating the presence of the parties in order to invoke Rule 3 of Order XVII, C.P.C is based not just on its plain language in comparison to Rule 2 thereof, but also on the distinct consequences that flow from the orders passed under each of the aforementioned provisions given that Rule 2 permits disposal of the suit whereas Rule 3 is a decision on merits[8]. In case of dismissal in default a remedy of restoration is available before the same Court upon showing sufficient cause for the previous non-appearance whereas in the case of dismissal on merits under Rule 3 of Order XVII, C.P.C the only remedy available is by way of appeal. On the other hand, if Rule 3 of Order XVII, C.P.C is construed to require presence it would afford the defaulting party at least an opportunity before the same Court to show a valid reason for non-compliance which, if found unsatisfactory, could then lead to the consequences as specified in Rule 3 of Order XVII, C.P.C.

32. It is noteworthy, however, that in reaching its conclusion that Rule 3 of Order XVII, CPC does not include within its ambit that which falls under

[8] *Mst Arifa Amjad (Supra)*

Rule 2 and that in case of dissatisfaction of the Court with the reason assigned by the party for its failure to perform the necessary act the Court can proceed to decide the suit forthwith under Order XVII, Rule 3 CPC the Full Court in *Rama Rao (Supra)* presumed the availability of material on the record. But what if the Court is dissatisfied with the reason assigned for non-compliance, however, there is no material available on the record for the Court to pass a judgment on merit? Or on the flip side what if it is a case of double default i.e., the plaintiff not only fails to appear after leading some evidence but also fails to produce the remaining evidence or to cause the attendance of his remaining witness or to perform any other act necessary for the further progress of the suit for which time has been allowed but there is material available on the record for the Court to pass a judgment on merit?

Material on the record

33. Let's deal with the former situation first. Since the decision under Order XVII, Rule 3, CPC is on merits some courts have additionally held that it is necessary for sufficient material to be on the record in order to invoke the said provision of law. The crux of the divergent opinions on the issue as to whether presence of the party and sufficient material on the record is necessary to invoke Rule 3 of Order XVII, CPC has been captured in *Mst. Arifa Amjad Vs. Abbas Tayyab Dar,* 1990 CLC 1743 as follows:

> *"Additionally, some decisions take the view that provisions in rule 3 being stringent and penal in character should not be applied unless the facts do not admit application of any other rule of the Code and also that for its proper application, sufficient material must be available on record for giving a proper decision on merits which do not include a summary decision. There is no doubt that provisions in Order XVII, rule 3 are permissive and not mandatory. However,* ***there is some dispute between the Courts on the application of rule 3 in case of a double default viz. non-appearance in Court and failing to take necessary steps for which the adjournment was granted by the Court.*** *In Jhanda Singh and others v. Sadiq Muhammad and others AIR 1924 Lahore 545 (D.B), Gopi Kisan v. Ramu and another AIR 1964 Rajasthan 147 and Smt. Shantabai v. Chokhelal A1R 1976 Madhya Pradesh 21 (F.B.)* ***it was held that it is open to the Court to proceed under Order XVII, rule 3 even in absence of a party where the conditions laid down in the said rule are fulfilled and it appears just and proper to do so.*** *In the above three decisions, Order XVII, rule 3 was applied to the case of double default viz default in appearance and failing to perform the necessary conditions for which the adjournment was allowed by the Court.* ***In the first case cited from the Lahore High Court which dealt with double default for application of Order XVII, rule 3, entire evidence in the case had been recorded and parties had closed their respective cases and a date for hearing of arguments had been fixed on which one of the parties***

> ***defaulted in appearance and in those circumstances it was held that order XVII, rule 3 could be applied for giving a decision on merits of the case.*** *In the other two cases from the post Indian jurisdiction, it was expressly found that rule 3 of Order XVII was applicable to a case of double default even if there was no material available on record for giving a decision on merits.* ***In Abdul Shakoor v. Abdul Rasool reported in PLD 1963 (W.P.) Karachi 356, a different view on this point was expressed. It was held that for application of the procedure laid down in rule 3 to case, there must be the presence of both the elements, namely, (1) the adjournment must have been at the instance of a party, and (2) there must be material on the record for the Court to proceed to decide the suit. It was further held that the presence of one without the other does not justify application of rule 3.*** *It was also observed that even in the case where a special adjournment is granted by the Court and party fails to appear in person and his pleader reports no instructions, it would be a case of double default in so far as there is default of appearance and* ***the case would then fall under Order XVII, rule 2 of the Code of Civil Procedure. In the above case, Order XVII rule 3 was not applied apart from other things to a case of double default.****"* [Emphasis added].

34. After discussing various case law, the Division Bench of the Lahore High Court in *Mst. Arifa Amjad (Supra)* expressed its own view by holding that in addition to the conditions already mentioned herein above for the application of Rule 3 of Order XVII, CPC it is necessary that the defaulting party must be present before the Court and some material must be on the record for decision to be on merits. The relevant passage is reproduced hereunder:

> ***"Therefore, in addition to the conditions already mentioned shove for the application of rule 3 of Order XVII, it is necessary that the defaulting party must be present or deemed to be present before the Court.*** *In our view, the views expressed by the Full Bench of Madhya Pradesh in the case of Rama Rao (supra) correctly summed up the law and enunciated it correctly with which we wholeheartedly agree and observe that* ***for the application of rule 3, the conditions given below must co-exist. (****i) adjournment must have been granted to the party at his request: (ii) it must have been granted to it for the purposes mentioned in the rule; (iii) the party who has taken the time defaulted in doing the act for which he took the time from the Court:* ***(iv) the party must be present or deemed to be present before the Court; (v) that there must be some material on record for decision of the case on merits and lastly, that the Court must decide the suit forthwith that is within a reasonable time. In our view, mere default m appearance without more at the adjourned hearing fell within the ambit of rule 2 of Order XVIL Rule 3 catered for an altogether different situation. As said above, it presupposed the presence of the parties and failing to perform the necessary acts mentioned in the rule by a defaulting party. Not only the above two rules attract to different sets of situations but the remedies provided against the orders passed under these rules are also different. In case of a mere dismissal in default of appearance, there is a remedy for restoration in an application for this purpose addressed to the trial Court. Conversely, if an order has been passed under Order XVII, rule 3 Civil Procedure Code, an appeal lies against it to the higher Court. When we look at the records keeping in view the distinction in rules 2 and 3, we feel no hesitation to say that necessary conditions for the applicability of rule 3 in the case before us were clearly wanting.*** *Adjournment in the suit was not at the request of the defaulting party but was by the order of the Court itself. Therefore, the very first condition for the applicability of rule 3 was conspicuous by its absence. Furthermore,*

according to the trial Judge, the plaintiffs had defaulted to appear and failed to produce evidence. Therefore, the second important condition for the applicability of rule 3 that the parties must be present or deemed to be present was also not existent. ***Similarly, there was no material on record to assist decision on merits by the trial Court. In absence of the plaintiffs, drastic provisions in rule 3 could not have been invoked against them to order an outright dismissal of a partition suit which involved rights to valuable property.*** *It may be of some advantage to observe here that even learned counsel for the respondents failed to support the impugned order on the score that it could not have been passed under rule 3 of Order XVII. In his view and we share this view, the case fell for disposal under rule 2 of Order XVII read with Order IX, Civil, P.C.* ***Either the suit could be dismissed in default of appearance under Order IX I rule 8 or the Court could make such other order as it thought fit which also l. included an order for further adjournment of the case.*** *It had the discretion to act; both ways and was not hound to order dismissal in default of appearance. Therefore, there is no doubt that upon proper reading of record and application of correct legal principles, impugned order closing evidence and dismissing the suit for want of proof in absence of the plaintiffs could not be made. Only proper and legal order which the trial Court could make was dismissal of the suit in accordance with the modes prescribed in Order 1X, Civil P.C. If this be so and* ***we think it is so, only rule 2 applied which gave power to the Court to dismiss the suit in default in case plaintiffs or their counsel did not appear when the suit was I called on for hearing and the defendants were present before the Court.*** *As we have already said, both the learned counsel agreed that the proper order in the case would have been the dismissal of the suit in default of appearance and not its dismissal on merits for want of proof.* ***There is no bar for us in law to treat the impugned order to have oxen made under rule 2 of Order XVII and hold it as a case of dismissal for default in appearance, though the trial Court had proceeded differently.*** *Next question confronting us is about the remedy and the relief that could he granted to the plaintiffs."* [Emphasis added].

