

IN THE HIGH COURT OF SINDH, KARACHI

Civil Revision No. 208 of 2010

Absar Ahmed Siddiqui through legal heirs.....Applicants

Versus

M/s. Union Bank Limited and 4 others.....Respondents.

ORDER

Date of hearing : 11th April, 2018 & 03rd September, 2018
 Date of Judgment : 06th September, 2018.
 Appellants. : Mr. Ch. Muhammad Iqbal, advocate
 Respondents : Mr. Aimal Kanshi, advocate.

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Kausar Sultana Hussain, J:- This Civil Revision under Section 115 C.P.C is directed against the judgment dated 16.07.2010 passed by learned VIIth Additional District Judge (South), Karachi, whereby Civil Appeal No. 73 of 2009, filed by the appellant Absar Ahmed Siddiqui was dismissed, whereby the judgment and decree dated 21.04.2009 and 25.04.2009 respectively, passed by the learned Xth Senior Civil Judge, Karachi South in Civil Suit No. 482 of 2003 (old H.C. No. 722 of 1998) were upheld. It may be mentioned here that during first round of litigation, the same suit was decreed in favour of the applicant/plaintiff, vide judgment and decree dated 16.08.2006 and 21.08.2006, which were assailed by the respondent in Civil Appeal No. 180 of 2006, before the learned VIth Additional District Judge, Karachi (South), who allowed the said Civil Appeal, vide judgment dated 24.09.2008, whereby the matter was remanded to the trial Court with direction to decide the same afresh by calling handwriting expert and offering opportunity to defendant/appellant as to cross-examine the handwriting expert. The learned trial Court dismissed the suit of the applicant/plaintiff, vide judgment and decree dated 21.04.2009 and 25.04.2009, respectively. The appellant challenged said judgment and decree in Civil Appeal No. 73 of 2009, after hearing both the side, the same was dismissed by the learned Appellate Court, vide judgment dated 16.07.2010. Being aggrieved the applicant/plaintiff has preferred instant Revision.

2. The concise germane facts forming background to institute instant Civil Revision are that the appellant/plaintiff filed Civil Suit No. 482 of 2003, old High Court No. 722 of 1998, against the respondents to credit a sum of Rs. 8,50,000/- to the account of the plaintiff/applicant and for Rs. 50,00,000/- (Five Million Only) in respect of damages and compensation towards encashment of disputed cheque, total amounting to Rs. 58,50,000/-. Initially, the suit was preferred before this Court being Civil Suit No. 722 of 1998, thereafter it was transferred to the learned District & Sessions Judge South, Karachi at the eve of enhancement of pecuniary jurisdiction of civil Courts. Consequently, the suit was transferred to the court of learned Senior Civil Judge-Xth, South Karachi and it was renumbered as Civil Suit No. 482 of 2003. It was alleged, as set out in the plaint, that the applicant/plaintiff and his son Aamir Ahmed Siddiqui were operating current account No. CD-0011080000, with respondent No. 1 (M/s. Union Bank Limited). On 10.12.1997, applicant/plaintiff received a telephonic message from his son inquiring about issuance of any cheque, since the defendant No. 5, contacted him with such query, the plaintiff refused issuance of any cheque of any amount, the plaintiff contacted the defendant No. 5, who asked to check page No. 61715 and 61716, the cheque books of the plaintiff which always remain under lock and key was checked and the plaintiff found, four complete leaves of the cheque book bearing Nos. 61715 to 61717 and 61750 were missing from the cheque book. The plaintiff reached the bank and came to know that two cheques bearing Nos. 61715 and 61716 have been presented in the bank filled with heavy amounts of Rs. 8,50,000/- and Rs. 9,00,000/- respectively. The plaintiff handed over the cheque book so issued by the defendants, missing leaves alongwith the counter foils of the cheques so presented and encashed by the defendants, the defendants checked the book and kept the cheque book in their custody, which was subsequently handed over to the police alongwith the cheques so encashed by the defendants. The plaintiff was asked to wait and see, as person to whom the defendants have made payment of Rs. 8,50,000/- now will come to collect Rs. 9,00,000/-, after about half an hour, an illiterate person reached at Bank, who got hold by the Bank staff, the defendant No. 2, asked questions to the person, who told his name as Idrees Janjua, the

