HCJDA-38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

R. F. A. No. 92515 of 2017

Shahid Hussain

versus

Abdul Jabbar Tassaduq

JUDGMENT

Date of hearing	08-10-2024
Appellant by:	Rana Maqbool Hussain, learned Advocate.
Respondent by:	Mr. Summair Jabbar, Mr. Bilal Ahmad and Mr. Anser Jabbar, learned Advocates.

Sultan Tanvir Ahmad, J:– The present Regular First Appeal is directed against judgment and decree dated 18.01.2017 passed by the learned Additional District Judge Sialkot, whereby, the suit of the appellant filed under Order XXXVII of the Code of Civil Procedure, 1908 (the '***Code***') has been dismissed.

2. Brief facts of the case are that the appellant filed suit No. 19 of 2016 dated 12.07.2006 (the '***suit***') on the basis of promissory note dated 22.11.2003 (the '***promissory note***') seeking to recover Rs.500,000/- from the respondent. The leave was granted to the respondent to contest the *suit,* vide order dated

28.04.2007. Thereafter, issues were framed on 06.06.2007 which followed the process of producing evidence. Learned trial Court decreed the *suit* vide judgment and decree dated 14.12.2009. The same was assailed in regular first appeal No. 31 of 2010. On 05.10.2015 this Court remanded the case and then the following issues were framed by the learned trial Court:-

1. *Whether the defendant obtained a loan of Rs.500,000/- from the plaintiff and executed promissory note dated 22.11.2003 in favour of the plaintiff? OPP*
2. *If the above issue is proved, then whether the plaintiff is entitled to recover Rs.500,000/- from the defendant as prayed for? OPP*
3. *Whether the suit of the plaintiff is false and baseless, therefore, defendant is entitled to recover compensatory cost U/S 35-A of CPC? OPD*
4. *Relief.*

3. The appellant availed several opportunities to produce evidence but upon his failure to do the needful his right to produce evidence was closed. On 18.01.2017 the learned trial Court proceeded to dismiss the *suit*. Being aggrieved from the same, the present appeal has been instituted.

4. Rana Maqbool Hussain, learned counsel for the appellant, has submitted that it was incumbent upon the learned trial Court to discuss the evidence led by the parties prior to the order of remand; that if the same is considered, the result could be different. He further submitted that the learned trial Court has acted in haste while closing the right of the appellant and he relied upon case titled "*Hasham Khan and others*

versus Haroon ur Rashid and others"[1].

5. Mr. Summair Jabbar, learned counsel for the respondent has vehemently opposed the appeal and in course of his arguments he relied upon several judgments including in the cases *Duniya Gul*[2], *Moon Enterprises CNG Station*[3], *Rana Tanveer Khan*[4], *Syed Tahir Hussain Mehmoodi*[5], *Atta Elahi*[6] and *Abdul Ghaffar*[7].

6. Heard.

7. The following two questions have emerged from the arguments of the learned counsel for the parties:-

(i) *If the learned trial Court fell to error while not discussing or considering the evidence adduced by the parties prior to the order of remand dated 05.10.2015? and*

(ii) *Whether the learned trial Court has failed to consider the facts of the case by applying correct law?*

8. It is well settled principle that on remand the learned Court trying the *suit* has to regulate the proceedings or proceed with the case in terms of order of remand passed by the higher Court as settled in *Jameel Ahmed*[8] case. Attempt to sidetrack issue or decision in a manner, not directed by Higher Court, can

---

[1] (**2022 SCMR 1793**)
[2] "Duniya Gul and another versus Niaz Muhammad and others" (**PLD 2024 Supreme Court 672**)
[3] "Moon Enterprises CNG Station, Rawalpindi versus Sui Northern Gas Pipelines Limited through General Manager, Rawalpindi and another"(**2020 SCMR 300**)
[4] "Rana Tanveer Khan versus Naseer-ud-Din and others" (**2015 SCMR 1401**)
[5] "Syed Tahir Hussain Mehmoodi and others versus Agha Syed Liaqat Ali and others" (**2014 SCMR 637**)
[6] "Atta Elahi versus Allah Bachaya and others" (**2024 CLC 29**)
[7] "Abdul Ghaffar versus Hafiz Atta ur Rehman and another" (**2022 YLR 2174**)
[8] "Jameel Ahmed versus Saifuddin" (**PLD 1994 Supreme Court 501**)

result into defiance of remand order[9]. In order to correctly appreciate the argument as to the first question reproduced above, it is now appropriate to reproduce the relevant part of order of remand passed in R.F.A. No. 31 of 2010. Paragraph Nos. 3 and 4 reads as under:-

