

JUDGMENT SHEET
IN THE HIGH COURT OF BALOCHISTAN, QUETTA

Civil Revision Petition No. 613 of 2022
(CC # 100107504166)

Javed Iqbal

Versus

Shaheen Iqbal and others

Date of hearing 07th April, 2022. **Announced on** _____.

Petitioner by: Mr. Rasool Bakhsh Baloch, Advocate _____.

Respondent No.1: by M/s Muhammad Saleem Lashari and Salman Langove, Advocate _____.

Respondent No.2: Proceeded against Ex-parte on 08.12.2022 _____.

Official respondent: by Mr. Abdul Tahir, Advocate _____.

JUDGMENT

Muhammad Aamir Nawaz Rana, J.- Tersely the relevant facts leading to file the instant Civil Revision Petition are; the respondent No.1/plaintiff had filed a suit seeking “*Declaration, Cancellation and Permanent Injunction*”, and sought the following reliefs:

- a. *Declaration be made that the legal heirs of (late) Munawar-ud-Din are shareholders into the disputed property i.e. (Mohall and Mouza Ward No.34 Tappa Urban-II, Tehsil City District Quetta Khewat/Khatooni NOs.239/231, Qita 02 total measuring 799 Sq.Ft situated at Art School Road Quetta near corner of Jamiat Rai Road, Quetta) to the extent of share i.e. 2/3, as the basic share of 1/3 is from the legacy of their father (Munawar-ud-din) and 1/3 share is after purchasing share of brother (late) Zia-ud-Din by (late) Munawar-ud-Din and 1/3 share is after purchasing share of brother (late) Zia-ud-Din by (late) Munawar-ud-Din and accordingly the disputed property to the extent of shares of (late) Munawar-ud-Din i.e. 2/3 be divided/partitioned among*

all the legal heirs of (late) Munawar-ud-Din as per their shares according to Sharia.

- b. Declaration be made that the alleged gift dated 23.10.1994 is a result of fraud and same has been obtained by the defendant No.1 fraudulently while imposing forged signature of (late) Munawar-ud-Din) on the gift dated 23.10.1994.*
- c. Declaration be made that the gift dated 23.10.1994 be declared as illegal, unlawful and same be cancelled.*
- d. Declaration be made that the gift dated 23.10.1994 even otherwise is illegal as the basic requirements/conditions of the gift has never been fulfilled nor a specific portion of the disputed property i.e. (Mohall and Mouza Ward No.34 Tappa Urban-II, Tehsil City District Quetta Khewat/Khatooni Nos.239/231, Qita 02 total measuring 799 Sq.Ft situated at Art School Road Quetta near corner of Jamiat Rai Road, Quetta) can be gifted without partitioning.*
- e. Declaration be made that the disputed property i.e. (Mohall and Mouza Ward No.34 Tappa Urban-II, Tehsil City District Quetta Khewat/Khatooni NOs.239/231, Qita 02 total measuring 799 Sq.Ft situated at Art School Road Quetta near corner of Jamiat Rai Road, Quetta) is unpartitioned and same is required to be partitioned according to the shares of legal heirs of (late) Munawar-ud-Din i.e. 2/3 and (late) Alloudin 1/3 accordingly.*
- f. Declaration be made that the share of plaintiff being legal heirs of (late) Munawar-ud-Din from the disputed property i.e. (Mohall and Mouza Ward No.34 Tappa Urban-II, Tehsil City District Quetta Khewat/Khatooni NOs.239/231, Qita 02 total measuring 799 Sq.Ft situated at Art School Road Quetta near corner of Jamiat Rai Road, Quetta) to the extent of his shares has become 66.5 Sq.Ft and the defendant No.17 (Tehsil Authorities) be directed to mutate 133 Sq.Ft upon the name of plaintiff and partition be made while separating the shares of plaintiff.*
- g. Declaration be made that the mutation bearing No.337 on the basis of gift whereby the shares of (late) Zia-ud-Din i.e 266.3 Sq.Ft (1/3) has been transferred to*

defendant No.1 be declared illegal, unlawful and same be cancelled.

