

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MUSHIR ALAM
MR. JUSTICE AMIN-UD-DIN KHAN

CIVIL PETITION NO. 510 OF 2019

(Against the judgment dated 05.12.2018 passed by
Lahore High Court Lahore in C.R.2144/2013).

Hassan Nawaz

...Petitioner(s)

VERSUS

Atta Muhammad (decd) his LRs

...Respondent(s)

For the Petitioner(s):

Ch. Nusrat Javed Bajwa, ASC
Syed Rifaqat Hussain Shah, AOR

For Respondents 2,4-7:

Mr. Masood A. Malik, ASC

Date of Hearing:

01.01.2021

ORDER

MUSHIR ALAM, J. — The Petitioner has impugned the judgment dated 05.12.2018, passed by learned Bench of Lahore High Court, Lahore, in C.R.2144/2013, whereby, the learned Revisional Court, in consideration of the fact that the learned Trial Court has neither recorded the evidence itself, nor made a memorandum of the substance of what each witness deposed, under his own hand and signature as mandated in terms of Rule 8 of Order XVIII of Code of Civil Procedure, 1908 remanded the matter back to the trial court. Paragraph 2 of the impugned judgement observed that the Local Commissioner did not perform his job honestly. The evidence recorded and documents received by the Local Commissioner were not in accordance with law. Consequently, the Revision was allowed and judgements and decree of learned trial Court, as maintained by the Appellate court, were set aside, "*suit instituted on behalf of the*

*petitioner will deem to be pending before the learned Civil Court, who will examine the witnesses of the parties himself and decide the same afresh, keeping in view the mandate of order XX rule 5 CPC*¹.

2. The learned counsel for the Petitioner contends that the impugned judgment is based on the assumption and supposition, wherein, the learned Bench assumed in para 2 that *"the Local Commissioner did not perform his job honestly, who during cross examination - recorded some of replies totally against the gist as well as substance of their examination in chief. Although, neither specific objections were raised during course of trial nor, it was agitated in Civil Revision in hand."* The observation made in the judgment that *"I was persuaded that some wrong for some ulterior motive with collusiveness was committed."* remains unsubstantiated. In addition to the misappreciation of rule 3 of order XVIII CPC, it was also urged that impugned judgment is based on surmises and conjectures on extraneous considerations which are not substantiated from the record.

3. It was argued with great vehemence by the learned Counsel for the Petitioner that the learned bench of the High Court erred to rely on Order XVIII, Rule 3 CPC to discard the entire evidence recorded by consent of the parties through Local Commissioner. It was contended that evidence was recorded in accordance with law by the local Commissioner. Neither the Respondent objected to the appointment of Local Commissioner, nor showed any reservation as to conduct of the Commissioner or on the Commissioner's report. It was argued that the learned bench grossly

¹ Court to state its decision on each issue.

erred to conclude that for the non-compliance of the noted provisions and judgments, the decision of the lower fora are rendered of no legal consequence. It was also argued that the learned Revisional Court failed to exercise its jurisdiction and decide the matter on merits.

4. The learned counsel for the Respondent supported the impugned Judgment. On our query, he candidly conceded that Local Commissioner was appointed by consent of the Parties. He also concedes that no objection as to the conduct and/or manner in which the evidence was recorded by the Local Commissioner was raised before the learned Trial Court, the learned Appellate Court, or even in the Revision before the learned High Court. Learned counsel for the Respondent was unable to demonstrate that any prejudice was caused to the Respondent by recording and receiving evidence through Local Commissioner.

5. Arguments heard and perused the record. A Court, under the Code², subject to such terms and conditions, as may be prescribed³, may appoint a Commission to examine a person, make local investigation, take accounts, and/or make partition. The elaborate manner and procedure to record evidence by a Court is provided for under the Code⁴. In normal circumstances, the evidence of a witness is to be recorded by a judge in open Court⁵, under his own hand, superintendence, and/or under his personal direction⁶. The evidence of a witness is *'taken orally in open Court in*

² Code Civil Procedure, 1908

³ Section 75, Order X, Order XVI, XVIII, XXVI CPC

⁴ See Order XVIII CPC in Civil cases and Section 353 to 365 Cr.P.C in Criminal cases

⁵ Rule 4 of Order XVIII CPC

⁶ Rule 4 & 5 of Order XVIII CPC

the presence and under the personal direction and superintendence of the judge⁷. The Court ordinarily records the deposition of a witness in writing in question and answer form, but in that of a narrative, generally in the vernacular language of the Court, or in English, read over to the witness after which any discrepancies or error(s) are corrected before signing it⁸.

6. There are two situations that are contemplated under the Code, where it is not necessary to take the evidence of a witness verbatim in writing but the judge is required to make '*memorandum of the substance of what each witness deposes*' as the examination of each witness proceeds. One such situation that is provided for is, where '*the evidence is not taken down in writing by the judge*',⁹ and secondly in *unappealable cases*¹⁰. Every memorandum so made forms part of the record¹¹. In cases where a judge is unable to prepare such *memorandum*, he is required to record reasons for the same¹². On examining the scheme of Order XVIII CPC, and other enabling provisions of the Code, it is clear that where the verbatim evidence is being recorded in writing, there is no necessity of making any *memorandum of the substance of what each witness deposes*. The recording of a *memorandum of the substance of evidence* means the essence, substance, or crux of the evidence that may be necessary for the just determination of the controversy in issue.

⁷ See Order X Rule 2, Order XVIII Rule 4, 5, 9, and Order XXVI, Rule 1 CPC.

⁸ Rule 5 of Order XVIII.

