SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Ch. Muhammad Ibrahim Zia, J.
Raja Saeed Akram Khan, J.

Civil Appeal No.362 of 2015
(PLA filed on 4.5.2015)

1. Zahid Hussain, deceased, s/o Mohammad Afzal Khan, caste Khakha, r/o Moziz Tilpatra Chanalbang, Tehsil and District Muzaffarabad, represented by:-
   (i) Safeeda Bibi, widow,
   (ii) Shahid Hussain,
   (iii) Sajid Hussain,
   (iv) Saqib Hussain,
   (v) Shehlla Bibi,
   (vi) Shamila Bibi, d/o Zahid Hussain.

....APPELLANTS

VERSUS

1. Sain s/o Rehman, caste Kumhar,
2. Saifullah Khan, deceased,
3. Ali Afsar Khan s/o Said Akbar Khan,
4. Ali Haider s/o Ali Bahadar,
5. Mst. Afsro Bibi, daughter of Ali Bahadar, wife of Rifaqat Hussain, represented by:-
   (i) Farnaz Bibi,
   (ii) Reenaz Bibi,
   (iii) Sohail Ahmed,
   (iv) Rohail Ahmed,
6. Mst. Sakeena Begum widow of Ali Bahader Khan, caste Khakha Rajpoot, r/o respondent No. 1 to 4 &

6 village Tilpatra Chanalbang & respondent No. 5 village Therian, Tehsil and District Muzaffarabad.

7. Revenue Department through its Representative, Muzaffarabad.

….RESPONDENTS

(On appeal from the judgment of the High Court dated 17.3.2015 in revision petition No.74 of 2013)

FOR THE APPELLANTS: Mr. Sajid Hussain Abbasi, Advocate.

FOR THE RESPONDENTS: Raja Shujat Ali Khan, Advocate.

Date of hearing: 6.12.2016.

JUDGMENT:

Raja Saeed Akram Khan, J.— The above titled appeal by leave of the Court has been directed against the judgment passed by the High Court on 17.3.2015, whereby the revision petition filed by Zahid Hussain, (deceased), predecessor of appellant, has been dismissed.

2. The facts relevant for the disposal of the appeal are that Zahid Hussain, (deceased), appellant, filed a revision petition in the High Court against the order passed by the Additional

District Judge, Muzaffarabad on 15.1.2013, through which the application filed for brining on record the additional evidence was dismissed. After necessary proceedings, a learned single Judge in the High Court vide impugned judgment dated 17.3.2015 dismissed the revision petition, hence, this appeal by leave of the Court.

3. Mr. Sajid Hussain Abbasi, Advocate, the learned counsel for the appellants, argued that the judgment passed by the High Court is based on misreading and non-reading of evidence which is not sustainable in the eye of law. The learned High Court failed to adhere to the law laid down the by this Court in a number of pronouncements while passing the impugned judgment. He submitted that the learned High Court while delivering the impugned judgment has wrongly interpreted section 115, C.P.C. and has not considered the fact that section 115,

C.P.C. is mandatory in nature and once the record has been summoned by the Court, the filing of mandatory documents under the said provision of law is construed to be exempted. The learned counsel further submitted that they have moved an application in the Court of Additional District Judge, Muzaffarabad under Order XLI, Rule 27, C.P.C., for production of additional evidence, which was necessary to resolve the real controversy between the parties but the Courts below failed to appreciate the matter in a legal manner. The Courts below have not taken into consideration the contents of the application for producing the additional evidence while handing down the impugned judgment. He has relied upon the case reported as *Riasat Ali vs. Muhammad Jaffar Khan & 2 others* [1991 SCMR 496].

4. On the other hand, Raja Shujat Khan, Advocate, the learned counsel for the

respondents, strongly controverted the arguments addressed by the learned counsel for the appellants, while submitting that there are concurrent findings recorded by both the Courts below which do not require any indulgence by this Court as there is no misreading or non-reading of evidence. He argued that the learned High Court has rightly observed that the appellants have not fulfilled the requirement of section 115, C.P.C., therefore, the revision petition before the High Court is not competent. The learned counsel contended that it was incumbent upon the appellants to file the certified copies of the plaint, written statement and other necessary documents along with memo of revision but they failed to comply with the statutory provisions. He has relied upon the judgment reported as *Mustafa Kamal & others vs. Daud Khan and others* [2009 SCMR 221].