35. The importance of the availability of sufficient material has also been highlighted in *Fazal Dad Vs. Ghulam Rasul*, PLD 1965 Azad J&K 18 as follows:

"We have other reason also why we prefer to apply rule 2 instead of rule 3 of Order XVII. In this case the suit was dismissed on two grounds; namely; default in appearance by the plaintiff and default in depositing 1/5th of the purchase money on the fixed date. If rule 3 is applied the remedy open to the plaintiff would be by way of appeal and if he prefers an appeal there would be no material on record, for the appellate Court to decide whether default in appearance by the plaintiff was due to any sufficient cause. But if we apply rule 2 the remedy open to the plaintiff would be to apply for restoration of the suit wherein he shall have an opportunity to produce evidence and convince the trial Court that his absence was due to a sufficient cause. *In case of dismissal of the suit on the ground of default in the payment of 1/5th of the purchase money in time, the position would be the same whether rule 2 or rule 3 is applied. If rule 2 is applied the plaintiff shall have an opportunity to go up in appeal in case his application for restoration of the suit is dismissed and if rule 3 is applied he shall have a remedy by way of appeal but then there would be difficulty for the appellate Court to Judge the case on merits in the absence of the evidence on record to show that the default in appearance was due to sufficient cause. In the present case, there is another reason also why the dismissal of the suit by the trial Court should be treated as one under rule 2, Order XVII and it is that in-fact 1/5th of the purchase money was deposited by the plaintiff in time as we would presently show when we discuss that point. We,*

therefore, for the reasons stated above hold that the dismissal of the suit in the present case by the trial Court was one under Order XVII, rule 2 and therefore, it was open to the plaintiff to apply to the trial Court for the restoration of the suit and since his application for restoration was dismissed he could appeal against the Order under Order XLIII, rule 1, clause (c), and this appeal having been dismissed he could come to this Court in revision. We, therefore, treat the second appeal in this case as revision." [Emphasis added].

36. The Sindh High Court at Karachi in *Abdul Shakoor (Supra)* explained that Rule 2 and 3 of Order XVII, CPC are not mutually exclusive therefore in cases of double default if there is no materials on the record the appropriate procedure to follow would be that laid down in Rule 2. The relevant passage is reproduced as follows:

"7. Mr. Nathulal for the applicant-plaintiff contends that if the Court below had passed the present order on 9-1-1962 it could be said to have been passed under rule 2, but since it was passed on 8-2-1962, it would come within the purview of rule 3. This contention was made solely on the ground that the matter was adjourned from the 9th of January 1961, to the 8th of February 1962, at the request of the plaintiff, although both parties were present at the time. Mr. Mulraj for the respondent has referred me to what I consider an extremely important ruling Enatulla Basunia v. Jiban Mohan Roy (ILR 41 Cal. 956). This case is on all fours with the present one and enunciates the principles for the distinction of what rule a matter will fall under. ***It has been held that the distinction between rule 2 and rule 3 of Order XVII is that while the former rule applies to hearings adjourned at the instance of the Court, the latter applies to hearings adjourned at the instance of a party, to whom time has been allowed to do some act to further the progress of the suit, but who has defaulted. There is yet another distinction between the rules. Where there are no materials on the record, the proper procedure to follow would be that laid down in rule 2, but if there are materials on the record, the Court ought to proceed under rule 3. To apply the procedure, therefore, laid down in rule 3 to a case, there must be the presence of both the elements, namely, (1) the adjournment must have been at the instance of a party and (2) ; there must be material on the record for the Court to proceed to decide the suit. The presence of one without the other does not justify the application of rule 3.*** *The same principle has been upheld in ILR 23 Cal. 738. In AIR 1943 Born. 321, it was held that Order XVII, rule 3 applies only if the previous adjournment was granted for any of the purposes mentioned in that rule, and the party committed default in compliance with it on the adjourned, date. It would not apply to a general adjournment under Order XVI, rule 3 (AIR 1941 Bom. 83). Even in the case where a special adjournment is granted and the defendant fails to appear in person and his Pleader withdraws for want of instructions, it would be a case of double default in so far as there is default of appearance, and the case would fall under Order XVII, rule 2. It was further held that*

> ***"It is not correct to say that Order XVII, rules 2 and 3 are in direct conflict with each other. They are neither conflicting nor mutually exclusive. The scope of rule 2 is quite distinct from that of rule 3. Rule 3 contemplates a case in which the Court has materials before it to enable it proceed to a decision of the suit. The mere fact of a party making default in the performance of what he was directed to do would not lead to the dismissal of the plaintiff's suit, if he was the party in default, or the decreeing of the claim against the defendant, if the defendant was the person, who made the default; the words***

`notwithstanding such default in rule 3 clearly imply that the Court is to proceed with the disposal of the suit inspite of the default, upon such materials as are before it. Order XVII, rule 2 on the other hand, speaks of the disposal of the suit, and includes cases in which there might not be any materials before the Court to enable it to pronounce a decision on the merits. It is clear, however, that the contingency contemplated in rule 2 may happen in a case which falls within the letter of rule 3. It may well happen, for instance, that a plaintiff to whom time has been granted to produce evidence, not only fails to do so, but also fails to appear. In such a case, if there are no materials on the record, the appropriate procedure to follow would be that laid down in rule 2, but if there are materials on the record, the Court ought to proceed under rule 3 : (34 Cal. 235 rel. on).” [Emphasis added].

37. Similar views have been expressed in the following cases:

Rahim Bux Vs. Mst. Nazir Khanum, 1980 CLC 595 [Lahore]:

“4. The Court can evidently proceed to decide the suit on merits, because the "decision" according to Industrial Sales and Service, Karachi v. Archifar Opal Laboratories Ltd., Karachi (P L D 1969 Kar.418) amounts to a "judgment" under the Code of Civil Procedure if it determines, as in the instant case, the' right to any relief claimed by any party to the proceeding and does not merely regulate a procedure and is not merely a technical step towards obtaining final adjudication. ***It is laid down that rule 3 is in its nature a penal provision and it can be pressed into service for deciding the suit finally on merits, on proof of default by some party. One of the conditions to be satisfied before passing the order under that provision is that there should be some material to decide the suit. It means that as long as there is no material to look into, the Court has no jurisdiction to decide the suit under rule 3.*** *In such a case, as directed in Mst. Zaitoon Begum and others v. Muhammad Ilyas and others (PLD 1971 Lah. 143) the Court should have "proceeded with the suit forthwith" under rule 1(3) and not "proceeded to decide the suit forthwith" under rule 3. In view of what - has been said, the trial Court, while proceeding to decide the suit forthwith without any material before it, has acted in its jurisdiction illegally and with material irregularity.”* [Emphasis added].

Rashida Vs. Shahzad Khanum Malick, PLD 1993 Sindh 771:

“As is apparent from the above order the suit was not decided on merits and indeed could not be, for, the evidence in the case had still to be recorded and there was no material on record to enable the Court to give a decision on merits. The suit had been dismissed due to absence of the plaintiffs *and denial of plaintiffs' claim by the only defendant who was at that time being represented by counsel.* ***Under rule 2 of Order XVII, if, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of he modes directed in that behalf by Order IX or make such other order as it thinks fit", and it would appear that the mode adopted by the learned Judge for the disposal of the suit was one contemplated by rule 8 of Order IX.*** *Another reason why the said dismissal order cannot be considered to be under rule 3 of Order XVII is that, to attract the provisions of that rule adjournment should have been granted at the instance of the party in default, whereas here the List adjournment was by the Court in the routine manner for service of notice of miscellaneous application moved by one of the defendants. As such, in my view the said order. cannot be considered to have been passed under rule 3 of Order XVII but should be taken to be covered by rule 2 thereof read with rule 8 of*

Order M C.P.C. and, therefore, the present application is maintainable." [Emphasis added].

