Judgment Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Civil Revision Application No. 50 of 2011

Before :
Mr. Justice Nadeem Akhtar

Applicant	:	Rafique Ahmed, through Mr. Abdul Hameed Khan advocate.
Respondent No.1	:	Ashok Kumar, through Mr. Abdul Rehman Bhutto advocate.
Respondents 2 to 6	:	Mukhtiarkar (Revenue) Taluka Larkano, Station House Officer P.S. Market Larkano, Deputy Commissioner Larkano / D.O. (Revenue) Larkano, City Surveyor Larkano and Province of Sindh, through Mr. Akbar Kalhoro, State Counsel.
Date of hearing	:	05.05.2015

J U D G M E N T

NADEEM AKHTAR, J. **–** Through this Civil Revision Application, the applicant has impugned the judgment delivered on 18.04.2011 by the VIIth Additional District Judge Larkana in Civil Appeal No.03/2007, whereby the said appeal filed by respondent No.1 has been allowed as prayed and the judgment delivered on 13.11.2006 and the decree drawn in pursuance thereof on 17.11.2006 in F.C. Suit No.127/1999 by the IInd Senior Civil Judge Larkana dismissing the respondent No.1's said Suit, has been set aside.

2. The main points involved in this Civil Revision Application are whether respondent No.1 could be allowed by the appellate Court to introduce a new document / additional evidence for the first time in his appeal without any application in this behalf ; whether such new document / additional evidence, which was not part of the record, could be considered by the appellate Court without recording any reasons in the impugned judgment ; and, whether the judgment and decree passed by the trial Court after examining and evaluating the evidence produced by the parties could be reversed on the basis of such new document / additional evidence.

3. The relevant facts of the case are that respondent No.1 Ashok Kumar filed the above mentioned Suit for declaration and permanent injunction against the present applicant Rafique Ahmed and official respondents 2 to 6 in respect of immovable property bearing C.S. No.1248, measuring 99.03 sq. yds., situated in Ward-B, Larkana Town ('the suit property'). It was the case of respondent No.1 before the trial Court that the suit property was owned by one Menghraj Mal who

became the owner thereof on 20.01.1948 by virtue of a decree passed by a Civil Court ; one Mai Hawa wife of Yar Muhammad purchased the suit property from the Settlement Department vide P.T.D. No.725 dated 07.07.1969 and mutation in her favour was effected on 22.11.1971 ; the said Mai Hawa transferred the suit property to Momin Khan son of Yar Muhammad and mutation was effected in his name on 22.11.1971 ; thereafter, the suit property was purchased by Ajeet Kumar and Shiri Chand Lal, both sons of Satramdas, from Momin Khan through registered sale deed dated 06.08.1977, and mutation in their favour was effected on 20.05.1984 ; the said purchasers Ajeet Kumar and Shiri Chand Lal had equal shares of 50% each in the suit property ; and, after the death of one of the co-owners, Shiri Chand Lal, his 50% share in the suit property was mutated on 19.01.1992 in favour of his legal heirs Shiri Sawatri Bai and three daughters. Respondent No.1 had claimed that he was the bonafide and lawful owner of the suit property having purchased the same from Ajeet Kumar and Shiri Sawatri Bai through registered sale deed dated 06.02.1992 in consideration of Rs.43,000.00. He had further claimed that mutation in his favour was effected in the record of rights on 01.03.1992, and he was in peaceful possession of the suit property.

4. It was alleged in his Suit by respondent No.1 that the applicant approached him and demanded possession of the suit property by claiming that he was the actual owner thereof ; the applicant also approached the Mukhtiarkar concerned, who called him in his office and directed him to hand over possession of the suit property to the applicant within fifteen days ; the applicant filed false application in this behalf to the SHO concerned, who also called him at the Police Station and issued threats and directions to hand over the suit property to the applicant, failing which he will be dispossessed therefrom ; and, the applicant filed false application also before the Deputy Commissioner concerned who issued threatening notice to him with similar directions. In view of the above averments and allegations, respondent No.1 had prayed for a declaration that he is the lawful and bonafide owner of the suit property and the claim of the applicant in respect thereof was false and fabricated. Consequential relief of injunction was also sought by him praying that the defendants be restrained from issuing notices to him and also from interfering in his possession.