- h. That the entire disputed property be partitioned among the share holders i.e. 2/3 shares of the disputed property be partitioned among the legal heirs of (late) Munawar-ud-Din and 1/3 be partitioned among the legal heirs of (late) Alloudin (defendants No.05 to 07).*
- i. Any other relief, which this honourable court deems fit may also be awarded along with cost of the proceedings, in the interest of justice, equity and fairplay.*

2. The petitioner as well as respondent Nos.2, 3 & 4 had filed their separate written statements. Out of the pleadings of the parties following issues were framed:

- 1). Whether predecessor-in-interest of plaintiff and defendants No.1 to 4 namely Munawar-ud-Din was the owner of 2/3rd shares in the disputed property i.e. house situated in Ward No.34, Tappa Urban-II, Tehsil City, Quetta under Khewat/Khatooni Nos.239/231, Khasra No.02-Qitta total measuring 799 Sq.ft, Art School road near corner of Jamiat Rai Road Quetta?*
- 2). Whether registered gift deed dated 23-10-1994 and subsequent Mutation No.337 dated 29.-5.1996 Ward No.34, Tappa Urban-II, Tehsil City Quetta were prepared/sanctioned with fraud and misrepresentation?*
- 3). Whether the disputed property is unpartitioned and is required to be partitioned amongst the legal heirs of Late Munawar-ud-Din to the extent of 2/3rd Shares and legal heirs of Allah-ud-Din late to the extent of 1/3rd shares?*
- 4). Whether the plaintiff is entitled to the relief claimed for?*
- 5). Relief.*

3. Thereafter the trial court allowed the parties to produce evidence in support of their respective contentions and on conclusion of the trial, the learned trial court vide judgment and decree dated 20th December, 2021 decreed the suit.

The record transpires that only petitioner had assailed the said judgment and decree before the appellate forum, whereas remaining legal heirs of Munawar-ud-Din did not opt to challenge the said judgment and decree.

4. The petitioner along with his appeal under Section 96 CPC had also filed an application under Order XLI Rule 27 CPC to produce additional evidence, which application was dismissed by the appellate court vide order dated 27.09.2022 (“**impugned order**”).

5. Learned counsel for petitioner mainly contended that under Order XLI Rule 27 CPC the appellate Court has jurisdiction to allow additional evidence and since the witnesses which petitioner intend to produce before the appellate court are marginal witnesses of alleged gift deed, therefore their testimonies are extremely important considering the controversy between the parties. In this regard the learned counsel has relied upon **Khursheed Ali V. Shah Nazar**¹.

6. Conversely learned counsel appearing on behalf of respondent No.1/plaintiff while opposing the grounds taken by petitioner in the instant petition contended that the petitioner has been lingering on the matter from quite some time as the suit was filed on 14.04.2017, which was decreed on 30.12.2021, but still the matter is subjudice before appellate Court and delaying tactics are being used by the petitioner. Learned counsel further contended that it was the responsibility of the petitioner to produce the private witnesses during the trial but since petitioner did not make any effort in this regard,

¹ PLD 1992 Supreme Court 822

therefore request of the petitioner was rightly rejected by the appellate Court.

