

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.361 of 2013

Col. (Retd) Nadeem Shafique Raja
Versus
Jamshed Khan Barki

Date of Hearing: 13.04.2017
Petitioner by: Mr. Shamshad Ullah Cheema, Advocate
Respondent by: Mr. Muhammad Younis Bhatti, Advocate

MIANGUL HASSAN AURANGZEB J:- Through the instant civil revision petition, the petitioner, Col. (Retd) Nadeem Shafique Raja, impugns the judgment dated 11.11.2013, passed by the Court of the learned Additional District Judge, Islamabad, whereby the respondent's appeal against the order dated 14.09.2013, passed by the Court of the learned Civil Judge, Islamabad, was allowed, and the respondent's civil suit for permanent injunction, was decreed. Vide the said order dated 14.09.2013, the learned Civil Court disposed of the respondent's suit in terms of the petitioner's undertaking/statement given before the learned Civil Court on 07.09.2013.

2. The record shows that an agreement was entered into between *inter-alia* the petitioner and the respondent for construction of an 80 foot wide road/passage to be used jointly by some of the parties to the said agreement. Subsequently, the petitioner put up a barrier on the said passage. On 01.03.2013, the respondent filed a suit for permanent injunction praying for the following relief:-

"It is, therefore, respectfully prayed that a decree for permanent injunction restraining the defendant from preventing the plaintiff, his employees, or any other persons authorized by him from having free access to and full use of the said road, which is marked in Red Ink on the attached site plan, may kindly be passed in favour of the plaintiff against the defendant with costs and oblige. Any other relief, which this Honourable Court may deem just and proper in the circumstances of the case may also be granted."

3. It is not disputed that the petitioner was proceeded against *ex-parte* by the learned Civil Court. After recording the

respondent's *ex-parte* evidence, when the case was fixed for final arguments, the petitioner appeared through counsel on 07.09.2013 before the learned Civil Court. On the same very day, the petitioner's counsel's statement to the effect that the petitioner would have no objection if the respondent and his employees (whose particulars were to be provided by the respondent), were to use the passage in question, was recorded by the learned Civil Court. Perusal of the order dated 14.09.2013, passed by the learned Civil Court shows that the learned Civil Court was of the view that after the said statement, no further proceedings in the suit were required to be taken. Consequently, the said suit was disposed of with the observation that the petitioner shall abide by the undertaking/statement given before the Civil Court on 07.09.2013.

4. Against the said order dated 14.09.2013, the respondent preferred an appeal before the Court of the learned Additional District Judge, Islamabad. In the said appeal, it was *inter-alia* pleaded that the only approach to the marriage hall owned by the respondent, was through the road in question, and that all persons connected with arranging functions, and attending such functions in the marriage hall had been authorized by the respondent to use the road in question. It was also pleaded that a decree had been sought for ensuring free and unhindered access to the said road by all persons authorized by the respondent. The respondent, in his appeal, had prayed for the said order dated 14.09.2013, to be modified and a decree in terms of the relief sought in the civil suit to be granted.

5. Vide the impugned judgment and decree dated 11.11.2013, the learned Appellate Court allowed the respondent's appeal by holding that the respondent's suit shall be deemed to have been decreed in terms of the prayer sought in the plaint. The said judgment and decree dated 11.11.2013 has been impugned by the petitioner in the instant civil revision petition.

6. Learned counsel for the petitioner submitted that the learned Civil Court, vide its order dated 14.09.2013, disposed of

the respondent's suit in terms of the statement of the learned counsel for the petitioner recorded by the learned Civil Court on 07.09.2013; that the said statement was restricted to the petitioner having no-objection to the respondent and his employees (whose particulars were to be provided) from using the road in question; that the learned Appellate Court could not have modified the said order dated 14.09.2013, passed by the learned Civil Court, because the petitioner had not given his no-objection for the use of the road in question by all those arranging and attending functions at the marriage hall; that in the event, the learned Appellate Court was of the view that the learned Civil Court should not have disposed of the suit in terms of the statement given by the learned counsel for the petitioner, it should have remanded the case to the learned Civil Court for arguments; that even though the learned Civil Court had proceeded *ex-parte* against the petitioner, there was no legal impediment before the petitioner to appear before the learned Civil Court and address arguments; that the learned Appellate Court should not have decided the matter itself by going beyond the statement given before the learned Civil Court by the petitioner's counsel; and that the learned Appellate Court could not have expanded the concession given by the petitioner through his counsel. Learned counsel for the petitioner prayed for the judgment and decree dated 11.11.2013, passed by the learned Appellate Court, to be set-aside and for the matter to be remanded to the learned Civil Court for *inter-parte* arguments of the contesting parties.