5. In his written statement, the applicant denied the title of respondent No.1 by alleging that the sale deed and mutation in his favour were collusive and forged ; the suit property was purchased by Mai Hawa from Settlement Department in auction after it was declared as an evacuee property and she was the real owner thereof ; mutation entries in favour of Momin Khan were manipulated and forged, which were cancelled by the Deputy Commissioner Larkana vide order dated

23.06.1999 on the applicant's application and the entries in the name of Mai Hawa were ordered to be maintained ; and, all subsequent alleged sales by Momin Khan in favour of Ajeet Kumar and Shiri Chand Lal and then by Ajeet Kumar and Shiri Sawatri Bai in favour of respondent No.1, were illegal and of no effect.

6. In view of divergent pleadings of the parties, nine (9) issues were settled by the trial Court, whereafter evidence was led by respondent No.1 / plaintiff and the applicant / defendant No.1. Respondent No.1 did not come in the witness box and examine his attorney who produced various documents ; whereas, the applicant examined himself and produced several documents, and he also examined other witnesses including the City Surveyor Larkana. After minutely examining and evaluating the evidence led by the parties and considering the submissions made on their behalf, it was held inter alia by the learned trial Court that the transfer documents in favour of Momin Khan were unattested and were not countersigned by the City Survey Officer ; as per Ex.177-B and the City Survey record, no document was found on record that the suit property had been transferred in the name of Momin Khan, original statement from the owner Mai Hawa or voucher were not on record, two entries were made simultaneously on the same day i.e. 22.11.1971 which were bogus and illegal, and no document of gift, sale or transfer was available on record ; it is settled law that mere mutation does not create any title ; Momin Khan was not the owner of the suit property, therefore, its sale by him in favour of Ajeet Kumar and Shiri Chand Lal was void and the superstructure built thereupon was also void ; there was no prayer by respondent No.1 in his original plaint that the order dated 23.06.1999 passed by the Deputy Commissioner Larkana cancelling the mutation in favour of Momin Khan be declared as illegal or without lawful authority ; an application for amendment in the plaint seeking such declaration was filed by respondent No.1 on 10.02.2001 after more than one year from the date of the said order ; under Article 14 of the Limitation Act, 1908, the prescribed period of limitation to challenge the order of a Government functionary was one year ; and, such declaration sought by respondent No.1 after the prescribed period of limitation was thus barred by time. In view of the above findings, the Suit filed by respondent No.1 was dismissed by the learned trial Court with no order as to costs.

7. In the appeal filed before the learned appellate Court, respondent No.1 filed a photo stat copy of statement of Mai Hawa as Annexure 'D'. It may be noted that respondent No.1 did not file any application under Order XLI Rule 27 CPC before the appellate Court seeking permission to produce additional evidence, and additional evidence in the shape of the aforesaid statement was introduced by him for the first time in his appeal. The learned appellate Court not only allowed

respondent No.1 to produce this new document / additional evidence for the first time in appeal, but also considered it and held as follows :

> **"**..... *such statement of Mst. Hawa has been filed by appellant / plaintiff with his appeal at annexure-D which supports the case of appellant / plaintiff that his name was mutated in city survey record on the basis of statement of her mother Mst. Hawa therefore report of city survey officer before D.C. Larkana / respondent / defendant No.4 that no such statement of Mst. Hawa is available on record seems to be false as from perusal of annexure-D it appears that it is photo state (sic) copy of certified true copy of statement issued by city survey officer and if such statement was not available on record as alleged by city survey officer then how it is filed by the appellant / plaintiff with his appeal which also proves that city survey officer filed false report at Ex:177-(b) before D.C. Larkana in collusion with respondent / defendant No.1. .....***"**

8. In order to decide the validity and legality of the additional evidence that was allowed by the learned appellate Court to be produced by respondent No.1 for the first time in his appeal without any application in this behalf and consideration thereof by the learned appellate Court, I have closely examined the law and the principles laid down on this point by the Hon'ble Supreme Courts of Pakistan and Azad Jummu and Kashmir, some of which are discussed here in brief :

A. In *Mad Ajab and others V/S Awal Badshah*, ***1984 SCMR 440***, by referring to the case of *Parshotim Thakur and others V/S Lal Mohar Thakur & others*, ***AIR 1931 Privy Council 143***, it was held by the Larger Bench of the Hon'ble Supreme Court of Pakistan that the provisions of law with regard to additional evidence are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch-up the weak parts of his case and fill up omissions in the Court of appeal ; and, such power ought to be exercised very sparingly.

