

SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

MR. JUSTICE AMIN-UD-DIN KHAN

MR. JUSTICE MUHAMMAD ALI MAZHAR

Civil Appeal No. 278 of 2015

(Against the judgment dated 12.12.2014 passed by the
Lahore High Court, Lahore in R.S.A. No. 181 of 2005)

Muhammad Sarwar and others

...Appellant(s)

Versus

Mst. Razia Sultana and others

...Respondent(s)

For the Appellant(s):

Ch. Afrasiab Khan, ASC

For Respondent No. 1 - 14:

Mr. Muhammad Shahzad Shoukat, ASC

Respondent Nos. 15 - 31:

Ex-parte

For Respondent No. 32:

Nemo.

Date of Hearing:

02.11.2021

ORDER

AMIN-UD-DIN KHAN, J.- Leave to appeal was granted in this
case vide order dated 08.04.2015, which is reproduced for ready reference:

“The learned ASC for the petitioners at the outset referred to the order dated 05.05.2004 rendered in FAO.No.250, whereby the case was remanded in the following terms:-

“After some deliberation at the bar, a consensual arrangement has been reached between the learned counsel for the parties i.e. (i) the additional issues framed by the appellate Court should remain intact and a direction be issued to the trial Court for recording of the evidence on those issues including the matter of appointment of local commission and his report, which exercise may be undertaken by the learned trial Court within six months and the evidence so recorded will be transmitted by him to the appellate Court where the appeal will be deemed to be pending; (ii) on receipt of the evidence so recorded by the trial Court, the appellate Court will hear and decide the appeal afresh and record its finding not only on the issues which had already been dealt with by the trial Court but also the additional issues framed by it. This may be done by the appellate Court within six months. I find that the course so agree will meet the ends of justice and would shorten the prolongation and delay of the matter.

2. After reading out the relevant part of the order, the learned ASC submitted, that the aforesaid judgment nowhere required the trial Court to give finding on any of the issues. It was indeed, the learned ASC added, the appellate Court which was required to give finding not only on the issues which had already been dealt with by the trial Court but also the additional issues thus framed, therefore, remand of the case was absolutely unjustified. It was all the more unjustified, exclaimed the learned ASC, when the appellate Court handed down finding on each and every issue and material on the record is by all means sufficient to enable the High Court to decide the lis.

3. Points raised need consideration we, therefore, grant leave to appeal to consider the same. Appeal be prepared on the basis of available documents with the liberty to the parties to add thereto. As the parties have already faced agonies for more than three decades, it be listed for hearing within three months that too when this petition has arisen out of an order remanding the case.

CMA No.449 of 2015 (Stay)

CMA is allowed. The operation of the impugned judgment is suspended.”

2. Learned counsel for the respondents submitted that the impugned judgment/remand order was a consent order and, in this regard, para No. 4 of the impugned judgment escaped sight of this Court while granting leave to appeal. On the other hand, learned counsel for the appellants submitted that he does not deny that it was a consent order. He argued that even in the previous round of litigation the remand order passed in FAO.No.250 of 2003 on 05.05.2004 (noted in the leave granting order) was also a consent order, which has practically been reversed by the impugned judgment. The present appeal filed against the impugned judgment/second remand order, according to the learned counsel, is therefore competent.

3. When confronted with the question whether the earlier remand order dated 05.05.2004 passed in FAO.No.250 of 2003 was in conformity with the legal provisions of Order XLI Rule 25 of the CPC, the learned counsel for the appellants was unable to satisfy us that the said order was passed in accordance with the provisions of Order XLI Rule 25 of the CPC. Rule 25 of Order XLI, CPC clearly provides that the trial Court, on remand, is to try the additional issues framed by the appellate court, take the additional evidence and record its findings and reasons therefor. Rule 25 of Order XLI, CPC is reproduced hereunder for ready reference:

“Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.—Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor.”

The simple question that requires determination by us, therefore, is: which of the two remand orders has to be given effect to, the earlier one dated 05.05.2004 or the second one dated 12.12.2014 which is impugned in the present appeal, when both the said orders were passed with the consent of the learned counsel for the parties. We are of the considered opinion that the order which is in conformity with the provisions of law must be given preference and complied with. The previous remand order dated 05.05.2004, though passed with the consent of the learned counsel for the parties, was not in conformity with the provisions of Rule 25 of Order XLI of the CPC. Further while granting leave on 08.04.2015 this Court could not notice that the impugned second remand order was passed with the consent of the learned counsel for the parties, and even before us none of the parties has denied the consent given at the time of passing of the impugned remand order. We find that the impugned order is in conformity with the provisions of Rule 25 of Order XLI of the CPC; therefore, no exception can be taken thereto. Further, no petition for leave to appeal lies against a consent order. The said factual and legal position escaped notice of the Court at the time of granting leave to appeal. We, therefore, recall the leave granting order and dismiss the petition of the appellants filed for seeking leave to appeal against the impugned remand order.

Judge

Islamabad, the
2nd of November, 2021
(Mazhar Javed Bhatti)

Judge

APPROVED FOR REPORTING