25/24

SUPREME COURT OF PAKISTAN
(Review Jurisdiction)

PRESENT:
Justice Jamal Khan Mandokhail
Justice Syed Hasan Azhar Rizvi
Justice Musarrat Hilali

C.R.P.870/2023 IN C.P.L.A.2166-L/2023
(For review of this Court's order dated 08.08.2023 passed in CP No. 2166-L/2023)

Ahmad Sikander ...*Petitioner(s)*

Versus

Commissioner Inland Revenue, AEOI Zone, Lahore ...*Respondent(s)*

For the Petitioner(s)	:	Sh. Muhammad Akram, ASC (via video link from Lahore)
For the State	:	Ch. Muhammad Zafar Iqbal, ASC
Date of Hearing	:	15 March 2024

O R D E R

Jamal Khan Mandokhail, J.- This civil review petition has been preferred against the order dated 8th August 2023 passed by this Court in CP No. 2166-L/2023.

2. Precisely facts of the case are that a show cause notice under section 122(9) of the Income Tax Ordinance, 2001 ("Ordinance") and a notice under section 111 of the Ordinance were issued to the petitioner. In the notices, it was alleged that upon a definite information, it was found that the petitioner was maintaining bank account in UK but did not disclose it in his wealth statement, hence, concealed the material fact. The notices were replied by the petitioner, denying the contention of the

respondent. The Assessment Officer did not accept the explanation advanced by the petitioner as such the petitioner was charged to tax under section 111(1)(b) of the Ordinance. The petitioner filed an appeal before the Commissioner Inland Revenue (Appeals-1), Lahore, which was dismissed on 04.02.2022. Feeling aggrieved, the petitioner filed the ITA before the Appellate Tribunal Inland Revenue, Lahore ("Tribunal"), which was allowed on 22.03.2022. Against the said order, the respondent filed Income Tax Reference before the Lahore High Court which was allowed on 06.04.2023. The petitioner filed civil petition before this Court which was dismissed on 08.08.2023, hence this review petition.

3. Learned counsel for the respondent waives notice and prepared to argue the case.

4. Learned counsel for the petitioner mainly contends that the petitioner has submitted his returns with all the necessary details and nothing was concealed. He submits that all the necessary documents including the foreign income and assets statement along with the bank statement and foreign loan documents were e-filed which were available at e-Portal of E-FBR. He adds that all these documents were supplied to the respondent through TCS as well, but the same were not considered by the fora below. It is further contended that, even otherwise, copies of the relevant documents were to be obtained from London, which could not be obtained in time on account of Covid-19 restrictions. He states that immediately upon receiving the documents they were produced before the Tribunal in order to substantiate his stance. According to the learned counsel, the documents were not new evidence,

rather the same were in support of the information already available at e-Portal, but the High Court has ignored the factum of availability of these documents at e-Portal and has wrongly considered them as fresh ones. Learned counsel for the petitioner submits that while arguing the matter before this Court, the petitioner tried his best to highlight all these facts and to establish that the High Court had erred in law by considering the documents as new evidence, but no proper opportunity was provided to him by this Court, therefore, in the interest of justice, an opportunity is required to be afforded to the petitioner to place all the relevant facts before this Court which were earlier not properly highlighted.

5. Arguments heard and have perused the record. It is a fact that the petitioner is pressing hard regarding availability of the relevant documents and necessary information at e-Portal. The High Court while deciding the Reference declared that the documents provided to the Tribunal were new evidence. The petitioner has raised all legal and factual grounds in his petition before this Court, but it seems that the grounds urged by the petitioner escaped the attention of this Court while deciding the civil petition. The petitioner's claim that the findings of the fora below raises serious questions of law and facts, therefore, re-appraisal of the record was necessary in the best interest of justice, but the needful was not done at the time of hearing the above titled petition. This raises sufficient reasons enabling us to accept the contention of the petitioner. Even otherwise, no prejudice would be caused to the respondent, if an opportunity of hearing is provided to the petitioner.

Thus, in view of the above, the review petition is allowed. The order under review dated 08.08.2023 passed by this Court is re-called. Civil Petition No. 2166-L/2023 is restored to its original number and **be fixed after Eid-ul-Fitr, 2024** for hearing.

Judge

I am disagree and will write my separate note

Judge

Judge

Islamabad
15 March 2024
Syed Farhan Ali

ORDER OF THE COURT

By majority of two to one (Syed Hasan Azhar Rizvi, J. dissenting), the instant civil review petition is allowed. Civil Petition No. 2166-L/2023 is restored to its original number and be fixed for hearing after Eid-ul-Fitr, 2024.

