

**MUHAMMAD FAYAZ---Petitioner**

**Versus**

**MUHAMMAD BANYAMEEN and 3 others---Respondents**

Writ Petition No. 1089 of 2020

**JUDGMENT**

**SARDAR EJAZ ISHAQ KHAN, J.---**This writ petition assails the judgment and decree in the first instance dismissing the petitioner's suit for declaration and permanent injunction. It also assails the appellate judgment dismissing the petitioner's appeal.

2. In 2012, the petitioner filed a suit for declaration and permanent injunction claiming title to and possession of land in khasras Nos. 1596/1079 and 1597/1079 in Mouza Mera Begwal, Islamabad. The written statement denied the petitioner's suit, and during trial the dispute stood narrowed to one khasra 1597/1079<sup>1</sup> only in which the petitioner claimed title on the basis of an agreement/ [REDACTED] and certain revenue records. The parties led their entire evidence and produced their witnesses and documentary evidence. Towards the end of the trial, the learned judge noted that his predecessor had omitted to frame issues and the trial had proceeded to evidence without the issues being framed. This is reflected in paragraph No. 3 of the judgment in the first instance which is reproduced below:

It is pertinent to mention here that during the proceedings of the case my learned predecessor in office inadvertently could not frame issues at proper stage of the case but when this fact came before this court after evidence then this court vide order dated 29.10.2018 framed the issues, out of divergent pleadings and the parties were given an opportunity to produce any further evidence on the basis of issues framed afterwards. However, parties relied on already recorded evidence and did not produce any evidence.

3. The learned trial court evaluated the evidence well, and dismissed the suit. The court took into account, inter alia, (i) an earlier decree by the civil court in 2010 declaring that the defendant in the suit (the respondent herein) was the owner in possession of the suit property (ii) the pre-existing Assistant Commissioner's report of 2009 to the same effect, and (iii) the local commission's report appointed during the trial whose report confirmed the defendant's possession of the suit land, and which report was not objected to by either party and therefore it carried weight with the trial court. In his appeal before the appellate court of the Additional District Judge Islamabad, the memo of appeal did not take the ground of the issues not being framed before the evidence was led by the parties, and the appellate court by a concise judgment upheld the judgment appealed from and dismissed the appeal.

4. The primary ground taken before this Court in this writ petition by the learned counsel for the petitioner was that the leading of the evidence without the framing of the issues was an illegality and therefore he asked for both the judgments to be set aside and the matter to be remanded for a fresh trial. He also raised other grounds to which I will turn later. Learned counsel cited judgments in support of his main ground which I discuss below:

- i) Farida Zafar Zehri and others v. Feroza Khanum and others (2007 SCMR 726)

Although the headnote of this case does read that no evidence could be produced in the absence of issues framed in view of the pleadings of the parties, the judgment when read in its entirety leads to a conclusion which can be confined to the facts of that case. An application under section 12(2), C.P.C. was filed to set aside a decree passed on the basis of alleged fraudulent conceding statement. The trial court asked the applicants to file their list of witnesses and adjourned the matter to a date for their evidence and on that date the trial court dismissed the application under section 12(2), C.P.C. for non-prosecution because of the failure of the applicants to produce evidence and for their failure to file the list of witnesses within 7 days without any sufficient cause. The High Court set aside the judgment of the trial court directing it to frame issues and then to provide a reasonable opportunity to the parties to lead evidence and remanded the

matter. The Hon'ble Supreme Court agreed with the High Court, finding that in the application under section 12(2) it was incumbent upon the trial court to have framed the issues and then given the parties reasonable opportunity to produce that evidence, instead of dismissing the application solely on the basis of the list of witnesses not being produced and no evidence being led on the very first date set for this purpose. It was in this context, and the headnote therefore reads that way, that the Supreme Court held that, as no issues had been framed, it was not appropriate to expect the applicants to lead evidence and the dismissal order of the learned trial court was therefore premature and unwarranted.

The instant case is altogether different, as the parties knowing that the issues had not been framed led their entire evidence and it cannot be seen how the instant case can be equated to the citation above.

ii) Mst. Bhagul and 8 others v. Abdullah and others (2016 MLD 70)

Again, though the headnote reads that the framing of issues was not a mere formality but a compulsory stage through which the court had to bring all the controversies in the shape of questions putting parties to specific and clear notice of their liabilities to discharge their respective burdens, the judgment when read in its entirety again paints a different picture.

In this case the issues were framed by the court but, while rendering the judgment, the court formulated one of the main issues in a negative form as opposed to the positive formulation in which it was originally formulated, and the High Court found that this shift in framing of the issues from a positive to a negative formulation not only shifted the burden of proof but created uncertainty as to how the learned trial court was meant to evaluate the evidence. It was in this context that the language in the headnote appears.

iii) Karachi Electric Supply Company Limited v. Tri-Star Energy Limited (PLD 2008 Karachi 572).

Here too the headnote is somewhat misleading if, as urged by learned counsel, it is to be read as laying down an absolute principle that it is incumbent on the court to frame issues and under no circumstances could evidence have been led without framing of issues.

What happened in this case was that the plaintiff was allowed to amend its plaint but a corresponding opportunity to the defendants for filing an amended written statement was not afforded and, on an urgent application by the plaintiff, the single judge in chambers framed a single issue and disposed of the case on the same day. The appellate bench found in the circumstances of this case that this had caused severe prejudice to the defendant because the single issue framed did not reflect the parties' pleadings accurately.

