

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**MR. JUSTICE UMAR ATA BANDIAL, HCJ**  
**MR. JUSTICE ATHAR MINALLAH**

**CIVIL PETITION NO.1692-L OF 2022**

*(Against the order dated 24.05.2022 of the  
Lahore High Court, Lahore passed in Civil  
Revision No.107777 of 2017)*

Shamshad Bibi, etc. ...Petitioner(s)

**Versus**

Riasat Ali, etc. ...Respondent(s)

For the petitioner(s): Malik Ejaz Hussain Gorche, ASC  
*(via video-link, Lahore)*

For the respondent(s): Rana Maqsood ul Haq, ASC  
*(via video-link, Lahore)*

Date of hearing: 25.05.2023

**ORDER**

**Athar Minallah, J.-** Shamshad Bibi ("**petitioner**") has sought leave against the order, dated 24.5.2022, whereby the High Court allowed the application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 ("**CPC**") and has remanded the matter to the trial court for recording of additional evidence. The civil revision was also subsequently allowed and the concurrent findings of the two competent courts were set-aside.

2. The petitioner asserted in the plaint that she was the daughter of Jabbar Din and granddaughter of Mst. Karima Bibi. The dispute is regarding the inheritance mutation incorporated in the revenue record after the passing away of Jabbar Din and his mother Mst. Karima Bibi. The property was described in the plaint. It was asserted that Jabbar Din had three wives, one of whom had been divorced. Jabbar Din had children from all the three wives and the petitioner was the only daughter from Mst. Fatima Bibi. The petitioner was excluded from the inheritance mutation incorporated in the revenue

record after the passing away of Jabbar Din and, later, his mother. The petitioner, therefore, challenged her exclusion by filing a suit for declaration, permanent injunction and malkana possession. The trial court had framed eight issues including the issue regarding the legitimacy of the petitioner as Jabbar Din's daughter. The suit was decreed by the trial court vide judgment and decree dated 19.12.2012, while the appeal preferred by the respondents was dismissed vide judgment and decree dated 08.11.2017. During the pendency of the appeal before the appellate Court, an application was filed seeking a direction to the petitioner to conduct her DNA test. The application was allowed, vide order dated 22.6.2013, and later it was set-aside by the High Court vide order dated 08.12.2016. The judgments and decrees of the trial court and the appellate Court, whereby the petitioner's suit was decreed, were assailed before the High Court, invoking its revisional jurisdiction under section 115 of the CPC. The respondents filed an application under Order XLI Rule 27 of the CPC and it was allowed by the High Court vide impugned order dated 24.5.2022. Simultaneously, the revision petition was also allowed and the concurrent findings of the two competent courts were set-aside. The matter was remanded to the trial court with a direction to record additional evidence.

3. We have heard the learned counsels for the parties at great length.

4. The questions that have arisen for our consideration are; whether the High Court, while exercising its revisional powers under section 115 of the CPC, was justified in accepting the application under Order XLI Rule 27 of the CPC and remanding the matter for recording of additional evidence; whether the High Court, in the absence of jurisdiction having been exercised illegally or without material irregularity by the subordinate courts, was justified to allow the revision petition and

remand the matter to the trial Court. The powers vested in the High Court under section 115 of the CPC are to be exercised in accordance with the parameters described in clauses (a) to (c) *ibid*. The revisional powers are meant for correcting errors made by the subordinate courts in the exercise of their jurisdiction. Ordinarily, erroneous decisions of fact are not revisable, except in cases where the decision is based on no evidence or inadmissible evidence and is so perverse that grave injustice would result therefrom.<sup>1</sup> Rule 27 of Order XLI CPC empowers the appellate Court to allow additional evidence to be adduced, whether oral or documentary, after the recording of reasons. This power is circumscribed by three eventualities described in clauses (a) to (c) i.e. if the court, from whose decree the appeal has been preferred, has refused to admit evidence which ought to have been admitted; the appellate court, on being satisfied that the additional evidence was available but could not be produced before the trial court for reasons beyond the control of the party seeking its production; or the appellate court itself requires any such evidence so as to enable it to pronounce a judgment. Rule 28 of Order XLI describes the procedure for taking additional evidence and provides that the appellate court may either take such evidence or direct the court from whose decree the appeal is preferred, or any other subordinate court, to take such evidence and to send it when taken to the appellate court. Rule 29 of Order XLI further provides that where additional evidence is directed or allowed to be taken, the appellate court shall specify the points to which evidence is to be confined and record in its proceedings the points so specified. It would also be relevant to refer to Rule 23 of Order XLI of CPC which describes the mode and conditions for remanding of a case by the appellate court. Rule 27 of Order XLI explicitly refers to an appellate court but by now it is well settled that in exceptional cases the power can also be exercised