7. On the other hand, learned counsel for the respondent submitted that since the petitioner had been proceeded against *ex-parte* by the learned Civil Court, he had lost the right to appear and defend the suit; that the learned Civil Court should not have simply disposed of the suit in terms of the statement given by the learned counsel for the petitioner on 07.09.2013; that in the respondent's civil suit, the respondent had prayed for free access of his employees or "any other persons authorized" by the respondent to the road in question; and that "any other

persons authorized” by the respondent included all those arranging and attending functions at the marriage hall.

8. Learned counsel for the respondent further submitted that the revision petition filed by the petitioner was liable to be dismissed, because the petitioner had not filed the relevant record along with the revision petition. He placed reliance on the case of “Tyeb Vs. Messrs Alpha Insurance Company Limited” (1990 CLC 428) in support of his contention that a party having produced no evidence of its own, would have to abide by and be bound by such evidence, as had come on the record. Learned counsel further submitted that since the evidence produced by the respondent before the learned Civil Court had gone un-rebutted, the facts deposed by the respondent stood proved. Learned counsel for the respondent also placed reliance on the case of “Syed Mushtaq Ali Vs. Master Khushi Muhammad” (PLD 1961 (W.P.) Lahore 792) in support of his contention that the only method by which a defendant can be heard after he had defaulted in appearance, was to appear in Court and assign good cause for his previous non-appearance. In the said report, it was also held that as soon as the defendant defaults in appearance, he is dead for the purpose of putting of appearance in the suit, and even if he physically appeared in Court later, his appearance cannot be recognized as appearance for the purposes of the suit. Additionally, learned counsel for the respondent placed reliance on the case of “Mst. Banori Vs. Jilani” (PLD 2010 SC 1186) in support of his contention that a revision petitioner was bound to furnish copies of the pleadings, documents and the order of the subordinate Court along with the revision petition. Learned counsel for the respondent prayed for the civil revision petition to be dismissed.

9. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant civil revision petition have been set out in sufficient detail in paragraphs 2 to 5 above and need not be recapitulated.

10. It is an admitted position that in the proceedings before the learned Civil Court, the petitioner was proceeded against *ex-parte*. The petitioner did not even cross-examine the witnesses produced by the respondent. The petitioner's case primarily centers around the argument that since the respondent, in his suit, had prayed for free access for the use of the road in question by himself, his employees and other persons authorized by him, and that after taking into account the said prayer, a statement was made by the learned counsel for the petitioner before the learned Civil Court on 07.09.2013 to the effect the petitioner would have no-objection to the use of the road in question by the respondent and his employees, (whose particulars were to be furnished), the learned Appellate Court could not have granted relief beyond what was in the statement of the learned counsel for the petitioner.

11. True, the learned Civil Court had disposed of the suit on the basis of a statement made by the learned counsel for the petitioner, and not on the merits of the case, but it is well settled that an appellate Court while hearing an appeal against an order or a decree of the trial Court exercises the same jurisdiction that vests in the Trial Court and the entire *lis* is reopened, without any restriction placed by the order or decree appealed against. An appeal is the continuation of the original suit and the appellate Court has power to thrash out and evaluate the entire evidence and scrutinize the available documents in the light of the arguments advanced by the respective parties. In other words, an Appellate Court, being the last Court of fact, can do all that the original/trial Court can do. An appellate Court has the power to uphold, modify or reverse the decree or order appealed against. An appeal being a continuation of the trial, the judgment of the trial Court merges into the judgment of the Appellate Court. In this regard, Section 107 C.P.C. is reproduced herein below:-

*"107. Powers of Appellate Court.-- (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power--
(a) to determine a case finally;*

