

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR, HCJ
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE FAISAL ARAB

CIVIL MISC. APPLICATIONS NO.2593 AND 2812 OF 2008 IN
CIVIL APPEAL NO.1268 OF 2008

CDA and another

...Appellant(s)

VERSUS

Hashwani Hotels Ltd.

...Applicant/Respondent

For the Appellant: Syed Najmul Hassan Kazmi, Sr. ASC
Mian Muhammad Hanif, ASC
Raja Abdul Ghafoor, AOR

For the Applicant/
Respondent: Mr. Naeem Bukhari, ASC

Date of Hearing: 25.9.2017

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ORDER

MIAN SAQIB NISRA, CJ.- Through the noted CMAs, the applicant (*who is the respondent in the main appeal*) seeks the dismissal of the appeal filed by the appellants on 11.8.2008 challenging the impugned judgment of the learned Islamabad High Court dated 10.7.2008 on the ground that the same is barred by 44 days for the reason that when the appeal was filed, the decree-sheet was not attached thereto and when it (*decree-sheet*) was filed on 24.09.2008 *vide* CMA No.2720/2008 by that time the appeal had become barred by the above-stated number of days.

2. Brief facts of the case are:- that the applicant filed a *suit for declaration, permanent injunction, restitution and damages alternative for the specific performance, possession and compulsory execution and registration of lease deed* in its favour against the

appellants. This suit was dismissed by the learned Trial Court *vide* judgment and decree dated 29.7.2006. Aggrieved of the said decision, the applicant filed RFA No.86/2006 before the learned Islamabad High Court, which was allowed *vide* impugned judgment dated 10.7.2008 and the judgment and decree of the learned Trial Court was set aside. It may be pertinent to mention here that the suit of the applicant was not specifically decreed in any of the terms as per the prayer made by it in the plaint. Be that as it may, on 23.7.2008, Mr. Zafar Khan, Advocate applied on behalf of the appellants for the certified copy of the impugned judgment *vide* Form No.4451 and the same was delivered to the appellants on 25.7.2008 and the appeal as mentioned above was filed on 11.8.2008 which was within time. The office entertained the appeal without any objection or calling upon the appellants to file the copy of the decree-sheet as well. The case of the applicant is that through this Form, the appellant did not apply for the copy of the decree-sheet, but only the impugned judgment; besides, as it is evident from the memo of appeal, the title and the prayer clause, the appellants had only challenged the impugned judgment dated 10.7.2008 but not the decree. It is argued that as the appeal was incompetently filed, therefore, the applicant moved the instant application for the dismissal of the same and it is only thereafter that the appellants applied for the copy of the decree on 9.9.2008 which was supplied on the same day and they filed the same in this Court on 24.9.2008 and by that time the appeal had been rendered barred by time.

3. The learned counsel for the applicant has argued that according to Order XII Rule 4 of the Supreme Court Rules, 1980

(Rules, 1980) the memo of appeal had to be accompanied by the certified copy of the judgment and decree to be challenged and as the appellants have failed to do so, therefore, the appeal should be dismissed as being barred by law. For the purposes of drawing support that the memo of appeal should be accompanied by the decree-sheet, the learned counsel has relied upon the provisions of Order XLI Rule 1 of the CPC and the judgments of superior Court reported as Haji Abdul Karim and others Vs. Messrs Florida Builders (Pvt.) Limited (PLD 2012 SC 247 at page 263, para 10), Apollo Textile Mills Ltd. And others Vs. Soneri Bank Ltd. (PLD 2012 SC 268 at pages 287 & 288, para 27), Cooperative Model Town Society through Secretary Vs. Mst. Asghari Safdar and others (2005 SCMR 931), Anoud Power Generation Ltd. and others Vs. Federation of Pakistan and others (PLD 2001 SC 340 at pages 353 & 358) and Imtiaz Ali Vs. Atta Muhammad and another (PLD 2008 SC 462 at page 465, para 6).

4. On the contrary, learned counsel for the appellants has argued that the decree-sheet in this case was not prepared along with the impugned judgment, but it was much later in time. When the appellants applied for the judgment of the court on 23.7.2008, the decree-sheet was not ready and prepared and thus, only the impugned judgment was delivered to them. He has further argued that while passing the impugned judgment, the learned High Court has not passed a decree to hold as to what relief has been allowed to the applicant, i.e., either the relief pertaining to declaration, injunction or the specific performance etc., therefore, any decree prepared in the case is beyond the scope of the judgment, rather it is absolutely not in consonance thereto. He has