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<sup>1</sup> *Kanwal Nain and others v. Fateh Khan and others* (PLD 1983 SC 53)

by the revisional court. A larger Bench of this Court has held that, ordinarily, at the stage of civil revision there is no question of recording additional evidence, but there may be exceptional cases where, in the interest of justice and if so required by the court to enable it to adjudicate on the matter, the court may order that such additional evidence should be recorded.<sup>2</sup> In exceptional cases depending on the facts and circumstances, a court exercising revisional jurisdiction may record clarificatory statement or admit evidence in any other form, in order to determine whether the lower court had acted illegally or with material irregularity, so as to attract clause (c) of section 115(1) of the CPC.<sup>3</sup> Another larger Bench of this Court has held that where in a case falling under section 115 (1)(c) of the CPC, it has been established that the appellate court had exercised its jurisdiction illegally or with any material irregularity then the scope of additional evidence is not excluded. Additional evidence can, therefore, be admitted in exceptional cases and to rectify the error where the court had acted illegally or with material irregularity in the exercise of its jurisdiction, and justifiably fell within the four corners of the power vested in the High Court under section 115 of the CPC.<sup>4</sup>

5. The power under order XLI Rule 27 of the CPC is not intended to be exercised to fill up lacunas, or to make up any deficiency in the case, nor to provide an opportunity to the party to raise a new plea. The power essentially has to be exercised cautiously and sparingly and not to facilitate an indolent litigant. The court, before exercising its jurisdiction of allowing the recording of additional evidence, must be satisfied that the document sought to be adduced in evidence is not of the nature that could be easily fabricated, tampered or manufactured.

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<sup>2</sup> *Ahmad Ashraf v. University of Punjab* (1988 SCMR 1782)

<sup>3</sup> *Haji Muhammad Zaman v. Zafar Ali Khan and others* (PLD 1986 SC 88)

<sup>4</sup> *Mohabbat v. Asadullah Khan and others* (PLD 1989 SC 112)

6. In the case in hand, the petitioner had brought sufficient evidence on record to prove, on the touchstone of the principle of balance of probabilities and preponderance of evidence, the factum of being Jabbar Din's daughter. The respondents were not able to rebut the evidence and, therefore, the two competent courts concurrently recorded findings in favour of the petitioner's claim. The respondents had filed an application before the appellate court, seeking a direction to the petitioner to subject herself to a DNA test. The application was allowed but subsequently dismissed by the High Court. The respondents had not filed any application before the trial court nor the appellate court for the recording of additional evidence. The application was, however, filed before the High Court which was exercising revision powers. The grounds mentioned in the application, filed under Order XLI Rule 27 of the CPC, did not disclose any exceptional circumstance to justify the recording of additional evidence. The grounds were flimsy and appeared to be an attempt to embark upon a fishing or roving inquiry. Moreover, it was not denied that the evidence sought to be recorded as additional evidence at the revision stage was available when the trial was pending but no attempt was made to produce it then. The remanding of the matter and setting aside of the concurrent findings by two competent courts was not in consonance with the legislative intent unambiguously manifest from principles highlighted above.

The above are the reasons for our short order dated 25.05.2023.

**Chief Justice**

**Judge**

**Islamabad, the**

25<sup>th</sup> May, 2023

**NOT APPROVED FOR REPORTING.**

(Amir Sh.)