- (b) *to remand a case;*
- (c) *to frame issues and refer them for trial;*
- (d) *to take additional evidence or to require such evidence to be taken.*
- (2) *Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein."*

12. It is not disputed that the proceedings before the learned Civil Court had reached the stage of arguments. The order sheet of the learned Civil Court shows that on 31.08.2013, the respondent's *ex-parte* evidence was completed and the matter was adjourned for final arguments to 07.09.2013. As mentioned above, on 07.09.2013, the learned Civil Court recorded the statement of the learned counsel for the petitioner. It is also not disputed that before the appellate Court *inter-parte* arguments had taken place. Hence, the petitioner cannot complain about not being heard on the merits of the case. The petitioner could not insist for the learned appellate Court to remand the case to the learned Civil Court for arguments. If an appellate Court finds the impugned decree or order of the lower Court to be erroneous or against the law or the facts, then it was required to correct the same in the appellate proceedings. A remand order should be avoided, unless exceptional circumstances call for it.

13. Even though, the petitioner had been proceeded against *ex-parte* by the learned Civil Court, he nonetheless had a right to participate in the proceedings at a subsequent stage. Where an *ex-parte* order had been passed by the trial Court against the defendant he could not ask for the reopening of proceedings unless he showed sufficient cause, but he could join at any time from the stage which had already been reached. The purpose to be achieved by the said principle was that decisions should be on merits. In the case of Police Department through Deputy Inspector General of Police Vs. Javid Israr (1992 SCMR 1009), it has been held that a defendant who is proceeded against *ex-parte*, and does not get the *ex-parte* order set-aside, was not debarred from appearing and participating in the proceedings at a subsequent stage. Additionally, in the cases of Sabir Ali Vs.

Khalida Parveen 2006 YLR 638, and Muhammad Mussain Vs. Dana Begum (PLD 2004 SC AJK 20), it has been held that where proceedings had been ordered *ex parte* against a defendant, he could join the proceedings at any subsequent stage, if he did not want the setting aside of the proceedings taken in his absence. The provisions of Order IX, Rule 7 CPC were attracted only, where the defendant wanted the setting aside of the *ex parte* proceeding. In the case at hand, the petitioner has, at no material stage, applied for the setting aside of the *ex-parte* proceedings.

14. The petitioner, instead of participating in the proceedings before the learned Civil Court, decided to have his statement recorded through his counsel. The learned Civil Court instead of simply deciding the case on the basis of the statement of the learned counsel for the petitioner, ought to have decided the case on merits i.e. on the basis of the material available on the record. There can be no doubt about the duty of the Court to ensure, even when proceeding *ex-parte*, that its decision is in accordance with the facts, which should be ascertained with as much care as is possible in the absence of any contesting party.

15. The record also shows that an agreement was executed between *inter-alia* the petitioner and the respondent with respect to the construction of an 80 foot wide road for common use through the properties owned by all the parties to the said agreement. A copy of the agreement (Exh-P.1) has been brought on record by the petitioner, who does not deny its execution. The road constructed pursuant to the said agreement was to be the joint property of three parties to the said agreement. The respondent's grievance arose when the petitioner placed a barrier on the said road. The said agreement does not provide for the restriction *qua* the use of the road in question. Furthermore, the agreement is also silent on whether any permission is required to be taken by the any of the parties to the said agreement from the other parties for the use of the road. The agreement also does not authorize any party to the agreement to place a barrier on the passage. Therefore, the

petitioner could not arrogate to himself the right to approve the list of persons authorized by the respondent to use the passage in question. The learned Civil Court by simply disposing of the suit on the statement of the learned counsel for the petitioner, failed to exercise jurisdiction vested in it by not deciding the case on its merits.

16. Since the proceedings before the learned Civil Court had reached the stage of arguments; and since an appeal is a continuation of the proceedings; and since *inter-parte* arguments were heard by the learned Appellate Court; and since the learned Appellate Court had decided the case on merits, I do not find any infirmity, factual or legal, in the findings of the learned Appellate Court. The learned counsel for the petitioner could not point out as to how the appellate judgment was against the law and facts of the case.

17. In view of the above, the instant petition is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2017

(JUDGE)

APPROVED FOR REPORTING

Sultan*

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