

**IN THE LAHORE HIGH COURT, LAHORE.
JUDICIAL DEPARTMENT**

R.F.A. No.8394 of 2023

SAASA Corporation (Pvt) Limited
Versus
M/s SEFAM Pvt Limited

JUDGMENT

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| Date of Hearing: | 30.09.2024. |
| Appellant by:- | Mr. Muhammad Riaz & Ms. Madiha Amin, Advocates. |
| Respondent by:- | Mr. Muhammad Saeed Sheikh, Advocate. |

CH. MUHAMMAD IQBAL, J:- Through this single judgment, we intend to decide the titled appeal [R.F.A. No.8394/2023] as well as R.F.A. No.12839/2024 as common questions of law and facts are involved in these appeals.

2. Through these appeals, the appellant has challenged the legality of judgment & decree dated 29.11.2022 passed by the learned Civil Judge, Lahore who dismissed the suit for recovery of Rs.61,35,326/- filed by the appellant/defendant and partially decreed the suit for recovery of Rs.65,279,570/- filed by the respondent/plaintiff.

3. Brief facts of these appeals are that on 31.05.2018 the respondent [hereinafter referred to as “respondent/plaintiff”] filed a suit for recovery of Rs.6,52,79,570/- against the appellant [hereinafter referred to as “appellant/defendant”] contending therein that the respondent/plaintiff is a renowned

company which runs business of stitched and unstitched garments with multiple brands since last so many years at home as well as abroad. Appellant/defendant corporation claiming to be dealing with the business of supply, installation, test and commission of ‘Elevators’ entered into an agreement dated 23.02.2017 with the respondent/plaintiff for supply and installation of “Shanghai Mitsubishi Branch, Chines MRL elevator to be installed at Shop No.10, Com-3, Karachi. The price of the said elevator was settled between the parties as Rs.47,00,000/- per unit inclusive of duties, taxes and installation charges. The respondent/plaintiff in strict compliance of the schedule of payment as settled in the said agreement made 50% advance payment of Rs.23,50,000/- to the appellant through cheque dated 29.03.2017 of Standard Charted Bank which amount was credited to the account of the appellant/defendant on 30.03.2017. As per terms of the said agreement, the shipment period was 100-days at Shanghai Sea Port after receiving the advance payment whereas the voyage period was settled as 25-days from the date of shipment which could have been arrived at any cost by 10th of July, 2017. Further submitted that construction of internal steel structure was another assignment to be made by the appellant/defendant in the line of the said agreement and as per commitment made by the appellant, the same was to be started on 17.07.2017 and to be

completed within 10-days period. The said structural work as per e-mail dated 12.07.2017 of the appellant, was to be started on 17.07.2017 and to be completed within ten days' time but the appellant failed to complete the said structure work, leaving the whole project in doldrums. Due to delay and breach of contract the respondent/plaintiff is entitled to recover Rs.6,52,79,750/- comprising a claim of Rs.50,00,000/- as loss of business goodwill, Rs.10,00,000/- regarding loss of business/sales loss and Rs.2,350,000/- as refund of 50% of advance payment of elevator charges etc. Appellant/defendant filed contesting written statement and the trial court from the divergent pleadings of the parties vide order dated 08.09.2018 framed following issues;

- “1. Whether the plaintiff is entitled for recovery of outstanding amount Rs.65,279,750/- with interest till the date of realization from the defendant? OPP
- 2. Whether the plaintiff is liable to pay Rs.5,959,110/- to the defendant? OPD
- 3. Relief.”

On 06.10.2018, the respondent /plaintiff filed an application under Order 14 Rule 5 read with Section 151 CPC for striking out issue No.2. The said application was accepted by the trial court vide order dated 19.11.2018 and issue No.2 was reframed. The evidence of the respondent/plaintiff was recorded and right for cross examination of the appellant /defendant upon the witnesses of the respondent was closed by the trial court vide order dated 02.10.2019. Against the

said order, the appellant filed revision petition which was dismissed on 02.09.2020.

