

Stereo. No.H C J D 38.

Judgment Sheet

IN THE LAHORE HIGH COURT

MULTAN BENCH, MULTAN.

JUDICIAL DEPARTMENT

Case No. Writ Petition No.6472 of 2016

Azhar Iqbal.

Vs.

Additional District Judge Sahiwal and three others.

J U D G M E N T

Date of Hearing	10.05.2017
Petitioner By:	Syed Tajammal Hussain Bukhari, Advocate.
Respondents By:	Syed Kabeer Ahmad and Zafar Iqbal Batalwi, Advocate for the respondents.

Muhammad Ali, J.- This constitutional petition is directed against the order passed in civil revision, whereby the civil revision was accepted and the order of the trial Court dismissing the application for production of additional evidence was set-aside and the application was allowed.

2. The necessary facts for the decision of this petition are that respondents No.3 and 4 (hereinafter referred as the “respondents”) filed a suit for specific performance of the contract on the basis of an agreement dated 14.03.2008. The

suit was contested by the petitioner by filing a written statement wherein the execution of agreement to sell was denied. The learned trial Court framed necessary issues and proceeded with the trial. In the meanwhile, the petitioner instituted a separate suit seeking cancellation of agreement to sell. Both the suits were consolidated and consolidated issues were framed on 08.09.2010. The respondents were considered as plaintiffs and the petitioner as defendant. The learned trial Court proceeded to record evidence of the respondents, in their evidence Zafar Iqbal respondent No.3 appeared as PW-1, Mian Muhammad Aslam Joiya appeared as PW-2, Ch. Khadim Hussain as PW-3 and Sh. Sakhawat Ali Stamp Vendor as PW-4.

3. After evidence of PW-3 was recorded, the learned counsel for the respondents made a statement on 08.02.2012 that no other witness except the stamp vendor and the Computer Composer would be produced. On 18.04.2012 evidence of PW-4 stamp vendor and PW-5 Muhammad Sohail was recorded. On the same day respondents filed an application under Order XVIII Rule 2 of the Code of Civil Procedure, 1908 (“C.P.C.”) seeking permission to produce Sohail Ahmed, second marginal witness of the agreement to sell in their evidence. The application was filed on the ground that one of the marginal witness of the agreement PW-3 had become hostile and the witness sought to be produced was earlier not available at the time of recording of the evidence. The application was contested by the petitioner, the learned trial Court after hearing the parties dismissed the application on 29.05.2012. The decision was challenged by the respondents by filing civil revision which was dismissed on 27.10.2014. After the dismissal of the revision petition, the

respondents filed another application for producing additional evidence, the substance of the subsequent application was same. The application was dismissed by the learned trial Court vide order dated 11.09.2015. The order was challenged by filing civil revision by the respondents. The learned Additional District Judge accepted the petition on 16.03.2016 and allowed the respondents to produce the witness as additional evidence, hence this writ petition.

4. The learned counsel for the petitioner submits that the learned revisional Court committed jurisdictional error in accepting the revision by ignoring the fact that additional evidence could not be allowed to fill the lacuna in a case; that earlier application on the same subject and same prayer was dismissed by the learned trial Court and the order was affirmed by the revisional Court; that subsequent application on the same subject was not maintainable in view of bar contained in the rule of *res judicata*; that the counsel for the respondents voluntarily made a statement on 08.02.2012 closing the right to produce further evidence except Stamp Vendor and Computer Composer as witnesses; that there was no legal justification to allow the application which was earlier dismissed and the order which was affirmed by the revisional Court attained finality and was not challenged any further.

5. Conversely, the learned counsel for the respondents submits that the learned revisional Court while deciding the first revision petition had permitted the respondents to file an application for production of additional evidence, therefore, the respondents were well within their right to file the application and the order passed by the revisional Court is not open to any exception. In support of his arguments, the learned counsel has relied on the case of Mst. IQBAL BEGUM

through her Legal Heirs v. MUHAMMAD AKBAR and 5 others (1992 CLC 232).