I am dissenting and will write my separate note

Judge

Judge

Judge

Islamabad
15.03.2024

JUDGMENT

(AFR)

SYED HASAN AZHAR RIZVI, J:- I have had the privilege of going through the majority judgment authored by my learned brother Justice Jamal Khan Mandokhail. I, with due respect, find myself in disagreement with the same for the following reasons:-

a) Scope of review is limited to the grounds mentioned in the Supreme Court Rules, 1980 and Order XLVII CPC

b) Grounds taken at appellate stage cannot be taken at review stage.

c) Re-appreciation of evidence is not permitted at review stage

2) Before discussing the grounds in detail, it is pertinent to reiterate important facts briefly. Perusal of the record indicates that petitioner filed return for the tax year 2018 but did not disclose therein that he had a bank account in the UK as well. Upon receipt of information regarding such bank account, a show cause notice under section 122(9) alongwith section 111 of the Income Tax Ordinance, 2001 (**"Ordinance"**) was issued to him that petitioner/tax payer has concealed the bank account and deposits therein. In reply to said show cause notice, petitioner submitted that the amount in the UK Bank account represents the loan taken in London which was subsequently paid, however, he failed to produce any documentary evidence of such loan transaction thereto. The said reply was found unsatisfactory therefore assessing officer issued another notice requiring the petitioner to submit relevant record, however, petitioner failed to submit the same. Consequently, he was charged to tax under Section 111(1)(b) of the Ordinance.

The petitioner filed appeal before the Commissioner Inland Revenue (Appeals), Lahore which was dismissed on 04.02.2022. It is pertinent to mention here that the said documentary evidence of the loan was not even produced before the Commissioner Inland Revenue (Appeals).

Feeling aggrieved, petitioner filed appeal before Appellate Tribunal Inland Revenue, Lahore which was allowed on 22.03.2022. Petitioner for the very first time produced the documents before the Tribunal. Against said order, respondent filed Income Tax Reference before the Lahore High Court which was allowed through order dated 06.04.2023, the operative part of the same is reproduced herein below:-

> "3. The primary basis of the challenge by the learned counsel for the applicant is that the Tribunal based its judgment on documents which were produced before the Tribunal and which were not part of the reply filed by the respondent in response to the show cause notice. We have indeed noticed that the fact that U.K based company had given a loan to the respondent to establish a business in U.K was not mentioned in any of the replies filed by the respondent. Further the documentary evidence which was produced before Tribunal at the time of hearing of the appeal was also produced for the first time before the Tribunal. We are clearly of the opinion that such a course was impermissible to the ATIR which should not have accepted the documents produced before it and to proceed to upset the findings of the forums below. This would be tantamount to set up a new case before the Tribunal and if these documents were available to the respondent, they ought to have been produced in response to show cause notice and a clear stance taken on their basis in any reply filed by the respondent. Thus, we hold that ATIR went wrong in allowing the appeal filed by the respondent."

Consequently, petitioner approached this court by filing a civil petition which was heard by a three-member bench comprising the then Chief Justice Umar Ata Bandial, Justice Jamal Khan Mandokhail and Justice Muhammad Ali Mazhar, JJ. and was dismissed vide order dated 08.08.2023 under review, reproduced herein below:-

> "After hearing the learned Counsel for the petitioner, we share the view taken in impugned judgment dated 06.04.2023 that no question of law arises for determination in this matter which is based on a factual dispute. The petition is accordingly dismissed."

A. SCOPE OF REVIEW

3) Article 188 of the Constitution of Islamic Republic of Pakistan, 1973 **("Constitution")** confers the power of Review on this Court. It states:-

> "Supreme Court shall have power, subject to the provisions of any Act of Majlis-e-Shoora (Parliament) and of any rules made by the Supreme Court, to review any judgment pronounced or any order made by it."

Rule 1 of Order XXVI of the Supreme Court Rules, 1980 provides that subject to the law and the practice of the Court, the Court may review its judgment or order in a Civil proceeding on grounds similar to those mentioned in Order XLVII, Rule I of the Code of Civil Procedure, 1908 and in a criminal proceeding on the ground of an error apparent on the face of the record. Perusal of Order XLVII, Rule I of the Code of Civil Procedure 1908, indicates that there are three grounds of review:-

(i) the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the applicant or could not be produced by him at the time when the judgment was pronounced or order made;
(ii) some mistake or error apparent on the face of the record; and
(iii) any other sufficient reason

4) As mentioned above, the power of review may be exercised when there is a discovery of new fact or evidence, or when some mistake or error apparent on the face of record is found. What is meant by an error apparent on the face of record is significant and needs to be delineated in detail. This court in ***Ghulam Murtaza Versus Abdul Salam Shah,***[1] has held that;

> "5. It is well-settled proposition of law that every judgment pronounced by this Court is presumed to be considered solemn, and final decision on all points arising out of the case. If the Court has taken a conscious and deliberate decision on a point of fact or law, a review petition will not be competent. It is also settled principle of law that a "review petition" not competent where there is neither new and important fact nor any error apparent on the face of record. Such error may be error of question of law or fact but the condition precedent is that it must be self-evident

[1] [2010 SCMR 1883]

floating on the surface and not requiring elaborate discussion or process of ratio cination."

