Judgment sheet

IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No. 44 of 2013

Present
Mr. Justice Muhammad Jaffer Raza

Mst. Abida Asghar
(since deceased through
her legal heirs)……..……..…… Appellants.

Versus

Laiq Ali
(since deceased through
his legal heirs) & others…….……...…… Respondents.

1. For hearing of CMA Number 7054/2023 (u/s 5 of the Limitation Act 1908)
2. For hearing of CMA Number 7055/2023 (U/O 41 Rule 1 CPC)
3. For hearing of main case.

Mr. Muhammad Mushtaq, Advocate for the Appellant.

Mr. Naeem Suleman, Advocate for Respondent No.1.

Mr. Zayyad Khan Abbasi, Advocate for Respondent No.2 a/w
Ch. Tariq Yousuf Advocate.

Dates of hearing : 20.03.2025 & 07.05.2025.

Dated of accouchement : 06.08.2025

O R D E R

***MUHAMMAD JAFFER RAZA – J*:** Vide order dated 12.09.2023 the Appellant was directed to satisfy the court on the maintainability of the instant Second appeal as the same was filed without the decree and only a certified copy of the Impugned Judgment dated 28.05.2012 was annexed. Thereafter, the applications at serial No.1 and 2 were preferred by the learned counsel for the Appellant and the same shall be adjudicated vide instant order.

2. Prior to recording the submissions of the learned counsels, it is most pertinent to mention that the instant appeal was presented on 06.08.2012 and various office objections were raised. However, it is imperative to highlight that **no** office objection was made in respect of the omission in filing the decree. Thereafter, the matter was fixed for non-prosecution and the learned counsel for

the Appellant was given time to comply with the various office objections, none of which pertained to the omission highlighted above. On 24.02.2015, when the instant appeal was listed for hearing, it was inadvertently noted in the said order that the instant Appeal was directed against the "judgment and decree" dated 28.05.2012. In the same order pre-admission notices were issued to the Respondents.

3. Thereafter, the matter proceeded on several dates up until 12.09.2023, where the record reflects, that for the first time the objection pertaining to the omission of filing the decree was highlighted by the learned counsel for the Respondent. Thereafter, the Appellant was directed to argue on the maintainability of the instant appeal. As noted above, the instant order shall only adjudicate the question of maintainability posed in the above noted order and address the same in adjudicating the CMAs listed herein.

4. Learned counsel for the Appellant has argued that omission to file the decree is bonafide and his client ought not be penalized for the mistake committed his counsel. He further argued that the instant Appeal was filed on 06.08.2012 against the Impugned judgment dated 28.05.2012 for the reason that there was grave urgency in the matter. He has further argued that the instant appeal was presented on the date noted above and no office objection regarding non-filing of the decree was made. Further, he has stated that impliedly such defect was condoned vide order dated 24.02.2015 when this Court issued pre-admission notice to the Respondents whilst noting that the instant appeal has been preferred against the judgment and decree. Thereafter, he has stated that vide order dated 24.05.2018 R&P was called from the Trial Court and even at that stage no objection was raised in this regard by the Respondent. For the first time the said objection was raised on 12.09.2023, after which the learned counsel has submitted that he filed the Impugned decree, along with the applications listed hereinabove. Lastly, he has contended that technicalities should not create hurdles to meet the ends of justice and the appeal is liable to be heard on merits. He relied upon the following judgments in support of his submissions: -

- ***Registrar, Cooperative Department Azad Jammu & Kashmir, Muzaffarabad and 4 others v. Muhammad Maqsood Butt and 8 others***[1]**.**
- ***Mst. Safia Begum v. Taj Din and 2 others***[2]**.**
- ***Haji Jehanzeb v. Khalid Khan and another***[3]**.**
- ***Sher and another v. Bhai Khan and another***[4]**.**
- ***Manzoor Hussain v. Zareeda Bi and 7 others***[5]**.**

5. Conversely, learned counsels for the Respondents have contended that the instant appeal is not maintainable and is liable to be dismissed due to non-compliance of provision of Order XLI Rule 1 CPC. They further argued that the objection regarding filing of the decree is mandatory and in absence of the decree the present appeal is not maintainable, and the same is liable to be dismissed on that ground alone. It is specified that the arguments noted herein are cumulatively encapsulated in the instant paragraph, as arguments made by the counsels appearing for the respective Respondents.

