

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Shahid Waheed
Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Miangul Hassan Aurangzeb

Civil Appeal No. 550-L of 2009

*[On appeal from the order dated 10.06.2009
of the Lahore High Court, Lahore passed in
C.R.No.545/2008]*

AND

C.M.A. No. 2063-L of 2016

Sultan Mahmood and another. ... Appellants

Versus

Munir Ahmad. ... Respondent

For the Appellants: Malik Matee Ullah, ASC.
(In CA. 550-L/09)

For the Applicant: Nemo.
(In CMA. 2063-L/16)

For the Respondent: Nemo.

Date of Hearing: 25.02.2025.

ORDER

Muhammad Shafi Siddiqui, J. In revisional jurisdiction of High Court, two varying judgments, i.e., (i) of Additional District Judge and (ii) of Civil Judge/Trial Court were placed for consideration. The order of Ist Appellate Court was set aside and that of the Trial Court was restored by revisional court, on the count that it was on special oath, whereas the arguments were that just because another view is possible, the lawful view expressed by Ist Appellate Court cannot be brushed aside.

2. Brief facts are that a suit for declaration, possession and specific performance being No. 433/1 was filed on 19.11.2022 by Munir Ahmed son of Ahmed Din against Sultan Mahmood and Sughran Bibi on the strength of mortgage deed. Suit decreed *ex-parte*.

The appellants filed an application on 11.05.2006 for setting aside *ex-parte* judgment and decree dated 14.04.2004 wherein the following issues were framed:

1. Whether the *ex parte* judgment and decree dated 14.4.2004 is liable to be set aside on the ground mentioned in the application? OPA
2. Whether the petitioner/defendants estopped by their words and conduct to file this application? OPR
3. Relief.

Respondent's evidence was recorded whereas at the time of evidence of appellants it is noticed via record that appellant No. 2 offered special oath as attorney of appellant No. 1. On 13.02.2007 the application for setting aside *ex-parte* judgment was dismissed in view of special oath. The petitioners then filed an appeal against the order dated 13.02.2007 before the Additional District Judge, Pattoki, which was allowed *vide* judgment dated 21.09.2007 and the order of the Civil Judge, Pattoki dated 13.02.2007 was set aside and the case was remanded back for deciding after recording evidence.

The respondent then filed Civil Revision before the High Court against the judgment of the Additional District Judge, Pattoki dated 21.09.2007, which was allowed by the High Court through the impugned judgment and the judgment of the Additional District Judge, Pattoki dated 21.09.2007 was

set aside and the order of the Civil Judge deciding the case on oath was upheld.

3. Notwithstanding that this appeal is filed by both appellants, the question before us is whether such powers were conveyed to the attorney who offered to dispose of the matter on special oath. We have minutely perused power of attorney. Para 8 of it only enabled the attorney to deal with regard to property in question and may undertake all consequential and related matters. We wish to reproduce para 8 in order as is reflected in the power of attorney:

مندرجہ بالا جائیداد کی بابت ہر قسم کے مالی - سول دعویٰ جات دائر کرے۔ دائر شدہ و آئندہ دائر ہونے والے دعویٰ جات کی مکمل پیروی کرے۔ وکیل - ایڈوکیٹ کا تقرر کرے۔ عرض دعویٰ، جواب دعویٰ، بیانات حلفی پر خود دستخط کرے۔ تصدیق کرے ہمہ قسم - درخواست دیوے۔ اپیل - نگرانی - نظر ثانی دائر کرے۔ راضی نامہ کرے۔ اپیل از عدالت ابتدائی تا عدالت انتہائی کرے۔ رقومات جمع کرائے۔ برآمد کرے۔

Any exercise of power should be ancillary to the "contest" which is *sine qua non*, whereas, "no contest" in the shape of proposal does not germane to the substance of para 8 of power of attorney. Even the alleged compromise has to be seen within the powers extended to the attorney. Such "steps" in the shape of proposal offered were neither delegated nor empowered the attorney to propose a settlement on special oath and as such she transgressed powers bestowed upon her to "pursue" the matter. Pursuing a matter under the special power has a specific meaning in context of para 8 above, i.e., to follow, go after, quest for, carry out or participate in an activity, prosecute actions etc. offer under consideration, under the given powers can be seen as surrender. Settlement (راضی نامہ) in context with aforementioned phrase identified in para 8 does not provide a solution out of box. Para 8 demonstrate that attorney should pursue the "contest" diligently in court and

may file all requisites which are required and essential for a "contest". Decision on special oath may be one of the way to decide a case, but such powers to our understanding were not extended in terms of para 8.

4. Perusal of the record of the trial court also reveals that the instant offer of special oath triggered when an application under Order IX rule 13 of the CPC for setting aside ex-parte order was fixed for evidence of the respondent while the applicant's partial evidence in this regard was already recorded. It was at this stage when such offer was made. If at all the special oath could have been offered, it could only be to the extent of deciding the pending application under Order IX rule 13 of the CPC. The procedure requires in terms of Article 163 of the Qanun-e-Shahadat Order, 1984 read with sections 8 and 9 of the Oaths Act, 1873 does not contemplate a decision of a dispute which has already been rendered *ex-parte*.¹ Decision on oath no doubt is one of the prescribed ways of disposal, but at the same time courts were bound to handle such cases with great care. The *ex-parte* judgment and decree was a past and closed transaction and it could only be open once an application under Order IX rule 13 of the CPC could have been allowed and not otherwise. The corpus before the trial court was a miscellaneous application and not the main suit.

5. The trial court's decision was based on special oath without realizing whether it was delegated or not whereas the appellate court formed a view that such powers were not delegated in terms of para 8 of the power of attorney and reasonings were justified. The revisional court, however, upheld the view of the trial court on the same analysis that it was a special oath administered by the attorney in terms of its para 8.

¹ Muhammad Ali vs Muhammad Aslam and others (PLD 1990 Supreme Court 841).

Revisional court's jurisdiction is limited to the extent mentioned in section 115 CPC. All that was exercised by Additional District Judge was well within his jurisdiction and there was nothing for revisional court to interfere and infact, when High Court replaces its views, it exceeds its jurisdiction, not the 1st Appellate Court.

6. This being the situation, the learned single Judge in revisional jurisdiction has exceeded its jurisdiction, when the Additional District Judge was found to have exercised its jurisdiction properly as being appellate court. The revisional court also misread the powers conveyed to the attorney which had not enabled the attorney to propose an offer on a special oath and hence the judgment of the Additional District Judge was incorrectly set aside. Resultantly, this appeal is allowed, the impugned order is set aside and that of the Additional District Judge is restored.

7. Since the Additional District Judge after setting aside the order of the Trial Court has remanded the matter for recording of evidence on application for setting aside *ex-parte* decree, it is expected that it will be taken to its logical end at the earliest.

Judge

Judge

Judge

Islamabad:

25.02.2025

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Approved for Reporting