Recently, this Court in the case of ***"Commissioner Inland Revenue Z-III, Corporate Regional Tax Office, Tax House, Karachi and another vs. M/s MSC Switzerland Geneva & others"***[2] (authored by Justice Muhammad Ali Mazhar in which I was one of the member of the Bench) has held as under:-

"10. ....Review by its nature is neither commensurate to a right of appeal or opportunity of rehearing merely on the ground that one party or the other conceived himself to be dissatisfied with the decision of the court, nor can a judgment or order be reviewed merely because a different view could have been taken.

11. Nowadays, it has become almost a fashion and/or custom to file review applications fleetingly and unthinkingly in routine on the basis of certificates issued by the advocates with a plain replica of the grounds urged in the main petition or appeal without any accurate allusion to any error in the judgment or order which warrants or merits reversal. We, in all fairness, denounce this fashion or practice which wastes the precious time of the Court with the exception in the clearest form, that while adverting to a provision or construction of any law and/or Constitution, some errors are apparent on the face of the record which caused substantial injury which requires some remedial measures to advance the cause of justice for which not only the specific ground(s) should be mentioned in the certificate of the advocate, but it should be pinpointed also in the review petition rather than mentioning sweeping and stereotypical grounds having no significance or nexus with the case."

In the case *supra*, the court discussed in detail the legal position pertaining to the exercise of review jurisdiction and analyzed various national and international judgments, one of which is reproduced herein below;

"16. **Justice Qazi Faez Isa and others Vs President of Pakistan and others (PLD 2022 SC 119).** The gist of this judgment is that under Order XLVII of the Code of Civil Procedure, 1908 three grounds for review are provided: (1) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of, or could not be produced by, the party seeking review at the time when the decree was passed or order made; (2) some mistake or error apparent on the face of the record; (3) or any other sufficient reason. The third ground has been interpreted by the courts to be read ejusdem generis in the context of two preceding grounds. It is notable that the ground, "error apparent on the face of the record", is common for review in both civil and criminal proceedings. The expression, "error apparent on the face of the record", as observed by Hamoodur Rehman, J. in Anwar Husain v. Province of East Pakistan, cannot be defined with precision or exhaustiveness, and there would always remain an element of indefiniteness inherent in its very nature. It is to be determined in each case on the basis of its own peculiar facts. Whenever Judges of these courts are pointed out, in review jurisdiction conferred by the Constitution or law, something in their judgment or order to be in conflict with

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[2] CIVIL REVIEW PETITIONS NO.432-K TO 459-K OF 2022 IN CIVIL PETITIONS NO.672-K TO 692-K OF 2021 & 694-K, 724-K TO 729-K OF 2021. **Announced on 09.02.2023** available at: https://www.supremecourt.gov.pk/downloads_judgements/c.r.p._432_k_2022.pdf

> the Constitution or any law of the land, it becomes their duty to unhesitatingly correct that error. Duty of the Judges of the apex Court of the country is more thoughtful and profound in this regard, as there is no other court which can correct their error, and the principles of law enunciated in their judgments are, under Article 189 of the Constitution, binding on all other courts in the country."

5) Reference may also be made to the case of neighboring jurisdiction reported as ***State of West Bengal and Others v. Kamal Sengupta and Another***[3] wherein it was held that;

> "The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC."

Perusal of the afore-cited cases indicates that an error on the face of record must be such an error which must strike one on mere looking at the record and would not require any in-depth process of reasoning on the points where there may conceivably be two opinions. Thus an error which is required to be detected by a process of reasoning can hardly be said to be an error on the face of the record.

6) Similar view was also taken in the case titled ***Parsion Devi and Others v. Sumitri Devi and Others,***[4] wherein it was observed that an error that is not self- evident and the one that has to be detected by the process of reasoning cannot be described as an error apparent on the face.[5] Error apparent on the face of the proceedings is an error which is based on clear ignorance or disregard of the provisions of law. Any order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law.

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[3] (2008) 8 SCC 612)
[4] 1997) 8 SCC 715)
[5] *Ibid.,*

B) GROUNDS TAKEN AT APPELLATE STAGE OR BEFORE THE TRIBUNAL CANNOT BE TAKEN AT REVIEW STAGE

7) Under the garb of filing a review petition, a party cannot be permitted to repeat old and overruled arguments for reopening the conclusions arrived at in a judgment. It is settled law that power of review is not to be confused with the appellate power which enables the Superior Court to correct errors committed by a subordinate Court. This has been affirmed by this court in a number of cases such as Pakistan International Airlines Karachi versus Inayat Rasool (2004 SCMR 1737); Nook Hassan Awan versus Muhammad Ashraf (2001 SCMR 367); Kalsoom Malik and others versus Assistant Commissioner and others (1996 SCMR 710) and Abdul Majeed and another versus Chief Settlement Commissioner and others (1980 SCMR 504). Similarly, examination of the foreign jurisdiction also affirms the same view such as in the case of ***Shanti Conductors (P) Ltd. Vs. Assam SEB,***[6] wherein it has been held that;

> "Scope of review under Order 47 Rule 1 CPC is limited and under the guise of review, the petitioner cannot be permitted to re-agitate and reargue questions which have already been addressed and decided."