6. I have heard all the learned counsels and have perused the record. More particularly I have perused the office objections and various orders passed by this Court in the instant appeal. It is evident and admitted between the parties that there was an omission in filing of the decree along with the instant appeal. The question before me is whether the omission is fatal to the case of the Appellant. At the outset it will be advantageous to first reproduce Order XLI Rule 1 CPC: -

> *"Form of appeal. What to accompany memorandum.– (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.*
> *[Provided that when two or more cases are tried together and decided by the same judgment, and two or more appeals are filed against the decrees, whether by the same or different appellants, the officer appointed in this behalf may, if satisfied that the questions for decision are analogous in each appeal, dispense with the production of more than one copy of the judgment.]"*

7. It is evident from the bare perusal of the above noted provision that it mandates the filing of judgment and decree for the purposes of filing an appeal.

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[1] 2018 CLC 313
[2] 1993 SCMR 882
[3] PLD 1983 Peshawar 215
[4] 2008 CLC 232
[5] 2013 CLC 1186

What is to be adjudged vide the instant order, is the effect of non-compliance of the noted provision. The Hon'ble Supreme Court, taking into account the diverse views expressed in earlier judgements, in the case of ***Pakistan Railway Employees Housing Society Versus Messrs M.A. Khan & Co.***[6], albeit in marginally different circumstances, held as under: -

> *"12. Indeed, in the plethora of case-law cited by Mr. H.A. Rahmani, the view taken by the various superior Courts is that the requirement of filing of certified true copy of decree with the memo. of appeal is mandatory, and its non-compliance will be fatal to the maintainability of appeal, but on the other hand, in the other set of cases cited by Mr. Rasheed A. Razvi, considering the peculiar facts of each case, a distinction has been made to this rule to save the appeals from technical knockout. Having considered the peculiar facts and circumstances of the present case and the diverse view expressed in the judgments cited by the learned counsel, with reference to import of Order XLI, rule 1, C.P.C., as discussed above, we are of the opinion that though the provisions of Order XLI, rule 1, C.P.C. are mandatory in nature, but for penalizing a party for its non-compliance no rigid/inflexible rule of application can be laid down. Moreso, when the relevant provisions of law itself does not provide any penal consequences for its non-compliance. In the instant case, though the appellant failed to file original certified true copy of the decree along with memo. of appeal presented before this Court on 18-9-1995 within the prescribed period of limitation, but the photostat copy of such decree accompanied with the memo of appeal was accepted by the office without any objection to that effect. Not only this, but this Court while passing order, dated 3-10-1995 on C.M.A. No.748 of 1995 also overlooked this important legal aspect and allowed exemption to the appellant from filing certified true copy of decree, subject to all just exceptions. It is also a matter of record that as soon as the respondent raised objection about non-filing of certified true copy of decree by the appellant in Court, such objection was promptly met by the appellant by placing on record the certified true copy of the decree before the Appellate Court on 12-12-1995. Thus, no element of contumacy can be justly attributed to the appellant for non-filing of certified true copy of decree in the first instance at the time of presentation of appeal."* (Emphasis added)

8. It has already been noted at the outset that the instant appeal was filed without annexing the decree. The learned counsel for the Appellant, in this regard has preferred CMA bearing number 7055/2023, promptly after the omission of filing the decree was first highlighted vide order dated 12.09.2023. Perusal of the record also reflects that the judgment was passed on 28.05.2012 and decree is dated 02.07.2012. The Appellant preferred an application for certified copy of **both** judgment and decree on 02.07.2012, however the record reflects that only copy of the judgment was made available to him. This is further substantiated

[6] 2005 C L C 1969

(after examining the R&P) from the record, as only the judgment dated 28.05.2012 was forwarded to the learned trial court after disposal of the noted appeal.

