HCJDA-38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT,LAHORE
JUDICIAL DEPARTMENT

Writ Petition No. 10608 of 2024

Mst. Afia Ambrine

Vs.

Addl. District Judge, Sialkot and 14 Others

JUDGMENT

Date of hearing	*12.06.2024.*
Petitioner by	*Mr. Muhammad Akhtar Rana, learned Advocate.*
Respondents No. 2 to 5 and 11 to 13 by	*Mian Umar Farooq, learned Advocate.*
Respondents No. 6 to 10 and 14	*Ex-parte.*

SULTAN TANVIR AHMAD, J:- Through this single judgment, I intend to decide the captioned petition as well as Constitutional Petitions No. 10609 and 10611 of 2024, involving similar question(s) of law and facts.

2. The facts of the titled case are that Muhammad Shafi and Muhammad Yaseen (respondent No. 2 and 3) instituted suit dated 04.10.2014 (the '***suit****')* seeking declaration with respect to inherited property as detailed in

the relevant paragraphs of the *suit. Ex-parte* proceedings were initiated against the defendants of the *suit* and on the basis of *ex-parte* evidence, the *suit* was decreed. On 18.03.2022 the petitioner instituted an application under section 12(2) of the Code of Civil Procedure, 1908 (the '***Code***'), *inter alia,* on the grounds that her mother namely Mst. Nusrat daughter of Ferozedin died in the year 2012, whereas, she has been fraudulently reflected in the array of parties as defendant No. 8 in the *suit*; that some death certificates, appended with the *suit* were bogus. The petitioner has sought to *set-aside ex-parte* judgment and decree. The learned trial Court framed the issues on 20.05.2023 and initiated the process of adducing evidence. After oral evidence certain documents were marked as Ex.PA-1 to Ex.PA-29 in the without oath statement of the learned counsel given on 21.06.2023. In this regard, separate short order was also passed by the learned trial Court reflecting that the evidence of the petitioner has been completed and directed the other side to produce their evidence. On 27.06.2023 respondents No. 2 to 5 and 11 to 13 filed an application to de-exhibit the aforementioned documents with the stance that the law does not permit documents to be marked as exhibits in the statement of the learned advocate, depriving them from their right to cross-examine the relevant witness(s); without referring to any documents objection was also taken in the application that some documents issued from Kenya have been marked as exhibit without complying with the provision of relevant

law. After contest on this application, on 19.10.2023 the learned trial Court passed another order to de-exhibit the documents which were earlier allocated numbers from Ex.PA-1 to Ex.PA-29. This order was assailed in Civil Revision No. 83 of 2023 which was dismissed by the learned revisional Court vide judgment dated 29.01.2024. Aggrieved from the same, Mst. Afia Ambrine has instituted the titled petition as well as the connected petitions, under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

3. Mr. Muhammad Akhtar Rana, learned counsel for the petitioner has submitted that the documents were brought on record in the presence of learned opposing counsel, who never raised any objection for producing the said documents, in without oath statement. Learned counsel for the petitioner has contended that the learned revisional Court has ignored that order dated 19.10.2023 is passed in mechanical manners and without application of judicial mind; that the order to de-exhibit is against the principle settled by the learned Islamabad High Court in case titled "*Malik Riazullah Versus Mst. Dilnasheen and Others"*[1] as well as by this Court in case titled "*Muhammad Arif and Others Versus Aziz-ur-Rehman and Others"*[2]. Learned counsel for the petitioner has stated that the expression "de-exhibit" is neither defined nor mentioned in the *Code*; that the order of de-exhibiting or removing the documents from record is illegal being alien to the provisions of the *Code.* It

[1]2018 CLC 1569
[2]2023 CLC 713

is added by the learned counsel for the petitioner that somehow the learned two Courts below have ignored that the documents which have been brought on record, in the application under section 12(2) of the *Code*, as exhibits were already part of the record in the *suit* which was *ex-parte* decreed on 20.04.2016 and when the opponent party has relied on the same documents they should have been construed as admitted documents and in such circumstances there was no scope to pass an order of de-exhibit.

4. Mian Umar Farooq, learned counsel for respondents No. 2 to 5 and 11 to 13, has vehemently opposed this petition. He contended that the learned trial Court on 21.06.2023 permitted the petitioner-side to bring on record the documents in the without oath statement of her learned advocate and such practice has repeatedly been discouraged by the Supreme Court of Pakistan, thus, the order based on error of law and in defiance of the guidelines given by the Supreme Court is liable to be corrected by way of passing an order to de-exhibit those documents. The learned counsel for the respondents has supported the impugned judgment and the order while stating that the respondents, by allowing the documents to be brought on record through the above without oath statement, were deprived from their right to cross-examine as to the same. He further contended that order to mark exhibits to the documents was passed in absence of the representative of the respondents and the objection was then taken just within five

working days thereof.

