

ORDER SHEET

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

W.P.No.57166/2019

Mst. Hajra Bibi (deceased)
through her legal heirs

VS.

Bashir Ahmad (deceased)
through his legal heirs etc.

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signatures of Judge, and that of parties or counsel, where necessary
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25.01.2023

Mr. Shahanshah Shamil Paracha and Mian Ali Asghar, Advocates for the petitioners.
Mr. Saleem Iqbal Awan, Advocate for respondents.

The purpose of placing this matter before us is to search out the point that whether instant petition is maintainable or the petitioner should have filed civil revision. To solve this proposition, we have summarized the controversy into a question, which is as under:

Whether the judgment passed by the first appellate court deciding objections to the award under Section 30/33 of the Arbitration Act, 1940 would be challenged by an aggrieved person before this Court either through revision petition under Section 115 C.P.C or constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973?

The history resulting in formulation of the aforementioned question is that the titled writ petition came up for hearing before a learned Single Bench on 02.10.2019 who, being of the opinion that civil revision under Section 115 C.P.C. is maintainable in instant matter, questioned the learned counsel for the petitioners regarding

maintainability of the instant constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 against the judgment passed by the learned Additional District Judge while exercising appellate jurisdiction. The learned counsel answered that he initially filed civil revision against the impugned order but due to an objection raised by the office that civil revision was not maintainable, he amended his case and filed constitutional petition.

2. After hearing the submission of the learned counsel, the learned Single Bench summoned the concerned official from office who stated that in the light of judgment rendered by a learned Singh Bench cited as Muhammad Nawaz vs. Mian Khan, etc. (PLJ 2019 Lahore 249) office is entertaining only constitutional petition in such like matters.

3. Upon sprouting of the aforesaid fact, the learned Single Bench, dealing with the instant constitutional petition, observed that the view taken in Muhammad Nawaz's case (supra) is contrary to the view taken in a case cited as Noor Alam through L.Rs. and another vs. Muhammad Bashir and another (2015 CLC 1675), thus, he referred the matter to the Hon'ble Chief Justice for placing the matter before a Division Bench so as to settle this issue conclusively. Accordingly, the case was proceeded and now the matter is before us to answer the afore-quoted question.

4. Before answering the question, it is necessary to give precise facts of the case. The

respondents filed an application under Sections 30 & 33 of The Arbitration Act, 1940 for cancellation of agreements for appointment of arbitrators & arbitration decisions which was accepted by learned Civil Judge, Bhalwal vide order dated 06.04.2018. Against the said decision, the petitioners filed an appeal under Section 39 of the Act *ibid* which was dismissed by the learned Additional District Judge, through judgment dated 19.08.2019. The petitioners have assailed the aforesaid orders through this writ petition.

5. We have heard the arguments of learned counsels for the parties on the aforesaid question of law and have gone through the record with their able assistance.

6. Under Section 39 of the Arbitration Act, 1940 the remedy of appeal is provided against orders but no second appeal is provided. For reference, aforesaid Section is reproduced as under:

“39. Appealable orders.—(1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order:—

An order—

- (i) superseding an arbitration;
- (ii) on an award stated in the form of a special cases;
- (iii) modifying or correcting an award;
- (iv) filing or refusing to file an arbitration agreement;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
- (vi) setting aside or refusing to set aside an award:

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this Section shall affect or take away any right to appeal to the Supreme Court.”

As there is no direct provision available in the Act *ibid* regarding availability of remedy of revision petition under Section 115 C.P.C, as such we have to look up to the precedents of the Hon'ble Supreme Court of Pakistan, which is the ultimate expositor of law. We are privileged to seek guidance from a Samiullah's case¹ wherein the Hon'ble Supreme Court of Pakistan has held that the revision petition is competent under Section 115 C.P.C. in arbitration proceedings. It would be of great help in the context of the matter to reproduce the relevant extract of the judgment (*supra*) as under:

“Mr. N. A. Faruqi, the learned counsel for the petitioner, has urged two points in support of the petition. In the first place, the learned counsel has contended that the High Court has no jurisdiction under Section 115, C. P. C. to interfere with the order of the Additional District Judge on the ground that it was an erroneous one. Secondly, he contended that the Arbitrator has given an incomplete award and, therefore, the learned Additional District Judge was justified in setting aside the award. None of contentions raised by the leaned counsel has any force. It is quite clear from the facts of the present case that no relief was claimed by respondent No.1 against respondent No.2. In view of this the Arbitrator was perfectly justified in dismissing the claim of respondent No.1 against respondent No.2. By doing so, he has not committed any illegality or been guilty of any mis-conduct. The learned Additional District, Judge, therefore, was not justified in setting aside the award on the ground that no relief was granted against respondent No.2. By doing so he has committed an illegality and, therefore, the High Court was quite competent to set aside the order of the Additional District Judge under section 115, C. P. C.”