9. What is relevant however for present purposes, is that immediately after the omission surfaced on 12.09.2023 the learned counsel for the Appellant preferred an application for certified copy of the decree on 14.09.2023 and the same was annexed with the applications under adjudication. It is further pertinent to reiterate that the office in the instant appeal failed to raise any office objection and this court vide orders mentioned above issued notices to the Respondents inadvertently noting that the instant appeal was filed against the Impugned Judgment and decree. It can safely be held that no valuable rights in this regard have accrued in favour of the Respondents as they have been contesting the instant appeal and it is only in the year 2023 when the objection regarding the noted omission was raised by them.

10. A similar question, in identical facts, came before a learned single judge of this court in the case of ***Muhammad Shafi versus Sirajuddin***[7] wherein it was held as under: -

> *"The failure of the trial Court to supply certified copy of the decree on 29-1-1975 as well as the failure of the office of the District Court to examine the defect in the presentation of the appeal at the initial stage have contributed substantially to the present unfortunate position. In such a case there can be no doubt that the litigant deserves to be protected against the default committed or negligence shown by the Court or its officers in the discharge of their duties."* (Emphasis added)

11. Further in the case of ***Baseer Ahmed Siddiqui Versus Shama Afroze***[8] a learned single judge of this court condoned the omission of filing a decree and held as under: -

> *"10. The upshot of the whole discussion is that in this case there has been a substantial compliance of Order XLI, rule 1, C.P.C. Although no decree-sheet was filed alongwith the memo of appeal, the same was furnished with a little delay subsequently and was very much before the Court at the time of hearing of the appeal. The reason advanced for not filing the decree-sheet alongwith the memo of appeal is that the decree was not drawn up and was not signed at the time when the copy of the judgment was supplied to the appellant on his urgent motion application, dated 27-12-1977. The appeal was heard and admitted to regular*

[7] 1985 CLC 1788
[8] 1985 CLC 1711

hearing. The record was summoned and was received by the appellate Court on 9-1-1978 with a properly drawn and duly signed decree."(Emphasis added)

12. The Hon'ble Supreme Court recently in the case of ***Faqir Muhammad versus Khursheed Bibi and others***[9], in specific reference to Order XLI, elucidated upon the duty of the court and its staff members, in the following words: -

"7. According to Order XLI, Rule 1 of the Code of Civil Procedure, 1908 ("C.P.C."), every appeal is required to be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf, along with a copy of the decree appealed from. It is also a requirement of law that the memorandum of appeal should set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and such grounds shall be numbered consecutively. Under Rule 3 of Order XLI, C.P.C., it is envisaged that where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court, or be amended then and there; and where the Court rejects any memorandum, it shall record the reason for such rejection and if the memorandum of appeal is amended, the judge, or such officer as he appoints in this behalf, shall sign or initial the amendment. Under Rule 9 of the same Order, it is further provided that where a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

8. A survey of the aforesaid provisions cited from the C.P.C. emphasizes the onerous duty of the Court, including the Officer of the Appellate Court or any staff member of the Court (clerk of court/chief ministerial officer) who has been authorized and assigned the task to accept the presentation of the memo of appeal before admission and diligently examine the memo of appeal, and judgment and decree, including all supporting documents, to ensure that everything is in order, and, if there is any doubt in the mind of the concerned Court clerk/official with regard to jurisdiction, they should raise the objection(s) and bring it to the attention of the Court to resolve it; and if the Court concludes at the time of admission that the appeal has been filed at the wrong forum, whether due to a lack of territorial or pecuniary jurisdiction, or some other ancillary or incidental reasons, the memo of appeal should be promptly returned to the appellant to elect the right remedy and forum to avoid rendering the decision of the Court coram non judice at the end of the day.