> *"3. In view of the above, the impugned judgment dated 14.12.2009 in Civil Appeal No. 06 of 2006 titled Shahid Hussain versus Abdul Jabbar Tassadaq passed by learned Additional District Judge, Sialkot is set aside. The matter is remanded back to the learned trial Court i.e. learned District Judge, Sialkot where the parties, who are being represented through their learned counsel, will appear on 19.10.2015 and the learned District Judge, after requisitioning the record, either himself hear the matter or entrust it to some other court of competent jurisdiction to try the suit afresh after putting the onus of proving execution and signing of promissory note on the plaintiff of the suit and also after referring the matter to the finger expert as also hand writing expert in order to verify signatures / thumb impressions of the defendant shown to have been put on promissory note with his admitted thumb marks and signatures.*
>
> *4. The suit was filed in the year 2006 and it would be appreciated if after 19.10.2015, the first date of hearing of the parties in post remand proceedings before the learned District Judge, the matter will be finally concluded within next six months…"*
>
> (Underlining is added)

9. A reading of above order reflects that the learned trial Court is ordered to try the *suit* after placing

[9] "Masood Rahim and 7 others versus Abdul Majeed and 9 others" (**2009 MLD 106**)

onus of proving of execution and signing of the *promissory note* by the respondent and also to refer the matter to verify the signatures / thumb impressions on the *promissory note*. Para No. 4 of the above order reveals that post remand proceedings were directed to be completed within stipulated time. It is not the case that the learned trial Court was directed to merely frame the "issue" or "issues" and then return the findings to this Court. There is no direction in the order of remand to return matter after recording the evidence. The case visibly is not covered under Order XLI Rule 25 of the *Code*. This Court remanded the matter as a whole which falls within the scope of Order XLI Rule 23 of the *Code*, which provides *…order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand*.

10. Perusal of Order XLI Rule 23 of the *Code* does not reflect if the legislature has envisaged to discard the pre-remand evidence altogether. It says the evidence recorded during the trial shall be the evidence after remand, which is subject to all just exceptions. The case has to be re-admitted by the learned trial Court on the number allocated to it originally in the register. A similar question was considered by the Supreme Court of India in *United Bank of India*[10] case and in paragraph No. 16 of the judgment it was observed that

[10] "United Bank of India, Calcutta versus Abhijit Tea Co. Pvt. Ltd. and others" (**AIR 2000 Supreme Court 2957**)

any evidence if already recorded would be evidence in remanded suit. The said paragraph reads as under:-

> *"16. But, it is now well settled that an order of remand by the appellate Court to the trial Court which had disposed of the t suit revives the suit in full except as to matters, if any decided finally by the appellate H Court. Once the suit is revived, it must, in the eye of the law, be deemed to be pending from the beginning when it was instituted. The judgment disposing of the suit passed by the single Judge which is set aside gets effaced altogether and the continuity of the suit in the trial Court is restored, as a matter of law.* ***The suit cannot be treated as one freshly instituted on the date of the remand order. Otherwise serious questions as to limitation would arise. In fact, if any evidence was recorded before its earlier disposal, it would be evidence in the remanded suit*** *and if any interlocutory orders were passed earlier, they would revive. In the case of a remand, it is as if the suit was never disposed of (subject to any adjudication which has become final, in the appellate judgment). The position could have been different if the appeal was disposed of once and for all and the suit was not remanded."*
>
> (Emphasis Supplied)

A contention of the learned counsel who sought to challenge the *vires* of a judgment on the point that the same is based on evidence recorded prior to remand order was repelled by this Court in *Noor and other*[11] case.

11. The matter essentially is one of interpretation of the order of remand and in my reading of this order the learned Judge deciding appeal No. 31 of 2010 has never intended that pre-remand evidence should be discarded in totality rather order was passed to place the

[11] "Noor and others versus Mst. Sattan through Legal Representatives and others" (**PLD 2013 Lahore 30**)

onus on plaintiff and with the direction to take assistance of expert. Upon receipt of the same the learned Judge who received the file correctly perceived the order of remand when after framing the issues, by placing the burden on appellant as ordered by this Court, the parties were directed to get recorded the additional evidence. This order dated 06.01.2016 reads as under:-

> *"...No other issue sought. Now to come up for recording additional evidence of the plaintiff, if any, on 11.01.2016..."*

However, the learned Judge passing the final judgment has not considered the pre-remand evidence.

12. Now coming to another aspect of the argument regarding closing the evidence of the plaintiff. In this regard learned counsel for the appellant relied on *Hasham Khan and others* case (*supra*) and stated that even in case of failure of party to comply with order to produce evidence, the Court can ask the failing party to record its statement and then to proceed with the matter. There is no dispute as to this settled law but the record reflects that while closing right to produce evidence or invoking penal provision of Order XVII Rule 3 of the *Code* no violation of settled law has taken place. Reading of record as well as the judgment assailed before this Court reflects that plaintiff was directed to record his statement but he remained reluctant and attempted to seek an adjournment. This fact is recorded in the impugned judgment in the following words:-

> *"...Plaintiff was directed to record his own statement but he was reluctant. By such right*

of plaintiff to adduce evidence was closed U/O XVII Rule 3 of CPC..."