5. Heard. Record perused.

6. It is now well settled that the objections with respect to admissibility of the documents can be of two kinds: (a) document is inadmissible in evidence being irrelevant or not capable for being considered in evidence (hereinafter called as the ***"inadmissibility in evidence"***); and (b) objections directed towards the mode of proof due to irregularity or insufficiency (hereinafter called as the "***mode of proof"***). If no objection is raised as to the *inadmissibility in evidence* but just the *mode of proof*, after the document has been marked as exhibit, the principle of waiver for failing to raise objection as to the formal validity can be attracted. The proper time for raising such objection as to formal validity or the *mode of proof* is prior to marking a document as exhibit or at the time when it is sought to be marked as an exhibit. These objections should be taken at earliest. Once document has been tendered and marked as an exhibit, belated objection as to the *mode of proof* is discouraged by the Courts. The prudence behind the same is avoiding any disadvantage to the party that has produced such documents but without adopting regular mode and this document, if otherwise is not liable to be rejected and irrelevant to the issue, is just discarded for not complying with the procedure that too having passed the stage to cure this mistake, can cause miscarriage of justice. However, when objection is taken at appropriate time, it would have

enabled the party, tendering the document, to cure defect and resort to such *mode of proof* as would be required. In *"Mst. Akhtar Sultana Versus Major Retd. Muzaffar Khan Malik through his legal heirs and Others"*[3] the Supreme Court of Pakistan explained the same as follows:-

> *"12. What is important to note is that, as a general principle, an objection as to inadmissibility of a document can be raised at any stage of the case[7], even if it had not been taken when the document was tendered in evidence. However, the objection as to the mode of proving contents of a document or its execution is to be taken, when a particular mode is adopted by the party at the evidence-recording stage during trial. The latter kind of objection cannot be allowed to be raised, for the first time, at any subsequent stage[8]. This principle is based on the rule of fair play.* ***As if the objection regarding the mode of proof adopted has been taken at the appropriate stage, it would have enabled the party tendering the evidence to cure the defect and resort to other mode of proof. The omission to object at the appropriate stage becomes fatal because, by his failure, the party entitled to object allows the party tendering the evidence to act on assumption that he has no objection about the mode of proof adopted****."*
>
> *(Emphasis supplied)*

7. In *"Gulzar Hussain Versus Abdur Rehman and another"*[4], a five members bench of Honourable Supreme Court of Pakistan adopted the view that *the respondents were not entitled to raise objection as to the proof of this*

[3]PLD 2021 Supreme Court 715
[4]1985 SCMR 301

document since they had not raised such objection at the time of document was exhibited on record. It will also be beneficial to reproduce paragraph No. 13 of the said judgment:-

> *"13. Coming now to the facts of this case the document in question was apparently a certified copy of the Revenue Record which was produced in the trial Court on an express permission obtained by the appellant. It is no doubt true that the respondents objected to the application of the appellant to produce further evidence after having closed his evidence earlier. But the Court allowed the request of the appellant and permitted him to adduce additional evidence consisting of documents including Exh. P.4. There is nothing on the record to indicate as to whether the respondents objected to the mode of proof in respect of this document at this stage. Objecting to a further opportunity being provided to the plaintiff to produce additional evidence is quite different from objecting to the admissibility of the document on the ground of mode of proof, It was argued on behalf of the respondents that there was no order of the Court that the document be exhibited. We are, however, unable to verify the correctness of this statement from the present record. However, there is on record the statement of the Advocate producing these documents and an exhibit number has been assigned to the document in question. In the judgments of the Courts below also the document has been referred to as Exh. P.4 - and there is nothing on the record to indicate as to whether the respondents raised this objection that the document was not exhibited by the Court, at any earlier stage. The rule of law laid down by this Court, therefore, was fully attracted in this*

> *case and the respondents are debarred from raising the question of the formal proof of this document at subsequent stage*."
>
> *(Underlining is mine)*

8. In *"Gopal Das and another Versus Sri Thakurji and Others*"[5] the Privy Council held that where the objection is not that the document is in itself inadmissible but that the *mode of proof* is irregular or insufficient it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. It was further observed that strict formal proof might or might not have been forthcoming had it been insisted on at the trial. The objection taken at the appellate stage as to the formal proof was repelled, in the following manners:-