9. In the application moved under section 5 of the Limitation Act, 1908 ("Limitation Act"), the petitioner highlighted all the circumstances and events necessitating the condonation of delay in good faith and clearly pleaded that the proceedings continued without any objection and on 17.05.2011 the learned Appellate Court realized that it lacked the requisite pecuniary jurisdiction. It was further averred that the petitioner had not filed the

[9] 2024 SCMR 107. A similar view was earlier elucidated by the Hon'ble Supreme Court in the case of Muhammad Hanif and others versus Muhammad and others reported at P L D 1990 Supreme Court 859 and by the Lahore High Court in the case of Akbar Khan versus Muhammad Sharif reported at 1993 MLD 2288.

> *appeals in the wrong forum deliberately, rather the original valuation of the suit was fixed at Rs.200/-, and neither the Court pointed out any defect of jurisdiction, nor did the other side raise any objection. Despite furnishing a reasonable explanation to justify the delay, the learned High Court dismissed the application without adverting to the bona fide of the petitioner to prosecute the appeals diligently. So far as the defect of choosing or opting for the wrong forum to present the appeals is concerned, the circumstances reveal that the petitioner was not solely responsible, rather it was due to the inadvertence of the Court staff that the question of pecuniary jurisdiction was not highlighted at the very initial stage in order to cure the defect within the period of limitation allowed for filing the appeals. Without a doubt, it is the responsibility of the appellant and, more importantly, of their counsel, being a legal expert, to oversee and ensure after due diligence that the appeal is being preferred before the right forum without any deficiency or oversight of jurisdiction and advise the client accordingly, but at the same time, it is also the bilateral and collaborative responsibility of the concerned Court staff not to sit as a silent spectator, but to also examine the memo of appeal diligently and conscientiously at the time of its first presentation in the Court (i.e. before the stage of admission) and raise objections immediately in writing, if any, with regard to jurisdiction and then invite the attention of the Court so that if the Court, after a preliminary hearing of the advocate or appellant, deems it fit to return the memo of appeal for presentation before the competent Court, the exercise should be done immediately rather than devastating or wrecking the residual period of limitation to approach the right forum which had virtually expired or lapsed. In this regard, wherever and whenever needed, the proper training of the Court's staff is also indispensable, being a cardinal limb of the doctrine of safe administration of justice. Sometimes, due to trivial errors or omissions on the part of Court staff, serious prejudice may be caused to the litigants, which is also a violation of the doctrine of due process and opposed to the right of fair trial enshrined under Article 10A of the Constitution of the Islamic Republic of Pakistan, 1973. Moreover, it is also a well settled elucidation of law that an inadvertent error or lapse on the part of Court may be reviewed in view of the renowned legal maxim "actus curiae neminem gravabit", recognized by both local and foreign jurisdictions which articulates that no man should suffer because of the fault of the Court or that an act of the Court shall prejudice no one. This maxim is rooted in the notion of justice and is a benchmark for the administration of law and justice to ensure that justice has been done with strict adherence to the law and for undoing the wrong so that no injury should be caused by any act or omission of the Court. The proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it is essential to comply with them on grounds of public policy [Ref: Imtiaz Ahmad v. Ghulam Ali and others (PLD 1963 SC 382)].*(Emphasis added)

13. After examining and perusing judgements from our jurisdiction, I shifted my focus to other jurisdictions, particular India, to access how the such omissions have been dealt with. In this regard, in almost identical facts, I came across a

judgement of the Supreme Court of India in the case of ***Jagat Dhish Bhargava Vs. Jawahar Lal Bhargava and Ors.***[10] wherein it was held as under: -

