

**IN THE SUPREME COURT OF PAKISTAN**

(Appellate Jurisdiction)

**PRESENT:**

**MR. JUSTICE YAHYA AFRIDI**

**MR. JUSTICE AMIN UD DIN KHAN**

**MR. JUSTICE JAMAL KHAN MANDOKHAIL**

**Civil Appeals Nos.8-Q& 11-Q of 2017 and Civil Petition No.32-Q of 2017**

*(Against the judgment dated 29.12.2016 passed by The High Court of Balochistan in R.F.A No.155/2014& Civil Revision Petition No.391 of 2014)*

**Asadullah Khan**

*(In Civil Appeal No.8-Q of 2017)*

**Muslim Commercial Bank Ltd.**

*(In Civil Appeal No.11-Q of 2017 and Civil Petition No.32-Q of 2017)*

...Appellants/petitioner

**VERSUS**

**Muslim Commercial Bank Ltd.**

*(In Civil Appeal No.8-Q of 2017)*

**Asadullah Khan**

*(In Civil Appeal No.11-Q of 2017 and Civil Petition No.32-Q of 2017)*

...Respondents

For the appellants/petitioner:

Mr. M. Mehmood Sadiq, ASC  
(In CA.No.8-Q of 2017).  
Mir Talal Rind, ASC  
(In CA.No. 11-Q of 2017 and  
CP.No. 32-Q of 2017).

For the respondents:

Mir Talal Rind, ASC (In CA.No.  
8-Q of 2017).  
Mr. M. Mehmood Sadiq, ASC  
(in CA.No.11-Q of 2017 and  
CP.No. 32-Q of 2017).

Date of Hearing:

28.07.2022

**J U D G M E N T**

**AMIN-UD-DIN KHAN, J:-** Through this single judgment we intend to decide the instant appeal as well as connected Civil Appeal No. 11-Q of 2017 and CPLANo. 32-Q of 2017 as all the three matters have arisen out of the consolidated judgment of the learned Division Bench of the High Court of Balochistan Quetta dated 29.12.2016 whereby

RFANo. 155 of 2014 filed by the present appellant and Civil Revision No. 391 of 2014 filed by the MCB were dismissed.

2. The impugned judgment under challenge in RFANo. 155 of 2014 was modified in a way that the amount of Rs. 14,45,369/- lying in the account of the appellant as was released in favour of the appellant vide order dated 8.9.2014 passed by the learned trial court *"the appellant is allowed to withdraw aforesaid amount with profit/interest from his account in accordance with law"*.

3. We have heard the learned counsel for the parties at length and minutely gone through the record. First we take the question of maintainability of the appeal as the same has been filed under Article 185(2)(d) of the Constitution of Islamic Republic of Pakistan, 1973 when the instant appeal by the appellant is certainly against the dismissal of his RFA and the appellant supports the varied part of judgment, therefore, in our view the appeal under the above provision of the Constitution was not competent.

4. The learned High Court has modified the judgment as noted in Para 2 supra. The order of modification has been accepted by the appellant as it goes in his favour and he has challenged the part of the judgment whereby his appeal was dismissed, therefore, he was not competent to file an appeal under Article 185(2)(d) of the Constitution of Islamic Republic of Pakistan, 1973 and he was required to file a petition for leave to appeal under Article 185(3) of the Constitution. In the given circumstances, it would be appropriate to delve upon the scope of Article 185(2) (d) of the Constitution. For ease of reference, the relevant portion of Article 185 of the Constitution, reads as follows:-

"185.(1) Subject to this Article, the Supreme Court shall have jurisdiction to hear and determine appeals from judgments, decrees, final orders or sentences of a High Court.

(2) An appeal shall lie to the Supreme Court from any judgment, decree, final order or sentence of a High Court-

(a) .....



(b) .....  
(c) .....

(d) if the amount or value of the subject-matter of the dispute in the court of first instance was, and also in dispute in appeal is, not less than fifty thousand rupees or such other sum as may be specified in that behalf by Act of [Majlis-e-Shoora (Parliament)] and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the court immediately below ; or

(e) if the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the court immediately below ; or"

(emphasis supplied)

5. Anxious consideration has also been given to the Supreme Court Rules 1980, Orders XII and XIII pertaining to Civil Appeals and Petitions for Leave to Appeal in Civil Proceedings, respectively, but nothing could be found therein with regard to issue in hand except the Certificate from the Advocate-on-Record in Respect of Value of Property in Appeal Filed under Order XII, Rule 1 (ii), at Serial No.14 in the Sixth Schedule of the Supreme Court Rules, 1980, which reads as follows:

**"CERTIFICATE FROM ADVOCATE-ON-RECORD IN RESPECT OF VALUE OF PROPERTY IN APPEALS FILED UNDER ORDER XII, RULE 1(ii) S. C. R.**

**IN THE SUPREME COURT.**

(Appellate Jurisdiction)

Civil Appeal No. \_\_\_\_\_ of \_\_\_\_\_ 19

A. P(B) .....Appellant

Versus

C.D ..... Respondent

**CERTIFICATE**

I, \_\_\_\_\_ Advocate-on-Record for the appellant in the above-cited appeal do hereby certify that the judgment/decreed/final order involves directly/indirectly a claim/question respecting property of the value of not less than Rupees fifty thousand and that the judgment/decreed/final order appealed from has varied/set aside, the judgment/decreed/final order of the court immediately below.

Dated this the.....day of .....19 .....

