

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.273/2016
OGDCL and another
Versus
Muhammad Ilyas Mian

Date of Hearing:	13.12.2017
Petitioners by:	Mr. Khalil ur Rehman Abbasi, Advocate
Respondent by:	M/s Mushtaq Hussain, and Muhammad Adil Umar, Advocates.

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition, the petitioners, Oil and Gas Development Company Limited and Ejaz Muhammad Khan, former Manager Legal Services of petitioner No.1, impugn (1) order dated 05.04.2016, passed by the Court of the learned Civil Judge, Islamabad, whereby the petitioners' right to cross-examine the respondent/plaintiff's witness was closed, and (2) order dated 15.06.2016, passed by the learned civil Court whereby the petitioners' review petition against the said order dated 05.04.2016, was dismissed.

2. Learned counsel for the respondent took preliminary objections to the maintainability of this petition. He submitted that there was no power of attorney on the file on behalf of petitioner No.2. He further submitted that the authorization given by the Board of Directors of petitioner No.1 to the person who had signed and filed the civil revision petition on behalf of petitioner No.1 did not include the authorization to file a civil revision petition. It was also submitted that the petition was liable to be dismissed on account of the non-impleadment of the legal heirs of late Ahmed Hassan, who was defendant No.2 in the civil suit instituted by the respondent.

3. The preliminary objections raised by the learned counsel for the respondent are misconceived. Petitioner No.2's power of attorney is on the record. I have gone through petitioner No.1's letter dated 21.03.2016, according to which the Board of Directors of petitioner No.1, in its 180th meeting, held on 16.02.2016, had delegated powers including the power to sign applications to the Head of the

Department concerned, or in his absence, the next senior officer available in the department. Furthermore, the power to sign power of attorneys was delegated to the General Manager (Legal Services) or in his absence the next senior officer in the legal services department. Since the power of attorney filed on behalf of petitioner No.1 has been signed by the Incharge (Legal Section) of petitioner No.1, who has also signed the revision petition, I do not find any legal infirmity in the filing of the said petition.

4. As regards the non-impleadment of the legal heirs of Ahmed Hassan/defendant No.2, I find the said objection to be hyper technical. The suit instituted by the respondent/plaintiff was for the recovery of legal fees for professional services alleged to have been rendered for petitioner No.1/defendant No.1. Defendant No.2 had served as Senior Law Assistant of defendant No.1. In the said suit, the allegations against defendant No.2 were that the plaintiff had given him Rs.80,000/- out of the fee paid to the plaintiff; and that defendant No.2 had become an impediment in the payment of the plaintiff's professional fees by defendant No.1. The plaintiff had not prayed for the recovery of the amount that had been allegedly paid by him to defendant No.2. The plaintiff did not plead that he had rendered any legal professional services for defendant No.2. The legal professional services are alleged to have been performed by the plaintiff for defendant No.1, for which an invoice was alleged to have been submitted on 24.03.2007 to defendant No.1. The plaintiff could not have expected for the payment against his invoice for professional services rendered for defendant No.1 to be made by defendant No.2 out of his own coffers. Therefore, it is my view that upon defendant No.2's death, the plaintiff's suit to the extent as against defendant No.2 stood abated. Therefore, it was not necessary for the petitioners to have impleaded the legal heirs of defendant No.2 as parties to the instant petition. Consequently, the preliminary objections raised by the learned counsel for the respondent are spurned.

5. Coming to the merits of the case, learned counsel for the petitioners submitted that the learned civil Court erred by dismissing the petitioners' review petition on the ground that the order dated

05.04.2016, whereby the learned civil Court closed the petitioners' right to cross-examine the plaintiff's witness, was an appealable order; that the learned civil Court erred by holding that the review petition could only be considered if it was filed within the time frame provided for filing an appeal against the said order; that the learned civil Court erred by not appreciating that the review petition against the said order dated 05.04.2016 was filed by the petitioners within the limitation period prescribed by law; and that since no decree was passed by the learned civil Court while closing the petitioners' right to cross-examine the plaintiff's witness, the said order dated 05.04.2016 was not an appealable order.