Syed Arshad Naeem Vs. Atta Rabbani, 1999 MLD 2267 [Lahore]:

"4. On the other hand, the respondents' learned counsel strenuously urged the past conduct of the plaintiffs vividly showed that they were grossly negligent and had obtained a number of adjournments but did not produce their evidence; that even if adjournment was not sought by the petitioners on 7-6-1997 the trial Court was justified to close their evidence on 12-6-1997 by applying the provisions of Order XVII, rule 3 of the C.P.C. In support of his contentions, he relied on the judgment in the case of "Executive Engineer, Peshawar v. Messrs Tour Muhammad & Sons and 4 others" (1983 SCMR 619).

5. ...

The Hon'ble Supreme Court was pleased to hold as under: --

> *"This order obviously is made under Order XVII, rule 3 of the C.P.C. is Rule applies where a party who is granted time to perform some act, not only fails to do so but is also absent on the date to which the hearing is adjourned. It is immaterial whether the adjournment was granted at the instance of the party or for other reasons."*

The rule laid down by the Hon'ble Supreme Court can be applicable in a case where there is material on the record to enable the Court to decide the suit forthwith. Otherwise, the Court has to apply the provisions of Order XVII, rule 2 of the C.P.C. *I am fortified in my view by an earlier judgment of the Supreme Court of Pakistan reported as "Muhammad Haleem and others v. H.H. Muhammad Naim and others" (PLD 1969 SC 270). In the said case, it was held:*

> *"It would, therefore, appear that there is a distinction between these two Rules 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.*
>
> *The consensus of judicial opinion appears to be in favour of the view that if it is possible for a Court to base a decision on merits upon the materials already brought on the record, it should proceed under rule 3 of Order XVII and not under rule 2. This appears to us also to be sound on principle. Every party who has instituted a cause or matter in a Court has a right to have his case decided on merits. A dismissal for non-prosecution should, therefore, be an exception and not a rule. If it 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."*

The same view was expressed by a Division Bench of this Court in the case of "Mst. Arifa Amjad and 2 others v. Abbas Tayyab Dar and another"(1990 CLC 1743). The relevant part from the judgment is reproduced below: --

> *"Having reproduced the relevant provisions of Order XVII, Civil P.C. above, we shall advert to rules 2, and 3 to discover about their application. Distinction in the phraseology employed in rules 2 and 3 appears to be marked. It has been subject-matter of discussion in numerous judgments of the superior Courts found in law reports. However, judicial consensus leans in favour of the view that necessary conditions for the applicability of rule 3 are: (i) the time must have been granted to the party at his instance; (ii) the time must have been granted to the party to do one or other of the three things mentioned in the rule*

viz. to produce evidence or to cause attendance of witnesses or to perform any other act necessary for the progress of the suit; (iii) default must have been committed by the party in doing the act for which the time and adjournment had been granted to it, and (iv) the Court must decide the suit forthwith which means a decision within a reasonable time under the circumstances. Additionally, some decisions take the view that provisions in rule 3 being stringent and penal in character should not be applied unless the facts do not admit application of any other rule of the Code and also that for its proper application, sufficient material must be available on record for giving a. proper decision on merits which do not include a summary decision. "

In the present case, there was no material on the record to enable the Court to decide the suit forthwith or within a reasonable time. Therefore, the Court ought to have proceeded under the provisions of Order XVII, rule 2 of the C.P.C. and either dismissed the suit for non-prosecution or granted one more adjournment to the petitioners to produce evidence. *Keeping in view the fact that they had brought their evidence on 7-6-1997, in the interest of justice, they should have been granted one more opportunity to produce their evidence."* [Emphasis added].

Mst. Asmat Begum Vs. Badiuzzaman Khan, 2002 CLC 71 [Sindh]:

"8. This Court had observed in Abdul Shakoor's case PLD 1963 West Pakistan (Karachi) 356 that rule 2, C.P.C. applies to hearings adjourned at the instance of a party and ***that the distinguishing feature of rule 3, C.P.C. is that there must be material on record for the Court to proceed to decide the suit.***

9. A review of the case-law and a discreet break up of rule 3, Order XVII, C.P.C. would indicate that the predominant factors requisite for the application of this rule in contradistinction with rule 2 of the same would be as follows:--

(1) The case must have been adjourned or time granted on the request of a party;

(2) The purpose of granting time/adjournment to the party shall be: (i) to produce his evidence, (ii) to call the attendance of his witnesses, or (iii) to perform any other act necessary to further progress of the suit;

(3) The party to whom adjournment/time was granted defaulted/ failed to perform the act(s) for which the adjournment/time was granted;

(4) There shall be some material on record and the Court shall proceed to decide the suit forthwith on the basis of such material;

(5) Such decision shall be made within a reasonable time if not on that very day;

(6) All these conditions shall co-exist and absence of any of these conditions shall exclude the applicability of this rule and in that event in case of default the case may fall within the domain of rule 2 of Order XVII, C.P.C.

……

14. ***It goes without saying that the above order does not touch the material whatsoever available on-record nor is it on merits.*** *Two outstanding conditions for applicability of rule 3, Order XVII, C.P.C. are again lacking. It would not be out of the place of emphasize with respect to the import of* ***rule 3, Order XVII, C.P.C. that indeed, the law favours decision on merits rather than on technicalities unless the party concerned is guilty of gross negligence within***

the contemplation of rule 3, Order XVII, C.P.C. *Reliance is placed on Zahoor Ahmed v. Mehra 1999 SCMR 105."* [Emphasis added].

Amanullah Khan Vs. Mst. Hayat Bibi, 2006 CLC 1546 [Lahore]:

"6. ***From the language deployed for construction of rule 3 of Order XVII, C.P.C. one can easily conclude that*** *failure to produce evidence has to be by the parties present before the Court and* ***when the respondents were not present, no penal action under this provision should have been taken.*** *In this formulation language of preceding rule is also much helpful wherein reference has deliberately been made by the legislature to Order IX and not to rule 3 of Order XVII, C.P.C. and power of the Court to pass such other order as it thinks fit, is relatable to the case in which some material on record is available for decision on merit in terms of rule 3.* ***In absence of any material in form of evidence, rule 3 should have been deserted by falling back to Order IX.*** *In support of this proposition we can refer to the judgments in the cases of Syed Haji Abdul Wahid and another v. Syed Sirajuddin 1998 SCMR 2296 and Muhammad Haleem and others v. H.H. Muhammad Naim and others PLD 1969 SC 270.*

7. ***Scan of case-law on the subject brings me to hold that in absence of the respondents and any evidence on the file, besides the fact that the case was not adjourned on behalf of the respondents on the preceding date of 16-2-2004, provisions of Order XVII, rule 3, C.P.C. were inapplicable and instead rule 2 of the same order was attracted and was applied by the trial Court.*** *Respondents rightly moved their application under Order IX, rule 9, C.P.C. for restoration of their suit dismissed for non-prosecution on 10-3-2004. This application not only made out sufficient cause explaining absence of the respondents and their counsel on the date when the suit was called on for hearing but was also moved within the period of limitation of 30 days and the petitioners have already been prized with costs of Rs.5,000 which is sufficient compensation to them for the inconvenience suffered by them on account of dismissal of the suit.* ***Law regarding decision of disputes between the parties is firmly settled to the effect that the cases should be decided on merit instead of divulging in technicalities by unnecessarily knocking out the litigants on the basis thereof.*** *"*[Emphasis added].

