Judgment Sheet

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

Judicial department.

Civil Revision No.200 /2019

Muhammad Sideeq
Vs.
Pervaiz Khan and others.

Petitioner By:	Raja M. Saleem Satti, Advocate
Respondents By:	M/s. Abul Kamran Butt & Kaleem Ullah Pirzada, Advocate.
Date of Hearing:	12.03.2020.

GHULAM AZAM QAMBRANI, J.: Through the instant Civil Revision, the petitioner has challenged judgment &decree dated 25.05.2018 passed by the learned Civil Judge-I (East) Islamabad and judgment &decree dated 27.03.2019 passed by the learned Additional District Judge-III, (East) Islamabad, whereby the suit and appeal filed by the petitioner were dismissed.

2. Briefly stated facts of the instant petition are that the petitioner/plaintiff filed a suit for declaration, cancelation of power of attorney, mandatory and permanent injunction against the respondents/defendants contending therein that the petitioner is owner in possession of land measuring 09 Kanal 18 Marlas bearing Khewat Nos.70, 88, 89, 90, 91, Khatooni Nos.129, 132, 160, 161 , 162, 163, 164, 165 and Khasra Nos. 27, 38, 26, 34, 37, 35, 30, 33, 29, 31, 81, 82, & 83 situated at Mouza Jandala, Tehsil and District Islamabad, since last many decades. Respondent No.3/ Tehsildar, Islamabad has been made party to the suit being custodian of the record.It has been averred that in the year 1990, the petitioner obtained a loan of Rs.30,000/- from Agricultural Development of Pakistan (Technology for Agricultural) (hereinafter be referred as *"**A.D.B.P**")* for improving his lands and its products but the petitioner sustained a heavy loss and become incapacitated to return the loan, well in time. The petitioner started requesting to A.D.B.P for rescheduling of its installments and also for relaxation of the interest rates and benefits upon the actual amount of loan received and

delayed payments while the petitioner's requests were underway with the A.D.B.P since 1993/1994.Respondent No.1who was well acquainted with the petitioner, approached the petitioner and told him that he can settle the petitioner's matter with A.D.B.P, as he has good connections with the Bank. The respondent asked for a general power of attorney from the petitioner in his favour, in pursuance thereof, the petitioner executed a general power of attorney in favour of respondent no.1, because the petitioner is an old and ill man and cannot visit office of A.D.B.P time and again.

3. It has been further averred by the petitioner that the matter was settled and A.D.B.P never asked for the payment. At the time of perusing the record of his property in office of respondent no.3, the petitioner came to know that name of respondent no.2 has been entered in the record of rights of his land as owner. Thereafter, the petitioner probed the matter and it revealed that respondent No.1 fraudulently, illegally and wrongfully had got transferred the land of the petitioner on the name of respondent No.2, being his attorney. That after filing the suit, notices were served upon respondents No.1 & 2, who appeared before the learned trial Court filed written statement and thereafter, absented themselves. Consequently, they were proceeded against Ex-parte vide order, dated 03.02.2018 and 21.05.2018, respectively. Notice was also served upon respondent no.3, but due to his non-appearance, he was also proceeded against Ex-parte. After recording Ex-parte evidence, the learned Civil Judge, Islamabad, dismissed the suit of petitioner vide judgment and decree, dated 25.05.2018. Feeling aggrieved, the petitioner filed an appeal before the learned Additional Sessions Judge-III, Islamabad. The petitioner also filed an application for placing on record additional evidence i.e. General Power of Attorney and Clearance Letter of A.D.B.P, Bank before the learned Additional District Judge, but the learned Additional District Judge, Islamabad, dismissed the appeal of the petitioner vide judgment, dated 27.03.2019, hence, this civil revision petition.

4. Learned counsel for the petitioner has contended that the impugned judgments and decrees are results of miss-reading and

non-reading of evidence available on record; the judgments and decrees of the learned Courts below are not sustainable in the eyes of laws; the impugned judgments are based on presumptions and the learned Courts below have ignored that respondent No.1 fraudulently and illegally has got transferred the land in the name of respondent No.2, being his attorney; respondent No.1 took the advantage of petitioner's old age, trust, innocence and illiteracy; the general power of attorney was executed in favour of respondent No.1 with regard to the land in dispute of the petitioner to deal with the affairs of A.D.B.P, but the respondent No.1 fraudulently transferred the land in dispute in the name of respondent No.2 and the learned Courts below passed the impugned judgments in a hasty manner, thus have committed irregularity; the judgments and decrees are nullity in the eyes of law, therefore, the same are liable to be set-aside. The learned counsel further contended that; the petitioner filed an application for placing on record the general power of attorney and the bank clearance letter of A.D.B.P as additional evidence, which was not allowed. Hence, prayed for acceptance of the instant petition.