6. Learned counsel for the petitioners further submitted that the learned civil Court erred by not appreciating that there was an error floating on the face of the record inasmuch as the learned civil Court had penalized the petitioners by closing their right to cross-examine the plaintiff's witness without issuing a notice under Order XVII, Rule 3 C.P.C. or giving a warning to the petitioners; that on the date prior to the closing of the petitioners' right to cross-examine the respondent's witness, the learned Presiding Officer was on leave; that the petitioners were not negligent, but had submitted defendant No.2's death certificate on the day on which the petitioners' right to cross-examine the respondent's witness was closed. Learned counsel for the petitioners prayed for the order dated 15.06.2016 as well as the order dated 05.04.2016, passed by the learned civil Court to be set-aside.

7. On the other hand, learned counsel for the respondent candidly admitted that the order dated 05.04.2016, passed by the learned civil Court was not an appealable order. He further submitted that the essential ingredients for interfering with the said order dated 05.04.2016 in the review jurisdiction were not satisfied; that there was no patent illegality in the said order dated 05.04.2016; that earlier, due to the petitioners' lack of interest in defending the suit, the petitioners had been proceeded against ex-parte; that there was no error apparent on the surface of the record; and that the petitioners' review petition against the said order dated 05.04.2016

was time barred. Learned counsel for the respondent prayed for the revision petition to be dismissed.

8. I have heard the contentions of the learned counsel for the contesting parties, and perused the record with their able assistance.

9. The record shows that on 31.07.2012, the respondent, who is an Advocate of the Supreme Court of Pakistan, filed a suit for recovery of his professional fee to the tune of Rs.28,81,016/- against the petitioners and one other person, namely Ahmad Hassan, Senior Law Assistant of petitioner No.1, who has since passed away. Ahmad Hassan was defendant No.2 in the said suit. After the filing of the written statement, the learned civil Court framed the issues, vide order dated 28.01.2013. Thereafter, the respondent/plaintiff appeared as PW-1 and submitted his affidavit-in-evidence.

10. Vide order dated 23.02.2016, the learned civil Court had adjourned the matter to 19.03.2016 for the cross-examination of PW-1. On 19.03.2016, the learned Presiding Officer was on leave and the matter was adjourned to 05.04.2016. On 05.04.2016, the death certificate of defendant No.2 was produced before the Court. Since the petitioners did not cross-examine PW-1 on the said date, their right of cross-examination was closed and the matter was adjourned to 19.04.2016 for the petitioners' evidence.

11. On 04.06.2016, the petitioners filed an application under Section 114 read with Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 ("C.P.C."), for the review of the order dated 05.04.2016, whereby the petitioners' right to cross-examine PW-1 was closed. Vide order dated 15.06.2016, the learned civil Court dismissed the petitioners' said application. The operative portion of the said order dated 15.06.2016, is reproduced herein below:-

"Scope of review as provided under Section 114 read with order 47 CPC is very limited and the same provides that this power can be exercise in a case where a remedy of appeal is provided and the same has not been availed. The impugned order dated 05.4.2016 is in itself an appealable order and the application in hand could have been considered if the same was filed within the time frame provided for filing an appeal, whereas the same was filed after the lapse of said time period, in which circumstances, the application in had being devoid of merits stand dismissed."

(Emphasis added)

12. The vital questions that need to be determined are whether the order dated 05.04.2016 was an appealable order; and whether learned civil Court was correct in holding that a review petition could be considered if it was filed within the time frame provided for filing an appeal against the said order.