5. We have heard the arguments advanced by both the learned counsel for the parties and also perused the record made available along with the impugned judgment. Before attending the other issues involved in the appeal, we intend to examine the application filed by the appellants under Order XLI, Rule 27, C.P.C., for recording the additional evidence. The operative part of the application reads as under:—

"درخواست بمراد لینے ایڈیشنل شہادت

جناب عالی۔ موجبات درخواست گزارش پذیل ہیں۔

نمبر 1 یہ کہ اپیل عنوان الصدر زیر سماعت عدالت گرامی ہے جس میں امروز تاریخ پیشی مقرر ہے۔

نمبر 2 یہ کہ ابتدائی حکم کے ساتھ جرگہ کے بہت سارے فیصلہ جات جنہیں فریقین نے تسلیم کر رکھا ہے کی فوٹوسٹیٹ کاپیاں شامل حکم ہیں لیکن اس پر کوئی شہادت پیش نہ ہو سکی۔ مقدمہ میں انصاف کے تقاضے پورے کرنے کے لئے ان دستاویزات کی تائید میں شہادت قلمبند کرنا ضروری ہے تا کہ صحیح انصاف ہو سکے۔

لہذا بنائے بالا استدعا ہے کہ بمنظوری درخواست ابتدائی حکم کے ساتھ شامل دستاویزات فیصلہ جات جرگہ جس کی کاپیاں شامل ہیں اور اپیل کے ساتھ بھی شامل کی گئی ہیں ان کی تائید میں ایڈیشنل شہادت قلمبند فرمائی جائے۔"

After going through the above said application, it appears that the plaintiff-appellants want to record the additional evidence for corroboration of the decisions of '*Jirga*'. The contents of the

application show that no sufficient cause has been shown for producing the additional evidence at appellate stage. It appears that the application has been filed just to fill up the lacuna which is not permitted under law. It may be observed here that under order XLI, Rule 27, C.P.C., the sufficient cause and reason must be shown for production of additional evidence at appellate stage as laid down by this Court in a case reported as *Muhammad Sadiq vs. Allah Ditta & 6 others* [2014 SCR 789] that:—

> "6. According to admitted facts, the suit remained pending for almost 7 year's period before the trial Court. The appellant submitted no application for production of additional evidence, therefore, in the light of statutory provision of Order XLI, Rule 27, of C.P.C., there must be sufficient cause and reason for production of additional evidence at appellate stage. The examination of the contents of application referred to hereinabove

clearly speaks that no reason or justification has been advanced by the appellant in this regard by the available documentary evidence has not been produced at this stage of proceedings of recording evidence of the parties.....”

In another case reported as *Salat & 15 others vs. Wadi Hussain & 3 others* [2014 SCR 1097], it has been held as under:—

“6. .....A perusal of the provisions makes it clear that additional evidence can be allowed by the appellate Court; (a) if the trial Court from whose decree an appeal has been filed, refused to admit the evidence which ought to have been admitted and; (b) the appellate Court itself requires that it is not possible to pronounce the judgment without bringing on record any document or witness to examine or the Court may allow the additional evidence on any other sufficient cause. The additional evidence cannot be allowed only to fill up the lacunas in the case of

> a party but to enable the Court to pronounce the correct judgment which cannot be pronounced without bringing on record the document required to be brought on record by a party.....”

6. It may be observed here that Order XLI, Rule 27, C.P.C. is very much clear that the additional evidence can be allowed if the Court considers that the same is required to reach the just decision of the case. The main factor involved for producing the additional evidence is the satisfaction of the Court. It cannot be allowed in routine just to fill-up the lacunas or cover-up the weaknesses of a party as laid down in a case reported as *Muhammad Siddique vs. Abdul Khaliq and 28 others* [PLD 2000 SC (AJ&K) 20] in which it has been observed as under:—

> “6. The parties to an appeal are not entitled to adduce any additional evidence but the same can be allowed if the Court from whose decree an appeal

> is preferred, has (i) refused to admit the evidence which ought to have been admitted or (ii) 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 under Order XLI, rule 27, C.P.C. which is an exception to the principle that the Appellate Court cannot record fresh evidence. Therefore, under the aforesaid rule, the additional evidence cannot be recorded unless the provisions of the aforesaid rule are attracted. ....."

