Judgment Sheet

In The Lahore High Court, Lahore
Judicial Department

Criminal Revision No.23556/2022

Zaheer Ahmed **vs** Judge, Special Court, etc.

J U D G M E N T

Date of hearing	**31.01.2023**
Petitioner by	M/s Abid Mehmood Sandhu and M. Usman Hanif Qureshi, Advocates.
State by	Ms. Amera Salam, Assistant Attorney General.
Respondents No.2 to 5 by	Nemo {Although name of learned counsel for respondents No.2 to 5 reflects in the Daily Cause List issued for today as apprised by Addl. Registrar (Court)}.
Respondent No.6 by	Mr. Sarmad Ali Khan, Advocate *vice* learned counsel.
Respondent No.7 by	Ch. Sohail Khursheed, Advocate.

FAROOQ HAIDER, J.:- Through instant revision petition, Zaheer Ahmed (present petitioner/complainant) has challenged the *vires* of order dated: 06.04.2022 passed by learned Judge Special Court (OIB-II), Lahore, whereby application filed by present petitioner for having comparison of signatures of his deceased father namely Ch. Muhammad Rafique, was dismissed.

2. Necessary facts for disposal of instant revision petition are that (Zaheer Ahmad (present petitioner) filed complaint under Section: 5 of Offences in respect of Banks (Special Court) Ordinance, 1984 with the allegation that father of present petitioner/complainant namely Ch. Muhammad Rafique died on 17.09.2020, who in his life time maintained two bank accounts i.e. *first* Account No.0020-00888361-0001, First Women Bank, Gujranwala Branch and second Account No.PK36HBB 0006827900918503, Habib Bank Ltd. G.T. Road Branch, Gujranwala; before death of father of the complainant, his age was more than 80-years, he was an ailing person, unable to move/walk himself and even his hand was fractured, hence, he was also unable to sign any document; after death of his father, petitioner/complainant approached respondents No.6 and 7 (both bank officials) for provision of statements of accounts of his deceased father but they were reluctant to provide the same and in this regard, he also filed a suit for

providing statements of accounts and ultimately when statements of accounts were provided to the petitioner, then it revealed to him that accused persons illegally and unlawfully withdrew huge amount of approximately Rs.44.2 million from aforementioned bank accounts of his father when he was bedridden and even not able to sign any cheque; aforementioned complaint was entrusted to learned Special Judge (OIB-II), Lahore, who after recording cursory statement of the petitioner, summoned accused persons for facing the trial; thereafter, petitioner filed an application for having comparison of signatures of his deceased father with the following prayer: -

> *"It is humbly submitted that the above said application may kindly be accepted and the manager of the above said two banks may kindly be directed to produce the said cheques and the SS Cards as lying in their bank in original form before this court for further transmitting to PFSL, so that the admitted signatures as lying on the SS cards may kindly be compared with the signature lying on the said cheques which are bogus and made by all the accused. It is further submitted that in this regard letter be written to the head of the PFSL to prepare the comparison report as early as possible."*

which was dismissed *vide* order dated: 06.04.2022 (impugned herein) passed by learned Judge Special Court (OIB-II), Lahore.

2. Learned counsel for the petitioner in support of instant revision petition submits that impugned order is against the law and facts of the case; further submits that since huge amount was withdrawn from two bank accounts of father of present petitioner/ complainant while putting forged signatures on the disputed cheques, therefore, it was necessary for having comparison of the signatures of his deceased father for just decision of the case. Learned counsel further goes on to add that impugned order is not sustainable in the eyes of law rather liable to be set-aside.

3. Learned Assistant Attorney General, *vice* learned counsel for respondent No.6 as well as learned counsel for respondent No.7 while supporting impugned order have prayed for dismissal of this revision petition.