Mst. Akhtari Begum Vs. Inayatullah, 2010 CLC 306 [Peshawar]:

"7. The crucial order sheet is dated 2-4-2007. ***It reveals that on this date neither the defendant was present nor his evidence available and the Court proceeded them under Order XVII, rule 3, C.P.C. and right of defence was struck off. In my opinion, the Court could not pass such an order in the absence of the defendant****. The Court could only pass such order in the presence of the party and in case of non-availability of the evidence. Only two chances have been given and thereafter provisions of Order XVII, rule 3, C.P.C. were pressed into service.* ***Moreover, the impugned judgment reveals that the learned trial Court has not discussed and appreciated the evidence of the plaintiff. The absence of defendant's evidence does not mean that whatever is produced by the plaintiff in the shape of evidence is to be believed. It is the duty of the Court to assess and examine the evidence and thereafter form an opinion. No such efforts have been made by the Courts below, therefore, the impugned judgments and decrees of both the Courts are not speaking one.*** *By not giving sufficient opportunity to the petitioners for producing evidence, the trial Court has committed an error and denied defence and condemned the petitioners unheard.*

8. In view of my above discussion, the petition merits acceptance. Accordingly, the revision petition is accepted, the impugned judgments and decrees of both

the Courts are set aside and the case is remanded back to the learned trial Court with the directions to record evidence of the defendants. The petitioners are burdened with cost of Rs.4,000 to be paid to the respondent in the trial Court. The petitioners are further directed to produce their entire evidence on 22-12-2009 in trial Court. The trial Court would be at liberty to proceed against the petitioners in case of their failure to produce evidence without sufficient cause. A short dispute is involved, therefore, the trial Court is directed to dispose of the matter within three months. The parties are directed to appear in the trial Court on 22-12-2009." [Emphasis added].

Changaz Khan Vs. Mian Khan, 2022 CLC 1966 [Baluchistan]:

"13. It appears that there is a distinction between Rules 2 and 3 of Order XVII, C.P.C. In Rule 2, where the suit is adjourned, the parties or any of them fails to appear; the court may proceed to dispose of the suit in one of the modes prescribed under Order IX, C.P.C. or make such order as think it fit. While under Rule 3 of Order XVII, C.P.C. when time is granted, any party failed to produce his evidence or cause of his attendance or perform any other act which is necessary for further progress of the suit, on default, the court would proceed to decide the suit forthwith.

14. The procedure laid down under Rule 3 there must be an element. The adjournment must have been on the instance of a party; ***secondly, there must be material on record for the court to peruse and decide the case. For proceeding under Rule 3 of Order XVII, C.P.C. there shall be material to decide the suit forthwith. The trial court proceeded to decide the suit forthwith without any material before it and has acted in its jurisdiction illegally and with material irregularity."*** [Emphasis added].

38. Conversely, where evidence has been recorded Courts have held that it must be taken into consideration when passing an order under Rule 3 of Order XVII, CPC. The Supreme Court in *Hasham Khan Vs. Haroon ur Rashid*, 2022 SCMR 1793 allowed a civil appeal against the appellate and revisional orders upholding the order of the trial court whereby the suit was dismissed and the plaintiff's right to adduce evidence was struck off upon their failure to produce the remaining evidence under Rule 3, Order XVII, CPC in view of the fact that judgment was passed without touching upon the merits or available evidence on the record. The Supreme Court explained that the words *"to decide the suit forthwith"* as used in Rule 3, Order XVII, CPC do not mean to decide or dismiss the suit there and then and that the Court while implementing such provision of law can take time to go through the available record and then decide the matter. Similarly, in *Tasleem Khan Vs. Sher Ghulam*, 2010 SCMR 1422, the plaintiff produced one witness but failed to produce any further evidence on the subsequent dates fixed for the said purpose by the trial court. The trial court opted for the provision of Order XVII, Rule 3, CPC and dismissed the suit on the basis of the evidence before it which the

Supreme Court held was rightly exercised. With regard to the objection raised that the suit could not be dismissed without considering the evidence on the record the Supreme Court held that there was no cavil to the said position but that both the trial court as well as the appellate court had considered the evidence on the record that the petitioner could not refer to any piece of evidence on the basis of which decree could be passed in his favour. The Baluchistan High Court in *Syed Haji Abdul Wahid Vs. Syed Sirajuddin*, 1998 SCMR 2296 reached the same conclusion as follows:

> *"8. The learned Judges of the High Court of Balochistan while condoning the delay in filing the appeal before the High Court and allowing the R.F.A. filed by the respondent against the judgment and decree of the trial Court observed as follows:--*
>
> > *"We have carefully gone through original record of this case and considered arguments advanced by learned counsel for parties besides case-law relied upon by them."*
>
> ***Firstly it may be seen that five witnesses had been undisputedly examined during trial but surprisingly suit has been dismissed without making any reference to said evidence,*** *vide order, dated 6th June, 1994 which is apparent by non-speaking and perfunctory. Trial Court appears to have passed said order/decree in purported exercise of power under Order XVII, Rule 3, C.P.C For convenience said provision is reproduced below:*
>
> > *'3. 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 same forthwith.'*
> >
> > *Obviously Court enjoins plenary authority to fore-close right or benefits flowing to defaulting party and in appropriate cases decide the matter forthwith.* ***Evidently while exercising such powers concerned Court/Forum, is under obligation to properly consider entire material so far brought on record. There is absolutely no jurisdiction vested in the Court to ignore the evidence already adduced by either party. Unfortunately in the instant case learned trial Court has glaringly disregarded essential requirements while passing impugned judgment/order. Since evidence available on record has not even been touched or considered, the impugned decree dated 6-6-1994 passed by learned Senior Civil Judge is completely devoid of lawful authority and a nullity in the eye of law.*** *In this behalf principle of law enunciated in case PLD 1978 SC page 89 is highly instructive, and applies with force to the facts of this case. No doubt, appellant should have taken appropriate measures to seek prescribed remedy before Court of competent jurisdiction with utmost diligence. We feel that learned counsel appearing before First Appellate Court on behalf of appellant was sufficiently ignorant about amendments concerning pecuniary jurisdiction introduced in section 18 of the Civil Courts Ordinance, 1962. Keeping in view nature of impugned decree which reflects gross disregard to law, the circumstances of instant case are distinguishable from cases relied upon by learned counsel for respondents. Thus, on the evaluation of all the factors and ratio decidendi in case 1995 SCMR 584,*

> *we are inclined to condone the delay mainly because original order was nullity and question of limitation in peculiar circumstances has no relevancy. However, we feel that respondents have been unnecessarily dragged on account of wrong advice or ignorance on the part of appellant or his counsel. Therefore, they are entitled to be adequately compensated.*
>
> *For the above reasons, the appeal is partly accepted and impugned judgment/decree dated 6-6-1994 is set aside subject to payment of Rs.8,000 (Rupees eight thousand) as costs which shall be conditional."*
>
> *9. The main consideration which weighed with the learned Judges of the High Court in condoning the delay in filing the appeal was, that the order passed by the trial Court was a nullity in the eyes of law. The learned counsel for the appellants admits that the plaintiff/respondent had already examined five witnesses in the case."* [Emphasis added].

39. Where the entire evidence is on the record the Supreme Court discouraged employing the use of Rule 2 of Order XVII, CPC in *Muhammad Haleem and H.H. Muhammad Naim*, PLD 1969 SC 270 notwithstanding the absence of the parties as follows:

> ***"The consensus of judicial opinion appears to be in favour of the view that if it is possible for a Court to base a decision on merits upon the materials already brought on the record, it should proceed under rule 3 of Order XVII and not under rule 2.*** *This appears to us also to be sound on principle. Every party who has instituted a cause or matter in a Court has a right to have his case decided on merits.* ***A dismissal for non-prosecution should, therefore, be an exception and not a rule. 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 proceeding for non-prosecution and leave the parties to start a second ground of litigation.***
>
> *In the facts and circumstances of the case before us we have no hesitation in coming to the conclusion that this was not an appropriate case in which the Court, acting in the proper exercise of its judicial discretion, should have dismissed it for non-prosecution.* ***The entire evidence had been led and the Court should have come to a decision on merits in the matter.***
>
> *...*
>
> *The main reason which has compelled us to allow this appeal is the fact that, in our view, the High Court had not exercised its discretion on sound judicial principles in dismissing the matter for non-prosecution.* ***It should have proceeded under Order XVII, rule 3, C.P.C., directing that since the learned counsel for the petitioners was not present, his argument must be taken as closed, then called up the learned counsel for the respondents to address the Court and given a decision on the merits of the case.*** *We, therefore, feel that this appeal should be allowed, for, otherwise it would result in inflicting a very harsh penalty upon the parties for no fault of their own. At the same time, however, we wish to record our disapproval of the conduct of the Attorney concerned by directing that the costs of this appeal, both of the petitioners and the respondents, should come out of his pocket, but since there are several respondents in this appeal, the respondents will be allowed only one set of costs.*" [Emphasis added].