B. In *Muhammad Siddique V/S Abdul Khaliq and 28 others*, ***PLD 2000 S.C. (AJ&K) 20***, it was held that parties to an appeal are not entitled to adduce any evidence, but the same can be allowed if the Court from whose decree an appeal is preferred had refused to admit the evidence which ought to have been admitted or the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce the judgment or for any other substantial cause which is an exception to the principle that the appellate Court cannot record fresh evidence ; under Rule 27 of Order XLI CPC, additional evidence cannot be recorded unless

provisions of the said Rule are attracted ; the power to allow additional evidence is discretionary in nature, but the same is circumscribed by the limitation specified in the said Rule as evidence under Rule 27(b) of Order XLI is required by the appellate Court itself and not by a party to the appeal ; it may be allowed only when a party was unable to produce evidence through no fault of its own or where evidence was imperfectly taken by the lower Court ; a party that had an opportunity, but elected not to produce evidence cannot be allowed to give evidence that could not have been given in the Court below ; and, the appellate Court can allow additional evidence only if it itself so feels that the judgment cannot be pronounced in the absence thereof.

C. In *Taj Din V/S Jumma and 6 others*, ***PLD 1978 S.C. (AJ&K) 131***, it was held by the Hon'ble Full Bench that provisions of Rule 27 of Order XLI CPC impose strict conditions so as to prevent a litigant from being negligent in producing the evidence at the time of the trial ; a litigant seeking permission to adduce additional evidence at the stage of appeal has to establish that evidence available apart from being of an unimpeachable character is so material that its absence might result in miscarriage of justice and that in spite of reasonable care and due diligence it could not be produced at the time the question was being tried or it has come into existence after completion of the trial ; therefore, where a party who had been negligent in producing evidence at the time the issue was being tried and a lacuna had been left and it is not shown as to how the absence of the proposed evidence would result into failure of justice, a prayer for additional evidence in such circumstances obviously would not be granted.

D. In *Nazir Hussain V/S Muhammad Alam Khan and 3 others*, ***2000 YLR 2629 [S.C. (AJ&K)]***, it was held that provisions contained in Rule 27 of Order XLI CPC would reveal that the appellate Court must be very cautious while allowing additional document ; and, a party which seeks to bring additional evidence on record must convince the Court with proof that such party could not lead the evidence at proper stage due to some substantial cause.

E. In *Abdul Hameed and 14 others V/S Abdul Qayyum and 16 others*, ***1998 SCMR 671***, application for production of additional evidence was dismissed by the lower appellate Court which order was maintained in revision by the learned High Court. It was held by the Hon'ble Supreme Court that the learned High Court was justified in refusing to allow production of additional evidence at the appellate stage specially when no reasonable ground was shown for not producing the same during the trial of the Suit ; and, though

the parties were conscious of the questions involved in the Suit, yet they did not produce the evidence.

F. In *Nazir Ahmed and 3 others V/S Mushtaq Ahmed and another*, ***1988 SCMR 1653***, leave was refused as no explanation was offered as to why the evidence which was sought to be produced in the High Court for the first time was not tendered before the trial Court.

G. In *Mst. Jewan Bibi and 2 others V/S Inayat Masih*, ***1996 SCMR 1430***, it was held that discretion of Court should not be exercised in favour of a person who had remained indolent for years together in the matter of producing oral or documentary evidence before trial Court, and such person should suffer the consequences of his failure.

H. In *Khan Iftikhar Hussain Khan of Mamdot (represented by 6 heirs) V/S Messrs Ghulam Nabi Corporation Ltd., Lahore*, ***PLD 1971 S.C. 550***, it was held by Hon'ble Full Bench of the Supreme Court that discretion under Order XLI Rule 27 CPC should not be exercised in respect of such documents which could be fabricated or manufactured.

I. In *Ejaz Muhammad Khan and others V/S Mst. Sahib Bibi through Shahzad Khan and others*, ***1996 SCMR 598***, it was held that no doubt Order XLI Rule 27 CPC empowers the appellate Court to receive additional evidence in appropriate cases, but in view of lack of vigilance on the part of the petitioners which lasted for years together, it was not a fit case for exercise of powers by the appellate Court in their favour under Rule 27 ibid ; and, possibility of fabrication of the documents sought to be produced by the petitioners as additional evidence or the making of any alteration or interpolation therein, could also not be ruled out completely.

