FORM No. HCJD/C-121

ORDER SHEET

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

C.R. No.1169 of 2013

Sui Northern Gas Pipelines Limited **Versus** Fazal Hussain (deceased) through L.Rs

Sr. No. of order/ proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties of counsel, where necessary

12.11.2024 Mr. Umar Sharif, Advocate for petitioner.
Respondents ex parte.

This judgment will decide civil revision wherein the judgments and decree of the courts below dismissing the suit for recovery filed by the petitioner and also the appeal thereagainst have been challenged.

2. Petitioner instituted a suit against Fazal Hussain, now deceased and represented by respondents, claiming that he was a consumer of the petitioner utility company; that there was some error in calculation of bills; that on detection of the error suit amount was concluded to be due against the respondent which he was required to pay and on failure to discharge it gas supply was disconnected; and that recovery of amount was due as short-payment against running bills for the gas supplied. The suit was contested by the legal heirs of respondent who denied their responsibility by asserting that all the payments, as claimed by the department, had been fully discharged and that they could not be held liable for any miscalculation, if made, by the meter-reader or other staff of petitioner. Issues were framed and evidence was recorded. The suit was dismissed by the learned Civil Judge vide judgment and decree dated 27.1.2012 which was affirmed in appeal vide

judgment dated 31.10.2013 by learned Addl. District Judge, Wazirabad.

3. Learned counsel submitted that the impugned judgments were untenable as the courts below overlooked the oral as well as documentary evidence, in particular, the Gas Sales Contract (Ex.P-5) and that the evidence produced by the petitioner including the consumption data supported the case of the petitioner which was unjustifiably dismissed and that the judgment of the appellate court did not satisfy the requirements of law. Respondents were proceeded against ex parte vide Order dated 16.10.2023.

4. Perusal of the judgments of the courts below reveals that the points raised in appeal are well- founded. The case set up in the plaint was that a sum of Rs.4,15,986/- was recoverable from the respondents as short payment against gas consumed which was on account of a mistake on the part of meter-reader had been incorrectly recorded resulting in under-billing and that on detection necessary inquiry was made and ultimately it was found that the amount claimed in the suit was payable as short-payment against the actual dues for gas consumed in terms of the contract. Petitioner produced oral and documentary evidence including statements of Ghulam Sarwar as PW-1, Muhammad Anwar as PW-2 and Muhammad Sharif as PW-3 and documents Ex.P-1 to Ex.P-9. In defence respondent produced one Waheed Hussain as DW-1 and did not produce any other oral or documentary evidence. The findings recorded by the learned Civil Judge were to the

effect that on account of any fault on the part of meter-reader the respondent could not be held responsible and that no show cause notice or hearing was given to the consumer and that no proceedings were conducted by the department against the meter-reader nor any inquiry was held, therefore, respondent could not be made responsible for the claimed amount. These findings were assailed on a number of grounds viz. that the findings on issue No. 5 were baseless; that evidence was not considered properly by the trial court; that under the Gas Supply Contract consumer was bound to pay the dues as determined by the company/department; that the suit itself was a notice; that documentary evidence proving the under-billing was illegally ignored; and that it was a case of no rebuttal; and that any mistake in the process of calculation of gas-charges could not extinguish the liability of the consumer to pay the dues against the actual supply at the contractually agreed rate.

5. Scrutiny of the judgment of the appellate court shows that the entire evidence was ignored, the questions raised in appeal were completely bypassed and the appeal was dismissed with observation that there was no allegation of meter tampering or gas theft and that the fault was of the meter-reader for which the consumer could not be held responsible. Neither the Gas Sales Contract (Ex.P-5) was considered nor were the documents adduced given any consideration and appeal was decided in oblivion of entire oral and documentary evidence on record. As such and on due

consideration there is substance in the submission of learned counsel for the petitioner that the appellate court did not follow the provisions of law and decided the appeal without considering the oral and documentary evidence or the material questions of law that arose in the case. Question necessitating analysis included as to whether the department could under the contract recover the amount claimed; what were the agreed terms and conditions of the contract; whether the respondent/consumer could avoid the responsibility to pay the amount; whether the evidence produced by the petitioner factually established short-billing; and whether any mistake in recording the billing charges incorrectly could exonerate the consumer to avoid liability on detection of under-billing. For the purpose Gas Sales Contract (Ex.P-5) was material document. Relevant part of sub-clause (ii) of clause 15 whereof is as under:

> "(i)…
> (ii)… Any mistake in the bills or incorrect billing shall not entitle the consumer to withhold payment of the bills in time. Provided however, if the Company finds any mistakes in the bill sent to the Consumer, then irrespective of the fact whether payment has been made or not, the **Company shall, upon having discovered the mistake at any time, be entitled to send a correct bill and the consumer shall be liable to pay the same**."
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> (emphasis supplied)

