

Judgment Sheet

PESHAWAR HIGH COURT, ABBOTTABAD BENCH

JUDICIAL DEPARTMENT

CR No.233-A of 2018

JUDGMENT

Date of hearing.....08/10/2018.....

*Petitioner(s)...(Zahid Zaman Khan etc) by Haji Ghulam Basit, Advocate
.....*

*Respondent(s)...(Khan Afsar) by Mr. Muhammad Naeem Anwar, Advocate
.....*

SYED MUHAMMAD ATTIQUE SHAH, J.-

The instant revision petition under section 115 CPC has been filed by the petitioners against the order dated 22.05.2018 passed by learned District Judge, Abbottabad in Civil Appeal No.16/13 of 2016, whereby, the request of petitioners qua remand of the case back to the learned trial Court for framing of additional issues in suit No.166/1 of 2007 arising out of the pleadings of the parties and to provide opportunity to both the parties to adduce their evidence, was declined.

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2. The brief and essential facts leading to institution of instant revision petition are that petitioners Zahid Zaman Khan etc filed suit No.167/1 of 2007 against the respondents seeking declaration and permanent injunction etc in respect of property comprising in '*Khasra*' Nos.586 and 587 measuring 13 '*Marlas*' situated in '*Mauza*' Dhamtaur, Tehsil and District Abbottabad and similarly, respondent No.1, Khan Afsar, also filed suit No.166/1 of 2007 for declaration and possession etc regarding the same property, referred to above. Both the parties appeared before the learned trial Court and filed their written statements in their respective suits. The learned trial Court consolidated both the suits and out of the pleadings of the parties framed as many as eleven consolidated issues and both the parties were allowed to produce their evidence in support of their respective issues. After recording evidence, the learned trial Court, while hearing arguments of learned counsel for the parties on the application of present petitioners Zahid Zaman

etc for appointment of local commission, with the consensus of both the parties also framed an additional issue and also produced evidence in respect of the said additional issue. The learned trial Court, after hearing arguments of learned counsel for the parties, dismissed suit No.167/1 of 2007 filed by the petitioners, while decreed the connected suit No.166/1 of 2007 filed by respondent No.1 vide its judgment and decree dated 31.01.2012. The said judgment and decree was impugned by both the parties in their separate appeals before the learned District Judge, Abbottabad. During pendency of said appeals, the present petitioners Zahid Zaman etc requested for remanding of the case to the learned trial Court for framing of additional issue and providing opportunity to the parties to produce evidence in support of said additional issue. However, the learned Appellate Court vide impugned order dated 22.05.2018 declined the request of the petitioners. Hence, the present revision petition.

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3. Learned counsel appearing on behalf of respondent No.1, at the very outset of the proceedings, has challenged the maintainability of the present revision petition on the ground that the same is not competent, as the appeal has not yet been finally decided by the learned Appeal Court, therefore, the present revision petition under section 115 CPC is not competent against the said order, as the impugned order of the learned Appeal Court does not fall within the ambit of 'Case Decided'.

4. Learned counsel for the petitioners, on the other hand, while controverting the arguments of learned counsel for the respondent, argued that the present revision petition is maintainable because the learned Appellate Court has finally decided point of law regarding framing of issues as per pleadings of the parties and contended that the impugned order squarely falls within the ambit of provisions of section 115 C.P.C.

5. Arguments of the learned counsel for the parties heard and the available record of the

case thoroughly gone through with their able assistance.


6. The controversy involved in the matter in hand pertains to the refusal of the learned Appeal Court to remand the case for framing of additional issue and providing opportunity for recording evidence of the parties in support thereof. However, the question arises, whether the impugned order has the attribute of the '**case decided**', which is the '*sine-qua-non*' for assuming the jurisdiction under section 115 C.P.C. For the Sake of convenience, provisions of 115 CPC are reproduced below:-

"115.Revision..-(1)The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears

- (a)
- (b)
- c)
- (2)
- (3)
- (4)"

7. It is very much manifest from the very provision of section 115 CPC that the jurisdiction of the Court is only provided in a situation where the 'case' has been 'decided' by a subordinate

