

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Ijaz ul Ahsan
Mrs. Justice Ayesha A. Malik

CIVIL APPEAL NO.1296 OF 2013

[Against the judgment dated 24.07.2013 of the Peshawar High Court, Abbottabad Bench, Abbottabad, passed in Civil Revision No.119-A of 2006]

Noor Muhammad (decd) through L.Rs. and
others ...Appellant(s)

Versus

Muhammad Ashraf and others ...Respondent(s)

For the Appellant(s) : Mr. Muhammad Munir Piracha, ASC

For Respondent(s) : Mr. Munawar Iqbal Duggal, ASC

Date of Hearing : 07.02.2022

JUDGMENT

AYESHA A. MALIK, J.- This Appeal impugns judgment dated 24.07.2013, passed by the Peshawar High Court, Abbottabad Bench, in Civil Revision No.119-A of 2006.

2. The basic facts of the case are that the Respondents filed suit No.170/1 of 2002 for declaration, perpetual injunction and recovery of possession on 18.07.1995 against the Appellants, with respect to the land located in the Shamlat Deh, measuring 106 Kanals and 11 Marlas bearing Khasra Nos.3026/7 and 9 situated in Village Jagul Tehsil & District Haripur. The case of the Respondents was that they are the sole owners in possession of the suit land as *Hissadari* and that the Appellants have no right of ownership or possession to the said land. The suit was decreed on 11.02.2004 in favour of the Respondents wherein the Court

concluded that the Respondents were the owners in possession of the disputed property as *Hissadars* and that the Appellants were not able to prove any right of ownership or possession, yet they were entitled to receive Rs.300,000/- for improvements made on the disputed property. Both parties filed Appeals such that the Appellants filed Appeal No.26/13 and the Respondents filed Appeal No.147/13. Both Appeals were heard together and the Appellate Court set aside the judgment and decree dated 11.02.2004 and remanded the matter to the trial court to decide the matter afresh, essentially on the ground that one Muhammad Siddique sought impleadment as a necessary party to the suit of the Respondents, being a co-owner in the disputed property. The Appellate Court concluded that as Muhammad Siddique was a necessary party, he should be heard and the matter had to be decided afresh. Hence, the case was remanded to the trial court vide order dated 26.01.2006. Against this order of 26.01.2006, the Respondents filed Civil Revision No.119-A of 2006 before the High Court wherein, the remand order was set aside and the original judgment and decree dated 11.02.2004 was restored. Furthermore, the findings of the trial court to the extent of grant of Rs.300,000/- by the Respondents to the Appellants as a compensation for improvements made was set aside.

3. The Appellants have challenged the judgment of the High Court essentially on the ground that since a remand order was before the High Court, at best the Court could have either affirmed the remand order or set it aside and remand the matter to the Appellate Court for a fresh decision on merit. The learned

counsel argued that the High Court in its Revisional Jurisdiction under Section 115 of the Code of Civil Procedure, 1908 (**CPC**) has to confine itself to the legality of the order of remand and cannot decide the case on its merits. He emphasised on the use of the words *in the case* in Section 115 of the CPC to suggest that a Revision Petition lies against a *case decided* which would necessitate the disposal of the case and not adjudication of the *lis* between the parties. In this regard, he has relied upon *Pakistan Fisheries Ltd., Karachi and others v. United Bank Ltd.* (**PLD 1993 SC 109**). The learned counsel has essentially argued that the power of the Revisional Court under Section 115 of the CPC in a case where a remand order has been made by the Appellate Court is restricted to determine the legality of the remand order and as such the Court does not have jurisdiction to decide the entire controversy between the parties.

4. The learned counsel for the Respondents has submitted written arguments in which he has raised the issue of limitation that this Appeal is barred by one day and that there is no explanation for the delay. On merit, the learned counsel argued that it is important to note that Muhammad Siddique, who sought impleadment in the suit before the Appellate Court has not challenged the impugned judgment dated 24.07.2013, which testifies to the fact that his objective was to delay the matter before the trial court. The learned counsel further argued that so far as the question of jurisdiction under Section 115 of the CPC is concerned, the High Court may pass any order as it deem fit, meaning that after taking notice of the error committed by the

subordinate court, the High Court could either remand the case or correct the error. He further submits that the concept of *case decided* and the use of the word *the case* under Section 115 of the CPC does not in any manner restrict the High Court from deciding the case on its merits, especially so, when no new evidence was required, as in the instant case where the High Court merely corrected the error of the Appellate Court.