> *"…….The endorsement means that the document is admitted in evidence as proved. Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof. A strictly formal proof might or might not have been forthcoming had it been insisted on at the trial. In the present instance, it does not appear that the objection was taken at the proper time or that it would have been of any avail had it been taken.."*
>
> *(Underlining is added)*

[5]A.I.R (30) 1943 Privy Council 83

9. The failure to take objection as to the *inadmissibility in evidence* of document as opposed to the *mode of proof,* however, is not fatal. The above rule of fair play is also reflected in "*P.B. Gajendragadkar, C.J., K.N. Wanchoo, M.Hidayatullah, Versus Ramaswami and P. Satyanarayana Raju, JJ.*"[6] as well as *"R.V.E. Venkatachala Gounder Vs Arulmigu Viswesaraswami & V.P. Temple*"[7]. Paragraph No. 20 of the *"R.V.E. Venkatachala Gounder"* case (***supra***) is repeatedly cited and relied in various cases including *"Dayamathi Bai (SMT) Versus K.M. Shaffi"*[8]and *"State of Gujarat Versus Ashokkumar Lavjiram Joshi"*[9]. The paragraph reads:-

> *"The learned counsel for the defendant-respondent has relied on The Roman Catholic Mission Vs. The State of Madras & Anr.AIR 1966 SC 1457 in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise.* ***Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently.*** *The objections as to admissibility of documents in evidence may be classified into two classes:- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not*

[6]AIR 1966 SC 1457
[7]2003 (4) R.C.R. (Civil) 705
[8](2004) 7 Supreme Court Cases 107
[9]R/SCr.A/2349/2018 (Also see "Muhammad Aslam and another Versus Mst. Sardar Begum alias Noor Nishan" (1989 SCMR 704)

dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. ***The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both***

> ***the parties.*** *Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court."*
>
> *(Emphasis supplied)*

10. The Supreme Court of Pakistan, in the recent past, has repeatedly observed that receiving of any document, in without oath statements of learned advocates and then marking them as exhibits, deprives the opponent party from their right to cross-examine as to the documents in question[10]. The documents which are marked as exhibits during without oath statement of the learned advocates who otherwise have no concern with such documents and the same are kept on record in violation of Qanun-e-Shahadat Order, 1984 (the '***QSO***'), after the suitable or permissible stage of trial / case till the litigants can take step to cure the defect, can result into possibility to prejudice the interest of the parties to the suit.

11. The learned counsel for the petitioner has also relied upon "*Malik Riazullah"* case (***supra***). He stated that the learned Islamabad High Court has already observed that

[10](i) Rustam and Others Versus Jehangir (Deceased) through LRs. (2023 SCMR 730)
(ii) Mst. Akhtar Sultana Versus Major Retd. Muzaffar Khan Malik through his legal heirs and others (PLD 2021 Supreme Court 715).
(iii) "Manzoor Hussain (deceased) through L.Rs. Versus Misri Khan"(PLD 2020 Supreme Court 749)

no provision to de-exhibit is available in the *Code* and orders to de-exhibit are alien to the *Code,* thus, the legislature has not envisaged removing of documents from the record. It is concluded by the learned Islamabad High Court that since marking of a document as an exhibit does not debar the other party from objecting admissibility at later stage, it is, therefore, axiomatic that admitting a document in evidence does not determine its evidentiary value nor does its admissibility attain finality. Paragraph No. 12 of this judgment reads as under:-

> *"12. The learned counsel for the Petitioner has laid great stress on Rule 3 of Order XIII of the C.P.C. in support of his contention that the learned trial Court is vested with the power to de-exhibit documents or, in other words, have them altogether removed from the record after they have been received in evidence and marked as exhibits. Such documents may become part of the record though the question of their evidentiary value remains open to challenge. The expression 'de exhibit' is not defined nor mentioned in the C.P.C. The above discussed provisions refer to the expressions 'receive' or 'produce'. Rule 3 of Order XIII, refers to the rejection of irrelevant or inadmissible documents. The scheme of the above mentioned provisions and the legislative intent does not envisage the removing of documents from the record after they have been received or allowed to be produced and thereafter marked as 'exhibits' except under Rule 9 of Order XIII. There is no provision in the C.P.C. for removing a document from the record which has been marked as an 'exhibit'. De exhibiting or removing from the record of the trial Court is alien to the provisions of the*