defendants called the police, and handed over the person to the police, and FIR being No. 317 of 1997, was lodged by the defendant No. 3. The statements of defendants/respondents, applicant/plaintiff and his son under Section 161 Cr.P.C were recorded by the police. The plaintiff was issued a statement of accounts dated 11.12.1998, showing withdrawal from the account of the plaintiff/applicant of both the amounts i.e. Rs. 8,50,000/- and Rs. 9,00,000/- and thereafter credited a sum of Rs. 9,00,000/- to the account of the plaintiff, hence this suit.

3. The respondent No. 1 filed written statement and controverted the averments of plaint by stating that the cheques in dispute were issued by the applicant with his own signature as appeared on the account opening form and signature card available with the bank and it is the bank who informed the applicant about the presentation of second cheque in sum of Rs. 9,00,000/- as such suit as framed is not maintainable in law. They have prayed for dismissal of the suit of the applicant/plaintiff with heavy compensatory costs.

4. The learned trial Court upon pleading of the parties framed the following issues for determination as under

1. Whether the cheque No. 61715 for Rs. 8,50,000/- was issued by the plaintiff?
2. What should the decree be ?

5. Learned counsel for the appellant has mainly contended that the learned trial Court passed the judgment and decree contrary to issues framed for determination. He has stressed upon the point that learned trial Court passed the judgment by raising absolutely new plea that Idress Janjua is not a party. He has further contended that the trial Court failed to adopt the procedure as required by the Qanun-e-Shahadat Order as provided under article 84 and reached to a wrong conclusion. In this regard, he has referred the case of Muslim Commercial Bank Limited, through General Attorney and another V/s Amir Hussain and another (1996 SCMR 464), wherein it was held by the apex Court that handwriting expert need not be examined in every case and Court itself is entitled to make

independent comparison of handwriting apart from opinion of expert as contemplated by Article 84, Qanun-e-Shahadat Order, 1984. He has further argued that both the Courts below failed to notice that applicant has no impunity of contract with stranger while money was encashed by the respondents from his account by committing a willful and deliberate negligence. He has further argued that the appellate Court has simply followed the judgment of learned trial Court without adverting and determining the questions raised before it, and mandatory provision of law viz; order XLI Rule 31 C.P.C was violated. He has referred case of Allah Ditta and others V/s Muhammad Sharif and others (2012 CLC 1274 SC Azad Jammu & Kashmir), Gul Rehman V/s Gul Nawaz Khan (2009 SCMR 589) and Moar through his legal heirs V/s Member Board of Revenue, Sindh and others (PLJ 2012 Karachi 106).

6. Conversely, the learned counsel for the respondents has vehemently opposed the above submissions, arguing that both the Courts below have correctly dismissed the claim of the appellant after due diligence as required by law as the applicant failed to discharge the burden of proof lay upon him. He has further argued that the grounds so advanced and taken during the course of arguments find no mention in the memo of Revision Application as such they may be discarded. He has referred case of Raja Nasir Khan v. Abdul Sattar Khan and another (PLD 1998 Lahore 20). He further submitted that both the learned Courts below committed no illegality in holding the report of Handwriting expert as inadmissible as neither the author thereof was appeared in the witness box, nor any opportunity of cross-examination was extended. In this connection he also referred case of Allah Dino and two others v. Mirza Muhammad Ismail (PLJ 2009, 429) and Hamid Qayoum and two others v. Muhammad Azeem through legal heirs and another (PLD 1995 SC 381).

7. While refuting the above submissions, the learned counsel for the applicant has further argued that no new plea has been taken beyond the grounds so narrated in the memo and explanation in detail has been given specifically about the illegalities committed in the impugned judgment. He has further argued that

Handwriting expert's report was rendered being inadmissible by the Courts below on wrong footing ignoring the fact that the author thereof was reportedly dead.