Hence, if an argument has been advanced by the party in the appellate forum then same cannot be argued at the review stage. In the case at hand, all the contentions made by the petitioner before us in the review were also advanced before this court so also courts below, which is not permitted at the review stage.

8) In the present case, learned counsel for the petitioner has relied on Section 128(5) of Ordinance, to establish that new documents can be produced before the commissioner at the appellate stage. For ease of reference, same is reproduced hereinbelow;

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[6] (2020) 2 SCC 677

> "128(5) The Commissioner (Appeals) shall not admit any documentary material or evidence which was not produced before the Commissioner unless the Commissioner (Appeals) is satisfied that the appellant was prevented by sufficient cause from producing such material or evidence before the Commissioner."

The bare perusal of the said provision indicates that it is only confined to the appellate stage before the Commissioner (Appeals), however, in the present case, petitioner neither mentioned the documentary evidence in his reply to the show cause notice, nor produced the same before the Commissioner, or Commissioner (Appeals), rather produced it at a belated stage before the tribunal, hence, it offers no support to the petitioner's stance.

C) RE-APPRECIATION OF EVIDENCE IS NOT PERMITTED AT REVIEW STAGE

9) It has been time and again observed by this Court that while exercising the review jurisdiction, the Review Court does not sit in appeal over its own order. Review proceedings are distinct from appeal and have to be strictly confined to the scope and ambit of Order XLVII Rule 1 CPC.

10) In exercise of review jurisdiction, the Court cannot re-appreciate the evidence to arrive at a different conclusion even if two views are possible in a matter. This court in the case of ***Ghulam Murtaza Versus Abdul Salam Shah,***[7] ruled as under:-

> "It is also settled proposition of law that the review is not meant for re-hearing of the matter. As mentioned above scope of the review is always very limited and confined to the basic aspect of the case referred to at review stage which was considered in judgment but if the grounds taken in support of the petition were considered in the judgment and decided on merits, the same would not be available for review in the form of re-examination of the case on merits."[8]

Similar legal position exists in other common law jurisdictions too. Reference may be made to the ***Kerala State Electricity Board v.***

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[7] (2010 SCMR 1883)
[8] *Ibid., para 5*

Hitech Electrothermics & Hydropower Ltd. and Others[9]

wherein Indian Supreme Court observed as follows:

> "10. ....In a review petition it is not open to this Court to reappreciate the evidence and reach a different conclusion, even if that is possible. The appreciation of evidence on record is fully within the domain of the appellate court. If on appreciation of the evidence produced, the court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. It has not been contended before us that there is any error apparent on the face of the record. To permit the review petitioner to argue on a question of appreciation of evidence would amount to converting a review petition into an appeal in disguise."

11) A review is not a routine procedure. We cannot review our earlier order or judgment unless satisfied that material error manifest on the face of the order, undermines its soundness or results in miscarriage of justice.[10]

12) Coming to the present case, learned counsel for the petitioner has not raised any ground as envisaged under Rule 1 of Order XXVI of the Supreme Court Rules, 1980 read with Order XLVII of the Code of Civil Procedure. Petitioner has failed to establish that he has discovered any new and important matter which after the exercise of due diligence was not within his knowledge or could not be brought to the notice of the Court at the time of passing of the order or judgment.

13) I have carefully examined the leave refusing order in the Civil Petition under present review passed by this court, as well as that judgment of the High Court. However, I find no compelling reason to entertain the review petition. The High Court has diligently addressed all issues raised thoroughly and decided the case on the basis of facts and grounds.

14) All pleas raised before us were, in fact, already been addressed by the High Court and were duly considered by this

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[9] AIR 2005 SC 43

[10] Ghulam Murtaza Versus Abdul Salam Shah (2010 SCMR 1883); Syed Wajihul Hassan Zaidi versus Government of the Punjab and others (PLD 2004 Supreme Court 801);

Court while passing the order dated 08.08.2023 under review. Moreover, learned counsel for the petitioner has failed to establish any mistake or error apparent on the face of the record warranting a review. Hence, this review petition is dismissed.

(SYED HASAN AZHAR RIZVI)

Judge

Paras Zafar, LC/
15th March 2024

APPROVED FOR REPORTING