Advocate-on-Record"

6. This Court further probed into the definition of "varied" as the term has been found in Article 185(2)(e) of the Constitution and the Certificate at Serial No. 14 noted supra. Black's Law Dictionary has defined the word "alteration" as "Variation; changing; making different. A change of a thing from one form or state to another; making a thing different from what it was without destroying its identity." The term "variance" has also been defined in Black's Law Dictionary as "Pleadings". A discrepancy or disagreement between two instruments or two allegations in the same cause, which ought by law to be entirely consonant. Thus, if the evidence adduced by the plaintiff does not agree with the allegations of his pleadings it is a variance. A disagreement between the allegations and proof in some matter which in point of law is essential to the charge or claim. A substantial departure in the evidence adduced from the issue as made by the pleadings." The term "vary" has also been defined in the Cambridge Dictionary as "If things of the same type vary, they are different from each other, and if you vary them, you cause them to be different from each other"; and in the Oxford Dictionary as "(of a group of similar things) to be different from each other in size, shape, etc."

7. The term "varied" as used in the present context seems also to present the same connotation as found in the lexical and legal dictionaries mentioned above; if a judgment is to change or alter or modify the ruling of the court below, it would be said that the judgment has varied the ruling of the lower court. However, where the same is set aside, or upheld, no modification takes place and the impugned ruling of the court below is either accepted in toto or reversed absolutely. Where a judgment is partially upheld, and partially reversed, and only that part of the judgment has been challenged which is partially maintained, as in the instant case, then the same cannot fall under the ambit of variation, and would have to be



considered as a judgment "upheld" to one extent, and a judgment "set aside" to the rest of it.

8. The instant case involves matter pertaining to property valued at more than Rs.50,000/- in the trial court, however, the High Court has "varied or set side the part of judgment, decree or final order of the court immediately below", as required under Article 185(2)(e) of the Constitution. The Appellant has only impugned that part of the judgment of the High Court which dismissed the claim of the Appellant in the RFA. Therefore, the present Civil Appeal under Article 185(2)(d) of the Constitution of the Islamic Republic of Pakistan, 1973 is not competent and the Appellant was required to file a Civil Petition for Leave to Appeal under Article 185(3) of the Constitution, in this eventuality. We have thoroughly examined the existing law on the subject but the answer is that it is a case of first impression. Though, previously when a decree or order was passed by the High Court and the party partially challenging a part of concurrent findings against them have filed Petition for Leave to Appeal, in the cases reported as "Muhammad Ismail and 5 others v. Bashir Ahmad and others"(2005 SCMR 1079), "Shakeel and another v. The Deputy Commissioner Sanghar and others"(1986 SCMR 121), and "The State Bank of Pakistan v. The Official Liquidator of National Commercial Bank Ltd."(1989 SMCR 1434), thus, we are clear in our mind that in the instant case, the portion of the judgment of the High Court which varied the judgment of the lower court was in favour of the Appellant and that portion was not challenged by the Appellant rather Appellant has challenged a portion of the judgment of the High Court as well as the two fora below whereby his claim was concurrently dismissed by all the two fora below, therefore, in our view, the appeal filed by the Appellant was not competent. He was required to file a Petition for Leave to Appeal.

9. We have considered the case of the Appellant on the touchstone of Article 185 (2) (d) and (e) of the Constitution of the Islamic Republic of Pakistan, 1973. No case has been made out even on merits. Therefore, no question of making out a case by the Appellant in the light of Clause (3) of Article 185 of the Constitution for grant of leave. Learned counsel for the appellant failed to make out a case for interference when there are concurrent findings of fact recorded by the two fora below against the appellant that he failed to prove the relevant documents to show that the amount claimed by the appellant to have been deposited in his account through the aforesaid deposit slips. When there are concurrent findings of fact of two fora below that the appellant has not proved through the documentary or oral evidence the case pleaded by him, therefore, it is not a case for interference in the concurrent findings of the two fora below.

10. Civil Appeal No. 11-Q of 2017 is barred by 64 days. The ground mentioned in CMANo. 62-Q of 2017 filed under section 5 of the Limitation Act, 1908 for condonation of delay is that the application was filed for grant of certified copies on 2.1.2017 and the same were issued on 1.3.2017 whereas counsel for the appellant-Bank had gone for performance of Umrah from 15.3.2017 to 13.4.2017 and the appellant was under the impression that the appeal period is 60 days. We are afraid that it is hardly a ground for condonation of delay. As the counsel has argued the case on merits that the modification has been challenged and argues that the plaintiff Asad Ullah Khan's account was a current account, therefore, he is not entitled for profit and any interest on the amount decreed in his favour by the learned trial court and confirmed by the appellate court. We are of the view that impression of the appellant is misconceived. The learned High Court has not ordered for grant of any profit or interest rather the same has been allowed in accordance with law. Needless to observe that if on the current account no



amount of interest or profit is admissible, the appellant is not obliged to pay the same.

11. Through CPLA No. 32-Q of 2017 order of dismissal of Civil Revision has been challenged by the defendant Bank. We have noticed that there are concurrent findings of two fora below against the petitioner on the basis of admission in the written statement as well as the witness of the petitioner-defendant Syed Zahid Hussain, Assistant Vice President of the Bank, therefore, no case for grant of leave is made out. Consequently, Civil Appeal No. 8-Q of 2017 which was not competent and we have considered the case where leave application should have been filed. Findings of the fora below are correct and in accordance with law, therefore, instant appeal stands dismissed. Civil Appeal No. 11-Q of 2017 being barred by time as well as on merits also stands dismissed and CPLA No. 32-Q of 2017 also stands dismissed as no case for grant of leave is made out.

**APPROVED FOR REPORTING.**

Quetta  
28.07.2022.  
Mazhar javed Bhatti