⁹ Rule 3 of the Order XVIII.

¹⁰ Rule 13 of Order XVIII.

¹¹ Rule 14 (2) of Order XVIII.

¹² Rule 14 of Order XVIII CPC.

7. The manner and procedure for recording evidence through commission is elaborately provided for under Order XXVI CPC. Once the Commission, under the orders of the Court, is executed and the evidence is recorded, the Commissioner shall return the Commission, together with his signed report, and the evidence recorded as per the direction and order of the Court. The evidence so recorded and taken by the Commission, subject to objections and decision of the court, forms part of the record, and is to be treated and considered as if the evidence has been reordered by the Court itself¹³. It appears that the learned Bench did not appreciate the scheme of the provisions of the Code¹⁴. The Learned bench of the High Court erred to rely on rule 8 of Order XVIII, CPC to discard the evidence recorded through the Commission appointed by consent of the parties. Rule 8 of Order XVIII is not applicable in cases where the evidence is recorded, under the orders of the Court, through Commission. Under the given facts and circumstances of the case, there was no justification to remand the case to the learned Trial Court for de-novo trial or proceeding afresh. The trial Court/Judge may take into consideration the evidence or memorandum of evidence, as the case may be, either recorded by the court itself, the predecessor judge¹⁵, or through Commission. Once such report of the commissioner, along with the evidence so recorded is taken on record, it forms part of the judicial record¹⁶ and is to be read at any hearing of the suit¹⁷ and for making any order or pronouncement of Judgment. The provisions noted herein

¹³ Rule 8 and 10 of Order XXVI CPC

¹⁴ Order XVIII and XXVI CPC

¹⁵ Rule 15 of Order XVIII, CPC

¹⁶ Order XXVI, Rule 7 CPC

¹⁷ Rule 16 (3) and Rule 17 of Order XVIII, CPC

are mere enabling provision, relating to a matter of procedure and not affecting the jurisdiction of the Court.

8. Where a court, for any reasons, is dissatisfied with the proceedings of Commissioner, there is nothing in the Code, which prevents it from directing a further enquiry as it may deem fit, substituting the commissioner and/or recalling and examining a witness already examined by the commissioner, whose deposition is found to be illegible, ambiguous or unclear, on any material particular affecting the merits of the case. A party cannot claim, nor appeal the decision of a revisional Court for de-novo trial as a matter of right.¹⁸

9. It appears that the learned bench of the High Court fell into error while considering the implication of Rule 8 of Order XVIII CPC and misapplied the same on the evidence recorded through the commission, acting under section 75 read with Order XXVI CPC, appointed by the Court.

10. It is not always necessary that the Court may record evidence itself. For a variety of reasons, it may be recorded through a Commission.¹⁹ The Court as a principal may exercise powers and delegate authority, under S. 75 or Order XXVIII, for personal appearance of a witness in front of the Commission either out of its own accord or on application of either party²⁰. However, it does not bar the Court itself of the authority to examine the witness where it is not satisfied.²¹ Under Rule 13 of Order XVIII, it is provided that in

¹⁸ Order XVIII, Rule 10 CPC.

¹⁹ Rule 1A of Order X, Rule 3,4,19 of Order XXVI

²⁰ Order XXVI, Rule 10(2)

²¹ Order XVIII, Rule 17

cases where no appeal lies, the Judge may merely make a memorandum of substance of the evidence. Rule 15 of Order XVIII contains a general provision that a succeeding Judge can deal with any evidence or memorandum taken by his predecessor and proceed with the trial.

11. The provisions of CPC relating to summoning, attendance, examination of witnesses, and producing of documents, the penalties imposed on the witness could be exercised by the Commissioner executing the order of the Court is deemed to be a Civil Court²².

12. As noted above, the learned Counsel for the Respondent was not able to show that any prejudice has been caused to the Respondent, rather the commission was constituted by consent of the parties. Under the given facts and circumstances in cases, where evidence is recorded through Commission, Rule 8 of Order XVIII of CPC is not attracted. As regard evidentiary value of documents exhibited and produced before the Local Commissioner²³, it is for the learned trial Court and the Appellate court that has to examine and appreciate its evidentiary value and admissibility, or otherwise, and the revisional court may see exercise of jurisdiction in accordance with set parameters. The evidentiary value and admissibility can also be examined further by the appellate Court in case it is wrongly admitted or appreciated within the set parameters of law. In this view of the matter, the impugned judgment cannot be sustained.

²² See Rule 16 to 18 of Order XXVI CPC

²³ Qanun-e-Shahadat Order, 1984, Section 91.

13. We inquired from both the counsels as to when the matter was remanded by the High Court to the learned trial court to which it was replied that the matter was remanded on 05.12.2018. Almost two years have elapsed, the fresh evidence could still have been recorded and case could have been decided. It is stated at bar that the case is still pending on account of transfer of jurisdiction/Court from Pindi Bhattian to Lahore, therefore, the matter could not be proceeded.

14. Accordingly, if the case has not been proceeded and decided by the learned trial court, the record and proceedings of the trial court may be remitted back to the learned High Court. The impugned judgment is set aside, Civil Revision No.2144/2013 titled Atta Mohammad (deceased) through L.Rs. etc. Vs. Hassan Nawaz shall be deemed to be pending before the learned High Court. The subject Civil Revision shall be heard and decided on merits strictly in accordance with law after due notice to the parties.

15. The instant Leave petition is converted into appeal and is allowed in the terms noted above.

Sd/- J
Sd/- J

ISLAMABAD
1st January, 2021

Approved for Reporting