> *C.P.C. As already noted, merely receiving a document and making it part of the record does not give finality to its evidentiary value and, therefore, by no stretch of imagination does it prejudice the right to a fair trial. The provisions of the C.P.C. are tools for ensuring a fair trial. If documents were allowed to be de exhibited then, despite not causing prejudice to the other party, it would be used for delaying adjudication of the suit. This definitely would have provided an opportunity to delay the proceedings besides the exercise being futile. Rejection of documents under Rule 3 Order XIII of C.P.C. is before receiving or marking them as exhibits. The expression 'de exhibit' or power vested in the trial Court in this regard would be reading in the C.P.C. something not provided therein by the legislature."*

Almost same view was later adopted by this Court in *"Muhammad Arif and Others"* case (***supra***).

12. Here I would like to advert to some orders, in the present case, passed by the learned trial Court. On 21.06.2023, statement of the learned counsel for the petitioner was recorded in which the documents were allocated numbers (Ex.PA-1 to Ex.PA-29). This statement was stamped and signed by the learned Court. It is observed that part of the record where this statement of the learned counsel for the petitioner is recorded does not reflect that the same was recorded in the presence of the learned counsel for the respondents. The learned revisional Court has also gathered from the proceedings that when the statement of the learned counsel for petitioner was recorded and documents were marked as exhibits, the other side was not present.

Though the following order of the same date of hearing reflects that learned advocates for all the parties were present:-

"21.06.2023 کونسل فریقین حاضر

زبانی و دستاویزی شہادت مدعیہ قلمبند ہو چکی ہے اب مسل برائے شہادت مدعاعلیہ بتقرر 23.06.2023 کو پیش ہووے۔

سنایا گیا۔

Sd/-
Civil Judge 1st Class,
Sialkot"

Nevertheless on 27.06.2023, without causing material delay and prior to further progress in the *suit*, an application to de-exhibit the above referred documents was filed by the respondents. After contest on this application, the learned trial Court passed the following order:-

" 19.10.2023 کونسل فریقین حاضر بحث بر درخواست سماعت شد۔ اعتراضات سائل plausible ہیں۔لہذا درخواست متذکرہ منظور کی جاتی ہے اور دستاویزات پیشکردہ EXA1سے EXA29 de-exhibit کیے جاتے ہیں۔ آئندہ مسل برائے شہادت مسول علیہ بتقرر 21.10.2023 پیش ہووے۔

سنایا گیا۔

Sd/-
Civil Judge 1st Class,
Sialkot"

13. Noticeably, the above orders have been passed without proper application of judicial mind and with no deliberation as to the discussed law. Examination of judgments on the subject reveals that permitting documents to be brought on record / marking them as exhibits, through without oath statements of learned advocates, can cause damage to the interest of litigants. It is the duty of the Courts to adhere to the above settled law. In *"Muhammad Akram and another Versus Mst. Farida Bibi and Others"*[11] the Supreme Court observed that the *Court is duty bound to look into the document produced on record. It is also a settled law that even if no objection was taken by the other side when the document was exhibited the Court has not prevented from adjudicating its nature, where it is valid or not, or where it is fake or not*. The above duty as well as the law settled by the learned Islamabad High Court in *"Malik Riazullah"* case (***supra***) and this Court in *"Muhammad Arif and Others"* case (***supra***) has been ignored.

14. The learned revisional Court though noticed that the learned trial Court acted in purely mechanical manners but without looking into the record and appreciating stage of the case proceeded to uphold the decision of the learned trial Court. The trial is in progress in consequence of the application under section 12(2) of the *Code*, wherein *ex-parte* judgment and decree dated 20.04.2016 is sought to be *set-aside*. Record reflects that some of the documents,

[11] 2007 SCMR 1719

brought on record (as Ex.PA-1 to Ex.PA-29), were also relied by respondents No. 2 and 3 in their suit and when they obtained the *ex-parte* judgment. Besides other documents (Ex.PA-9 to Ex.PA-12), the death certificates issued on 29.07.2015 was produced by the respondents to secure the *ex-parte* judgment and decree. Ex.PA-13 to Ex.PA-17 were also brought on record by the respondent-side in their suit. There are some other documents that have been ordered to be de-exhibited, which are part of the judicial file of the main suit. It looks that respondent-party relied on such documents as well.