Similar view prevailed in the case titled *Zarait Ullah Khan vs. Fazal Ahmed and 29 others* [PLD 2004 SC (AJ&K) 35], in which it was held as under:—

> "8. A perusal of the aforesaid provisions of law reveals that the appeal is a re-hearing as such Appellate Court does not ordinarily record fresh evidence. However, the Appellate Court is empowered under this rule which is an

exception to the principle provided the provisions of rule are attracted. In accordance with rule 27 referred to above, the additional evidence can be allowed only where; (i) the trial Court has improperly refused to admit the evidence which ought to have been admitted or (ii) the Appellate Court requires such document or witness and cannot pronounce judgment without such additional evidence, or (iii) the Appellate Court requires such evidence for any other substantial cause. The additional evidence cannot be allowed in order to allow the parties to patch up the weaker parts of its case or fill up omissions or to enable it to raise new point. The party to the appeal may move the Court for additional evidence but it can only be allowed if it is required by the Appellate Court itself on the basis of its own appreciation of the evidence already on record. This clause is attracted if some inherent lacuna or defects become apparent. The test is whether the Appellate Courts can pronounce judgment satisfactorily

without taking into consideration the evidence sought to be produced. .....”

7. It may also be observed here that the additional evidence cannot be recorded unless the provisions of Order XLI, Rule 27, C.P.C. are attracted. The additional evidence can be allowed only where; (i) the trial Court has improperly refused to admit the evidence which ought to have been admitted or (ii) the Appellate Court requires such document or witness and cannot pronounce judgment without such additional evidence, or (iii) the Appellate Court requires such evidence for any other substantial cause, whereas, no such eventuality is available in the case in hand. The argument of the learned counsel for the appellants that the photocopies of the decisions of *‘Jirga’* were attached with the plaint and in support of the same they want to produce the additional evidence. The learned Additional District Judge, Muzaffarabad dismissed the application filed

under Order XLI, Rule 27, C.P.C. on the ground that the appellants have not attached the alleged documents with the plaint. We have also minutely examined the record of the trial Court but no such decisions of *'Jirga'* are appended with the same. Although, some photocopies of the decisions of *'Jirga'* are appended with the file of the Additional District Judge, Muzaffarabad but the appellants failed to furnish any reason in the application for production of additional evidence as to why the same was not produced before the trial Court.

8. Another argument of the learned counsel for the appellants was that the learned High Court under section 115, C.P.C., is empowered to call for the record, thus, once the High Court has called for the record, the revision petition should have been decided on merits. It may be stated that section 115, C.P.C. provides that where a person makes an application under

this section, he shall furnish the copies of the pleadings, documents and the order of the subordinate Court. The appellants failed to produce the certified copies of the pleadings before the trial Court as well as the first appellate Court. Neither the learned High Court has summoned the file of the trial Court nor the certified copies of any such document have been appended with the revision petition filed before the learned High Court. The argument of the learned counsel for the appellants that the learned High Court while passing the impugned judgment has not appreciated the provisions of section 115, C.P.C. in a legal manner has also no substance. The learned High Court thoroughly dealt with the point in paragraphs 5 & 6 of the impugned judgment, while holding that the revision petition is not maintainable on the point of non-compliance of provisions of section 115, C.P.C., therefore, we also agree

with the finding recorded by the learned High Court.

9. The learned High Court has intelligently dealt with the issue regarding the production of additional evidence in paragraph 9 of the impugned judgment while assigning cogent reasons. We fully endorse the findings recorded by the High Court while observing that the application filed by the appellants for recording the additional evidence in support of the decisions of the *'Jirga',* does not come within the purview of Order XLI, Rule 27, C.P.C. The case law referred to and relied upon by the learned counsel for the appellants having distinguishable facts and features, has no nexus with the case in hand.

Resultantly, this appeal having no force is hereby dismissed with no order as to costs.

Muzaffarabad.
__.2.2017 **JUDGE** **JUDGE**

Date of announcement: 17.2.2017