5. Conversely, the learned counsels for respondents No.1 & 2 have contended that Exh.P1 is an affidavit of the petitioner, wherein he has not stated even a single word for cancellation of the general power of attorney executed by the petitioner in favour of respondent No.1; the petitioner has not produced the said general power of attorney before the learned trial Court; the general power of attorney was executed and signed before the witnesses duly registered at the Sub-Registrar Office, Islamabad, and in this regard, certificate of registration of the documents was also issued; respondent No.2 has further sold out the property in-question to other persons and lastly, urged for dismissal of the instant petition.

6. Arguments of the learned counsel for the parties have been heard and available record perused with their able assistance.

7. Perusal of record reveals that the petitioner filed a suit for declaration, cancelation of general power of attorney, mandatory and permanent injunction against the respondents/defendants

before the learned trial Court, which was dismissed where-after the petitioner preferred an appeal against the impugned judgment and decree, dated 25.05.2018 before the learned Additional District Judge, Islamabad. The petitioner also filed an application for placing on record General Power of Attorney executed in favour of respondent No.1 and Clearance Letter of A.D.B.P, contending that the said documents were not in his possession at the time of filing the civil suit and he subsequently obtained copies of the same after hectic efforts but the learned Additional District Judge, dismissed the appeal of the petitioner vide judgment and decree, dated 27.03.2019.

8. The Provision of Order XLI Rule 27 of the Civil Procedure Code, 1908 deals with the matter regarding production of additional evidence at appellate stage. Perusal of Rule 27(1) of Order XLI, C.P.C. shows that the scope thereof is limited as it contemplates very few circumstances or conditions in which the appellate Court may allow a party to the appeal to produce additional oral or documentary evidence. Such circumstances/ conditions are, (a) where the Court from whose decree the appeal is preferred had refused to admit evidence which ought to have been admitted, or (b) where the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or (c) for any other substantial cause. Admittedly, the case of the appellant does not fall under Rule 27(1)(a) as he neither attempted to produce the document in question before the learned trial Court nor did the learned trial Court refuse to admit the same in evidence. Regarding Rule 27(1)(b), it may be noted that the learned appellate Court was not of the view that the evidence sought to be produced by the appellant was required by the appellate Court itself to enable it to pronounce judgment. As far as the question of 'substantial cause' mentioned in Rule 27(1)(c) is concerned, needless to say it depends upon the facts and circumstances of each case. I have also perused the contents of the application filed by the petitioner before the learned Additional District Judge wherein neither any specific provision of law nor any reason has been mentioned for non-production of the such

documents before the learned trial Court. The contention of the petitioner in the para No.8 of his suit has been mentioned that recently when he visited the Patwari's office, it came into his knowledge that the land in dispute had been entered on the name of respondent No.2 and the same has been transferred by respondent No.1 showing himself as attorney of the petitioner. It means that the petitioner had sufficient time to obtain copy of such power of attorney from the Tehsil office or from the office of sub-registrar before filing of suit. The fact of execution of general power of attorney in favor of respondent No.1 is also admitted by the petitioner, but to the extent of settlement of loan with A.D.B.P, this fact also leads this Court that the petitioner must had copy of the power of attorney. If it is presumed that the petitioner did not keep the copy in his possession at the time of executing it, but before filing of suit admittedly when it was well within knowledge of the petitioner that his landed property has been transferred in the name of respondent No.2 on the basis of said general power of attorney, even then copy of the same was not annexed with the plaint as required by Order VII Rule 14 C.P.C. In documentary evidence, he produced copy of mutation No.304 as Exh.P2, attested copies of register of Haq Daran-e-Zameen Exh.P3 (four pages) and copy of ownership as Mark-A. I have also gone through the Exh.P2 which shows that the ownership rights of petitioner have been transferred from petitioner's name to name of respondent No.2 by the respondent No.1 being his attorney. The petitioner produced the above documents in Ex-parte evidence, he had ample opportunity to have produced the proposed document i.e. general power of attorney in support of his claim but he failed in doing so. Even, he failed to file an application to the learned trial Court for summoning the record from the Tehsil office. I have also perused the contents of the said general power of attorney which shows that the same is registered with the office of Sub-registrar; it could be procured and produced in evidence, but the petitioner while recording his own evidence in the shape of affidavit and at the bottom of the same mentioned that he does not want to produce anymore oral as well as documentary evidence. In such circumstances, there left no room for the petitioner to seek

anymore additional evidence. The law laid down by Hon'ble Supreme Court of Pakistan and Azad Jammu and Kashmir regarding production of additional evidence in appeal is briefly discussed below:

A. *In "Mad Ajab and others v. AwalBadshah"[1984 SCMR 440], by referring to the case of "Parshotim Thakur and others v. LalMohar Thakur and others"[AIR 1931 Privy Council 143], it was held by the Larger Bench of the Hon'ble Supreme Court of Pakistan that the provisions of law with regard to additional evidence are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch-up the weak parts of his case and fill up omissions in the Court of appeal, and such power ought to be exercised very sparingly.*

B. *In "Muhammad Siddique v. Abdul Khaliq and 28 others"[PLD 2000 SC (AJ&K) 20], it was held that parties to an appeal are not entitled to adduce any evidence, but the same can be allowed if the Court from whose decree an appeal is preferred had refused to admit the evidence which ought to have been admitted or the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce the judgment or for any other substantial cause which is an exception to the principle that the appellate Court cannot record fresh evidence ; under Rule 27 of Order XLI, C.P.C., additional evidence cannot be recorded unless provisions of the said Rule are attracted ; the power to allow additional evidence is discretionary in nature, but the same is circumscribed by the limitation specified in the said Rule as evidence under Rule 27(b) of Order XLI is required by the appellate Court itself and not by a party to the appeal ; it may be allowed only when a party was unable to produce evidence through no fault of its own or where evidence was imperfectly taken by the lower Court ; a party that had an opportunity but elected not to produce evidence cannot be allowed to give evidence that could not have been given in the Court below ; and, the appellate Court can allow additional evidence only if it itself so feels that the judgment cannot be pronounced.*

C. *In "Taj Din v. Jumma and 6 others"[PLD 1978 SC (AJ&K) 131], it was held by the Hon'ble Full Bench that the provisions of Rule 27 of Order XLI C.P.C. impose strict conditions so as to prevent a litigant from being negligent in producing the evidence at the time of the trial ; a litigant seeking permission to adduce additional evidence at the stage of appeal has to establish that evidence available apart from being of an unimpeachable character is so material that its absence might result in miscarriage of justice and that in spite of reasonable care and due diligence it could not be produced at the time the question was being tried or it has come into existence after completion of the trial ; therefore, where a party who had been negligent in producing evidence at the time the issue was being tried and a lacuna had been left and it is not shown as to how the absence of the proposed evidence would result into failure of justice, a prayer for additional evidence in such circumstances obviously would not be granted.*

D. *In "Nazir Hussain v. Muhammad Alam Khan and 3 others"[2000 YLR 2629 SC (AJ&K)], it was held that a*

perusal of the provision contained in rule 27 of Order XLI, C.P.C., would reveal that the Appellate Court must be very cautious while allowing additional evidence. A party which seeks to bring additional evidence on record must convince the Court with proof that such party could not lead the evidence at proper stage due to some substantial cause.

E. *In "Abdul Hameed and 14 others v. Abdul Qayyum and 16 others"[1998 SCMR 671], application for production of additional evidence was dismissed by the lower appellate Court which order was maintained in revision by the learned High Court. It was held by the Hon'ble Supreme Court that the learned High Court was justified in refusing to allow production of additional evidence at the appellate stage specially when no reasonable ground was shown for not producing the same during the trial of the Suit ; and, though the parties were conscious of the questions involved in the Suit, yet they did produce the evidence.*

F. *In "Nazir Ahmed and 3 others v. Mushtaq Ahmed and another"[1988 SCMR 1653], leave was refused as no explanation was offered as to why the evidence which was sought to be produced in the High Court for the first time was not tendered before the trial Court.*

G. *In "Mst. Jewan Bibi and 2 others v. InayatMasih"[1996 SCMR 1430], it was held that "additional evidence should not be allowed to be produced to enable a party to fill up any lacuna in his case. This principle can more aptly be applied to the case of a person who has remained indolent, for years together, in the matter of producing oral or documentary evidence before the Trial Court. The petitioners' position in this regard was still worse at the stage of revision. We cannot, therefore, blame any of the Courts, which have dealt with this case earlier, for non-receipt of the said documents in evidence. The entire fault lies with the petitioners and so they must suffer the consequences thereof".*

