

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

C.R. No.105 of 2016

Ch. Muhammad Arshad
Versus.

PTCL through its General Manager

Date of Hearing: 19.04.2016

Petitioner by: Syed Hasnain Ibrahim Kazmi and Mr. M. Akram
Shaheen Advocates.

Respondent by: Mr. Tariq Khushnood Qureshi, Advocate.

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition, the petitioner, Ch. Muhammad Arshad, impugns the order dated 13.01.2016, passed by the court learned Civil Judge 1st Class (West), Islamabad, whereby the petitioner's application under Order XVI, Rule 14 of the Code of Civil Procedure, 1908 (C.P.C.), for summoning the local commission as a court witness, was dismissed.

2. The record shows that on 13.09.2011, the petitioner instituted a suit for recovery of Rs.82,95,490/- etc, against the respondent (Pakistan Telecommunication Company Limited). Through the said suit, the petitioner/plaintiff sought to recover the amount expended on the repairs carried out on the premises which had earlier been leased by the petitioner to the respondent. The petitioner had also sought the recovery of unpaid rent until the leased premises were handed over to the petitioner. Alongwith the said suit, the petitioner also filed an application under Order XXVI, Rule 9 C.P.C. praying for the appointment of a local commission to determine the present status regarding possession of the leased premises. Vide order dated 15.09.2011, the learned Civil Court appointed Mr. Tanvir Khalid Awan, Advocate, as a local commission, with the direction to inspect the leased premises after issuing notice to the parties, and to submit a report on 05.10.2011. On 05.10.2011, the learned local commission submitted his report in the court. For the present purposes, it is not necessary to go into the contents of the report.

3. The suit instituted by the petitioner was contested by the respondent by filing its written statement. Thereafter, issues were framed on 06.01.2014, and the contesting parties were required to submit their list of witnesses and a certificate of readiness to produce evidence within a period of seven days. After the framing of issues, evidence of the petitioner's witness was recorded on 07.09.2015 and 27.10.2015. On 06.11.2015, the petitioner filed an application under Order XVI, Rule 14 C.P.C. praying for the learned local commission to be summoned to depose evidence as a Court witness and get his report exhibited. Vide order dated 13.01.2016, the learned Trial Court dismissed the said application. The reasons for the dismissal of the said application are set out in paragraph 4 of the said order, which is reproduced herein below:

"As per record the issues were framed on 25.01.2014 and the plaintiff was directed to submit list of witnesses within 07 days as required under order 16 rule 1 C.P.C., but the plaintiff did not submit any list of witnesses, therefore, the application in hand is time barred, so the same stand dismissed."

4. It is the said order dated 13.01.2016 which has been impugned by the petitioner in the instant civil revision petition.

5. Learned counsel for the petitioner submitted that under Order XVI Rule 14 C.P.C. the court is vested with ample powers to direct the local commission to appear in the court as a Court witness; that in the interests of justice, the learned Civil Court should have summoned the local commission so that he could be cross-examined by the petitioner; and that it was important for the report of the local commission to be exhibited so that it could form part of the evidence. In making their submissions, the learned counsel for the petitioner placed reliance on the law laid down in the cases of Mst. Hajra Begum through legal heirs Vs. Mst. Badar-ur-Nissa and others (PLD 2013 Sindh 417), Urman Jee Vs. District Judge, Kohat and 3 others (PLD 1990 Peshawar 100), and Amna Bibi and 2 others Vs. Sona Khan and others (2012 YLR 2047).

6. On the other hand, learned counsel for the respondent defended the impugned order dated 13.01.2016 by submitting that the same was passed strictly in accordance with the law;

that the report of the local commission pre-dates the framing of issues; that as the name of the local commission is not included in the list of witnesses submitted on behalf of the petitioner, the local commission could not be summoned through the process of the court; and that the petitioner was estopped from filing of an application for the summoning of the local commission.

7. I have heard the arguments of the learned counsel for the contesting parties and have perused the record with their able assistance.

8. The facts leading to the passing of the impugned order dated 13.01.2016 have been set out in sufficient detail in paragraphs 2 to 3 above and need not be recapitulated. Order XVI Rule 14 C.P.C reads as follows:-

"14. Court may of its own accord summon as witnesses strangers to suit.—Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document."

9. Order XVI Rule 14 C.P.C. gives a court the power, of its own motion, to cause a person to be summoned to give evidence at any stage of the proceedings if the court thinks it necessary to examine such a person. This power is discretionary and can be exercised by the court to ensure complete justice. The provisions of Order XVI Rule 14 C.P.C., cannot be used by a party to a litigation to summon any person. The court's power under the said law cannot be used to help a party remedy his omission to examine a witness. As the report of the local commission dated 05.10.2011 is prior in time to the framing of issues on 06.01.2014, there was nothing preventing the petitioner for giving the name of the learned local commission in the list of the witnesses. Had the petitioner given the name of the learned local commission in the list of witnesses, he could have had the learned local commission summoned through the process of the court. This, the petitioner did not do. After the evidence of the petitioner's witnesses has

been partially recorded, the petitioner cannot insist the court to exercise its powers under Order XVI Rule 14 C.P.C. to summon the learned local commission as a court witness to give evidence.