4. On 01.02.2020 appellant/defendant also filed a suit for recovery of Rs.61,35,326/- against the respondent/plaintiff in which the respondent/plaintiff filed contesting written statement and filed an application on 22.03.2021 under Section 151 CPC for consolidation of both suits. On the application of the respondent/plaintiff both suits were consolidated and on 06.11.2021 consolidated issues were framed as under:-

“1. Whether the plaintiff (M/s Sefam Ltd) is entitled for recovery of outstanding amount Rs.65,279,750/- with interest till the date of realization from the defendant? OPP

2. Whether the defendant (Saasa Corporation Ltd) has no cause of action and locus standi to file this suit, hence, the same is liable to be dismissed? OPP

3. Whether defendant’s suit (Saasa Corporation (Pvt) Ltd Vs M/s Sefam (Pvt) Ltd) is false, frivolous, vexatious, hence, the same is liable to be rejected? OPP

4. Whether the defendant has come to the Court with unclean hands? OPP

5. Whether the suit of the defendant is not maintainable, hence, the same is liable to be dismissed? OPP

6. Whether the defendant is entitled for recovery of Rs.6,135,326/- till date with interest till the date of realization total outstanding amount as prayed for? OPD

7. Whether the plaintiff (M/s Sefam Ltd) is liable to pay Rs.5,959,110/- to the defendant (Saasa Corporation Ltd)? OPD

8. Whether the defendant is entitled for recovery of total Rs.61,35,326/- including an amount of Rs.14,10,000/- as second payment in main agreement, an amount of Rs.447,500/- as second payment on steel structure agreement, an amount of Rs.1,133,540/- liability or rent of ware house, an

amount of Rs.6,98,286/- USD difference on second payment and an amount of Rs.2,444,000/- as delay payment penalty, from the plaintiff as prayed for? OPD.

Relief?”

On the very date of framing of issues (06.11.2021) the learned counsel of the respondent/ plaintiff made statement that he relied upon the evidence already available on record and the trial court adjourned the case for evidence of the appellant/defendant for 20.11.2021. The trial court after recording the evidence of the appellant /defendant dismissed the suit of the appellant and partially decreed the suit of the respondent/plaintiff vide judgment & decree dated 29.11.2022 by granting following reliefs;

“33. In view of discussion on issues supra first suit filed by plaintiff for recovery of Rs.23,50,000/- as refund of 50% advance payment of elevator charges and Rs.7,07,750/- as refund of 50% advance payment of structural work (Total Rs.30,57,750/-) is hereby decreed in favour of plaintiff company and against defendant company alongwith cost and markup @ bank rate from filing of this suit till full recovery of outstanding amount. Remaining claims of plaintiff/suit is hereby dismissed.

34. Suit of Defendant Company/suit at serial No.2 for recovery of Rs.61,35,326/- is hereby dismissed.....”

Being dissatisfied with above determinations, the appellant filed the instant appeals on the ground that no opportunity was granted to the appellant to cross examine the statement of the witnesses of the respondent/plaintiff which cause

infringement of fundamental right of the appellant as well as offend the provisions of order XVIII CPC.

5. Arguments heard. Record perused.
6. Admittedly, on the application of the respondent/plaintiff both suits were consolidated and issues were framed on 06.11.2021 and on the same date, the learned counsel of the respondent/plaintiff got recorded his statement whereby he relied upon the evidence already recorded before consolidation of suit titled as *M/s Sefam Pvt. Ltd Vs Saasa Corporation* of the respondent/plaintiff but the trial court did not require the appellant to cross examine the statements of the witnesses of the respondent/plaintiff and straightway fixed the case for evidence of the appellant/defendant whereas after framing fresh consolidated issues it is mandatory under Order XVIII of CPC for the trial court to fix the case for cross examination upon the witnesses of the respondent/plaintiff/PWs but no fair opportunity was granted which is blatant violation of aforesaid provision of law, as such the said order dated 06.11.2021 to the extent of non-granting opportunity to the appellant/defendant to cross examine the witnesses of the respondent/plaintiff derives no support of law.

