

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Ijaz ul Ahsan
Mr. Justice Amin-ud-Din Khan

**CIVIL APPEAL NO.455 OF 2012 AND CIVIL PETITION
NO.1173 OF 2012**

(On appeal against the judgment dated 5.3.2012, passed by the Peshawar High Court, Abbottabad Bench, in C.Rs. Nos.131 of 2004 and 35 of 2005)

Mst. Gulnaz
(in CA.455/2012)

Mir Afzal Khan
(in CP.1173/2012)

...Appellant (s)
Petitioner (s)

Versus

Haji Muhammad Riaz and others

...Respondent(s)
(in both cases)

For the Appellant (s) : Haji Sabir Hussain Tanoli,
ASC with
Syed Rifaqat Hussain Shah,
AOR

For the Petitioner (s) : Mr. M. Ayub, ASC with
Ch. Akhtar Ali, AOR

For Respondents : Raja M. Farooq, ASC
No.1 to 3
(in CA.455/2012)

For Respondents : *Ex-parte*
No.3 to 24, 26 and 27
(in CA.455/2012)

For Respondent No.25 : Mr. Mehmood A. Sheikh, AOR
(in CA.455/2012)

For Respondents (s) : N.R.
(in CP.1173/2012)

Date of Hearing : 23.12.2019

JUDGMENT

AMIN-UD-DIN KHAN, J.- The Appellant, who filed a Suit for Specific Performance of an Agreement to Sell, has impugned the judgment dated 05.03.2012 of the learned Peshawar High Court, Abbottabad Bench, whereby a Civil Revision bearing No.131 of 2004, filed by the Appellant varied the judgments and decrees of both the Courts below, to the extent of two houses, the Suit was partially decreed. Vide said judgment the learned High Court, to the extent of rest of the claim of Appellant, maintained the dismissal of her appeal by the learned Additional District Judge, Abbottabad, vide judgment dated 24.05.2004 as well as the dismissal of her Suit by the Senior Civil Judge, Abbottabad vide judgment and decree dated 18.04.2000; the learned Trial Court decreed the Suit for Possession of the predecessor-in-interest of Respondents No.1 to 3 (Sher Zaman) by the same consolidated judgment.

2. The Petitioner in Civil Petition No.1173 of 2012 has also impugned the same consolidated judgment dated 05.03.2012 of the learned Peshawar High Court, Abbottabad Bench, whereby a Civil Revision bearing No.35 of 2005, filed by him was dismissed. He has also impugned the consolidated judgment and decree of the learned Additional District Judge dated 24.05.2004, whereby his appeal was dismissed as well as the Suit for Specific Performance of an

Agreement to Sell filed by him was dismissed by the learned Trial Court vide judgment and decree dated 18.04.2000.

3. We have heard the learned counsel for the parties at length and perused the available record.

4. The Appellant as well as the Petitioner lodged their claims of Specific Performance before the learned Trial Court but Suits of both were dismissed on the ground that they failed to prove their cases by adducing evidence required for grant of a decree in a Suit for Specific Performance whereas the Suit of Respondents No.1 to 3 for possession was decreed on the basis of a previous consent decree dated 18.03.1985 passed by the learned District Judge, Abbottabad in Civil Appeal No.17/13 of 1985, which decree was challenged under Section 12(2) of the CPC previously and the matter proceeded up to the learned High Court, which observed that the consent decree will not effect the cases of Mir Afzal Khan and Mst. Gul Naz. Now, the Suits of Mir Afzal Khan (Petitioner) and Mst. Gul Naz (Appellant) have concurrently been dismissed to the extent of the property measuring 02 *Kanals* and 11 *Marlas*, hence, the learned High Court observed that the said consent decree remained in the field, which has correctly determined the rights of late Sher Zaman.

5. The learned counsel for the Appellant as well as the Petitioner could not show any illegality, infirmity or legal

flaw in the impugned judgment dated 05.03.2012 passed by the learned Peshawar High Court, Abbottabad Bench, therefore, no case for interference by this Court is made out. In this view of the matter, concurrent findings of fact recorded by the learned three Courts below are upheld.

