Order Sheet

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision Application No.111 of 2016

Date	Order with signature of Judge

1. For hearing of CMA No.831/2016
2. <u>For hearing of main case</u> :

<u>16.04.2018</u> :

Mr. Safdar Ali Bhatti, advocate for the applicants.

Mr. Khalid Hussain Korai, State Counsel.

<u>NADEEM AKHTAR, J.</u> – Through this Civil Revision Application, the applicants have impugned order dated 22.10.2016 passed by learned 1st Additional District Judge Khairpur in their Civil Appeal No.78/2011, whereby the application under Order XLI Rule 27 CPC filed by them in their above appeal for production of additional evidence, has been dismissed.

2. Relevant facts of the case are that Civil Suit No.93/1970 was filed by present applicant No.1 Khadim Hussain (who being deceased is now being represented by his legal heirs) and two others viz. Bakhshal and Ghous Bakhshan against Federation of Pakistan, the then Province of West Pakistan and others. The above Suit was dismissed on 31.01.1983, but in appeal it was remanded back to the trial Court by the appellate Court. Thereafter, parties submitted a compromise application before the trial Court, and accordingly the aforesaid Suit was decreed by the learned trial Court on 30.11.1989 in terms of the said compromise. F.C. Suit No.48/2007 was filed by present applicants for declaration and permanent injunction in respect of the same land which was the subject matter of earlier Civil Suit No.93/1970. The plaint of this subsequent Suit was rejected by the learned trial Court for want of jurisdiction. The order of rejection of their plaint was challenged by the applicants by filing Civil Appeal No.78/2011, wherein they also filed an application under Order XLI Rule 27 CPC for production of additional evidence, which was dismissed by the learned appellate Court through the impugned order.

3. Along with their aforesaid application for production of additional evidence before the learned appellate Court, the applicants had filed original certified copies of the plaint and amended plaint of earlier Civil Suit No.93/1970,

compromise application filed therein and the decree drawn in the said Suit in pursuance of the said compromise. It was specifically pleaded in this application by the applicants that production of the above was necessary for the just decision of their appeal as the said documents were in respect of the same property which was the subject matter of their appeal ; above certified copies were obtained by them after filing of the appeal ; the delay in filing the said documents was not deliberate or intentional ; no prejudice will be caused to any of the parties if the same were allowed to be produced ; and, the said documents were certified copies of pleadings and decree of the previous Suit.

4. Perusal of the impugned order shows that the above application was dismissed by the learned appellate Court mainly on the grounds that the requirements of Order XLI Rule 27 CPC were not attracted in the instant case, and since the documents sought to be produced at the appellate stage were not produced before the trial Court, the applicants were trying to improve their case. A bare reading 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 to the 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 Code of Civil Procedure, 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 the applicants did not fall under Rule 27(1)(a) as they neither attempted to produce the documents in question before the learned trial Court nor did the learned trial Court refuse to admit the same in evidence. That leaves only Rule 27(1)(b). Thus, the learned appellate Court ought to have examined whether or not any additional document was required to be produced or any witness was required to be examined to enable it to pronounce judgment ; was the evidence and material available on record sufficient to pronounce judgment ; and, was there any other substantial cause for allowing the applicants to produce additional evidence.

5. 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 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*. Thus, 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. Another important aspect of Order XLI Rule 27 is that additional evidence sought to be adduced must have a direct and important bearing on the main issue in the case. The above views expressed by me are fortified by *Parshotim Thakur and others V/S Lal Mohar Thakur & others*, ***AIR 1931 Privy Council 143***, *Mad Ajab and others V/S Awal Badshah*, ***1984 SCMR 440***, *Muhammad Siddique V/S Abdul Khaliq and 28 others*, ***PLD 2000 SC (AJ&K) 20***, and *Taj Din V/S Jumma and 6 others*, ***PLD 1978 SC (AJ&K) 131***.

6. In view of the legal position discussed above and the law laid down on this subject by the Hon'ble Supreme Court, I am of the view that the learned appellate Court did not consider or examine the main criteria for deciding the applicants' application, that is, whether or not the documents in question / additional evidence was required by the appellate Court **"***to enable it to pronounce judgment or for any other substantial cause***"**. In fact, the impugned order is absolutely silent in this behalf. It appears that the question whether or not additional evidence sought to be produced by the applicants had a direct and important bearing on the main issue in the case, was also not considered by the learned appellate Court as none of the documents mentioned in the applicants' application was discussed with reference to the issues / dispute in appeal, although all the said documents were certified copies of pleadings and decree of the previous Suit which was filed in respect of the same land which was the subject matter in appeal before the learned appellate Court. In the above circumstances, I am afraid the impugned order cannot be allowed to remain in the field.

7. Accordingly, the impugned order is hereby set aside and the matter is remanded to learned appellate Court with direction to decide the application filed by the applicant under Order XLI Rule 27 CPC within thirty (30) days strictly in accordance with law and without being prejudiced with any of the observations made in this order. This Civil Revision Application and listed application are allowed in the above terms with no order as to costs.

J U D G E