4. **After hearing learned counsel for the petitioner, *vice* learned counsel for respondent No.6, learned counsel for respondent No.7, learned Assistant Attorney General and going through the available record with their able assistance**, it has been noticed that since entire controversy/dispute in the case in hand revolves around the impugned signatures of Ch. Muhammad Rafique (deceased father of present petitioner/complainant) on the cheques which were encashed from the bank because it is case of present petitioner/complainant that signatures on the disputed cheques are not of his father rather same are forged, therefore, comparison of signatures available on said cheques with the admitted signatures of deceased father of the complainant, is necessary/essential for just decision of the case. It is well settled principle of

law that criminal justice system is not adversarial rather inquisitorial and Court has to reach at just decision of the case; any piece of evidence which is essential for just decision of the case, has to be brought on record irrespective of the fact that either it favours one party or goes against other; similarly, filling lacuna in the case is immaterial if said piece of evidence is otherwise necessary for securing ends of justice; in this regard, case of "**Abdul Latif Aasi versus The State**" (**2001 P.Cr.R 548**) can be advantageously referred and its relevant paragraph No.7 is hereby reproduced: -

> *"7. The main plank of the petitioner's arguments before me has been that in our adversarial system of justice there was no scope for an inquisitorial approach adopted by learned Trial Court through the impugned order passed by it. However, the learned counsel for the petitioner have failed to point out any statutory sanction for observing that our system of justice is adversarial and not inquisitorial. If one looks at the history of our judicial system one may notice that this concept has gradually developed therein as a rule of prudence and practice mainly as regards civil litigation wherein the parties to a lis are required to lay their respective claims before the Trial Court and then substantiate, the same through evidence to be led by them. There are indications available in the Code of Civil Procedure which support the perception that civil litigation in our system is, by and large, adversarial in nature. But even there the inherent and general powers of the court, and even some specific powers, sometimes cut across that concept. A general acceptance of that concept in the civil litigation is, even otherwise, understandable. In a civil lis, more often than not, it is the parties to the lis alone who are interested in its outcome and effect. This cannot be said to be true for a criminal case wherein an offence committed by an individual is considered to be an offence not only against his victim but also against the whole society and the State.* ***Thus, in a criminal case an intentional or an un-intentional lapse on the part of the complainant, the Investigating Officer or the prosecuting counsel is not to be allowed to stand in the way of a Trial Court to rectify that lapse by calling in evidence on its own if such evidence can have a bearing on the determination of guilt or innocence of the accused person. Such a power has to be conceded to a Criminal Court in the larger interest of the community at large. Looked at in this context the stage of a trial appears to be irrelevant to an exercise of such a power of the Court and the only factor relevant to the exercise of such a power cannot be other than the relevance of the evidence called.****"***
>
> ***(emphasis added)***

It goes without saying that Ch.1-E of the Volume III of Lahore High Court Rules and Orders deals with recording of evidence in criminal cases and relevant portion of its Rule 2 clearly reflects as under: -

> *"2. Duty of Court to elucidate facts.---.....*
> *.....a Judge in a Criminal trial is not merely a disinterested auditor of the contest between the prosecution and the defence, but it is his duty to elucidate points left in obscurity by either side, intentionally or unintentionally, to come to a clear understanding of the actual events that occurred and to remove obscurities as far as possible. The wide powers given to the court by [Article 161 of the Qanun-e-Shahadat, 1984] ***[…] should be judiciously utilized for this purpose when necessary****".*
>
> ***(emphasis added)***

Similarly, Article 161 of the Qanun-e-Shahadat Order, 1984 is also relevant and concerned portion of the same is hereby reproduced: -

> *"161. Judge's power to put question or order production.*---***The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant, and may order the production of any document or thing and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:"***

Furthermore, Section: 94 Cr.P.C. is also relevant, therefore, its concerned portion is also being reproduced: -

> ***"94. Summons to produce document or other thing.—(1)*** *Whenever any Court, or any officer in charge of a police-station considers that the production of any document or other thing is necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order:*"

As far as filling lacuna left by any party is concerned, if such evidence/material is necessary for just decision of the case, then it becomes mandatory for the Court to summon and examine such evidence/material; in this regard, guidance has been sought from the case of "**Muhammad Azam versus Muhammad Iqbal and others**" (**PLD 1984 Supreme Court 95**) and relevant portions from its Pages No. 118, 121 and 122 are hereby reproduced: -