7. Initially, there was no direct provision available in Code of Civil Procedure for the consolidation of the suits and to circumvent the multiplicity of litigation as well as to avoid

passing of the conflicting judgment/ decree, the Courts ordinarily resorts to its inherit jurisdiction under Section 151 C.P.C to consolidate the suits, proceedings, petitions on the basis of similarities of parties, subject matter of suits as well as dispute between the parties and it would be in the fitness of things to resolve the controversy between the parties, avoid passing of conflicting decisions as well as multiplicity of litigation and said objects could only be achieved by consolidating the suits. Reliance is placed on a judgment titled as *Muhammad Yaqoob Vs. Behran Khan (2006 SCMR 1262)* wherein the Hon'ble Supreme Court of Pakistan has observed as under:

“3.... It is settled principle of law that where a common subject of claim is in dispute in counter-suits, both the suits are consolidated and decided together. This rule is imperative in order to avoid conflicting decisions. The rule was completely ignored by the trial Court as it failed to decide the issue in question and committed error to stay the proceeding of time respondent's suit which was rightly rectified by the learned High Court with cogent reasons in the impugned judgment. It is pertinent to mention here that parties in both the suits are the same and subject-matter/ property is the same. It is well-settled by a long chain of authorities that the consolidation of the suits can be ordered by the Court in exercise of its inherent powers. The consent of the parties is not the condition precedent for exercise of such powers. The purpose of the consolidation is to avoid multiplicity of litigation to eliminate award of contradictory judgments and to prevent the abuse of the process of the Court. These purposes are merely illustrative and not exhaustive of the powers of the Court. There may be other variety of grounds that in the interest of justice the Court may persuaded to consolidate the cases.”

Another reliance is placed on a case titled as *Zahid Zaman Khan and others Vs. Khan Afsar and others (PLD 2016 SC 409)* the relevant portion whereof is reproduced as under:

“7.... It is settled law that it is the inherent power of the Court to consolidate suits and the purpose behind it is to avoid multiplicity of litigation and to prevent abuse of process of law and court and to avoid conflicting judgments. No hard and fast rule forming the basis of consolidation can be definitive and it depends upon the facts and the points of law involved in each and every case, obviously where the court is persuaded that the interests of justice so demand, consolidation can be ordered, provided no prejudice is caused to any litigant and there is no bar in the way of the courts to consolidate the suits.”

8. The power of consolidation of two or more suits is normally derived by the lower courts from principles laid down by the Hon'ble Supreme Court of Pakistan in cases titled as *Muhammad Ijaz and another Vs. Muhammad Shafi through L.Rs. (2016 SCMR 834)* and *Abdul Qudoos Vs. Commandant Frontier Constabulary, Khyber Pakhtunkhwa, Peshawar and another (2023 SCMR 334)*.

9. Further, to cater the obstacle in the way of consolidation of suits/ proceedings an amendment was introduced in Order II Rule 6-A C.P.C whereby a modus operandi was provided in respect of consolidation of two or more suits. The said provision is reproduced as under:

“6-A. Consolidation of suits.—Where two or more suits or proceedings of the same nature requiring determination of similar issues between the same parties are pending in relation to the same subject matter, the Court may, if considers it expedient for avoiding multiplicity of litigation or conflict in judgments, direct the consolidation of such suits or proceedings as one trial, whereupon all such suits or proceedings shall be decided on the basis of the consolidated trial.”

After consolidation of the suits it is legal requirement to record evidence in the light of Order XVIII C.P.C. The ingredients of a valid statement of a witness are enunciated in

Articles 132, 133 & 134 of Qanoon-e-Shahadat Order, 1984

which consists of almost three constituent:-

- i) Examination in chief.
- ii) Cross examination and
- iii) Re-examination

As the complete statement of a witness entail examination in chief, cross examination and re-examination and if a witness enter in the witness box, it is legally desirable that his statement in complete be recorded in one session and fragmentary recording of the statement should be avoided subject to certain legal and well-reasoned exceptions. In this regard Rule 3 of Chapter I, Volume I of the Rules and Orders of the Lahore High Court, Lahore prescribes the procedure for recording examination-in-chief of a witness and Rule 4 thereof categorically prescribes that when the examination in chief is concluded, the opposite side should be allowed to cross examine the witness. For ready reference, Rules 3 and 4 ibid are reproduced as under:

“3. Examination-in-Chief.—In the examination of witnesses questions ought not to be put in a leading form, nor in such a form as to induce a witness, other than an expert, to state a conclusion of his reasoning, an impression of fact, or a matter of belief. The question should be directed to elicit from him facts which he actually saw, heard or perceived within the meaning of Article 71 of the Qanun-e-Shahadat, 1984 (X of 1984). The questions should be simple, should be put one by one and should be framed so as to elicit from the witness, as nearly as may be in chronological order, all the material facts to which he can speak of his own personal knowledge. A general request to a witness to tell what he knows, or to state the facts of the case should, as a rule, not be allowed because it gives an opening for a prepared story. Where the party calling witnesses is not abided by Counsel, and is unable himself to propyl examine his witnesses he may be asked to suggest questions and the examination may be conducted by the Court.