7. I have heard the learned counsel for the parties and have perused the record. Record transpires that suit filed by the plaintiff was decreed on 30th December, 2021 by the trial court and the appeal filed by the petitioner is still pending before the appellate Court. The petitioner had filed an application under Order XLI Rule 27 CPC to produce additional evidence i.e. marginal witnesses of alleged gift deed i.e. Saleem Iqbal son of Munawar-ud-Din and Abdul Rasheed son of Ahmedullah. The record divulges that Saleem Iqbal had been arrayed as respondent No.2, who had filed his written statement as well before the trial court. It is also relevant to mention here that the petitioner had filed his list of witnesses in which the said witnesses were mentioned alongwith other witnesses. The perusal of the order-sheets of trial court reveals that on 23.05.2019 after recording the statement of representative of QESCO by the petitioner/defendant No.1, the learned counsel appearing on behalf of the petitioner requested for conclusion of the evidence of the petitioner. In this regard matter was fixed for 17.06.2019 but the petitioner could not produce any evidence and thereafter without making any effort to produce the aforementioned witnesses on 06.08.2019 the petitioner recorded his statement and even subsequently no efforts have been made by the petitioner to produce the aforementioned witnesses before the trial court and when the suit had been decreed in favour of respondent No.1. The petitioner subsequently while filing appeal under Section 96 of the CPC had also filed an

application under Order XLI Rule 27 CPC and sought permission to produce the marginal witnesses of the alleged gift deed.

8. Since the matter is subjudice before the appellate court, therefore the scope of this revision petition is limited to the provisions invoked by the petitioner under Order XLI Rule 27 CPC. It would be appropriate to reproduce Order XLI Rule 27 CPC, which reads as under:

“Order XLI Rule 27 CPC: Production of additional evidence in Appellate Court. – (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if- -

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

The Appellate Court may allow such evidence or document to be produced or witness to be examined.”

9. The perusal of aforementioned provisions stipulates certain circumstances in which the appellate court can exercise its jurisdiction. It is trite law that parties to the suit must be vigilant while contesting the suit and if any party is careless or failed to take necessary steps for production of evidence then subsequently any request on behalf of such party under the garb of Order XLI Rule 27 CPC for production of additional evidence has to be considered with extreme caution as the conduct of a party is always extremely relevant. The petitioner had filed

his list of witnesses in which both the said witnesses were mentioned but subsequently the petitioner without mentioning any cause did not produce them before the trial court. The *ibid* provision of CPC i.e. Order XLI Rule 27 (1)(a) stipulates that only in those cases where the trial court has refused to admit any evidence which ought to have been admitted, then the appellate Court can exercise the discretion to allow additional evidence but in the instant case the trial court was never approached by the petitioner in this context rather the petitioner himself despite taking responsibility to produce the said witnesses failed to do so, therefore the *ibid* provisions of CPC is not attracted in this case as the said powers of CPC are not unfettered nor the appellate Court has the discretion to allow additional evidence per its own caprice, rather this discretion is structured/limited by the factors enunciated in the said provisions of law. Reliance in this regard is being placed on **Ideal Arcade Builders And Development Versus Miss Farida Shehnaz², ,** wherein it was held:

“2. Perusal of Rule 27(1) of Order XLI, C.P.C. shows that the scope thereof is limited as it contemplates very few circumstances or conditions in which the appellate Court may allow a party to the appeal to produce additional oral or documentary evidence. Such circumstances/ conditions are, (a) where the Court from whose decree the appeal is preferred had refused to admit evidence which ought to have been admitted, or (b) where the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or (c) for any other substantial cause. Admittedly, the case of the appellant does not fall under Rule 27(1)(a) as he neither attempted to produce the document in question before the learned trial Court nor did the learned trial Court refuse to admit the

² P L D 2019 Sindh 691

same in evidence. Regarding Rule 27(1)(b), it may be noted that the learned appellate Court was not of the view that the evidence sought to be produced by the appellant was required by the appellate Court itself to enable it to pronounce judgment. As far as the question of 'substantial cause' mentioned in Rule 27(1)(c) is concerned, needless to say it depends upon the facts and circumstances of each case. The law laid down by Hon'ble Supreme Courts of Pakistan and Azad Jammu and Kashmir regarding production of additional evidence in appeal is briefly discussed below:

A. In *Mad Ajab and others v. Awal Badshah* 1984 SCMR 440, by referring to the case of *Parshotim Thakur and others v. Lal Mohar Thakur and others* AIR 1931 Privy Council 143, it was held by the Larger Bench of the Hon'ble Supreme Court of Pakistan that the provisions of law with regard to additional evidence are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch-up the weak parts of his case and fill up omissions in the Court of appeal, and such power ought to be exercised very sparingly.