13. Now, by closing the petitioners' right to cross-examine the respondent's witness, the learned civil Court has exercised its powers under Order XVII, Rule 3 of C.P.C., which reads as follows:-

“Court may proceed notwithstanding either party fails to produce evidence, etc.– Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.”
(Emphasis added)

14. The petitioners' obligation to cross-examine PW-1 was an act necessary for the further progress of the suit. After passing the said order dated 05.04.2016, the learned civil Court did not decide the suit, but adjourned the matter to 19.04.2016 for the petitioners' evidence. Since no decree was passed by the learned civil Court after the petitioners' right to cross-examine PW-1 was closed, the said order dated 05.04.2016 was not an appealable order.

15. Section 96 C.P.C. provides that an appeal shall lie from every decree passed by a Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such a Court. Where a Court disposes of a suit by invoking the provision of Order XVII, Rule 3 C.P.C., the decision amounts to a decree and the same can be assailed through an appeal. Reference in this regard may be made to the judgments in the cases of “Muhammad Khalid Vs. Principal, Government Higher Secondary School (2005 MLD 332), Muhammad Suleman Vs. Muhammad Shabbir Akhtar (1999 YLR 1653) and Rehmatullah Khan Vs. Saadat Ali Khan (1991 MLD 1017). Since the suit was not disposed of and no decree was passed by the learned civil Court when the petitioners' right to cross-examine PW-1 was closed, the learned civil Court was not correct in holding that the said order dated 05.04.2016 was an appealable order. The learned civil Court has not made reference to any provision of law which makes the order dated 05.04.2016 (whereby the petitioners' right to cross-

examine the respondent's witness was closed) appealable. The said order dated 05.04.2016 was neither appealable under Section 104 nor Order XLVII, Rule 1 C.P.C.

16. Under Order XLVII, Rule 1 C.P.C., a person aggrieved of an order from which an appeal is allowed but from which no appeal has been preferred or from which no appeal is allowed, can apply for a review of such an order to the Court which passed the order. The mere fact that an appeal is competent against a certain order is no ground for refusing to entertain an application for review of such an order. In the case at hand, it is an admitted position that no appeal is allowed against an order closing the petitioners'/defendants' right to cross-examine the respondent's/plaintiff's witness. This is *moreso*, when the learned civil Court after taking such a penal measure against the petitioners did not *"proceed to decide the suit forthwith"*. Had the suit been decided and a decree being passed, the same would have been appealable under section 96 C.P.C. Therefore, it is my view that a review petition against the said order dated 05.04.2016 was competent.

17. The petitioners had filed the application for the review of the said order dated 05.04.2016 under Section 114 read with Order XLVII Rule 1 C.P.C. For making an application for review of an order passed by the civil Court, the limitation period as prescribed by Article 173 of the Schedule to the Limitation Act, 1908, is ninety days from the date of the order. In the impugned order dated 15.06.2016, the learned civil Court had observed that the application for review of the order dated 05.04.2016 was filed by the petitioners on 04.06.2016. This makes the petitioners' review petition clearly within the limitation period prescribed by law. The jurisdictional infirmity in the impugned order dated 15.06.2016 is that the learned civil Court has held that the petitioners' review application *"could have been considered if the same was filed within the time frame provided for filing an appeal"*. The limitation period for filing a review application has been prescribed by the law as mentioned above. The law does not obligate a party seeking review of an order (assuming that such an order is appealable) to file the review application within the limitation period prescribed by law for filing an appeal.

18. In view of the above, I am of the considered opinion that the impugned order dated 15.06.2016 suffers from the abovementioned jurisdictional error and therefore, not sustainable and liable to be set-aside. This was a case of non-exercise of jurisdiction by the learned civil Court, which ought to have considered whether there was a mistake or error apparent on the face of the record so as to review the order dated 05.04.2016. In the case of Land Acquisition Officer and Assistant Commissioner, Hyderabad Vs. Gul Muhammad through legal heirs (PLD 2005 SC 311), it has been held that misconstruction of law, misreading of the evidence on the record and non-consideration of pleas raised before a Court, would amount to an error floating on the surface of the record.