9. Perusal of Rule 27(1) of Order XLI CPC shows that the scope thereof is limited as it contemplates very few circumstances or conditions in which the appellate Court may allow a party in appeal to produce additional oral or documentary evidence. It may be noted that except for Rule 27(1) ibid, there is no other provision for this purpose in the entire Civil Procedure Code, 1908. Such circumstances / conditions are, (a) where the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or (b) where the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or (c) for any other substantial cause. Admittedly, the case of respondent No.1 did not fall under Rule 27(1)(a) as he neither attempted to produce the statement of Mai Hawa before the trial Court nor did the trial Court refuse to admit the same in evidence. That leaves

only Rule 27(1)(b). Thus, it has to be seen whether or not the learned appellate Court while hearing the appeal required any additional documentary or oral evidence to enable it to pronounce judgment ; whether the evidence and material available on record was sufficient or not for the learned appellate Court to pronounce judgment ; and, was there any other substantial cause for allowing respondent No.1 to produce additional evidence in his appeal.

10. Keeping in view the language used in Rule 27 ibid, it may be observed that the first appellate Court could take additional evidence only if after examining the evidence produced by the parties it comes to the conclusion that the same was inherently defective or insufficient, and unless additional evidence was allowed, judgment cannot be pronounced ; and, only such additional evidence can be permitted to be brought on record at the appellate stage which is required by the appellate Court itself for final or conclusive adjudication in the matter, or for any other substantial cause. It follows that additional evidence can be allowed in appeal when on examining the record, as it stands, an inherent lacuna, defect or deficiency is not only apparent, but is also felt by the appellate Court itself. The sole criterion as to whether additional evidence should be allowed or not depends upon the question of whether or not the appellate Court requires the evidence **"***to enable it to pronounce judgment or for any other substantial cause***"**, as to which the appellate Court is the sole judge as the need for additional evidence must be felt by the appellate Court itself. In such an event, the appellate Court may allow additional evidence either on an application by any of the parties or even *suo motu*. However, in any event the appellate Court is duty-bound to record reasons for admitting additional evidence, as recording of such reasons is a mandatory requirement under Rule 27(2) of Order XLI CPC.

11. From the above discussion, it can be safely concluded that the expression **"***to enable it to pronounce judgment***"** means to enable the appellate Court to pronounce a satisfactory and complete judgment ; it certainly does not mean that additional evidence should be admitted in appeal in order to enable the appellate Court to pronounce judgment in favour of a particular party ; and, the provisions of Rule 27 ibid can be legitimately invoked by allowing additional evidence only in cases where it is impossible for the appellate Court to pronounce judgment on the basis of the evidence available on record.

12. Coming back to the present case, respondent No.1 did not come in the witness box himself and instead examined his attorney who produced certain documents. Respondent No.1 had the full opportunity to lead evidence in support of his claim, but he failed to produce the statement of Mai Hawa at the relevant time. Not only this, he also failed before the appellate Court to justify his said

failure. Thus the principles laid down by the Hon'ble Supreme Courts of Pakistan and Azad Jummu and Kashmir in the cases of *Abdul Hameed*, *Nazir Ahmed*, *Mst. Jewan Bibi*, *Muhammad Siddique*, *Taj Din*, *Nazir Hussain*, and *Ejaz Muhammad Khan* (supra) shall apply to the instant case with full force ; namely, a party which seeks to bring additional evidence on record must convince the Court with proof that such party could not lead the evidence at proper stage due to some substantial cause ; when no reasonable ground is shown for not producing the evidence during the trial of the Suit though the parties were conscious of the questions involved in the Suit, such evidence cannot be allowed ; when no explanation is offered why the evidence sought to be produced before the appellate Court for the first time was not tendered before the trial Court, evidence cannot be allowed ; a party that had the opportunity but elected not to produce evidence cannot be allowed to give evidence ; discretion of Court should not be exercised in favour of a person who had remained indolent for years together in the matter of producing oral or documentary evidence before trial Court, and such person should suffer the consequences of his failure ; additional evidence may be allowed only when a party was unable to produce evidence through no fault of its own or where evidence was imperfectly taken by the lower Court ; and, a litigant seeking permission to adduce additional evidence at the stage of appeal has to establish that in spite of reasonable care and due diligence it could not be produced at the time the question was being tried. It is well-settled that in civil law a negligent party has to suffer for its omissions and negligence as because of such omissions and negligence on his part, a valuable right accrues in favour of the opposite party which cannot be taken away lightly.