B. In *Muhammad Siddique v. Abdul Khaliq and 28 others* PLD 2000 SC (AJ&K) 20, it was held that parties to an appeal are not entitled to adduce any evidence, but the same can be allowed if the Court from whose decree an appeal is preferred had refused to admit the evidence which ought to have been admitted or the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce the judgment or for any other substantial cause which is an exception to the principle that the appellate Court cannot record fresh evidence ; under Rule 27 of Order XLI, C.P.C., additional evidence cannot be recorded unless provisions of the said Rule are attracted ; the power to allow additional evidence is discretionary in nature, but the same is circumscribed by the limitation specified in the said Rule as evidence under Rule 27(b) of Order XLI is required by the appellate Court itself and not by a party to the appeal ; it may be allowed only when a party was unable to produce evidence through no fault of its own or where evidence was imperfectly taken by the lower Court ; a party that had an opportunity but elected not to produce evidence cannot be allowed to give evidence that could not

have been given in the Court below ; and, the appellate Court can allow additional evidence only if it itself so feels that the judgment cannot be pronounced in the absence thereof.

C. In *Taj Din v. Jumma and 6 others* PLD 1978 SC (AJ&K) 131, it was held by the Hon'ble Full Bench that provisions of Rule 27 of Order XLI C.P.C. impose strict conditions so as to prevent a litigant from being negligent in producing the evidence at the time of the trial ; a litigant seeking permission to adduce additional evidence at the stage of appeal has to establish that evidence available apart from being of an unimpeachable character is so material that its absence might result in miscarriage of justice and that in spite of reasonable care and due diligence it could not be produced at the time the question was being tried or it has come into existence after completion of the trial ; therefore, where a party who had been negligent in producing evidence at the time the issue was being tried and a lacuna had been left and it is not shown as to how the absence of the proposed evidence would result into failure of justice, a prayer for additional evidence in such circumstances obviously would not be granted.

D. In *Nazir Hussain v. Muhammad Alam Khan and 3 others* 2000 YLR 2629 [SC (AJ&K)], it was held that provisions contained in Rule 27 of Order XLI C.P.C. would reveal that the appellate Court must be very cautious while allowing additional document; and, a party which seeks to bring additional evidence on record must convince the Court with proof that such party could not lead the evidence at proper stage due to some substantial cause.

E. In *Abdul Hameed and 14 others v. Abdul Qayyum and 16 others* 1998 SCMR 671, application for production of additional evidence was dismissed by the lower appellate Court which order was maintained in revision by the learned High Court. It was held by the Hon'ble Supreme Court that the learned High Court was justified in refusing to allow production of additional evidence at the appellate stage specially when no reasonable ground was shown for not producing the same during the trial of the Suit ; and, though the parties were conscious of the questions involved in the Suit, yet they did produce the evidence.

F. In Nazir Ahmed and 3 others v. Mushtaq Ahmed and another 1988 SCMR 1653, leave was refused as no explanation was offered as to why the evidence which was sought to be produced in the High Court for the first time was not tendered before the trial Court.

G. In Mst. Jewan Bibi and 2 others v. Inayat Masih 1996 SCMR 1430, it was held that discretion of Court should not be exercised in favour of a person who had remained indolent for years together in the matter of producing oral or documentary evidence before trial Court, and such person should suffer the consequences of his failure.”

10. The case law relied upon by the learned counsel for the petitioner is distinguishable to the facts and circumstances of the instant case.

For the foregoing reasons the instant revision petition is dismissed, the order dated 27.09.2022 passed by Additional District Judge-IV, Quetta is upheld. The interim order dated 11.10.2022 is hereby recalled.

Announced in open Court
On 5th May, 2023.

JUDGE