Court to such High Court. In the instant case, the learned District Judge, through the impugned order, has declined the verbal request of petitioners for remanding of case back to the learned trial Court for framing of additional issue in the case and it has not decided the appeal, which is still pending before it. It is to worth mentioning that Code of Civil Procedure, 1908 has provided a mechanism for impugning/challenging interlocutory orders passed by the trial Court and in this respect section 104 and Order XLIII CPC has specifically mentioned all those orders, which are appealable. However, the orders, which do not fall within the ambit of the provisions of section 104 and Order-XLIII CPC could be impugned in a revision petition. So far as the interlocutory orders of the Appeal Court are concerned, no such mechanism and distinction has been provided by section 96 read with Order XLI of the C.P.C. Thus, in view of above it is held that interlocutory orders of Appeal Court which do not finally decide the appeal or a contesting issue during the pendency of appeal having the attribute of a final



order, are not challengeable in revision petition under section 115 CPC. In this regard, this Court would like to refer to the judgment passed in case titled 'Mian Muhammad Luqman and 5 others v. Farida Khanam and another (1994 SCMR 1991) wherein, it has specifically been observed as under:

"It is not denied by the respondents' learned counsel that unless it is "a case decided" the High Court has no jurisdiction under section 115, C.P.C. to deal with the matter on civil Revisional side. On the specific point; where, the order passed in this case by the trial court which was impugned before the High Court did constitute a "case decided" the learned counsel, although having remained for considerable time hesitant to admit that it did not constitute "a case decided" ultimately failed to satisfy the Court that it did constitute "a case decided."

The same principle has been reiterated in the judgment reported as Nestle Milkpak Limited v. Classic Needs Pakistan (Pvt.)Ltd. And 3 others (2006 SCMR 21)."

Moreover, in support of abovementioned legal point, reference may be made to Nawabzada Malik Habibullah Khan's case (1969 SCMR 965), 'Messrs PAK ASIA CNG-2, Filing Station through Ahmad Dawood Sole Proprietor V. SNGP Lines through Managing Director and 3

others' (2012 YLR 1241), '*Haji Ghulam Muhammad v. Haji Anwar Jan and 3 others'* (2012 YLR 2670), '*Haji Baz Muhammad and another v. Mst. Humera alias Shireen Taj and 3 others'* (PLD 2003 Quetta 128) and '*Abdul Razzaq and others Vs. Muhammad Ajmal Khan'* (PLD 2018 Lahore 491).

Thus, in view of above, the present revision petition is not maintainable under section 115 C.P.C.

8. Even otherwise, the case of the petitioners on merits is also not worth consideration because the record reveals that on 05.01.2012, learned trial Court during the course of arguments on application for appointment of local commission and application for re-examination of DW-3 Arif Khan, with concurrence of both the parties had framed the following additional issue:

"What is the market value of the suit property, including improvements, constructions and shops constructed over the disputed property for the purpose

of suit valuation and court fees?"

After framing of abovementioned additional issue, plaintiffs were directed to record their additional evidence on 09.01.2012, which was accordingly recorded in shape of AW-1 to AW-8 and they closed their evidence, subsequently, the respondent/defendant recorded his evidence and also closed his evidence and the cases were decided by the learned trial Court through a consolidated judgment dated 31.01.2012.

Granted, that it is the duty of the Court under Order XIV of CPC to frame issues arising out of the pleadings of the parties, however, it is also settled that the parties are under an obligation to go through the issues so framed and if they notice any shortcoming/ deficiency, it should be pointed out to the Court at the very outset. In '**EADA KHAN v Mst. GHANWAR and others**' (2004 SCMR 1524), the Hon'ble Apex Court has held that:

"It is settled principle of law that if once the parties are alive to the contentions raised and when once evidence is adduced in support of such contentions, the

*framing or non-framing of issues
loses significance."*

The same view has been adopted by the august Apex Court in case titled 'AMJAD KHAN v. MST. ASIYA KAUSAR and 2 others' (2015 SCMR 1) Reliance in this respect is also placed on 'MUHAMMAD YASIN through L.Rs and others v. Additional District Judge and 2 others' (2016 YLR Note 203). Therefore, the subsequent verbal request of the petitioners for framing of additional issue and recording of evidence at such a belated stage before the Appellate Court was not justified and tenable in view of settled principles of law referred to above.

9. Keeping in view the above facts and circumstances of present case and discussion made thereupon, the present revision petition is dismissed both on maintainability as well as on merits.

Announced:
Dt.08.10.2018.


J U D G E

/M SALEEM/
(SB) Mr. Justice Syed Muhammad Attique Shah