> **(Page 118)** *"The duty nevertheless lay squarely on the trial Court to summon the entire available evidence on this controversy and record/ admit the same by virtue of power under section 540, Cr.P.C. It reads as follows:*
>
> > *"540. Power to summon material witness or examine person present. Any Court may, at any stage of any inquiry, trial of other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."*
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> *This provision is divided into two parts: one where it is only discretionary for the Court to summon a Court witness suo motu or on application, and the second part where it is mandatory for the Court to do so. The main condition to be satisfied with regard to the second part is that the evidence to be summoned under this part should appear to the Court to be essential to the just decision of the case."*
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> **(Page 121)** *"It needs to be observed that for purpose of acting under section 540, Cr.P.C. (whether the first or second part), it is permissible to look into the material not formally admitted in evidence, whether it is available in the*

> *records of the judicial file or in the police file or elsewhere. The perusal of both these records would show that if evidence, in connection with the items already noticed, would have been properly entertained the reasoning and decision of the learned two Courts might have been different.*
> ***Sometimes apprehension is expressed that any action by the trial Court under section 540, Criminal Procedure Code would amount to filing the gaps and omissions in the version or evidence of one or the other party. It may straightaway be observed that in so far as the second part of section 540 goes, it does not admit any such qualification. Instead, even if the action thereunder is of the type mentioned, the Court shall act in accordance with the dictates of the law. In fact the Court has no discretion in this behalf. It is obligatory on it to admit evidence thereunder if it is essential for the just decision of the case****."*
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> ***(emphasis added)***

(Page 122) *"In yet another case Rashid Ahmad v. The State (1), this Court made it more clear that "a criminal Court is fully within its rights in receiving fresh evidence even after both the sides have closed their evidence and the case, is adjourned for judgment, for, till then the case is still pending. The only question therefore, is as to whether in the interest of fairness further opportunity should have been given to the accused"; and, it was held that "there is no bar to the taking of additional evidence in the interest of justice, at any stage of inquiry or trial as provided by the provisions of section 540, Cr.P.C."* ***In these cases if the question regarding so-called filling of the gaps would have been raised more squarely, the answer in view of what has been noticed above would have been the same as already rendered; namely, that if it is essential for the just decision of the case, then the same is the command of the law under the second part of section 540, Cr.P.C. It would not be possible to canvass that when the action under the said provision amounted to so-called filling of a gap, the Court would for this reason, avoid its duty to admit the additional evidence. Two more decisions by this Court as illustrative of the practice, may also be noted. There are: Bashir Ahmad v. The State and another (2), and Yasin alias Cheema and another vs. The State (3).****"*

(emphasis added)

In this regard, further guidance has been sought from the case of "**The State Vs. Muhammad Yaqoob and others**" (**2001 SCMR 308**) and relevant portions from its Page No.325 are hereby reproduced: -

> ***"It is thus manifest that calling of additional evidence is not always conditioned on the defence or prosecution making application for this purpose but*** *it is the duty of the Court to do complete justice between the parties and the carelessness or ignorance of one party or the other or the delay that may result in the conclusion of the case should not be a hindrance in achieving that object****."***
>
> ***(emphasis added)***

> ***"It is correct that every criminal case has its own facts and, therefore, no hard and fast rule or criteria for general application can be laid down in this respect but*** *if on the facts of a particular case it appears essential to the Court that additional evidence is necessary for just decision of the case then under second part of section 540, Cr.P.C. it is obligatory on the Court to examine such a witness ignoring technical/formal objection in this respect as to do justice and to avoid miscarriage of justice****".***
>
> ***(emphasis added)***

Nutshell of the above discussion is that in "peculiar facts & circumstances" of the case, impugned order dated: 06.04.2022 passed by learned Judge Special Court (OIB-II), Lahore is not warranted by law, hence, same is hereby set-aside. Resultantly, application filed by present petitioner/complainant for having comparison of signatures of his deceased father, is "allowed" and learned trial court is directed to have comparison of signatures of Ch. Muhammad Rafique (deceased father of present petitioner/complainant) available on the disputed cheques with the admitted signatures of said Ch. Muhammad Rafique available on SS Cards from Punjab Forensic Science Agency, Lahore, in accordance with law. Needless to add that observations mentioned above are only meant for the purpose of decision of this revision petition. Instant revision petition stands **accepted/allowed**.

(Aalia Neelum)
Judge

(Farooq Haider)
Judge

This judgment has been dictated, pronounced, prepared and signed on 31.01.2023.

Kashif

APPROVED FOR REPORTING.

(Aalia Neelum)
Judge

(Farooq Haider)
Judge