40. My research shows that while Indian case law is firmly of the view that Rule 3 of Order XVII, C.P.C. cannot be applied in the absence of the parties the courts in Pakistan tend not to regard Rule 2 and Rule 3 of Order XVII, C.P.C. as mutually exclusive. There is perhaps good reason for such approach. As seen in some of the cases discussed herein above, a plaintiff could fail to appear at a stage in the proceedings where some or all or a substantial portion of the evidence is already on the record. In such circumstances, it is better to decide the matter on merits rather than to dismiss the suit simply for default which would in effect reward the plaintiff for its double default by allowing it an opportunity to start a second round of litigation. On the other hand, there could very well be a situation where the plaintiff appears but fails to produce evidence or to cause the attendance of his witness or to perform any other act necessary for the further progress of the suit for which time has been allowed without sufficient cause but there is no material available on the record before the trial court to pass a judgment on merits.

41. Therefore, generally speaking, I agree with the reasoning given in the aforementioned judgments that where the party at whose instance adjournment was granted fails to produce evidence or to cause the attendance of his witness or to perform any other act necessary for the further progress of the suit for which time has been allowed and further adjournment is declined for want of sufficient cause but there is no material available for the trial court to decide the issue on merits the trial court should refrain from invoking Rule 3 of Order XVII, C.P.C. and instead opt for Rule 2 thereof as the law favours decision on merits rather than on technicalities.

42. In the instant case, in my opinion, the learned Trial Court could have disposed of the suit by invoking Order XVII, Rule 2, CPC long ago. The order sheets reflect many dates on which either none was present on behalf of the Appellant/Plaintiff or the proxy counsel had no instructions except to request for adjournments, which too amounts to absence. Yet adjournments were granted as a matter of routine for more than two years. Neither the order sheets record the sufficient cause shown by the Appellant/Plaintiff for requesting adjournments nor has the Appellant/Plaintiff placed before this Court any

adjournment applications stating such cause. In this regard, the following passage from the judgment passed in *Dunia Gul Vs. Niaz Muhammad*, PLD 2024 SC 672 is extremely instructive:

> *"7. There is a prevalent and concerning trend of frequent adjournment requests in lower courts, which amounts to an abuse of the process of the court. This practice has significantly contributed to a substantial backlog of litigation in the lower judiciary. It is imperative that we actively discourage this behavior to ensure the prompt delivery of justice to the citizens of Pakistan.* ***By curbing the routine use of adjournments, we can expedite legal proceedings, alleviate the burden on the lower judiciary, and ultimately enhance the efficiency of the judicial system.*** *This, in turn, will contribute to a more timely and effective resolution of legal matters, promoting access to justice for all.*
>
> *It is apparent from the above-noted detail of the trial court proceedings that the petitioners were afforded more than forty-three adjournments spreading over more than two years for the production and recording of their evidence. Even, despite the clear warnings i.e. "last opportunity" by the trial court and the imposition of costs, the petitioners failed to produce and record the oral evidence. Besides,* ***we have also noted the conduct of the trial court as it liberally granted unreasonable adjournments for the recording of the evidence of the petitioner. In our view, it is imperative for the court to exercise vigilance and refrain from granting adjournments so liberally and without any compelling reasons. Such a cautious approach is necessary to prevent abuse of the legal system, ensure a fair and timely resolution of cases, and optimize the use of judicial resources.*** *In this regard, the Code of Civil Procedure, 1908 ("C.P.C.") under Order XVII, Rule 3, empowers the court to proceed to decide the suit forthwith if a party, to whom time has been granted, fails to produce evidence, secure the attendance of witnesses, or perform any other act necessary for the further progress of the suit. For convenience, the said Rule 3 is reproduced hereunder for ease of reference:*
>
> *"3. 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 each default, proceed to decide the suit forthwith."……*
>
> *10.* ***It is relevant to observe here that when the last opportunity to produce evidence is granted and the party has been duly warned of the consequences, the court must execute its order consistently and strongly, without exceptions.*** *Such a measure would not only realign the system and reaffirm the authority of the law but also curb the trend of seeking multiple adjournments on frivolous grounds, which serve to needlessly prolong and delay proceedings without valid or legitimate justification.* ***Moreover, when the court issues an order providing the final chance, it not only issues a judicial order but also extends a commitment to the parties that no further adjournments will be permitted for any reason. The court must stand by its order and uphold its commitment, leaving no room or option for any alternative action."*** [Emphasis added].

43. Be that as it may, the question that arises is whether the Appellant/Plaintiff in the instant case is entitled to the setting aside of the Impugned Order and Decree only because none was present on behalf of the

Appellant/Plaintiff on the fateful date when the Impugned Order and Decree was passed and that no material was available with the Trial Court to pass a judgment on merits when the Appellant/Plaintiff had already availed numerous opportunities to produce evidence. It must be borne in mind that the effect of setting aside the Impugned Order and Decree would be to either convert the Impugned Order into an order dismissing the suit under Order XVII, Rule 2, CPC read with Order IX, Rule 8, CPC (which would allow Appellant/Plaintiff to seek for its restoration under Order IX, Rule 9, CPC) or to remand the matter to the Trial Court while allowing the Appellant/Plaintiff one more opportunity to produce evidence against the Respondent/Defendant as has been done in some of the cases where Order XVII, Rule 3, CPC was wrongly invoked.

Negligent/contumacious conduct of the plaintiff

44. However, one cannot lose sight of the fact that Rules 2 and 3 of Order XVII, CPC have been devised to check misuse and abuse of the power of the court to grant adjournments. The technicalities of Rules 2 and 3 cannot be exploited to foster misuse or abuse. Therefore, a distinction must be drawn in cases of negligent/contumacious conduct.

45. In the following cases, the superior Courts refused to interfere with dismissal of suits under Order XVII, Rule 3, CPC notwithstanding absence of the parties and/or material on the record due to the negligent/contumacious conduct of the plaintiff who failed to produce evidence despite numerous opportunities granted over a long period of time along with last chances and imposition of costs:

(i) *Munawar Hussain Vs. Additional District Judge, Jehlum,* 1998 SCMR 1067:

> *"6. 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 authorised attorney had not appeared before the Court on any of the dates of hearing.*** ***Record speaks volumes about petitioner's extraordinary negligence in pursuing 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, conclusions 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."* [Emphasis added].

(ii) *Muhammad Nazir Vs. Mst. Hayatan*, 1999 YLR 2693 [Lahore]:

"5. It follows from the above that both the Courts below have given concurrent findings on the question of fact that ***petitioner/plaintiff having been given numerous opportunities with a warning by giving him last opportunity to adduce his evidence, but nothing was done by him and as such provisions contained in Order XVII. Rule 3, C.P.C. were invoked to close his evidence. It is the cardinal principle of law that a litigant should be vigilant while conducting a case. In the instant case facts mentioned above clearly reveal that petitioner/plaintiff was not only indolent but also negligent to examine his evidence, at the trial.*** *The orders passed by the learned Courts below do not suffer from any latent or patent legal defect so as to call for interference by this Court in its Constitutional jurisdiction. This petition being merit-less is accordingly dismissed in limine."* [Emphasis added].