> *"14. Let us then consider the technical point raised by the appellant challenging the validity or the propriety of the order under appeal. The argument is that O. 41, r. 1 is mandatory, and as soon as it is shown that an appeal has been filed with a memorandum of appeal accompanied only with a certified copy of the judgment the appeal must be dismissed as being incompetent, the relevant provisions of O. 41 with regard to the filing of the decree being of a mandatory character. It would be difficult toaccede to the proposition thus advanced in a broad and general form. If at the time when the appeal is preferred a decree has already been drawn up by the trial Court and the appellant has not applied for it in time it would be a clear case where the appeal would be incompetent and a penalty of dismissal would be justified. The position would, however, be substantially different if at the time when the appeal is presented before the appellate Court a decree in fact had not been drawn up by the trial Court; in such a case if an application has been made by the appellant for a certified copy of the decree, then all that can be said against the appeal preferred by him is that the appeal is premature since a decree has not been drawn up, and it is the decree against which an appeal lies. In such a case, if the office of the High Court examines the appeal carefully and discovers the defect the appeal may be returned to the appellant for presentation with the certified copy of the decree after it is obtained. In the case like the present, if the appeal has passed through the stage of admission through oversight of the office, then the only fair and rational course to adopt would be to adjourn the hearing of the appeal with a direction that the appellant should produce the certified copy of the decree as soon as it is supplied to him. In such a case it would be open to the High Court, and we apprehend it would be its duty, to direct the subordinate Court to draw up the decree forthwith without any delay. On the other hand, if a decree has been drawn up and an application for its certified copy has been made by the appellant after the decree was drawn up, the office of the appellate Court should return the appeal to the appellant as defective, and when the decree is filed by him the question of limitation may be examined on the merits. It is obvious that the complications in the present case have arisen as a result of two factors; the failure of the trial Court to drawn up the decree as required by the Code, and the failure of the office in the High Court to notice the defect and to take appropriate action at the initial stage before the appeal was placed for admission under O. 41, r. 11. It would thus be clear that no hard and fast rule of general applicability can be laid down for dealing with appeals defectively filed under O. 41, r. 1. Appropriate orders will have to be passed having regard to the circumstances of each case, but the most important step to take in casesof defective presentation of appeals is that they should be carefully scrutinized at the initial stage soon after they are filed and the appellant required to remedy the defects. Therefore, in our opinion, the appellant is not justified in challenging the propriety or the validity of the order passed by the High Court because in the circumstances to which we have already adverted the said order is obviously fair and just. The High Courtrealised that it would be very unfair to penalise the party for the mistake committed bythe trial Court and its own office, and so it has given time to the respondents to apply for a certified copy of the decree and then proceed with the appeal."*

[10] Civil Appeal No. 222 of 1960

14. It is evident from the perusal of the record that the noted omission cannot solely be attributed to the Appellant. It was the duty of the respective office to ensure that the decree was made available to the Appellant, and thereafter it was the obligation of the office to whom the instant appeal was presented, to ensure that the same was filed in accordance with provisions of Order XLI. It is held that the litigant cannot be penalized for this collective oversight of the learned counsel and the office of this court. I am not inclined to take a rigid and hyper technical view in this regard, particularly because no element of contumacy can be attributed to the Appellant, given his promptness after the omission surfaced. Any adjudication otherwise, will only give effect to the form and not the substance, which would inevitably result in defeating substantial rights. Moreover, it is a settled principle of law, that technicalities should not come in the way of substantial justice. Whilst I was attempting to articulate and expand on the noted principle, I came across the judgment in the case of ***Imtiaz Ahmed versus Ghulam Ali***[11] where the said principle was very aptly captured by Fazle Haq J. (as he then was) (with Cornelius J. agreeing), in the following words: -

> *"I must confess that having dealt with technicalities for more than forty years, out of which thirty years are at the Bar, I do not feel much impressed with them. I think the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy. The English system of administration of justice on which our own is based may be to certain extent technical but we are not to take from that system its defects. Any system, which by giving effect to the form and not to the substance defeats substantive rights, is defective to that extent. The ideal must always be a system that gives every person what is his."*(Emphasis added)

15. In light of what has been held above it is clear that the Appellant has satisfactorily explained the delay in filing of the Impugned Decree and has shown "sufficient cause" within the meaning of Section 5 of the Limitation Act 1908. Consequently, CMA No. 7055/2023 is allowed as prayed. Further, CMA No. 7054/2023 is granted and the delay in filing of certified copy of the decree is condoned.

J U D G E

Nadeem Qureshi "PA"

[11] P L D 1963 Supreme Court 382