6. We have observed that the learned High Court partially allowed the Civil Revision filed by the present Appellant whereby her Suit was partially decreed to the extent of Houses No.3915 and 3916. In this view of the matter, the partial decree was passed in her favour whereas rest of her claim was dismissed and to that extent there are concurrent findings of the learned three Courts below. The Appellant has challenged the part of judgment of the learned High Court whereby her claim to the extent of land measuring 02 *Kanals* and 11 *Marlas* was dismissed. Therefore, she was not competent to file an appeal under Article 185(2) of the Constitution of the Islamic Republic of Pakistan, 1973 and she was required to file a Petition for Leave to Appeal under Article 185(3) of the Constitution. In this eventuality, to strength the view of maintainability or otherwise, of appeal in the circumstances of this case, a detailed view of the matter is necessary. For ease of reference, the relevant portion of Article 185 of the Constitution, reads as follows:-

"185.(1) Subject to this Article, the Supreme Court shall have jurisdiction to hear and determine appeals from judgments, decrees, final orders or sentences of a High Court.

(2) An appeal shall lie to the Supreme Court from any judgment, decree, final order or sentence of a High Court—

(a)

(b)

(c)

(d) if the amount or value of the subject-matter of the dispute in the court of first instance was, and also in dispute in appeal is, not less than fifty thousand rupees or such other sum as may be specified in that behalf by Act of [Majlis-e-Shoora (Parliament)] and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the court immediately below ; or

(e) if the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the court immediately below ; or"

(emphasis supplied)

7. Anxious consideration has also been given to the Supreme Court Rules 1980, Orders XII and XIII pertaining to Civil Appeals and Petitions for Leave to Appeal in Civil Proceedings, respectively, but nothing could be found therein with regard to issue in hand except the Certificate from the Advocate-on-Record in Respect of Value of Property in Appeal Filed under Order XII, Rule 1 (ii), at Serial No.14

in the Sixth Schedule of the Supreme Court Rules, 1980,
which reads as follows:

“CERTIFICATE FROM ADVOCATE-ON-RECORD IN RESPECT OF VALUE OF PROPERTY IN APPEALS FILED UNDER ORDER XII, RULE 1(ii) S. C. R.

IN THE SUPREME COURT.

(Appellate Jurisdiction)

Civil Appeal No. of 19

A.P(B) Appellant

Versus

C.D Respondent

CERTIFICATE

I, ----- Advocate-on-Record for the appellant in the above-cited appeal do hereby certify that the judgment/decreed/final order involves directly/indirectly a claim/question respecting property of the value of not less than Rupees fifty thousand and that the judgment/decreed final order appealed from has varied/set aside, the judgment/decreed/final order of the court immediately below.

Dated this the day of 19

Advocate-on-Record

8. This Court further probed into the definition of “varied” as the term has been found in Article 185(2)(e) of the Constitution and the Certificate at Serial No.14 noted *supra*. Black’s Law Dictionary has defined the word “alteration” as “Variation; changing; making different. A change of a thing from one form or state to another; making

a thing different from what it was without destroying its identity." The term "variance" has also been defined in Black's Law Dictionary as "*Pleadings*. A discrepancy or disagreement between two instruments or two allegations in the same cause, which ought by law to be entirely consonant. Thus, if the evidence adduced by the plaintiff does not agree with the allegations of his pleadings, it is a variance. A disagreement between the allegations and proof in some matter which in point of law is essential to the charge or claim. A substantial departure in the evidence adduced from the issue as made by the pleadings." The term "vary" has also been defined in the Cambridge Dictionary as "If things of the same type vary, they are different from each other, and if you vary them, you cause them to be different from each other"; and in the Oxford Dictionary as "(of a group of similar things) to be different from each other in size, shape, etc."