(iii) *Mian Gul Shahzad Aman Room Vs. Kameen Mian*, PLD 2003 Peshawar 60:

"*3.* ***The argument of the learned counsel for the petitioners that the Court should have proceeded under Order 17, Rule 1(3), C.P.C. instead of Order 17, Rule 3, C.P.C. loses its significance****. The adjournments were made on the request of the petitioners and they failed to comply with the order of the learned trial Court for producing their evidence. Even otherwise Order 17, Rule 1(3), C.P.C. does not debar the Court from dismissing the suit after it has been made impossible for the Court by the defaulting party to proceed with the matter by failing to bring any material on record.* ***In the instant case, petitioners were directed to produce their evidence in the year 1997 and over a period of 4 years they failed to bring any evidence on record, therefore, they practically made it impossible for the learned trial Court to further progress with the suit. The learned trial Court, therefore, had no other option but to close their evidence and dismiss the suit.***" [Emphasis added].

(iv) *Aftab Ahmad Khan Vs. Mst. Surayah Begum*, PLD 2004 Peshawar 168:

"11. The arguments of the learned counsel for the appellants that the evidence of the petitioners/plaintiffs was wrongly closed under Order 17 Rule 3 C.P.C., has no force. Perusal of the record shows that vide order dated 23-2-1998 the case was fixed for evidence of the plaintiffs for 28-3-1998. Thereafter, vide order dated 2-2-1999 plaintiffs were again directed to produce their evidence on 13-2-1999. It was vide order dated 15-10-1999 that the learned trial Court directed to summon the official witnesses of plaintiffs for 13-11-1999. It was on 3-2-2000 that official witness Shaukat Jamil Record Clerk of Municipal Committee, Abbottabad was present but he had not brought the relevant record with him and he sought time to bring the same. The case was adjourned to 21-2-2000 for evidence of plaintiffs. The dates were adjourned for one reason or

the other. It was, however, vide order dated 6-12-2000 that one of the official witnesses of plaintiffs was present but the learned counsel for defendants sought adjournment. The case, therefore, stood adjourned to 17-1-2001 on which date the examination-in-chief of the official witness was recorded, and the learned trial Court directed the witness to bring further record. The case was posted to 22-2-2001 for cross-examination of the said official witness. On the next date, i.e., on 22-2-2001 the record keeper did not attend the Court. Similarly, on the next date of hearing the date was adjourned due to, the note of the reader. It was, however, on 18-4-2001 that cross-examination of the official witness (record keeper) was completed and the case was again posted for remaining evidence of the plaintiffs for 17-5-2001 on which date the plaintiffs sought adjournment for producing their evidence. They were given "last opportunity" to produce their evidence on 21-6-2001. Thereafter three dates were adjourned on the note of the reader. The order sheet dated 28-11-2001 shows that the evidence of the plaintiffs was not present on the said date and the learned counsel representing the plaintiffs sought further adjournment. The plaintiffs were again given last opportunity and the case was posted for 5-1-2002. Again four dates were adjourned on the note of the reader and the case was transferred by the learned District Judge, Abbottabad to Civil Judge-II. On 27-5-2002 the learned trial Court received the case file and recorded the order that the plaintiffs had already been given last opportunity vide order dated 28-11-2,001. The same warning/last opportunity was repeated again and case was posted for the evidence of plaintiffs for 11-6-2002. The evidence of the plaintiffs was not present on 11-6-2002 also, therefore, the learned trail Court closed the evidence of the petitioners/plaintiffs under Order 17, rule 3, C.P.C. ***The above noted order of the learned trial Court shows that the petitioners/plaintiffs were provided ample opportunities to produce their evidence but they failed to produce the same. The petitioners/plaintiffs were not only negligent in producing their evidence but they did not care about the last chances provided and warnings given to them, therefore, the order dated 11-6-2002 whereby the evidence of the petitioners/plaintiffs was closed was unexceptionable.*** *This Court in PLD 2003 Peshawar 60 "Mian Gul Shahzad Aman Room and others v. Kameen Mian and others" had held:-*

> *"The perusal of the record annexed with the revision petition shows that the petitioners/plaintiffs were not only negligent in producing their evidence but they did not care about the last chances provided and warnings given to them to proceed under Order 17, therefore, the order passed by the learned trial Court, closing the evidence of the petitioners/plaintiffs was unexceptionable."*

Similarly, august Supreme Court of Pakistan in "Fateh Sher v. Muhammad Zubair" 2003 SCMR 797 held:-

> *"We however; find that the order passed by the learned trail Court for closing his evidence was in accordance with law, for the same was passed on the date which was fixed on the petitioner's request after affording him a number of opportunities for production of evidence. We also infer that the petitioner did not produce the evidence for the reason that admittedly he had already executed an Arbitration agreement on 29-3-2001."* [Emphasis added].

(v) *Abdul Jabbar Vs. Mst. Pathani*, 2004 YLR 2185 [Sindh]:

"9. From the perusal of the judgment, it is obvious that the trial Court framed the issues on 18-2-2002 and matter was adjourned to 18-3-2002 for recording of the evidence. The counsel for the applicant/plaintiff moved adjournment application on the ground of ailment of son of the applicant/plaintiff and matter was adjourned to 9-4-2002. On that date learned counsel for the applicant moved adjournment application and consequently the matter was adjourned to

4-5-2002. On that date the learned counsel for the applicant/plaintiff again moved adjournment application on the ground of ailment of applicant/plaintiff, which was granted and matter was adjourned to 3-6-2002. On that day, learned counsel for the applicant/ plaintiff also sought adjournment and the same was too granted and matter was adjourned to 22-8-2002. On that date the applicant/plaintiff filed an adjournment application and matter was adjourned to 16-9-2002. On that date, learned counsel for the applicant/plaintiff sought adjournment on the ground that he is busy before High Court and adjournment was granted and matter was adjourned to 17-10-2002. On 17-10-2002 the adjournment was sought due to non-appearance of the applicant/ plaintiff due to ailment, but the adjournment application was rejected and the trial Court proceeded with the case and passed an order under XVII, rule 3, C.P.C. as the applicant/plaintiff sought(s) eight adjournments continuously as mentioned above. ***It is settled principle of law that the law favours decision on merits rather than on technicalities unless the party is guilty of gross negligence. As per case diaries, it is manifest that the applicant/plaintiff remained negligent and adopted careless attitude to proceed with the matter.*** *He himself failed to lead his own evidence.* ***It is settled principle of law that the law helps to the vigilant not to indolent.*** *...According to the record, after framing of the issues, the applicant and his witnesses failed to lead evidence, but the applicant/ plaintiff moved application for seeking adjournments…*

*10. It is manifest that in the particular case before me, I find that eight adjournments were sought by the petitioner/plaintiff and the defendants are contesting the case on the genuineness of the sale agreement. The petitioner/plaintiff has failed to lead the evidence despite of several chances and due to the conduct of the petitioner/plaintiff, the trial Court was left no option to decide the case under Order XVII, rule 3, C.P.C. as the applicant/plaintiff continuously moved the adjournment application on flimsy grounds and dragged the matter since 18-3-2002…****It is an admitted position that Order XVII, rule 3,, C.P.C., is in its nature and a penal provision. That provision can be pressed into service for deciding the suit finally on merits and some of the conditions to be satisfied before passing an order under that provision are if the conditions of this rule are satisfied, then only the Court can proceed to decide the suit****. Admittedly the petitioner/plaintiff availed several dates of hearings to adduce the evidence, but on the contrary he obtained adjournments on formal grounds so as to drag the matter for indefinite period. The petitioner/plaintiff has failed to adduce his own evidence. In my view the conditions of rule 3 of Order XVII have been satisfied in this case by the trial Court. The trial Court adjourned the case from time to time, but the petitioner/plaintiff after closing all the doors for production of evidence and failed to examine himself also. In the similar circumstances the Honourable Apex Court has laid down a rule in case of Shahid Hussain v. Muhammad Akram 2000 SCMR 1135. In this authority it is dilated that failure to produce evidence on final date and closure of the evidence by the trial Court and the trial Court has rightly closed the evidence and the order was unexceptionable, in the circumstances. The Honourable Supreme Court of Pakistan has held that the order of closure of the evidence was quite right. The trial Court despite various opportunities were extended to the petitioner/plaintiff, but he failed to produce his evidence, which was eventually closed on 17-10-2002 and eight adjournments were granted on formal grounds and the learned trial Judge was justified to proceed with the case by deciding the case under Order XVII, rule 3, C.P.C.* ***It is settled principle of law that the law favours decision on merits rather than on technicalities unless the party is guilty of gross negligence. In the present case petitioner/plaintiff seems to be negligent and careless and it is also well-settled law that law helps to the vigilant not to indolent.*** *After framing of the issues the petitioner/plaintiff failed to adduce his evidence, but on the contrary he sought adjournments continuously and failed to produce any evidence, therefore, the closing the side of the applicant/plaintiff for the purpose of evidence was in accordance with*

law, as several opportunities were 'offered for producing of the evidence. The judgments and decrees passed by the two Courts below do not suffer from illegality, therefore, the same are maintained. The discretion vested in the Court has been appropriately exercised by the Court in accordance with law in view of the facts and circumstances of the case." [Emphasis added].

