

Order Sheet
IN THE LAHORE HIGH COURT
Bahawalpur Bench, Bahawalpur
Judicial Department

W.P. No. 9272 of 2021/BWP

Amjad Amin Lodhi.

Vs.

Addl. District Judge, etc.

<i>Sr. No. of order/ proceedings</i>	<i>Date of order/ Proceeding</i>	<i>Order with signature of Judge, and that of Parties' counsel, where necessary</i>
13.12.2023.		Malik Imtiaz Mahmood Awan, Advocate for petitioner. Malik Muhammad Khalid Dwanj, Advocate for respondent No. 3.

Malik Imtiaz Mahmood Awan, Advocate for petitioner.
Malik Muhammad Khalid Dwanj, Advocate for respondent No. 3.

Through the instant constitutional petition,

the petitioner challenges the impugned judgment and decree dated 22.09.2021 passed by learned Addl. District Judge, Bahawalpur, whereby appeal filed by the petitioner challenging the decree passed in favour of the respondent No. 3 (***'respondent'***) in a family suit has been dismissed.

2. The grievance of the petitioner is that application for permission for production of additional evidence filed by the petitioner, reply of which was submitted by the respondent on 20.05.2019 remained un-decided while passing the impugned judgment and decree.

3. Learned counsel for the respondent has defended the impugned judgment and decree by stating that even if it is assumed that the witness to be summoned in the witness box shall support the petitioner's claim and his evidence shall not be

different from the petitioner, the result of the case would not be any different, hence, pendency of the said application could not effect the merits of the case and prays that the matter may be decided on its own merit in accordance with law on the basis of available evidence by assuming that evidence of said witnesses had been recorded in favour of the petitioner.

4. Heard. Record perused.

5. The contention of the learned counsel for respondent that it may be assumed that the witnesses required to be produced by the petitioner would support the petitioner's claim in verbatim and treat their evidence in his support as having been recorded without their evidence being formally recorded is not based on any provision of law and such an assumption or presumption cannot be drawn by this Court as the same may be prejudicial to the rights of either of the parties and even otherwise adoption of such procedure is not permissible under the law. Moreover, despite the fact that the Family Court can adopt any procedure which is not against the procedure prescribed by Family Court Act, 1964, by treating the same as permissible, this Court cannot assume that the said application had either been allowed or declined by the appellate court or that the witnesses if permitted to be

produced in additional evidence would definitely support the claim of the petitioner in verbatim. Besides, this Court can only proceed in the matter by observing the principle of practice that a thing must be done in the manner permitted by law to be done and not otherwise. Hence, this Court is not inclined to proceed with the matter on the basis of such misconceived assumption/presumption of treating the evidence as recorded despite the fact that application for seeking permission for additional evidence was still undecided.

6. Even otherwise, where an application that can affect the merits of the case is left undecided, the same causes prejudice to the rights of the parties and in that eventuality the court cannot assume that such application was dismissed by the Court before which the same was pending for the reason that such presumption would cause serious prejudice to the rights of either of the parties especially the applicant and final judgment, if any passed, without decision of such like application is not sustainable and the courts in such like eventuality have time and again set-aside the judgments and remanded the matter for fresh decision after deciding the pending applications.

Reliance in this regard is placed on **2008 SCMR 1326**
(Abdul Ghafoor and another versus Mst. Hassan Bibi

and others), 2008 SCMR 1259 (Mst. Imtiaz Begum versus Mst. Sultan Jan and others), NLR 2005 Criminal 178 (SC) (The State through Deputy Prosecutor General, NAB versus Tariq Mohsin and others), 2019 CLD 181 (DB). (Shahid Saleem versus Bank Alfalah Limited) and 2016 CLD 1741 (Lahore) (Iyaz-ul-Haq Chaudhry versus NIB Bank Limited through Authorized Attorney and 4 others).

7. In furtherance of what has been discussed above, it is settled by now that application for permission to allow additional evidence goes to the very root of the matter especially when in the present case learned counsel for the petitioner states that the learned appellate court while dismissing his appeal had observed that the petitioner had not led any evidence and in this circumstance, it could be not assumed that the appellate court while neglecting to decide the application for permission to record additional evidence had properly exercised its jurisdiction. Besides pendency of an undecided application for permission to record additional evidence was enough to set aside the impugned judgment of the appellate court for the reason that the court had failed to exercise jurisdiction vested in it and same had caused prejudice to the petitioner. Reliance in this regard is placed on

principles laid down in case reported as **2015 CLC 54**

(Sindh) (*Mst. Asia Begum and 2 others vs. Muhammad Alam and 3 others*).

8. In view thereof, without commenting upon the other merits of the case, the impugned judgment and decree dated 22.09.2021 passed by the learned appellate court is set-aside with the result that the appeal filed by the petitioner shall be deemed to be pending before the appellate court, which after affording opportunity of hearing to the parties shall decide the application for production of additional evidence on its own merits and also the pending appeal, expeditiously, preferably within next two month. With this observation, the instant constitutional petition is

disposed of.

**(Muzamil Akhtar Shabir)
Judge**

Zeeshan Khan

APPROVED FOR REPORTING

Judge