8. Considered the above submissions and have also gone through the available record, it may be observed that Revision and Appeal are admittedly two different fields. Appeal is the continuation of original suit and appellate Court has got ample power to thrash out the entire evidence and to scrutinize the available documents in the light of the arguments advanced by the respective parties. On the other hand, scope of Revision is limited to some illegality, material irregularity or jurisdiction define in the impugned judgment. While saying so reliance is placed to the case of Gul Rehman v. Gul Nawaz Khan (2009 AC 837), wherein the lordship Mr. Justice Mian Shakirullah Jan, Mr. Justice Muhammad Qaim Jan Khan and Mr. Justice Mian Hamid Farooq have been pleased to held as follows :-

{Regarding duties of the Appellate Court, specially the first Appellate Court, learned Narayan, J, in paragraph 22 of judgment in the case of Sailajananda Pandey & another 9supra) has clearly stated that "it has been repeatedly pointed out that the legislature has entrusted a very important duty to the first Appellate Court. It is for that Court to decide finally all questions of facts on which the disposal of the suit might depend and the appellate Court should not easily agree with the Trial Court simply because it was not inclined to take much trouble over the case. If the lower Appellate Court does not examine the facts and the evidence for itself and does not even mention the points which the case raises, it will be certainly failing in its duty."}

9. In the present case, a bare perusal of judgment of first appellate Court clearly reflects that it has not given due attention to the available evidence on record. It appears that the appellant got examined an Inspector Rasheed Ahmed, but the learned appellate Court neither took pain to discuss evidence of the applicant/plaintiff in connection with controversies involved in the matter, nor even touch the evidence of his witnesses. What to speak about diligence of the learned appellate Court in the impugned judgment, it had only agreed with the findings of the Trial Court as to the non-admissibility of report of hand writing expert on the ground that the author thereof has failed to step into witness box

though such non stepping into the witness box was due to the reason of his death and it was not intentional. Nevertheless, in the judgment dated 24.09.2008 passed by the learned Additional District Judge VIth Karachi (South) in Civil Appeal No.180 of 2006 while remanding the matter back it was specifically directed to the learned trial Court to decide the matter afresh by either calling handwriting expert and offering opportunity to the Respondent to cross-examine or to verify the signature of the applicant/plaintiff upon disputed cheque personally. Neither the learned trial Court, nor first appellate Court in the impugned judgment bother to express any personal opinion concerning the disputed signature on cheque with available admitted signature of appellant., which also permitted under the law viz Article 84 of Qanoon-e-Shahadat Order, 1984, resulting in sheer illegalities and such opinion ought to have been taken being necessary as the author of handwriting report was stated to have passed away and such factor was also very essential with other ancillary factors to decide the controversy in a just and lawful manner. The case laws reported in (1974 SCMR 411), (PLD 2000 429) & (PLD 1995 SC 381) relied upon by the learned counsel for the Respondent No.1 are inapplicable in view of circumstances of present case as both the Courts below failed to adopt provision of Article 84 of Qanoon-e-Shahadat Order, 1984 and travelled contrary to law and in a cursory way declaring the handwriting expert's opinion being inadmissible. More so, the learned Appellate Court should have thrashed out entire evidence and adjudged the controversy in view of the circumstances discussed above and then should have come to a definite conclusion. The judgment of appellate Court in hand is not a judgment in its true sense and is negation of Order XLI Rule 31, 32 & 33 CPC. For ready reference I would like to reproduce here Rule 31, 32 & 33 of Order XLI CPC as under :

- 31. Contents, date and signature of judgment:-- The judgment of the Appellate Court shall be in writing and shall state—*
- (a) the points for determination;*
 - (b) the decision thereon;*
 - (c) the reasons for the decision; and,*
 - (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;*

And shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

32. *What judgment may direct:--The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the Appellate Court may pass a decree or make an order accordingly.*

33. *Power of Court of Appeal:--The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection."*