Record shows that the petitioner produced Ghulam Sarwar, Superintendent-Billing as PW-1 who produced the bill as Ex.P-1 and deposed that he had prepared the said bill. Muhammad Anwar, Meter-Reader/Inspector as PW-2 deposed in respect of the circumstances in which the under-

billing took place and the mistake was detected. Muhammad Sharif, Deputy Foreman (PW-3) appeared as PW-3 in support of the case of department. He deposed about the procedure for charging the gas-bills. Documents Ex.P-1 to Ex.P-8 were tendered in evidence which included the final bill as Ex.P-4, Notices as Ex.P-6, Ex.P-7 and Ex.P-8 and Ex.P-9 as the computerized final bill. The learned Addl. District Judge did not consider the evidence on record to determine the questions raised supra instead casually observed that it was the fault of meter-reader who could be held responsible and that demand from the consumer was not legally justified. The judgment recorded without considering the evidence cannot be approved as it violates the provision of Rule 31 of Order XLI, C.P.C. which contemplates that the appellate court shall deliver the judgment in writing and shall state points for determination, the decision thereof and the reasons for the decision. The appellate court in first appeal is duty-bound to consider the case de novo for reaching a conclusion. In Nasir Abbas v. Manzoor Haider Shah (**PLD 1989 SC 568**) it was observed as under:

> "11. The submission of the learned counsel for the appellants is correct that except nothing the submissions of the learned counsel for the parties and referring to the certain pieces of evidence which have been mentioned hereinbefore the first appellate Court has not considered the entire evidence which was referred to and discussed by the trial court in its judgment. Nowhere the first appellate Court has referred to or discussed the evidence of Khan Zaman (D.W.3) which has been mentioned above and the evidence of Khalid Mahmud Malik fully. It is settled that if the

> evidence on the record has not been fully weighed and considered, that does not fulfil the requirements of O. 41, R 31, and is liable to be set aside on revision. See Mathra Dass and others v. Muharram Din and others (AIR 1915 Lah. 242). 1 It is also settled that if the lower Court, misreads the evidence on record and fails to take notice of a vital fact appearing therein, comes to an erroneous conclusion, it would be deemed to have acted with material irregularity and its decision is open to revision by the High Court."

In Gul Rehman v. Gul Nawaz Khan (**2009 SCMR 589**) it was observed that:

> '8. Regarding duties of the Appellate Court, specially the first Appellate Court, learned Narayan, J, in paragraph 22 of judgment in the case of Sailajananda Pandey and another (supra) has clearly stated that "it has been repeatedly pointed out that the legislature has entrusted a very important duty to the first appellate Court. It is for that Court to decide finally all questions of fact on which the disposal of the suit might depend and the appellate Court should not easily agree with the trial Court simply because it was not inclined to take much trouble over the case. If the lower Appellate Court does not examine the facts and the evidence for itself and does not even mention the points which the case raises, it will be certainly failing in its duty" . In the instant case, a bare perusal of the judgment of the first appellate Court clearly reflects that it has not given due attention to the available evidence on record. Three important statements of witnesses i.e. Doulat Khan P.W.2, Gul Nawaz Khan plaintiff, P.W.3 and his son Muhammad Nisar P.W.4 are available on record and the appellate Court should have thrashed statements of these three important witnesses and then should have come to a definite conclusion. The judgment of the appellate Court in hand is not a judgment on its true sense and it is even admitted by the High Court that the first appellant court has followed the path least resistant. The appellant court should have applied Order XLI, rule 31, C.P.C. in stricto senso as it has got ample powers under Order XLI, rules 32 and 33, C.P.C. For convenience sake rule 33 of Order XLI is reproduced below:-

> "33- **Power of Court of appeal**:- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection:
>
> **Provided** that the Appellate Court shall not make any order under section 35-A in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order"
>
> We are convinced that the first appellate Court, which is ultimate Court of facts, has not done its legal duty.'

6. Reference can also be made to the case of Mst. Sarwar Bano through Attorney v. Province Of Sindh through Member Board of Revenue, Hyderabad and 5 others (**PLD 2015 Sindh 445**) where it was observed to the effect that the appellate court having not discussed the evidence brought on record, the judgment of appellate court would not qualify the meaning of "judgment". In Abdul Hameed and 7 others v. Abdul Razzaq and 3 others (**PLD 2008 Lah. 1**) it was observed to the effect that the judgment of appellate court shall be error free, concise, consistent, coherent and comprehensible irrespective of the stylistic differences and that the principles, parameters and requirements of a judgment are that judgment should contain a concise statement of case, points for determination, decision thereon and reasons for such decision manifesting application of mind to resolve the issue involved which ought to be self-contained, unambiguous, easily intelligible, lucid,

open only to one interpretation and thus leaving nothing to guesswork or probabilities on matters under determination and should also be self-speaking, well-reasoned and analytical reflecting due consideration of facts, law and contentions of the parties founded on legal grounds and the evidence on record. Reference can also be made to the case of Gul Muhammad v. Kiamuddin (**2012 YLR 218**) where it was observed as follows:

> "8. The statutory right of appeal confers the right of rehearing the whole dispute unless expressly restricted in its scope and the appellate court, is not confined to the reasons which have been given by the subordinate court or the grounds for its decision. The right of appeal is a substantive and vested right and not as a matter of mere procedure. According to Order XLI, rule 31, C.P.C. it is mandatory that judgment passed by the appellate court shall state the points for determination, the decision thereon, the reasons for the decision and where the decree appealed from is reversed or varied, the relief to which the appellant is entitled. This rule makes it apparent that for just and proper decision, the appellate court should state the points for determination and apply its independent judicial mind to the controversy involved between the parties and also examine the record for the purposes of pronouncing its judgment. The phrase "points for determination" refers to all important questions involved in the case, therefore, this rule has been incorporated in the Code for framing the points for determination so that the judgment should be self-explanatory, illuminative and in the nature of a speaking order.
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> 9. Every finding of fact is not immune from interference in revisional jurisdiction when the Courts below commit jurisdictional illegality and this concept of jurisdictional illegality has been considered by the honourable Supreme Court in the case of Kanwal Nain PLD 1983 SC 53 and held that to cover cases where decision on facts is based on no evidence or inadmissible evidence or is so perverse that grave injustice would result, revisional jurisdiction is justified when the findings

> are based on conjectural presumptions, erroneous assumptions of facts and wrong proposition of law and where unreasonable view on evidence has been taken . In 2010 SCMR 786, Brig. (R) Sher Afghan .vs. Mst. Sheeren Tahira and others, it was held that by now a well-settled principle of exercise of revisional jurisdiction under section 115 CPC is that if a finding of first Court of Appeal is based on no evidence or is arbitrary and fallacious, the Revisional Court is not denuded of its power to interfere with such a finding. This view was reiterated in Naziran Begum.vs. Khurshid Begum 1999 SCMR 1171 wherein it was held a finding on a question of fact arrived at by the First Appellate Court which is based on no evidence or is the result of conjectures or fallacious appraisal of evidence on record is not immune from scrutiny by the High Court in exercise of its power under section 100 or 115 C.P.C. In 2008 SCMR 1454 (Nabi Bakhsh.vs. Fazal Hussain), it was held that no exception could be taken to the exercise of revisional powers and setting aside of the findings of the lower courts even if they be concurrent if it had found that the said findings were based on misreading or non- reading of the material available on record. Similarly, in 2007 SCMR 838 (Ch. Muhammad Shafi. vs. Shamim Khanum) it was held that First Appellate Court has a right to reverse the finding/conclusions of the trial court while exercising power under section 96 of the C.P.C. subject to the condition that First Appellate Court has to meet the reasoning of the trial Court in the first instance and thereafter reappraise the evidence on record while reversing the finding of the trial Court as law laid down by this court in Madan Gopal's case PLD 1969 SC 617. The High Court has wide power to reverse the finding of the First Appellate Court while exercising power under section 115 C.P.C. having supervisory jurisdiction."

In Punjab Industrial Development Board v. United Sugar Mills Limited (**2007 SCMR 1394**) it was observed to the effect that it is duty of the appellate court to decide the controversy between the parties after application of independent judicial mind and that mere reproduction of the judgment of trial court and thereafter dismissing the appeal

could not be in consonance with the law and that after the insertion of section 24-A in the General Clauses Act, 1894, even the public functionaries are duty bound to decide the applications of citizens while exercising statutory powers with reasons after judicial application of mind.

7. On the touchstone of rule supra, it is manifest that in the instant case the court below did not take the trouble of looking into the evidence and thereafter recording findings by giving reasons for the conclusions drawn. It was ignored that mere mistake of the departmental representative in process of calculation of bill could not be a ground to exonerate the consumer from paying the actual dues for consumption of gas and that the liability was to be regulated by terms agreed in the contract. The material questions inter alia required to be determined were as to whether the department could prove any short payment or under-billing and that whether the subsequent bills were factually correct and whether the supporting evidence could establish the actual dues as claimed in the plaint by the petitioner and it was only after attending to these questions that the matter could be decided by appellate court one way or the other. The learned Addl. District Judge did not deem it necessary to look into the evidence and thereafter determine controversy, rather, hypothetical assumptions were relied upon in disposal of the appeal which does not have any support of law.

8. For the reasons supra, the revision petition is accepted, the judgment dated 31.10.2013 of the appellate court is set aside and the matter is

remanded to the appellate court for decision afresh by considering the points raised for determination, the evidence on the file and recording the reasons by attending to the questions raised supra in this judgment, in accordance with law.

(RASAAL HASAN SYED)
JUDGE

ANNOUNCED IN OPEN COURT ***29.11.2024***.

JUDGE

APPROVED FOR REPORTING

JUDGE

Rabbani