10. The case law relied upon by the learned counsel for the petitioner does not come to his aid. In the case of Mst. Urmanjee Vs District Judge, Kohat and 3 others (PLD 1990 Peshawar 100), it has been held that the powers of the court under Order XVI Rule 14 C.P.C. to summon any person to give evidence or produce a document would not extend to summoning of a party as a witness. The same view was taken by the Hon'ble Peshawar High Court in the case of Amna Bibi and 2 others Vs Sona Khan and another (2012 YLR 2047). In the case of Mst. Hajra Begum through legal heirs Vs Mst. Badar-un-Nissa and others (PLD 2013 Sindh 417), it has been inter-alia held that a court might permit summoning of a proposed witness, if it is satisfied that the party requiring his production had shown a good cause for not including his name in the list of witnesses.

11. The record is silent on whether any party subjected the report of learned local commission to a challenge. The learned counsel for the petitioner, during his arguments, submitted that it was essential for the report of the learned local commission to be exhibited so that it is made a part of the evidence. Notwithstanding the observations made hereinabove, a solution to the petitioner's concern is provided in Order XXVI, Rule 10 C.P.C, which reads as follows:-

"10. Procedure of Commissioner.---(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him to the Court.

Report and depositions to be evidence in suit. Commissioner may be examined in person.---(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.”
(Emphasis added)

12. Under the said Order XXVI, Rule 10 C.P.C. a report of a local commission together with evidence recorded by him is evidence in the suit. Such a report or evidence ought to be taken into consideration by the court in coming to its conclusion. However, a report of a local commission is not binding on the court, which can arrive at its own conclusion. The parties to a suit are entitled to object to the report of the local commission and to substantiate their assertion by examining the Commission. Case law to this effect is referred to herein below:

- (i) In the case of Islamuddin and others Vs. Ghulam Muhammad and others (PLD 2004 SC 633), the learned Trial Court had appointed a local commission, who, after conducting local inspection, had submitted his report. This report was not subjected to a challenge by any party. An objection was raised by the learned counsel for the appellant to the effect that without getting the report of the local omission exhibited, it was inadmissible and could not be used against the appellant. It was held that as the report of the local commission had not been objected to by any of the parties before the learned Trial Court, the Court could refer to it *“to explain the evidence which had come on record”*. Furthermore, it was held that such a report could not form the basis for the grant of a relief.
- ii) In the case of Abdus Shakoor Vs Muhammad Zafar Ullah Khan and others (2007 CLC 1661) it was inter-alia held that a report of a local commissioner was to be treated as evidence in the suit, although it was not binding on the court, which could arrive at its own conclusion on the basis of the evidence on record.

- (iii) In the case of Zaheer-ur-Din Vs Mst. Khurshida Begum (1996 CLC 585) it was held at paragraph 8 of the report as follows:-

"8....A bare reading of the sub-clause (2) of Rule 10 of Order XXVI, would show that a Local Commissioner is not required to be examined as a Court-witness nor he is ever summoned as such. Any party can summon the Local Commissioner to appear as witness in the case and then a departure has been made from the age old principle of conducting examination-in-chief by the party calling the witness and cross-examination by the opposing party. It has been provided in the rule itself that even the party calling the evidence may examine the Commissioner touching any of the matters referred to him or mentioned in his report or as to his report or as to the manner in which he has made the investigation meaning thereby that the party calling the Commissioner as a witness can also cross-examine him."

- (iv) In the case of Allah Jewaya Vs Muhammad Bakhsh (PLD 1998 Lahore 338) it has been held that the right to cross examine a local commissioner personally was available to party only with the permission of the court under Order XXVI, Rule 10(2) C.P.C.
- (v) In the case of National Bank of Pakistan Vs M/s Ch. Auto and Tools Agency (PLD 2001 Lahore 135) it was held that any issue for enquiry can be referred to a local commissioner under provision of Order XXVI, Rule 10(2) C.P.C. and his report is evidence in the suit.

13. In the case at hand it appears that no party has filed objections to the local commission's report dated 05.10.2011. At no material stage did the petitioner file an application under Order XXVI, Rule 10 (2) C.P.C. for summoning the learned local Commission. As the learned Civil Court, in its discretion, did not think it necessary to examine the local commission or to summon him of its own motion as a witness to give evidence, no valid grouse could be made by the petitioner against the learned Civil Court for not allowing his application under Order XVI, Rule 14 C.P.C. for summoning the learned local commission as a court witness. Therefore, I do not find any merit in this petition, which is accordingly dismissed.

14. Before parting with this judgment, it may be observed that the report of the learned local commission alongwith the evidence submitted before the learned Civil Court on 05.10.2011 is to be treated as evidence in the suit in terms of Order XXVI Rule 10(2) C.P.C. There is nothing preventing the petitioner from filing of an application under Order XXVI Rule 10 C.P.C. for seeking the permission of the court to examine the learned local commission personally. Should the petitioner make such application, the learned Civil Court may, in its wisdom, pass an order thereon uninfluenced by any observations made in this judgment. However, the learned Civil Court, may bear in mind that such an application was being made years after the submission of the local commission's report dated 05.10.2011.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON _____/2016

(JUDGE)

APPROVED FOR REPORTING

(JUDGE)

Qamar Khan*