10. It is noted that the subordinate appellate Court neither framed points for determination, which fact abundantly shows that the impugned judgment passed by it in a cursory manner depending on the decision of the trial Court, even without advert to material points involved in the controversy and without thrashing out and discussing material evidence, discussed above. Reliance in this regard is placed to the case of *Abdul Waheed v. Muhammad Bilal (PLD 2005 Peshawar 19)* and *Mst. Sabahat Idrees and Chaudhry Muhammad Idrees v. Mst. Clari Beditca Conville etc. (2008 A.C. 29)*. It would not be out of place to observe that there is no cavil to the proposition that High Court while exercising its jurisdiction conferred upon it under Section 115 CPC can interfere when the concurrent findings of facts based on insufficient evidence, non-reading or misreading of evidence, non-consideration of material evidence, erroneous assumption of facts patent, errors of law, consideration of inadmissible evidence, excess or abuse of jurisdiction, arbitrary exercise of power and where unreasonable view has been taken which is not in consonance with the evidence. Reference is to be made to the case law ***Asmatullah v. Amantullah through Legal representatives (PLD 2008 S.C 155)***.

11. As regards, the objection raised by the learned counsel for the Respondents regarding new pleas taken in arguments by the Appellant's side, such contention found without substance. The Appellant in the memo of Revision specifically

challenged the judgment on account of material illegalities, which he explained categorically in a specific manner during the course of arguments, even other-wise law permits, question of law could be raised at any stage, as such, the case law reported in (PLD 1998 Lahore 20) referred by the learned counsel for Respondent is distinguishable from the case in hand.

12. It may be observed that this is a Revision Application under Section 115 CPC and in the discussed circumstances, remand of the case is inevitable following the observations of the Hon'ble apex Courts given in the case laws *Gul Rehman v. Gul Nawaz Khan (2009 SCMR 589)* wherein it was held that:

“Order XLI, rules 31, 32, 33. Appellate Court should apply rule 31 stricto sensu as it has got ample powers under rules 32 and 33. High Court if it is of opinion that first Appellate Court has not adhered to rule 31 should send the case back to Appellate Court with some directions and should not decide the case itself in its revisional jurisdiction as the scope of revision under S. 115 is, to some extent.”

13. For the reasons, recorded above, without touching the merits of the case, instant Revision is allowed, the impugned judgment passed by the subordinate appellate Court stands set aside and case is remanded to the First Appellate Court to decide the appeal afresh in the light of evidence as per law after giving fair opportunity of hearing to the respective parties so also following the observations, made herein above. However, there is no order as to costs.

J U D G E

Faheem/PA

from who further contended that he came to know that one Mr. Idrees Janjua presented two cheques for encashment one amounting to Rs. 9,00,000/- and another amounting to Rs. 8,50,000/- has already been en-cashed by the said Idrees Janjua and was caught hold by the staff of respondent No. 1 while taking amount of remaining cheque of Rs. 9,00,000/- and was handed over to police. The appellant filed suit for recovery of Rs. 8,50,000/- against the respondents towards cheque which was uncashed by the said Idrees Janjua through alleged forged signatures and amount of Rs. 50,00,000/- towards damages and compensation with the following prayer.

- i. To declare the acts and omissions of the defendants against law and practice, malafide and negligent.
- ii. To direct the defendants to credit a sum of Rs. 8,50,000/- to the account of the plaintiff being account No. CD-0011080000 or pay in cash, with interest.
- iii. To declare the plaintiff is entitled to the damages/compensation.
- iv. To direct the defendants to pay the plaintiff a sum of Rs. 50,00,000/- as damages and compensation, or any amount so determined by this Court.
- v. Costs.

Any other relief / relives.