4. Cross-examination.—When the examination-in-chief is concluded the opposite side should be allowed to cross-examine the witness, or, if unable to do so, to suggest questions to be put by the Court. In cross-examination leading questions are permissible.”

Further, the right to give evidence and the right to cross-examine the witness strictly in terms of Order XVIII C.P.C read with the relevant provisions of Qanun-e-Shahadat Order, 1984 unmistakably is part of substantial law. Reliance in this regard is placed on a judgment titled as *Muhammad Asghar Vs. Hussain Ahmad and others (PLD 2014 SC 89)*.

10. Moreover, it is settled principle of law that no one should be condemned unheard and if any adverse order is passed without affording an opportunity of hearing to the opponent party, such order is termed as illegal and passed in violation of the principle of “due process of law” as enshrined in Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973. Reliance in this regard is placed on the dicta rendered by the Supreme Court of Pakistan cited as *Mrs. Shagufta Shaheen & Others Vs The State through D.G. NAB, Khyber Pakhtunkhwa & Another (2019 SCMR 1106)* and *Justice Qazi Faez Isa and others Vs. President of Pakistan and others (PLD 2022 SC 119)*. Moreover, non-providing opportunity to cross examine the witnesses is violative of the principles of fair trial as settled by this Court in a case titled as *Adnan Anwar & Another Vs Muhammad Sharaiq Hussain & Another (PLD 2019 Lahore 68)*.

11. As far as argument of the learned counsel for the respondent/plaintiff that in the first suit before consolidation the right for cross examination upon the witnesses of the respondent/plaintiff was closed and in this regard, Revision Petition of the appellant was also dismissed, as such order was rightly passed, suffice it to say that after consolidation both suits and framing of fresh issues, the learned counsel of the respondent/plaintiff made a statement regarding taking reliance upon the evidence already recorded before the consolidation, thus it was imperative for the trial Court to afford fair opportunity to the learned counsel of the appellant/defendant to cross examine the witnesses of the respondent/plaintiff in the light of principles prescribed by Order XVIII CPC read with Rules 3 & 4 of Chapter I, Volume I of the Rules and Orders of the Lahore High Court, Lahore, but the said procedure was deviated which offend the process of law as well as the principle of fair trial and pronouncements of the Hon'ble Superior Courts, whereas it was mode of law that the case ought to have been fixed for cross examination but no such opportunity of cross examining the witnesses was granted, hence, the act of the court cause prejudiced to the fundamental right of the appellant whereas it is settled principle that act of court should not cause prejudice to the right of any party. Reliance is placed on the cases cited as Muhammad Ijaz & Another Vs

Muhammad Shafi through LRs (2016 SCMR 834) & Abdul Qudoos Vs Commandant Frontier Constabulary, Khyber Pakhtunkhwa, Peshawar & Another (2023 SCMR 334).

12. In view of above, these appeals are allowed. Judgment & decree dated 29.11.2022 passed by the learned Civil Judge, Lahore is set aside and matters are remanded to the trial court who shall afford two fair opportunities to the appellant/defendant to cross examine the witnesses of the respondent/plaintiff whereafter the trial court shall decide both the suits on merits afresh. Parties are directed to appear on 28.10.2024 before the learned District Judge, Lahore who shall entrust the case to the court of competent jurisdiction for adjudication. The said court shall give two fair opportunities to the appellant/defendant for cross examination upon the witnesses of the respondent and whereafter shall decide the fate of the suits on merits expeditiously preferably within a period of four months positively.

Approved for reporting.

Judge

*Shahzad Mahmood /
Abdul Hafeez*