C. R. No. 47 of 2008.

Abdul Majeed. . . . . Applicants.

Versus.

Additional District Judge
and or. . . . . …Respondents.

1.For orders on CMA 67/09.
2.For Regular Hearing.
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06.04.2009. Mr.Mian Mumtaz Rabbani, advocate for the applicant.
Mr.Ali Haider Dareshani State counsel.
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ARSHAD NOOR KHAN, J.- By this revision application, the applicant has called in question the order dated 09.09.2008 passed by the learned Vth Additional Sessions Judge, Sukkur in CMA in C.A.No.36/2006 whereby the application filed under Section 13 of the Court Fees Act, for issuance of certificate for return of Court fees, has been dismissed.

The facts leading to the present revision application in brief are that the applicant filed suit No.78 of 2003 for possession and mense profit, wherein, the respondents filed written statement and the learned trial Court framed as many as six issues and matter was posted for evidence of the plaintiff but the evidence was not recorded in a considerable time, therefore the learned trial Court

passed the Judgment and decree under Order 17 Rule 3, CPC and recorded its findings on all the issues. The applicant filed civil appeal before the learned District Judge, Sukkur, who entrusted the same to the learned Vth Additional District Judge Sukkur, who after hearing of the learned counsel for the parties, remanded the case to the learned trial Court for fresh adjudication of the matter after recording of the evidence of the parties. After passing order of remand of the case, the applicant filed misc. application under Section 13 of the Court Fees Act praying therein to issue Certificate directing to the Collector for refund of the Court fee, which has been refused by the learned Vth Additional District Judge, Sukkur vide order impugned herein; hence the present revision application.

I have heard Mr.Mian Mumtaz Rabbani, learned counsel for the applicant and Mr.Ali Haider Dareshani, learned State counsel.

The learned counsel for the applicant contended that the suit was decided on preliminary point and in appeal the matter has been remanded, therefore, the applicants are entitled for refund of the Court fee, as such the learned appellate Court was not competent to refuse to issue the certificate in question. In support of his contention he has relied upon the case of Fateh khan etc v Province of Punjab etc reported in 1995 Civil 597 and the case of Malik Nayyar Hussain v Muhammad Saeed reported in 1993 MLD 1788.

The learned State counsel has contended that the matter was not decided by the trial Court on any preliminary point, therefore, the appellate Court rightly refused to

issue such certificate for return of Court fee to the applicant.

I have considered the arguments advanced on behalf of the parties and have gone through the material available before me.

A perusal of the judgment and decree passed by the learned trial Court, shows that the same was passed under Order 17 Rule 3, CPC after considering the whole material available before the Court and each and every issue was discussed separately while passing the Judgment and decree, as such the judgment and decree passed by the learned lower Court, in any way, could not be treated as decree on preliminary point. In fact the disposal of the suit under Order 17 Rule 3, CPC was disposal of suit on merits against which, the applicant preferred civil appeal, which was decided by the learned Vth Additional District Judge, Sukkur, who remanded the suit with direction to record the evidence of the parties and decide the matter afresh in accordance with the law.

Section 13 of the Court Fees Act postulate that, in case, if the appeal is allowed and the matter is remanded to the trial Court on any ground envisaged under Order 41 Rule 23, CPC, the Court may grant a certificate to the applicant thereby authorizing him to receive the Court fee amount from the Collector, which was paid by him on the memorandum of appeal. Section 13 of the Court Fee Act imposes the conditions that the matter envisaged under Order 41 Rule 23, CPC disposed off upon a preliminary point and the decree is reversed in appeal by the appellate Court and, in case, if appellate Court think fit, while passing the

order of remand, may further direct the decision on the issue involved in the suit. The condition precedent by virtue of Rule 23 Order 41, CPC, is that the decision of the suit on a preliminary point but in the case in hand, the judgment and decree was not passed by the trial Court on any preliminary point but the same was passed after considering each and every issue in the light of the evidence available on record, as such the judgment and decree involved in the case in hand, does not cover the provision of Order 41, Rule 23, CPC. The same point also came for consideration before this Court in the case of Nabi Bux Khan Bhurghari v National Bank of Pakistan reported in PLD 1988 Karachi 24, wherein it has been observed that the decision in that appeal was on merits after deciding the issues though it was an ex-parte order. The relevant observation made by this Court in the case of Nabi Bux Khan Bhurgari, is usefully quoted herein below for the sake of convenience;-