H. *In "Rana Abdul Aleem Khan Versus Idara National Industrial Co-Operative Finance Corporation Defunct through Chairman Punjab Cooperative Board for Liquidation, Lahore and another" [2016 S C M R 2067], it was held that "We are afraid that the power under the provisions of Order XLI, Rule 27 of the C.P.C. for allowing additional evidence available is not unfettered nor does the Appellate Court has the discretion to allow additional evidence per its own caprice, rather it (discretion) is structured/limited by the factors enunciated in the said provisions of law i.e., where the Court from whose decree the appeal has been preferred has refused to admit any evidence which it ought to have admit. In this case, the petitioner never moved the Courts below to produce any evidence in the nature of examination of the Postman which was declined; that the Appellate Court requires any document or examination of witnesses enabling it to pronounce its judgment does not mean that the Court shall provide a delinquent with a chance to make up for his omission and fill up the lacuna of his case and allow additional evidence particularly in the circumstances when neither in the grounds of appeal a case for additional evidence has been set out nor any independent formal application has been moved for the purposes of producing additional evidence. It is categorically held in a number of judgments including that reported as Muhammad Tariq*

and others v. Mst. Shamsa Tanveer and others (PLD 2011 SC 151) that, ".....such power should not be exercised as a matter of course to favour a delinquent litigant, rather in genuine cases .....", and that too within the strict scope of Order XLI, Rule 27 of the C.P.C. We do not find this to be a case falling within the purview of the provision ibid. The judgment reported as Mst. Fazal Jan v. Roshan Din and 2 others (PLD 1992 SC 811) cited by the learned counsel for the petitioner has no bearing on the facts and circumstances of the case and, therefore, is inapplicable, Consequently, we do not find any reason to interfere in the impugned judgment. Petition is dismissed accordingly."

9. Keeping in view the language used in Rule 27 Order XLI C.P.C, it may be observed that the learned appellate Court could take additional evidence only if after examining the evidence produced by the parties it comes to the conclusion that the same was inherently defective or insufficient, and unless additional evidence was allowed, judgment cannot be pronounced; and, only such additional evidence can be permitted to be brought on record at the appellate stage which is required by the appellate Court itself for final or conclusive adjudication in the matter, or for any other substantial cause. It follows that additional evidence can be allowed in appeal when on examining the record, as it stands, an inherent lacuna, defect or deficiency is not only apparent, but is also felt by the appellate Court. The sole criterion as to whether additional evidence should be allowed or not depends upon the question whether or not the appellate Court requires the evidence "to enable it to pronounce judgment or for any other substantial cause", as to which the appellate Court is the sole judge as the need for additional evidence must be felt by the appellate Court itself. In such an event, the appellate Court may allow additional evidence either on an application by any of the parties or even *suo-motu*. Thus, it can be safely concluded that the expression "to enable it to pronounce judgment" means to enable the appellate Court to pronounce a satisfactory and complete judgment; it certainly does not mean that additional evidence should be admitted in appeal in order to enable the appellate Court to pronounce judgment in favour of a particular party. Thus, the provisions of Rule 27 ibid can be legitimately invoked by allowing additional evidence only in cases where it is impossible for the appellate Court to pronounce judgment on the basis of the

evidence available on record. These views expressed by me are fortified by the authorities discussed above.

10. In the case in hand, it is an admitted position that no application for summoning the witness/record from Tehsil office or from the office of Sub-registrar was filed by the petitioner before the learned trial Court although he was fully aware at that stage that the relevant document was available with the concerned Tehsil and sub-registrar office. Moreover, the record does not suggest any reasonable explanation or justification on the part of petitioner for not producing the said document before the learned trial Court or why application in this behalf was not filed by him before the learned trial Court. Therefore, the petitioner, who had an opportunity, but failed to avail it, was rightly not allowed to fill up the omission/lacuna in his case before the learned appellate Court.

11. In view of the above, learned counsel for the petitioner has not been able to point out any illegality or irregularity in the concurrent findings of the learned Courts below. Resultantly, this civil revision has no merits and the same is hereby ***dismissed***.

(GHULAM AZAM QAMBRANI)
JUDGE

Announced in open Court, on this 21st of April, 2020.

JUDGE

Approved for reporting.

S.Akhtar