further submitted that when the file of the Trial Court was sent back to it on 15.07.2008, only the copy of the impugned judgment of the learned High Court was attached thereto and not the decree-sheet. Had the decree-sheet been prepared, that should have also been attached therewith. It is also submitted that according to the provisions of Order XII Rule 4 of the Rules, 1980, the filing of the decree-sheet in all cases is not required as the language of this rule is absolutely different from the provisions of Order XLI Rule 1 of the CPC, which provisions even otherwise are not applicable to the appeals filed before this Court. Learned counsel has also submitted that when the appeal was filed, the office did not raise any objection about the non-attachment of the decree-sheet. Such objection was only conveyed to the appellants when the office in this respect issued a notice on 5.9.2008, but before that the appellants had already procured the decree-sheet and filed the same. He has also submitted that even the applicant had applied for the judgment and decree of the learned Trial Court, but only the copy of the judgment was supplied to it on 15.7.2008 because till then the decree-sheet had not been prepared. It is for such reason that when Criminal Original Petition No.77/2008 was initiated by the applicant before the learned High Court, seeking implementation of the impugned judgment/decreed, the decree-sheet had not been filed alongwith. Learned counsel in support of his submissions has relied upon the judgment reported as **Imtiaz Ali vs. Atta Muhammad** (PLD 2008 SC 462) and **Prime Dairies Ice Cream Ltd, Lahore vs. Commissioner of Income Tax, Companies Zone** (2002 SCMR 540 at page 543, para 6). In the former judgment this Court held that where a copy of the judgment

impugned has been appended with the memo of appeal, while filing of appeal in this Court, the same would be competent as the impugned judgment has been treated as a decree by fiction of law due to the provision of Order XLV, Rule 1 of the C.P.C. In the later judgment it was held by this Court that since by virtue of subsection (2) of Section 137 of the Income Tax Ordinance, 1979 (ITO), the provisions of the CPC relating to appeals to the Supreme Court against the judgment and decree of the High Court so far as applicable shall apply to the appeals under that section, and the provisions of CPC shall be deemed to have been incorporated by way of legislation with regards to the regulation of the procedure of filing of appeals to judgments under the ITO in the Supreme Court, therefore, by fiction of law, a judgment under appeal is to be treated as a decree of the High Court passed in a regular civil matter.

5. Heard. The gist of the submissions made by the learned counsel for the parties has been provided above. However during the course of reasoning of this opinion, if any further submission made by them requires mention, it shall be so depicted. In order to resolve whether the provisions of Order XII Rule 4 of the Rules, 1980 have been complied with by the appellants or not, suffice it to say that this rule prescribes as under:-

“(4). The petition of appeal shall be accompanied by:

- (i) certified copies of the judgment and decree or final order appealed against, and of Courts below;*

- (ii) *a certified copy of the certificate granted under Article 185(2)(f) where that certificate is not embodied in the judgment; and*
- (iii) *an affidavit of service of copy of the petition or appeal on the respondent.”*

It may also be relevant to mention here the specific provisions under Order I Rule 5 of the Rules, 1980 which provide that “*Save as otherwise expressly provided by these Rules, the provisions of the Code shall not apply to any proceedings in the Court*”. The ‘Code’ has been defined in the Rules to mean “*the Code of Civil Procedure, 1908*” (CPC). We have not come across any provision of the Rules, 1980 whereby the provisions of Order XLI Rule 1 of the CPC has been made applicable thereto; therefore, the case law relied upon by the applicant’s counsel and his reliance upon Order XX Rule 7 of CPC is not of much help in this case. Even otherwise order/rule *ibid* is not meant for the purpose of the determination and the calculation of period of limitation for the purposes of appeal, rather according to the said provisions, regardless of the decree-sheet when it is prepared, the purpose and the object is that it (*decree*) shall have the effect from the date of the pronouncement of the judgment. This is so clear from the wording of the rule which stipulates that “*The decree shall bear date the day on which the judgment was pronounced ...*”. It does not mean that such date should be considered to be the date of coming into existence of the decree-sheet, rather the decree sheet should mention the date of its preparation and completion, so that the limitation for the appeal purpose should be reckoned from that date. It may not be irrelevant to mention here that there are no two opinions that the decree-sheet is not prepared on the same day, rather it takes time and therefore, the date on which it

came into existence is relevant and has to be mentioned in the decree-sheet. It may be mentioned that according to the judgment reported as **Government of Sindh through Land Acquisition Officer and others Vs. Muhammad Juman and another (2009 SCMR 1407)** the limitation for filing appeal will commence from the date of decree and the time, elapsed between the announcement of the judgment and signing of the decree, shall be included in the time requisite for obtaining the copy of the judgment and decree. In another judgment of this Court reported as **The Government of West Pakistan through Chief Secretary, Lahore etc. Vs. Niaz Muhammad (PLD 1967 SC 271)** in which it has been clearly held that the limitation for the purposes of appeal shall commence from the date of preparation of the decree. In this case, we had sought report from the learned High Court as to when the decree was prepared and had also requisitioned the original record but it is not clear therefrom on what specific date the decree-sheet has been prepared. There is no material about the movement of file indicating as to when, after the judgment had been signed by the Hon'ble Bench, the file was sent to the office for the preparation of the decree, how much time was consumed in this respect and what is the exact date when the decree-sheet was prepared and completed in all respects. It is this date, on which the decree comes into existence and thus there is a serious doubt in this regard. This view is fortified by the fact that when the applicant filed the contempt petition before the learned High Court, the decree-sheet was not appended thereto. We had repeatedly required the learned counsel for the appellants to produce any certified copy of the decree which the applicant had applied and