6. Arguments heard. Record perused.

7. Undeniably, the respondents earlier moved an application for production of second marginal witness of the agreement to sell before the learned trial Court under Order XVIII Rule 2 of C.P.C. The said application was dismissed by the trial Court and the order was upheld by the revisional Court by dismissing the civil revision vide judgment dated 27.10.2014. After dismissal of civil revision another application with identical prayer was filed which was not competent and the learned trial Court rightly dismissed the application vide order dated 11.09.2015. The learned revisional Court without examining the relevant provisions of the Code of Civil Procedure, 1908 on the subject allowed the revision by accepting the application in an illegal manner vide order dated 16.03.2016.

8. There are certain requirements, limitations and parameters for exercising revisional jurisdiction. The jurisdiction in terms of Section 115 of the C.P.C is primarily meant for correction of jurisdictional defect, error, material illegalities or irregularities. The learned revisional Court while exercising the jurisdiction was required to examine the effect of dismissal of earlier revision petition on the same subject and whether subsequent application on the same subject was hit by the rule of *res judicata* as well as the constructive *res judicata* and whether the plea not raised in the earlier application on the same subject would not be considered to have been abandoned by the respondents or they could be given liberty to achieve something indirectly which they failed to achieve directly. Admittedly, in the subsequent application

filed by the respondents no fresh or new ground was taken, the contents of the application were almost the same, only the heading of the application was changed. The second application in pith and substance was aimed at achieving the same relief which was earlier denied in the first round. The law is settled that merely mentioning wrong provision of law or making a wrong head note in the heading of the application hardly makes any difference, what is required to be seen is the gist and substance of the matter. Merely writing something different in the head note of the application would not change its substance and complexion. Reference in this regard is made to the case of SOHAIL FAROOQ v. FARZANA RAFIQUE and others (2017 YLR 1300). The revisional Court while accepting the petition was impressed by the findings recorded in the earlier order passed in revision, such observations are found to be unsustainable, there cannot be an observation which is against the law, the revision should have been decided on its own merits rather than taking shelter of the observation made in the order passed previously.

9. The subsequent application seeking the same relief was barred by rule of *res judicata*. The principle is equally applicable to miscellaneous applications filed during pendency of the suit. Reference in this regard is made to the cases of Messers NEW RAHAT ENGINEERING WORKS through Proprietor and 4 others v. NATIONAL BANK OF PAKISTAN and another (2003 CLD 282) and KHARATI and others v. MUHAMMAD IBRAHIM and others (1989 CLC 894). In presence of an earlier order dated 27.10.2014 passed in the first revision petition through which the same witness was not allowed to be produced in evidence had attained finality and was not challenged any further. After the dismissal of the earlier application there was no occasion

to allow subsequent application with similar prayer in the second round, the matter cannot be subsequently re-opened to treat the same under a different provision of law. The respondents while moving an application in the first instance were required to take all available pleas and were also required to agitate what could have been their ground of attack and by not taking such ground, it is deemed to have been given up. The order passed in revision is thus violative of the express provision of law and is liable to be interfered in exercise of constitutional jurisdiction of this Court. Reference is made to the case of MUHAMMAD ANWAR v. Mst. ILLYAS BEGUM and others (PLD 2013 Supreme Court 255). The case law relied upon by the learned counsel for the respondents is distinguishable, based on different facts and is not applicable to the facts and circumstances of this case, in the said judgment the application which was allowed was moved for the first time and there was no previous order of a higher Court disallowing such request.

In this view of the matter this constitutional petition is **accepted**. The order dated 16.03.2016 passed by the learned revisional Court is found to be illegal and without lawful authority, same is set-aside, the result would be that the application filed by the respondents is deemed to be dismissed.

(MUHAMMAD ALI)
JUDGE

Approved for reporting

JUDGE