15. It is the claim of the petitioner in her application under section 12(2) of the *Code* that *ex-parte* judgment and decree is passed on the basis of bogus death certificates. It is also claimed that Mst. Nusrat daughter of Ferozdin was reflected as defendant No. 8 in the main suit (instituted in the year 2014), whereas, Mst. Nusrat passed away in the year 2012. The process of adducing evidence of the defendants of application under section 12(2) of the *Code* (present respondents) has not yet started. In *"Khurshid Ali and 6 Others Versus Shah Nazar"*[12] it is observed that Courts are not only to sit and watch as to who commits a mistake and who does not commit a mistake, from amongst the litigants and one who commits a mistake should be deprived of the right claimed. I would like to reproduce the following paragraph of the said judgment:-

[12]PLD 1992 Supreme Court 822

> *"It is incorrect to think now under an Islamic dispensation that the Courts are only to sit and watch as to who commits a mistake and who does not commit a mistake, from amongst the contesting litigants, and one who commits a mistake in procedural matters should be deprived of the right claimed; even if he is entitled to it. This Court has not approved of such like practice. (See Muhammad Azam v. Muhammad Iqbal PLD 1984 SC 95). In this case even if the application had not been pressed "so called"; if it was necessary for just decision of the case, as held by the High Court (to summon the material relied upon by the appellants side), it should have been summoned and treated as evidence in the matter without any formalities. And mere failure to exhibit a document formally would not make any difference."*

16. Prejudice must not be caused to the litigants because of any mistake of the Courts though the litigants and their learned counsel are also required to be vigilant. The order-sheet of the learned trial Court and the observation of the learned revisional Court regarding the presence of learned counsel for the respondent, at the time when the documents were marked as exhibits, are also at variance. Order dated 21.06.2023 reflects that this order was passed in the presence of all the parties. Learned counsel for the respondents stated that his attendance is incorrectly marked as evident from part of the record where the statement producing documents is recorded. The learned revisional Court, as already discussed above, has gathered from the circumstances of the case that the respondent side was not present when the documents were marked as

exhibits. Nevertheless, it is clear from the record that the respondents have raised objection before any further step in the progress of the case. Orders to exhibit and then to de-exhibit have been passed not merely ignoring the *Code* and the *QSO* but at the same time the repeated observation of the Honourable Supreme Court of Pakistan as well as this Court in various cases including *"Rustam and Others", "Mst. Akhtar Sultana" and "Manzoor Hussain (deceased) through L.Rs."* (***supra***) clearly disapproving the trend of permitting the learned advocates to exhibit the documents, in their without oath statements, has been overlooked. It will not be out of place to once again observe that these judgments contain clear guidelines for the learned Courts below as to the proper procedure and practice required to be adopted in course of trial *vis-à-vis* bringing the documents on record. Ignoring them by the litigants or by the learned Courts is not just resulting into unnecessary delays but at the same time it can cause miscarriage of justice.

17. The orders to exhibit and then to de-exhibit the documents have been passed in haste, which is also ignored by the learned revisional Court. As already discussed in detail that the trial in pursuance to the application under section 12(2) of the *Code* is still at the stage when the mistake can be cured. In case titled *"Jodhpur Gums & Chemicals Pvt. Ltd. Versus Punjab National Bank and Ors"*[13] the mistake was allowed to be cured by recalling the

[13]AIR 1999 Rajasthan 38

relevant witness(s). In case titled *"N.M.S. Sadasivier Krishnier and Others Versus T.S. Meenakshi Iyer and Others"*[14] it is held that it is wrong to commence judgment before completing the matters of admitting documents, unless the exceptional circumstances do exist. Considering the peculiar facts and circumstances of the case, I am of the view that the learned revisional Court should have proceeded to exercise its jurisdiction to avoid the clear possibility of miscarriage of justice or likely prejudice to the interest of the parties, by giving opportunity to cure mistake instead of simply upholding the orders of the learned trial Court.

18. In view of the above discussions, orders of the learned trial Court marking the aforesaid documents as exhibits through without oath statement of learned advocate and then order to de-exhibit them as well as judgment dated 29.01.2024 are *set-aside*. The petitioner can file a suitable application to produce further evidence / documents or re-examination of any witness. The learned trial Court to give chance to the respondent-side to cross-examine as to additional evidence, if produce. The learned trial Court shall not allow any undue adjournment to produce witness or documents and this process is expected to be completed within forty five working days from the receipt of this judgment. Any undue adjournment or hindrance in the progress of the case, by either side, shall carry the consequence as provided in law.

[14]A.I.R. 1933 Madras 781

19. The present petition as well as the connected petitions are ***allowed*** in the above terms.

(Sultan Tanvir Ahmad)
Judge

Announced in open Court on 13.08.2024.
Approved for reporting

Judge

J.A. Hashmi/-