Order XLI Rule 1 C.P.C, it has repeatedly pointed out by Supreme Court that the legislature has entrusted a very important duty to the first Appellate Court. Who requires to decide finally all questions of facts on which the disposal of the suit might depended the appellate court should not easily agree with the trial Court simple because it was not inclined to take much trouble over the case. If the sub-ordinate Appellate Court does not even mention the points, which the case raises, it will be contained failing in his duty

Rule 31 CPC which envisages that the appellate Court have power to pass any decree and make any order which ought to have been passed or made and to pass

or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as two parts only of the decree and may be exercised in favour of all or only of the Respondent or parties, although such Respondent and parties may not have filed any appeal or objection.

1.....It was second round of litigation as before that the learned Xth Senior Civil Judge Karachi South had passed a judgment and decree dated 16.08.2006 and 21.08.2006 respectively in same Civil Suit No. 482 of 2003 (old No. 722 of 1998), whereby the suit of the plaintiff Absar Ahmed Siddiqui was decreed to the extent of Rs. 8,50,000/-. The respondents filed an appeal against the said judgment dated 16.08.2006 and decree dated 21.08.2006 before the learned VIIIth Additional District Judge South, Karachi, who after hearing arguments of both the side set aside the said judgment and decree dated 16.08.2006 and 21.08.2006 and case was remanded to the learned Xth Senior Civil Judge, South Karachi for passing afresh judgment and decree, who passed the judgment and decree dated 21.04.2009 and 25.04.2009, which was up held by the learned VIIIth Additional District Judge, South Karachi, hence this second appeal.

3. The concise germane facts forming background to institute instant Civil Revision are that the appellant/plaintiff filed Civil Suit No. 482 of 2003, old High Court No. 722 of 1998, against the respondents to credit a sum of Rs. 8,50,000/- to the account of the plaintiff/applicant and for Rs. 50,00,000/- in respect of damages, compensation towards encashment of disputed cheque, totaling amount to Rs. 58,50,000/-. Initially, the suit as preferred before this Court being Civil Suit No. 722 of 1998, thereafter it was transferred to the learned District & Sessions Judge South, Karachi at the eve of enhancement of pecuniary jurisdiction of civil Courts. Consequently, the suit was

transferred to the court of learned Senior Civil Judge-Xth, South Karachi and it was renumbered as Civil Suit No. 482 of 2003. It was alleged, as set out in the plaint, that the applicant and his son Aamir Ahmed Siddiqui were operating current account No. CD-0011080000, with respondent No. 1 (M/s. Union Bank Limited). On 10.12.1997, applicant/plaintiff received a telephonic message from his son inquiring about issuance of any cheque, since the defendant No. 5, contacted him with such query, the plaintiff refused issuance of any cheque of any amount, the plaintiff contacted the defendant No. 5, who asked to check page No. 61715 and 61716, the cheque books of the plaintiff which always remain under lock and key was checked and the plaintiff found, four complete leaves of the cheque book bearing Nos. 61715 to 61750 were missing from the book. The plaintiff reached the bank and came to know that two cheques bearing Nos. 61715 and 61716 have been presented in the bank filled with heavy amounts of Rs. 8,50,000/- and Rs. 9,00,000/- respectively. The plaintiff handed over the cheque book so issued by the defendants, missing leaves alongwith the counter foils of the cheques so presented and encashed by the defendants, the defendants checked the book and kept the cheque book in their custody, which was subsequently handed over to the police alongwith the cheques so encashed by the defendants. The plaintiff was asked to wait and see, as person to whom the defenants have made payment of Rs. 8,50,000/- now will come to collect Rs. 9,00,000/- after about half hour, a illiterate person reached at Bank, who got hold by the Bank staff, the defendant No. 2, asked questions to the person, who told his name as Idrees Janjua, the defendants called the police, and handed over the person to the police, and FIR being No. 317 of 1997, was lodged by the defendant No. 3. The statements under Section 161 Cr.P.C

were recorded, the statement of the plaintiff and his son was also recorded. The plaintiff was issued a statement of accounts dated 11.12.1998, showing withdrawal from the account of the plaintiff of both the amounts i.e. Rs. 8,50,000/- and Rs. 9,00,000/- and thereafter credited a sum of Rs. 9,00,000/- to the account of the plaintiff, hence this suit.