The reference made by the learned counsel for the appellant to *Hasham Khan and others* case (*supra*), therefore, is misplaced.

13. Rana Maqbool Hussain, learned counsel for the appellant then sought an order of remand. I am not inclined to do the same. The entire evidence and the material is before this Court and keeping in view the fact that the *promissory note* pertains to the year 2003 and the *suit* was instituted eighteen years ago, another order of remand will serve no purpose but adding to the agony of the litigants. Since I am of the opinion that right to produce evidence was rightly closed, therefore, I would like to give my findings, keeping in view the language of the order of remand and the law already settled and discussed above that the learned trial Court was supposed to stay within the scope of order of remand.

14. In pursuance to the order of remand the matter was referred to Finger Print Bureau, Punjab for comparison of thumb impressions, which reaches to the conclusion that impression marked on the *promissory note* is dim and is not enough to permit the comparison. Thereafter, vide order dated 13.01.2016 the case was sent to the Punjab Forensic Science Agency, Home Department, Government of the Punjab, after accepting the objections of the plaintiff for ascertaining expert evidence as to the signatures of the plaintiff. The report dated 23.09.2016 is part of the record, which has the following conclusion:-

"...After careful examination and comparison of original Questioned Signatures of Abdul Jabbar Tasaduq on Original Questioned Promissory Note dated 22-11-2003 (item no. 03) with routine signature of Abdul Jabbar Tasaduq on photocopy of CNIC (item no. 04) and with original dictated signature exemplars of Abdul Jabbar Tasaduq (item no. 05 & 06), ***it is concluded that Questioned Signatures on original Questioned Promissory Note dated 22-11-2003 (item no. 03) are not done by Abdul Jabbar Tasaduq. Hence, Abdul Jabbar Tasaduq is not the author of original Questioned Signatures on Original Questioned Promissory Note dated 22-11-2003*** *(item no. 03)..."*

(Emphasis Supplied)

15. After receipt of the report adjournment was sought on 05.10.2016. The case was then fixed for 13.10.2016 when the evidence of the appellant was not present. On 28.10.2016 the Court found that the evidence of the appellant once again is not present and another adjournment was given with the clear warning that no further opportunity will be granted. Same remained the position on 10.11.2016. This continued for some dates of hearing and then the case was fixed on 05.01.2017 when another warning was given. On 07.01.2017 the case was adjourned because the learned counsel for the appellant was on general adjournment. The warning was repeated and the case was then fixed for 18.01.2017 when the following order was passed:-

"18.01.2017
Present: Plaintiff present in person.
Counsel for defendant present.
Plaintiff seeks adjournment.

This is suit for recovery under Order XXXVII CPC.

This suit was instituted on 12.07.2006. Earlier it was dismissed by the

> *predecessor of this court vide judgment dated 14.12.2009. However, the Honourable High court vide judgment dated 05.10.2015, remanded the case for its decision afresh after putting the onus of proving execution and signing of promissory note on the plaintiff. Thereafter the learned predecessor of this court re-casted the issues on 06.01.2016 and directed the appellant to adduce evidence. Since then the file is coming up for evidence of plaintiff. Plaintiff was given last opportunity for 10.11.2016, then for 7.01.2017 and lastly for today i.e 18.01.2017. Today plaintiff has no evidence.* ***He was directed to record his own statement but he is reluctant to have adjournment****. Since warning of last opportunity has already been given any further indulgence will amount to abuse of process of court. Accordingly right of plaintiff to adduce is hereby closed U/O 17 Rule 3 CPC and through separate judgment, suit is dismissed....”*

16. In pursuance to the order of remand expert evidence was sought which went against the interest of the plaintiff. It looks that after knowing the same the plaintiff started adopting delaying tactics. The respondent categorically denied execution of the *promissory note*; his thumb impression or signing the same. This remained his stance in his written statement as well as examination-in-chief when he appeared as DW-1. He deposed in his examination-in-chief that false suit has been filed because in some other case he was appointed as referee against the interest of the appellant. The question was put to him as to why he has not lodged any criminal proceeding against the appellant which was convincingly answered by deposing that he gained knowledge of fake *promissory note* at belated stage. He denied the suggestion that he has given his thumb impressions or signatures on the

promissory note.

17. The scope of remand was to place the burden on the appellant (plaintiff) to prove the execution of the *promissory note* and soliciting the expert evidence. I have gone through the entire pre-remand evidence as well as the post remand record and I have reached to the firm opinion that the appellant has failed to discharge the burden.

18. The remand order was passed giving six months' time to complete the process of post remand proceedings. The appellant (plaintiff) delayed the matter for about fifteen (15) months, thus, neither any leniency can be shown nor appellant remained able to prove his case. This appeal is, therefore, dismissed with costs of Rs.25,000/- (Rupees twenty-five thousand only).

(Sultan Tanvir Ahmad)
Judge

Announced in open Court on 22.10.2024.

Approved for reporting

*Iqbal**

Judge