> **4. Section 13 of the Court Fees Act provides that if a suit is remanded in appeal, on any of the grounds mentioned under Order XLI, rule 23 of the First Schedule of the Code of Civil Procedure, for a second decision by the lower Court, the Appellate Court shall grant to the appellant a certificate, authorizing him to receive back from the Collector the full amount of the court-fees paid on the memorandum of appeal. No counter-affidavit has been filed to this application. However, section 13 of the Court Fees Act provides that the remand in appeal should be on any of the grounds mentioned in Order XLI, rule 23, C.P.C and in rule 23 the remand can be made in appeal if the suit was disposed of by the trial Court upon the preliminary point and the decree is reversed in appeal. There is no doubt**

that the decree was reversed in appeal and the case has been remanded but the further question for consideration is whether the suit was disposed of by the trial Court upon the preliminary point.

The word preliminary point used under Order 41 Rule 23, CPC has also been examined in the aforesaid case of Nabi Bux Bhurghari and after the examination of the case of Madras High Court reported in the case of Malayath Veetil Reman Nayar and others v C. Krishnan Nambudripad and another AIR 1922 Mad.505, wherein it was observed that a preliminary point does not necessarily mean a point collateral to the merits of the case but would include any point whether of fact or law, the decision on which renders the decision of other issues arising in the case unnecessary. After considering the contention in the case of Nabi Bux Bhurghar, supra, this Court was of the opinion that the preliminary point used in Order 41 Rule 23, CPC does not include the decision of a case on issues framed in the suit and in similar circumstances involved in the present case, it was observed that judgment and decree passed by the trial Court, could not be treated to have been decided on preliminary point. The dictums laid down in the case of Nabi Bux Bhurghari, supra, is therefore, fully applicable to the circumstances of the present case.

The same point also came for consideration before the Lahore High Court in the case of Riaz Ahmad v Muhammad Ismail and 2 others reported in PLD 1976 Lahore 1320, wherein the learned Lahore High Court was pleased to observe that the suit was not decreed on preliminary point by the trial Court and the said decree has not been reversed in appeal rather on the contrary decree was awarded in

favour of that applicant on merits and the same reversed under Rule 23(a) of Order 41, CPC and not under Rule 23 of the said Order. Under Section 13 of the Court Fees Act, if appeal or plaint, which has been rejected by the lower Court on any of the ground mentioned in the CPC, is ordered to be reversed or if the suit is remanded in appeal on any of the grounds mentioned in the Rule 23 of Order 41, CPC for its second decision of the lower Court and appellate Court shall grant Certificate authorizing him to receive back the Court fee from the Collector.

The observations made by the Lahore High Court also attracted to the circumstances of the present case. The case of Fateh Khan etc relied upon by the learned counsel, has not supported his contention and even in that case, the Lahore High Court refused to issue such Certificate under Section 13 of the Court Fees Act The observations made by the Lahore High Court in the case of Malik Nayyar Hussain, supra, are also on different footing, which is distinguishable from the circumstances of the present case.

For all the aforesaid reasons and circumstances, I am of the opinion that the suit filed by the applicant, was decided on merits under Order 17 Rule 3, CPC, which judgment and decree was set aside by the learned appellate Court but the judgment and decree was not decided on any preliminary point as envisaged under Rule 23 of Order 41, CPC, as such the learned appellate Court rightly refused to issue such Certificate in favour of the applicant, thereby directing the Collector to refund the Court fees to the applicant. The revision application was dismissed vide order dated 06.04.2009 for the reasons to be recorded later on, these are the reasons for the same.

JUDGE

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Approved for reporting.