19. Now, the petitioners have also prayed for the setting aside of the order dated 05.04.2016 whereby the petitioners' right to cross-examine PW-1 was closed. The instant revision petition against the said order dated 05.04.2016 was filed on 29.06.2016 which is within the limitation period prescribed by law. The mere fact that the review petition against the said order dated 05.04.2016 was dismissed by the learned civil Court on 15.06.2016, would not preclude this Court from entertaining a revision petition against the said order dated 05.04.2016.

20. It is my view that once a civil Court refuses to entertain a review petition and the same is dismissed confirming the main order under review, there is no question of any merger. In such circumstances, the aggrieved person can challenge the main order because on the dismissal of the review petition the principle of merger would not apply. In the case at hand, the learned civil Court did not reverse, alter or modify the order dated 05.04.2016, on the petitioners' review petition. Vide order dated 15.06.2016 the learned Civil Court dismissed the petitioners' review petition, thereby affirming the order dated 05.04.2016. In such a scenario, the question of a merger does not arise and the petitioners were well within their rights to challenge the original order dated 05.04.2016 in a revision petition. Reference in this regard may be made to the judgments in the cases of Manohar s/o Shankar Nale Vs. Jaipalsing s/o Shivilalsing Rajput (2008) 1 Supreme Court 520, and DSR Steel (Private) Limited Vs. State of

Rajasthan (2012) 6 Supreme Court 782. Indeed, the petitioners tried their luck by waiting for the outcome of their review petition, but as mentioned above, the instant revision petition has been filed within a period of ninety days from 05.06.2016, when the order closing the petitioners' right to cross-examine the respondent's witness was passed. I now proceed to examine whether the said order dated 05.06.2016 is liable to be interfered with in the revisional jurisdiction of this Court.

21. The provisions of Order XVII, Rule 3 C.P.C. are penal in nature, and must be strictly construed. Action under the said provision should be taken against a party only if such a party despite being given a warning to perform an act necessary for the progress of the suit, ignores such a warning and does not perform such an act. In the case at hand, no such warning was given to the petitioners to cross-examine the respondent's witness. It is an admitted position that on 19.03.2016, the learned Presiding Officer was on leave. On the said date, the matter was adjourned in routine to 05.04.2016 by the reader of the Court. In the case of Muhammad Ramzan Saifi Vs. Abdul Majid (PLD 1986 SC 504), it has been held that if on the date immediately preceding the date on which the provisions of Order XVII, Rule 3 C.P.C. were invoked, adjournment was granted due to the absence/leave of the Presiding Officer, the provisions of Order XVII, Rule 3 C.P.C. were not attracted because it was necessary thereunder that the relevant adjournment should have been sought by the party concerned. Furthermore, in the case of Mst. Nazima Batool Vs. Sabar Ali Shah (2004 CLC 1175), it has been held that where an adjournment has been granted in routine, penal action could not be taken, especially when no final opportunity had been given to a party to do an act necessary for the further progress of the suit. In the case of Saeed Ahmad Malik Vs. Rana Muzaffar Ali (2004 MLD 859), it has been held that the power conferred under Order XVII, Rule 3 C.P.C. was very drastic and should be used only in exceptional cases and when the Court is satisfied that the party was trifling with the Court or contemptuous to the proceedings or was purposely absenting himself in order to harass the adversary.

22. In the case at hand, the petitioners were not given a last and final opportunity for cross-examining the respondent's witness. The learned civil Court had also not given a warning to the petitioners that in the event, the petitioners did not cross-examine the respondent's witness on a date fixed by the learned civil Court, penal action of closing the petitioners' right to cross the respondent's witness would be taken. Due to the absence of all these prerequisites for invoking the penal provision of Order XVII, Rule 3 C.P.C., I am of the view that the order dated 05.04.2016 is liable to be interfered with in the revisional jurisdiction of this Court.

23. In view of the above, the instant petition is allowed and as a result the orders dated 15.06.2016 and 05.04.2016, passed by the learned civil Court, are set-aside with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2018

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*

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