5. We have heard the learned counsel for the parties at considerable length and note that in the application for condonation of delay the learned ASC, Muhammad Munir Paracha has stated that the delay of one day is not intentional rather based on a simple calculation mistake as he assumed July to have 30 days instead of 31 days and thus, erroneously calculated the last day for filing the appeal as 10.09.2013 instead of 09.09.2013. He has explained that the delay of one day is neither deliberate nor based on any *mala fide*, rather a simple human mistake. Given the contents of the application for condonation of delay accompanied by the affidavit, we condone the delay and proceed to decide the case on its merits.

6. The basic issue is whether the High Court under Section 115 of the CPC was restricted to have either affirmed the remand order or else, if found defective, obligated to remand the matter to the Appellate Court to decide the case on its merits.

Section 115 of the CPC is reproduced hereunder:-

"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) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit; (**emphasis added**)

Provided that where a person makes an application under this subsection, he shall, in support of such application, furnish copies of the pleadings, documents and order of the subordinate Court and the High Court shall, except for reasons to be recorded, dispose of such application without calling for the record of the subordinate Court.

Provided further that such application shall be made within ninety days of the decision of the subordinate Court [which shall provide a copy of such decision within three days thereof and the High Court shall dispose of such application within six months]."

7. The arguments of the learned counsel for the Appellants are based on the use of the words *in the case* in Section 115 of the CPC where the High Court may make such order *in the case* as it thinks fit. While relying on *Pakistan Fisheries' case* (*supra*) the learned counsel has suggested that since a revision lies against a *case decided* the High Court could not have adjudicated upon the merits of the case but should have remanded the matter to the Appellate Court for a fresh decision. We are not in agreement with the contentions of the learned counsel in this case, on two accounts; firstly, there was sufficient evidence in the case, hence the Appellate Court was in error, when it remanded the matter; and secondly, the use of the words *in the case* in Section 115 of the CPC, does not restrict the jurisdiction of the court under Section 115 of the CPC. From the record, it is evident

that the Appellate Court remanded the matter to the trial court on account of an application for impleadment filed by Muhammad Siddique who claimed that he had constructed a house on the property in dispute of which he is the owner in possession and that he had not been impleaded as a necessary party in the suit, hence the judgment and decree was illegal. The Appellate Court without considering the record or the evidence, remanded the case for a fresh decision. The High Court vide the impugned judgment considered the application of Muhammad Siddique and concluded that there was no reason to remand the case, on the impleadment of Muhammad Siddique, as he is the brother of Respondents No.6 and 7 in the instant Petition being Muhammad Ajeeb and Khalid, and that Muhammad Siddique's claim is the same as that of Muhammad Ajeeb and Khalid. The learned High Court concluded that Muhammad Siddique holds the same status in respect of the disputed property as that of his brothers and therefore, there was no basis to remand the matter for a fresh decision as the issue stands decided. Consequently, the Appellate Court committed an error by remanding the matter as it was not a case where fresh evidence was required, as the rights of Muhammad Siddique had already been adjudicated upon through his brothers who raised the same claim as that of Muhammad Siddique. In this regard, we note that the trial court concluded that the Appellants were not able to establish their rights as owners in possession of the disputed property whereas the Respondents had established their claim of being *Hissadars* in the *Shamilat Deh* from 1947 onwards. Furthermore, we find that a remand order is required in cases

which cannot be decided on the basis of available evidence, however, where the evidence is sufficient for a decision of a case, a remand order is not required. The learned High Court in this case was justified not to remand the matter to the Appellate Court, and set aside the remand order as the record showed that there was no reason to adjudicate afresh on the rights of Muhammad Siddique's claims, as his rights, if any, were the same as his two brothers who were contesting the case.

8. So far as the arguments with respect to the meaning *in the case* in Section 115 of the CPC, we find that it does not suggest a restrictive interpretation to the jurisdiction of the court under Section 115 of the CPC. In the case of Raja Hamayun Sarfraz Khan and others v. Noor Muhammad (2007 SCMR 307) this Court has held that where a remand order of the Appellate Court was in issue, the High Court was justified in not remanding the case to the Appellate Court as the High Court has given solid reasons for restoring the judgment of the trial court. In this case, the parties have been litigating for over twenty years, and the only ground agitated before the High Court and before us today is the legality of the remand order.

9. Under these circumstances, we find no merit in this Appeal. Consequently, the Appeal is dismissed with no order as to costs.

JUDGE

Bench-IV
Islamabad
07.02.2022

JUDGE

' APPROVED FOR REPORTING '
Asif/*