(emphasis supplied)

¹ *Samiullah Vs. Mst. Zubeda Khatoon and anther* (1971 SCMR 615)

The Hon'ble Apex Court of the country reiterated the aforesaid view in Rahim Jan's case² by holding as under:

“7... it is expedient to note that statutory right in terms of sections 17 and 39 of the Act, 1940 is available to an aggrieved person to institute appeal and if appeal is not competent then the parameters of section 115 would be applicable, which envisages that revision would be competent if no appeal lies. It is pertinent to mention here that section 115 does not say that if appeal is not competent under the Code, only then revision would be competent, as such conclusion would be that if the Code of Civil Procedure is applicable or has been made applicable on the proceedings then the order passed by any Court, subordinate to the High Court can be challenged in the revision.”

The August Supreme Court of Pakistan in Messrs Tribal Friends Co.'s case³ has also held that where no remedy of appeal is provided in the Arbitration Law and the court has exceeded jurisdiction or acted without jurisdiction or committed irregularity in conduct of proceedings or passed an order in violation of natural justice which cannot be assailed under Act *ibid*, then High Court may exercise its jurisdiction under Section 115 C.P.C on an application of the party or suo motu. For ready reference, the relevant portion of the judgment (*supra*) is reproduced as under:

“8....The applicability of section 115 of C.P.C. has not been completely excluded. In cases where remedy has been provided by appeal within the framework of the Arbitration Act revision application will not lie but in cases where these provisions do not apply the revisional jurisdiction of the High Court under section 115, C.P.C. can be invoked. Where in cases no appeal is provided and the Court has exceeded jurisdiction, acted

² *Rahim Jan Vs. Mrs. Z. Ikram Gardezi and others* (PLD 2004 SC 752)

³ *Messrs Tribal Friends Co. Vs. Province of Balochistan* (2002 SCMR 1903)

without jurisdiction, committed material irregularity in the conduct of proceedings, passed order in violation of principles of natural justice and the same cannot be assailed under the provisions of the Arbitration Act and the High Court may exercise its supervisory jurisdiction under Section 115, C.P.C. on an application made by any party or suo motu.”

The aforementioned case law was followed by the learned Single Bench while authoring *Noor Alam's* case.

5. On the other hand, perusal of *Muhammad Nawaz's* case shows that the learned Single Bench has held therein that after exhausting the remedy under Section 39 of the Act *ibid*, remedy of second appeal is prohibited and thus, on the same analogy the remedy of civil revision under Section 115 C.P.C. is also not available. The operative part of the judgment (*supra*) is as under:-

4.I am further of the view that even a revision petition against the judgment passed by the learned Additional District Judge is not competent is provided under the statute. If no power of revision is provided under the statute i.e. Arbitration Act, 1940, same forum is not available against the appellate judgment rendered in accordance with Section 39 of the Arbitration Act, 1940. In this eventuality, at the most the orders impugned through this second appeal could have been challenged through a constitution petition if the same are without jurisdiction....”

6. The Arbitration Act, 1940 is a special statute having limited application relating to matters governed by the said Act. The revisional jurisdiction of the High Court under the C.P.C or under any other statute therefore shall not stand superseded under the Act *ibid* and if the Act does not contain

any express bar against exercise of revisional power by the high Court provided exercise of such revisional power does not militate against giving effect to the provision of the Act *ibid*. There is no express provision in the Arbitration Act putting an embargo against filing a revisional application against appellate order under Section 39 of the Act. The Arbitration Act has put an embargo on filing any second appeal from appellate order under Section 39 of the Act. It may be stated that even if a special statute expressly attaches finality to an appellate order passed under that statute, such provision of finality will not take away revisional powers of the High Court under Section 115 of C.P.C. There is also no such express provision in the Arbitration Act attaching finality to the appellate order under Section 39 of the said Act. As already indicated, only bar under sub-section (2) of Section 39 is of a second appeal from an appellate order under Section 39 of the Act *ibid*.

7. In the light of the aforesaid discussion, we are of the considered view that the judgment passed by the learned appellate Court deciding objections to the Award under Section 30 & 33 of the Act *ibid* can be challenged through a revision petition under Section 115 C.P.C.

8. The legal question has since been answered, therefore, this constitutional petition is converted into civil revision, which will now come up for hearing before a Single Bench for its decision on

merits. Office is directed to fix the case before a Single Bench on 23.02.2022 after fulfilling the codal formalities.

(Muzamil Akhtar Shabir) (Ch. Muhammad Iqbal)
Judge Judge

Approved for reporting.

Abdul Hafeez

Judge