9. The term "varied" as used in the present context seems also to present the same connotation as found in the lexical and legal dictionaries mentioned above; if a judgment is to change or alter or modify the ruling of the court below, it would be said that the judgment has varied the ruling of the lower court. However, where the same is set aside, or upheld, no modification takes place and the impugned ruling of the court below is either accepted in toto or

reversed absolutely. Where a judgment is partially upheld, and partially reversed, and only that part of the judgment has been challenged which is partially maintained, as in the instant case, then the same cannot fall under the ambit of variation, and would have to be considered as a judgment “upheld” to one extent, and a judgment “set aside” to the rest of it.

10. The instant case involves matter pertaining to property valued at more than Rs.50,000/- in the trial court, however, the High Court has “varied or set side the part of judgment, decree or final order of the court immediately below”, as required under Article 185(2)(e) of the Constitution. The Appellant has only impugned that part of the judgment of the High Court which dismissed the claim of the Appellant in the Civil Revision. Therefore, the present Civil Appeal under Article 185(2)(e) of the Constitution of the Islamic Republic of Pakistan, 1973 is not competent and the Appellant was required to file a Civil Petition for Leave to Appeal under Article 185(3) of the Constitution, in this eventuality. We have thoroughly examined the existing law on the subject but the answer is that it is a case of first impression. Though, previously when a decree or order was passed by the High Court and the party partially challenging a part of concurrent findings against them have filed Petition for Leave to Appeal. In the cases reported as Muhammad

Ismail and 5 others v. Bashir Ahmad and others (2005 SCMR 1079), Shakeel and another v. The Deputy Commissioner Sanghar and others (SCMR 1986 121), and The State Bank of Pakistan v. The Official Liquidator of National Commercial Bank Ltd. (SMCR 1989 1434), thus, we are clear in our mind that in the instant case, the portion of the judgment of the High Court which varied the judgment of the lower court was in favour of the Appellant and that portion was not challenged by the Appellant rather Appellant has challenged a portion of the judgment of the High Court as well as the two fora below whereby her claim was concurrently dismissed by all the three fora below, therefore, in our view, the appeal filed by the Appellant was not competent. She was required to file a Petition for Leave to Appeal.

11. We have considered the case of the Appellant on the touchstone of Article 185(2)(d) and (e) of the Constitution of the Islamic Republic of Pakistan, 1973. No case has been made out even on merits. Therefore, no question of making out a case by the Appellant in the light of Clause (3) of Article 185 of the Constitution for grant of leave.

12. Coming to the case of the Petitioner, his Suit was also dismissed by the learned courts below for want of convincing and reliable evidence, and the case of

Respondents No.1 to 3 was decreed on the basis of a previous consent decree dated 18.03.1985 passed by the learned District Judge, Abbottabad in Civil Appeal No.17/13 of 1985 in a *lis* between the predecessor-in-interest of the present Appellant, the present Petitioner and the predecessor-in-interest of Respondents No.1 to 3. Said decree was challenged vide an application under Section 12(2) of the Civil Procedure Code, 1908, but the learned Peshawar High Court observed that the consent decree would not affect the cases of the Appellant and the Petitioner, and the same application was not pursued thereafter. The consent decree dated 18.03.1985 remains in field, while the Suit of present Petitioner remains dismissed. No illegality, legal infirmity or legal or factual error has been pointed out by the learned counsel for the Petitioner, hence, the Civil Petition for Leave to Appeal No.1173 of 2012 is also dismissed.

13. In this view of the matter, concurrent findings of fact recorded by the learned three Courts below are upheld. The learned counsel for the Appellant as well as the Petitioner could not show any illegality, infirmity or legal flaw in the impugned judgment dated 05.03.2012 passed by the learned Peshawar High Court, Abbottabad Bench, therefore, no case for interference by this Court is made out.

14. Consequently, the titled Civil Appeal filed by the Appellant is not competent and the titled Civil Petition is without merit. Both the cases stand dismissed. No order as to cost.

JUDGE

Islamabad, the
23rd December, 2019
'APPROVED FOR REPORTING'
*Mahtab H. Sheikh/**

JUDGE