5. The judgments cited by the learned counsel for the respondent in reply are summarized below.

i) Muhammad Ibrahim (deceased) through LRs and another v. Taza Gul and others (2020 SCMR 2033)

The Hon'ble Supreme Court in this case held that the framing or non-framing of issues could not be a ground for reversing the judgment and decree of any court, and a party could not ask for a remand of the matter at a later stage on the basis that any issue which was required in accordance with the pleadings of the parties was not framed. In this case, the Supreme Court took into account the fact that during the trial the party claiming to be aggrieved had not agitated the non-framing of issues according to its liking during the trial. More to the point, the Hon'ble Supreme Court observed at paragraph 6 that "[W]e are of the view that the evidence of the parties is to be led in accordance with the pleadings. It is not a legal defect if any specific issue is not framed and party claiming that issue do not [sic] agitate the matter for decades and if the language of existing issues is not in accordance with the wishes of any of the parties."

ii) Mian Arshad v. Election Tribunal (PLD 1999 Lahore 392)

It was held that "[O]nce the parties have adduced all the relevant evidence which they wanted to produce, then the onus and the form of the issues becomes immaterial. Moreover, no prejudice has been caused to the petitioner, therefore, it would be a case covered by section 99, C.P.C."

iii) Qazi Shamsur Rehman and another v. Mst. Chaman Dasta and others (2004 SCMR 1798)

It was held that if there was a procedural defect and such procedural defect was not pointed out timeously, then it was not possible for the party to object to it later. Such procedural defect had to be closely linked to the prejudice caused thereby. If the objection is not raised timeously, then the court should not do suo motu and not reverse the judgment on that basis. The court cited section 99, Civil Procedure Code for the said finding.

6. In Muhammad and 9 others v. Hashim Ali (PLD 2003 SC 271), the Hon'ble Supreme Court held<sup>2</sup> that if on a question of fact a specific issue required to be framed in light of the pleadings of the parties was not framed, but the parties had produced evidence on the controversial question of fact, the decision could be legally rendered on such question without framing the issue. The Hon'ble Supreme Court went on to hold that where the pleadings of the parties related to a controversial question of fact and the parties had led evidence in support of their respective stance and the decision thereon could be rendered in light of the evidence available on record, the framing of a separate issue and recording further evidence in the matter was not an essential requirement of law for rendering the decision by the trial court.

7. As noted in paragraph 3 of the impugned judgment in the first instance, the trial court not only framed the issues based on the pleadings of the parties before proceeding to give judgment, but also gave the opportunity to the parties to produce further evidence on the basis of the issues framed, which the parties voluntarily declined to do. The said paragraph notes unequivocally that the parties relied on already recorded evidence, and did not produce any further evidence. As the petitioner did not object at the time, not only is the petitioner now estopped from questioning this immaterial irregularity once his suit was dismissed, he is also to be taken to have waived any right to object that he might have had with reference to the judgments cited above. On reading the impugned judgment, it is obvious that the petitioner produced all the evidence he wanted to his heart's content, and now he wants the impugned judgment to be reversed for it turning out against him. Section 99, C.P.C. is fully attracted to this case, and neither any miscarriage of justice is found to have occurred in this case nor the merits of the case stand affected to the prejudice of the petitioner for the decree to be reversed; not applying section 99, C.P.C. in the circumstances of this case would defeat the very purpose for which section 99, C.P.C. was enacted. Moreover, as the petitioner did not raise this ground in appeal before the appellate court and agitated it in this petition for the first time, not only it cannot be entertained even if it deserved to be entertained, the consequence of knowingly raising this ground nonetheless is that it must be regarded as frivolous and vexatious for which I award costs against the petitioner and in favour of the defendant towards the end of this judgment.

8. Another ground raised by the petitioner is that the appeal was decided without hearing his counsel, raising the rather cryptic reason that the learned ADJ was on training until a day before the appeal was heard. This is an utterly frivolous plea because it does not claim that the appeal was heard on a date on which it was not already listed for hearing. The judgment in appeal dated 30.01.2020 notes 'nemo for the appellant', and paragraph 2 thereof reads that the appeal was filed on 19.03.2019 and, due to the unavailability of the appellant's counsel, it had been adjourned for a number of times despite 'absolute final opportunities'. The appellate judgment is concise, refers to the relevant findings and the evidence per the judgment in first instance, and finds no reason to interfere therewith.

9. Ground No. (i) of the memo of petition avers that, after framing of issues, the learned trial court did not receive any evidence hence the judgment rendered by the trial court could not be termed as a judgment. This plea too is false and frivolous, because para 3 of the

judgment reproduced above clearly states that an opportunity to produce further evidence was duly given to the parties, which they elected to forego. If that were not the case, one would have expected this to be one of the strongest grounds in the memo of appeal before the appellate court, but this ground was not taken therein.

10. This being a writ petition, illegality, failure or excess of jurisdiction, perverse exercise of discretion, material misreading of evidence, and the like, have to be shown for this Court to interfere, rather than a reappraisal of the evidence which the learned counsel for the petitioner wants this Court to engage in. This of course can't be done.

11. Resultantly this petition is without merit and is dismissed.

12. For raising frivolous and vexatious pleas, the petitioner is fastened with special costs of Rs. 50,000/- under section 35-B, C.P.C., which he is directed to pay to the legal heirs of respondent No.1 within 30 days from today. The petitioner shall submit the receipt, duly signed by legal heirs of respondent No.1 with the Deputy Registrar (Judicial). The payment shall be confirmed by the Deputy Registrar (Judicial) on file put up in Chambers within one week thereafter.

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