13. Admittedly, respondent No.1 did not file any application before the appellate Court under Order XLI Rule 27 CPC seeking permission to produce the statement of Mai Hawa. It is also an admitted position that it was not his case before the appellate Court that he had been vigilant and diligent in tracing and producing the said statement at the time when the evidence was being recorded, or he had disclosed valid, cogent, reasonable or justifiable grounds that in spite of all reasonable care and due diligence he could not or was unable to produce the said statement or was prevented from doing so at the time of evidence, or he had attempted to produce the same before the trial Court which was refused by the trial Court, or the evidence was imperfectly taken by the trial Court. In view of the above, the discretion for allowing additional evidence in appeal could not have been exercised by the appellate Court in favour of respondent No.1. It is certainly not the purpose of Order XLI Rule 27 CPC or the intention of the lawmakers to allow a party to produce additional evidence at the appellate stage even if he had remained negligent in producing the same evidence at the time when he had the

legal right and full opportunity to do so. As held in the cases of ***Mad Ajab*** and ***Taj Din*** (supra) by the Hon'ble Larger Bench of the Supreme Court of Pakistan and the Hon'ble Full Bench of the Supreme Court of Azad Jummu and Kashmir, the provisions of law with regard to additional evidence are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch-up the weak parts of his case and fill up omissions in the Court of appeal ; such power ought to be exercised very sparingly ; and, where a party who had been negligent in producing evidence at the time the issue was being tried and a lacuna had been left, a prayer for additional evidence in such circumstances would obviously not be granted.

14. It may be noted that the parties in the instant case had led the evidence in support of their respective cases. The purported statement of Mai Hawa filed by respondent No.1 for the first time in appeal admittedly pertained to the period when the alleged transfer from Mai Hawa to Momin Khan had taken place, and the said purported statement was allegedly in existence when the evidence was recorded. Therefore, the same could have been produced by respondent No.1 at the trial if he had been diligent. Thus, the said purported statement could not be admitted or considered by the appellate Court in order to fill in the lacuna left in the respondent No.1's case. It is apparent from the record that sufficient evidence was available before the learned appellate Court to pronounce judgment by deciding the respondent No.1's appeal effectively one way or the other.

15. Another important aspect of this case is that no reasons whatsoever were recorded in the impugned judgment by the learned appellate Court for considering additional evidence which was a mere photo stat copy of certified copy of the statement of Mai Hawa filed by respondent No.1 with his appeal without any application under Order XLI Rule 27 CPC, and for accepting the contents thereof as true. Moreover, the impugned judgment is also completely silent about any observation or finding that the learned appellate Court itself had felt some deficiency or defect in the evidence due to which it was unable to pronounce judgment. No doubt an appellate Court may allow admission of additional evidence *suo motu*, but not without recording reasons thereof. Rule 27(2) of Order XLI CPC specifically provides that whenever additional evidence is allowed to be produced by an appellate Court, the appellate Court shall record the reasons for its admission. The use of the word **"**shall**"** in Rule 27(2) ibid is significant, which makes the provision thereof mandatory.

16. In *Karim Bakhsh through L.Rs and others V/S Jindwadda Shah and others*, ***2005 SCMR 1518***, it was held by the Hon'ble Supreme Court that when findings of two courts below were at variance, the High Court was justified in appreciating the

evidence to arrive at the conclusion as to which of the decisions was in accord with the evidence on record. In *Abdul Rashid V/S Muhammad Yasin and another*, ***2010 SCMR 1871***, the Hon'ble Supreme Court was pleased to hold that where two courts below, while giving their findings on question of law, had committed material irregularity or acted to read evidence on point which resulted in miscarriage of justice, High Court had the occasion to re-examine the question and to give its findings on that question in exercise of revisional jurisdiction, and High Court was obliged to interfere in the findings recorded by the courts below while exercising power under Section 115 C.P.C.

17. In addition to the above authorities, it is a well-established principle that if the findings of the two courts are at variance, the conflict would be seen to assess the comparative merits of such findings in the light of the facts of the case and reasons in support of two different findings given by two courts on a question of fact ; and, if findings of the appellate court are not supported by evidence on record and the same are found to be without logical reasons or are found arbitrary or capricious, same can be interfered with in Revision. After giving due consideration to the submissions made by the learned counsel for the parties and examining and evaluating the material on record with their able assistance, I am of the considered opinion that the findings of the trial court were in accord with the material on record, and those of the appellate court were not only contrary to the material on record, but also against the well-settled law of admitting additional evidence in appeal. The impugned judgment is contrary to the law laid down by the Superior Courts, and thus, not being sustainable in law, is liable to be set aside.

Foregoing are the reasons of the short order announced by me on 05.05.2015, whereby the impugned judgment was set aside and this Civil Revision Application was allowed. There will be no order as to costs.

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