was supplied to him so as to suggest the exact date on which the decree-sheet was prepared. The record of the Trial Court when sent by the learned High Court also does not accompany the decree-sheet, rather it is only the impugned judgment was sent. The office had entertained the appeal against the impugned judgment alone and never required the appellants to also file the decree-sheet till such date when a notice in this regard was issued but before that the appellants had already filed an application for obtaining the copy of the decree-sheet which was, as mentioned earlier, supplied to them and had been filed. Keeping in view all these circumstances in totality, we are of the candid view that no sure date can be ascertained as to when the decree as per the provisions of Rule 8 Part H of Volume V of the Rules and Orders of the Lahore High Court, Lahore (*which too were adopted by the Islamabad High Court*) was prepared because one thing is absolutely and unequivocally clear that the decree-sheet was not prepared and was not in existence on the date of the pronouncement of the impugned judgment i.e. 10.7.2008, rather it is subsequently prepared and, as repeatedly mentioned above, the date in this regard is absolutely obscure. Obviously in such a situation the appellants' appeal cannot be with surety held to be barred by time and even if that being so on account of the facts forthcoming and the law mentioned, the appellants are entitled to the condonation of delay which is hereby condoned. Before parting with this opinion, we must make it clear that we do not agree with the contention of the learned counsel for the appellants that as per Order XII Rule 4 of the Rules, 1980 (*reproduced above*) it is not mandatory that the impugned judgment and the decree (*whereby the*

decree-sheet has been prepared pursuant to the impugned judgment) is not required to be filed, rather in case where either the judgment or the decree has not been filed, that shall be the sufficient compliance of the above provision. Rather to the contrary, such an appeal filed by the appellants would be incompetent and the defect would only stands cured from the date when the decree-sheet or the impugned judgment is filed and obviously the time limitation shall also be reckoned from the date of complying with the mandatory provision of law. Obviously this shall be subject to the appellant in any case showing 'sufficient cause' for not filing the copy of either of the two documents and can seek the condonation of delay which would be dependent upon the facts and circumstances of each case.

6. In light of the above, the delay of 44 days as alleged by the applicant in filing the present appeal is condoned. The applications seeking dismissal of the appeal on account of the limitation are dismissed.

CHIEF JUSTICE

JUDGE

JUDGE

Islamabad, the
25th of September, 2017
Approved for reporting
Waqas Naseer/*

Be that as it may, we have required a report from the learned High Court as to when the decree was prepared and also requisitioned the original record from the learned High Court. It is not clear therefrom that on what specific date the decree-sheet had been prepared. As there is a serious doubt about the date of preparation of the decree in this case and the signing thereof by the competent authority, throughout, we have asked the learned counsel for the applicant to place on the record the decree-sheet which had been provided to it pursuant to the application which it had filed for the attested copy of the judgment and decree, but it has not been able to do so. There is no material on the record as to when the file of the case after the pronouncement of the judgment was sent to the office, where the decree sheet had to be prepared by the office. Moreover, the office of this Court also did not raise any objection while entertaining the appeal of the appellants, rather issued a notice on 15.07.2008 requiring them to file the copy of the decree. Before that date, the appellants having the awareness that the applicant is seeking the dismissal of this appeal being time barred, as a precaution, had moved an application for obtaining the certified copy of the decree, which was supplied to the appellants on 9.9.2008 and immediately, the same was filed in the office. Keeping in view all the facts in totality, we find it obvious that the decree which had to be prepared by the office in terms of the provisions of Rule 8 Part H of Volume V of Rules and Orders of the Lahore High Court, Lahore (*which too were adopted by the Islamabad High Court*) the decree-sheet was not prepared on the same day when the judgment was pronounced on 10.7.2008, rather it was prepared subsequently, but it is not divulged from the record that on which

date the same was prepared and thus came into existence. Obviously, in such a situation, the benefit should be given to the appellants for the purpose of condoning the delay. Thus, following the view set out in the judgment reported as **The Government of West Pakistan through Chief Secretary, Lahore etc. Vs. Niaz Muhammad (PLD 1967 SC 271)**, we hold that the decree-sheet having not been prepared on the same day, but subsequently on an unknown date, hence, in the circumstances, the provisions of Order XX Rule 7 of CPC shall not be attracted.

6. In light of the above, we find it to be a fit case for condonation of delay; resultantly, the delay of 44 days in filing of the appeal is condoned. The applications are accordingly dismissed.

CHIEF JUSTICE

JUDGE

JUDGE

Islamabad, the
25th of September, 2017
Not approved for reporting
Waqas Naseer/*