(vi) *Abdul Shakoor Vs. Province of the Punjab*, 2005 SCMR 1673:

"3. 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/plaintiffs was dismissed in view of the provisions 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****..."* [Emphasis added].

(vii) *Maqbool Hussain Vs. Abdul Jabbar*, 2013 YLR 2524 [High Court AJ&K]:

"The perusal of the record shows that the appellant/ plaintiff was ordered to produce evidence in support of his claim on 25-10-2008 and the appellant/plaintiff did not file any list of witnesses. ***The trial Court granted more than eighteen opportunities to the appellant/plaintiff from 25-10-2008 to 26-8-2011, but the appellant failed to produce any evidence.*** *The trial Court as well as Additional District Judge has passed the speaking orders, as it is apparent from the record that the suit was dismissed twice for non-prosecution and then it was restored.* ***Thereafter the negligent prosecution of the appellant/ plaintiff does not entitle him any more concession.*** *The impugned judgment is wisely drawn keeping in view all the legal provisions which warrants no interference by this Court."* [Emphasis added].

(viii) *Mian Saeedullah Jan Vs. Mst. Nusrat Begum*, 2013 YLR 2553 [Peshawar]:

"5. This Court in a case reported as PLD 2004 Peshawar 168 Aftab Ahmad Khan and others v. Mst. Surayah Begum and 7 others has held that the ***petitioners/plaintiffs were not only negligent in producing their evidence but they did not care about the last chances provided and warnings given to them to proceed under Order XVII, therefore, the order passed by the learned trial Court, closing the evidence of the petitioners/plaintiffs was unexceptionable.*** *"* [Emphasis added].

(ix) *Mst. Shamim Ara Vs. District Coordinator*, 2013 YLR 1615 [Sindh]:

"5. I have given careful consideration to the arguments and minutely gone through the relevant papers on record. It is admitted fact that the suit was filed in the year 2006 and issues were framed on 25-1-2007 thereafter the matter was being adjourned on each and every date for the evidence of the plaintiffs/appellants. The said history of the case is shown in para-1, page-2 the

Judgment of the trial Court and it has also been mentioned in the order that on 29-10-2010 and 21-2-2009 costs were also imposed upon the appellants/plaintiffs with direction to produce the evidence. The appellants/plaintiffs did not comply with the directions and warnings. Consequently the trial Court was compelled to reject the adjournment application filed by the appellants/plaintiffs. Not only this, but it also appears from the record that Advocate for the appellants/plaintiffs was inclined to write letter to the parties to withdraw his power. This prima facie shows that the plaintiffs/appellants have lost interest even by not remaining in touch with their advocate which shows negligence and laxity on their part. Law also favours who are vigilant and not indolent. No explanation has been brought on record that why they were not in contact with their advocate or not attending the court except that the matter was adjourned due to strikes of Advocates. ***This plea is not acceptable because this is not a matter of a single date of absence but regarding the absence of 34 dates****. Rules and Regulations are framed for compliance and not for abrogation.* ***In circumstances when many opportunities for recording the evidence were granted to the plaintiffs/appellants who failed to produce evidence, the trial Court proceeded under Order XVII Rule 3, C.P.C., closed the said and the said order of the trial Court was upheld by the appellate court.*** *In similar circumstances in a case of Fateh Sher v. Muhammad Zubair (2003 SCMR 797) the Hon'ble Supreme Court refused to grant the leave to appeal. In the instant case plausible or good explanation has been brought on record that non-appearance of appellants or their witnesses was beyond their control or it was with any bona fide.* ***The contention of learned counsel for the appellants/plaintiffs that trial Court did not decide the case on the basis of issues is also devoid of force for the reasons that burden lies upon the appellants/plaintiffs to prove their case positively, which they have failed to prove,*** *even though the trial Court has discussed the material available on record issue-wise at the time of passing the Judgment under Order XVII Rule 3, C.P.C. The orders of trial Court and appellate court are justified and require no interference in second appeal, which is dismissed accordingly."* [Emphasis added].

(x) *Ahmad Khan Vs. Sikandar, Umar Zeeshan Vs. The Additional District Judge,* 2018 MLD 1658 [Lahore (Multan Bench)]:

"6. Although the rule is not mandatory as is evident from its language and matter has been left to the discretion of the court but ***where the act/conduct of the party appears to be contumacious/ negligent one and it fails to produce its evidence in spite of grant of time, in order to maintain discipline in civil cases court has been bestowed with the power to decide the suit forthwith. This empowerment to my mind makes the provision penal in nature and should, therefore, be strictly construed and applied by curtailing discretionary powers.*** *In order to better understand the intent of legislature and to make more clarity in mind reference may be made to Syed Tahir Hussain Mehmoodi and others v. Agha Syed Liaqat Ali and others (2014 SCMR 637) wherein Hon'ble Supreme Court has held as under:*

> *"Notwithstanding our refraining to interfere in the matter on account of the above, we are of the candid view that provisions of Order XVII, Rule 3, C.P.C. are penal in nature and as per the settled law such provisions should be strictly construed and applied, therefore,* ***once the case of a delinquent litigant squarely falls within the purview and mischief of the law (ibid) then neither any concession should be shown to such litigant nor a lenient view favouring him should be resorted to; this should not even be permissibly done on the touchstone of exercise of 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 the litigants should not***

> ***<u>be knocked out on technical grounds, and that adversarial lis should be settled on merits.</u>*** *If such approach is liberally followed and resorted to there shall be no discipline in the adjudication of the civil litigation and the delinquent whose case though is squarely hit and covered by the penal provisions of Order XVII, Rule 3, C.P.C. would be given a chance to his advantage and to the disadvantage of his opposing 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 law is not a mere technicality, rather it is duty cast upon the court as per Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 to do so. Thus where Order XVII, Rule 3, C.P.C. is attracted, the court has no option except to take action in accord therewith."*
>
> *In the present case the petitioner failed to produce his evidence despite repeated opportunities including last and absolute final opportunities, as such the learned trial Court has rightly observed that pendency of application for custody of minor was nothing but mere harassment to the respondent. As calculated by this Court, in the light of assistance rendered by learned counsel for the petitioner, despite availing 23 clear opportunities the petitioner did not produce his evidence. Only on one occasion the petitioner produced his evidence but even on the said date he sought adjournment. As such the petitioner himself has caused inordinate delay in conclusion of trial. Therefore, the learned guardian court has properly exercised discretion vested in it which cannot be considered arbitrary, capricious, harsh or without application of judicious mind. Learned counsel has not been able to show any illegality or irregularity in the impugned orders calling for interference by this Court in its constitutional jurisdiction. Consequently, I find no merits in this petition which is dismissed in limine."* [Emphasis added].

46. The Appellant's reliance upon *Pakistan Telecommunication Company Limited (PTCL) Vs. Mst. Naima Ayub*, <u>2013 CLC 1191 [Islamabad]</u> whereby it was held that an order without pronouncing judgment and without giving issue-wise findings is not permissible under the law is misconceived. The judgment specifically notes that there is no mention in the impugned order of the trial court that nobody turned up to represent the plaintiff therefore instead of dismissing the suit forthwith the trial court should have asked the plaintiff to come in the witness box despite non-production of witnesses by the plaintiff. On the other hand, in the instant case, the learned Trial Court specifically observed in the Impugned order that no one turned up for the Appellant/Plaintiff therefore it was not possible for the Trial Court to have asked the authorized representative of the Appellant/Plaintiff to enter the witness box. Under the circumstances when numerous opportunities had been granted to the Appellant/Plaintiff despite which it failed to produce evidence, the Trial Court had no choice but to close the Appellant/Plaintiff's right to do so and to proceed to decide the suit forthwith. I am fortified in my view by the judgment of the Supreme Court passed in *Tanveer Khan (Supra)* while quoting

Syed Tahir Hussain Mehmoodi Vs. Agha Syed Liaqat Ali, 2014 SCMR 637 as follows:

> *"2. ...The above judgment of this Court has been taken into account in the latest pronouncement of this Court in Syed Tahir Hussain Mehmoodi and others v. Agha Syed Liaqat Ali and others (2014 SCMR 637) in which similar question was involved, and though other evidence of the delinquent party was closed, but it was argued that the statement of plaintiff/defendant at least, should be allowed to be recorded; and it was held as under:-*
>
> > *"5. In the above context, it may be held that in every case where the action against a delinquent party is imperative and his evidence has to be closed because the case squarely and eminently falls within the mischief of Order XVII, Rule 3, C.P.C.,* ***the court while closing the evidence is not in any manner obliged to adjourn the case and require or ask the litigant to appear and examine himself as a witness on a subsequent date. Obviously if the party is present in the court and desires to appear as a witness the court should not decline his request, rather it shall be appropriate that where the party is present, the court while applying Order XVII, Rule 3, C.P.C. and closing the evidence on a given date should itself ask the party to avail the chance of appearing as his own witness, and should also record such fact in its order (order sheet) that a chance was given to the litigant which has not been availed.*** *However, if this fact is not so recorded by the court though the party was present and sought its examination such party should initially move an application to the court for examination if the case has not yet been decided. But where the case is finally decided a ground should be specifically set in the memo of appeal/revision as the case may be about the presence of the party and asking for the examination, which should be supported by an affidavit of the counsel of the said party to the above effect."*
>
> *In the present case, as mentioned above, it is clear from the record that the appellant had availed four opportunities to produce his evidence and in two of such orders (the last in the chain) he was cautioned that such opportunity granted to him at his request shall be the last one, but still on the day when his evidence was closed in terms of Order XVII, Rule 3, C.P.C. no reasonable ground was propounded for the purposes of failure to adduce the evidence and justification for further opportunity, therefore, notwithstanding that these opportunities granted to the appellant were only in a span of about 1 month and 26 days, yet his case squarely fell within the mischief of the provisions ibid and his evidence was rightly closed by the trial court.* ***As far as the argument that at least his statement should have been recorded, suffice it to say that the eventuality in which it should be done has been elaborated in the latest verdict of this Court (2014 SCMR 637).*** *From the record it does not transpire if the appellant was present on the day when his evidence was closed and/or he asked the court to be examined; this has never been the case of the appellant throughout the proceedings of this case at any stage; as there is no ground set out in the first memo of appeal or in the revision petition. Resultantly, we are not persuaded to hold that the provisions of law (Order XVII, Rule 3, C.P.C.) have been wrongly applied to the appellant's case or that he should be given the benefit of the judgment Muhammad Aslam v. Nazir Ahmed (2008 SCMR 942). In light of the above, we do not find any merit in this appeal which is accordingly dismissed."* [Emphasis added].

47. Insofar as whether the Impugned Order constitutes a judgment is concerned, similar orders as the Impugned Order have been upheld in the cases

cited hereinabove including judgments passed by the Supreme Court in *Rana Tanveer Khan (Supra)*. In the said case the Appellant/Plaintiff availed four opportunities for adducing his evidence and on two such occasions he was cautioned that it was the last chance yet he failed to produce his evidence resultantly by applying the provision of Order XVII, Rule 3, CPC the right to produce evidence of the plaintiff was closed and the suit was dismissed for lack of proof. Yet the Supreme Court was not persuaded to hold that the provision of Order XVII, Rule 3, CPC had been wrongly applied. In *Ghulam Qadir Vs. Haji Muhammad Suleman*, PLD 2003 SC 180 the petitioner failed to cause the attendance of his witnesses form 3-1-1995 to 14-7-1999 without any valid reason. Even on the last date of hearing neither he nor his witnesses or his advocate was present which the Supreme Court concluded was sufficient cause to exercise jurisdiction under Order XVII, Rule 3, CPC to close the evidence of the plaintiff and to dismiss the suit. The petitioner's counsel in *Shahid Hussain (Supra)* also argued that the trial court had merely passed an order dismissing the suit but there was no judgment, however, the Supreme Court categorically held that an order dismissing a suit under Order XVII, Rule 3, CPC would be deemed to be a judgment on merits. In *Fateh Sher Vs. Muhammad Zubair*, 2003 SCMR 797, leave to appeal was refused in circumstances where the trial court had proceeded to close the plaintiff's evidence under Order XVII, Rule 3, CPC and also to dismiss the suit as there was no evidence to prove the execution of the agreement of which specific performance was sought by the plaintiff. The Peshawar High Court explained in *Shahzada Aman Room Vs. Miangul Hilal*, 2022 CLC 659 that where there was no evidence produced by the plaintiff putting the case for the defendant's evidence and recording the same would be a mere legal formality having no substantial effect.

48. In the instant case the Appellant/Plaintiff failed to produce his evidence from 13-2-2013 till 6-4-2015 despite 15 opportunities spanning over a period of two years. The learned Trial Court issued warnings of last chances and also imposed cost but the Appellant/Plaintiff paid no heed. Thus, there can be no manner of doubt that the Appellant/Plaintiff was given more than adequate opportunity to do the needful yet the Appellant/Plaintiff was negligent. It is also noteworthy that no reason has been offered by the Appellant/Plaintiff even

before this Court, let alone sufficient cause as to why the Appellant/Plaintiff failed to produce evidence despite abundant opportunities or to even appear before the Trial Court despite last opportunities granted several times. Moreover, the Appellant/Plaintiff has not produced any evidence before this Court that the cost of Rs. 500/- imposed by the learned Trial Court on 26-6-2013 has been paid by the Appellant/Plaintiff till date or any given explanation as to why such cost was not paid. The Appellant/Plaintiff has exhibited highly negligent and contumacious behavior by failing to pay heed to the last chances and imposition of cost by the learned Trial Court, which does not leave any room for indulgence toward the Appellant/Plaintiff. I, therefore, find no cause for warranting interference in the Impugned Order and Decree.

49. Before parting with the judgment, it may be useful to enumerate the some of the principles to be kept in mind by the trial court when dealing with cases under Order XVII, CPC as follows:

(i) Adjournments must not be granted in routine and may only be allowed strictly in accordance with Rule 1 of Order XVII, CPC for sufficient cause which ought to be reflected in the orders;

(ii) Matters falling squarely within the purview of Rules 2 or 3 of Order XVII, CPC should be dealt with strictly in accordance with the law without showing indulgence or leniency sooner rather than later;

(iii) Where adjournment is refused for want of sufficient cause yet the plaintiff fails to produce evidence or to cause the attendance of his witness or to perform any other act necessary for the further progress of the suit for which time has been allowed but there is no material available for the trial court to decide the issue on merits the trial court should opt for Rule 2 of Order XVII, C.P.C. except in the case of negligent or contumacious conduct where Rule 3 may be invoked; and

(iv) Rule 3 of Order XVII, C.P.C. may be invoked where all other necessary conditions are fulfilled and material is available on the

record to pass judgment on merits or in the absence of such material where the plaintiff is negligent or contumacious.

50. In view of the foregoing, the appeal is devoid of merit, hence **dismissed**.

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in the open Court on this 11th day of June, 2025.

JUDGE

JUNAID

Approved for Reporting
Blue Slip added.