

ORDER XLI
APPEALS FROM ORIGINAL DECREES

[See Sections 96 to 99, 107 and 108]

1. Form of appeal. What to accompany memorandum.--(1)

Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.

(2) Contents of memorandum.--The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.

High Court Amendments. Lahore. Add the following proviso to sub-rule (1):

"Provided that when two or more cases are tried together and decided by the same judgment, and two or more appeals are filed against the decrees, whether by the same or different appellants, the officer appointed in this behalf may, if satisfied that the questions for decision are analogous in each appeal, dispense with production of more than one copy of the judgment."

N.-W.F.P. Add the following as proviso to sub-rule (1):

"Provided that when two or more cases are tried together and decided by the same judgment and two or more appeals are filed against the decrees by the same appellant or appellants it shall not be necessary to produce more than one copy of the judgment."

Appeal filed without complying with mandatory requirements can not be said to be a properly instituted appeal. [2002 CLC 1177]. Discretion, however, is vested in the Court to dispense with the copy of judgment either of the trial Court or of the Appellate Court keeping in view the facts and circumstances of each case. [1993 SCMR 882].

Filing of copy of decree sheet. Filing of copy of decree sheet alongwith memo. of appeal is mandatory, failure to abide by the provisions of law would render appeal incompetent. [2003 YLR 1686].

Filing of returned memorandum of appeal. In cases titled *Mst. Hawabai* [PLD 1970 Kar. 367] and in *Sardar Khan's case* (PLD 1995 Pesh. 86) it was held that appellants were required to file the old appeal before the High Court but this proposition of law has not been followed by the Division Bench judgment of the Sindh High Court as reported in [PLD 1981 Kar. 277]. It is now held that after a plaint if returned to the plaintiff, he can adopt any of the four courses (i) challenge the order returning the plaint for presentation to the proper Court by filing an appeal against such order, (ii) he may present the same plaint after its return to him to a Court having jurisdiction in the matter; (iii) he may amend the plaint by giving up a part of the relief or reducing the valuation so as to make it cognizable by the Court which returned the plaint and then represent the same to the same Court or amend the plaint and present it before a Court having jurisdiction in the matter; and (iv) he may file a fresh suit in the Court having jurisdiction in the matter. This view was approved by the Supreme Court in *Abdus Shakoor's case* (1982 SCMR 867). [PLD 2001 S.C. 355].

Appeal by stranger. Appeal can be filed by an aggrieved person whether he is party or not. [1985 SCMR 1991]. Filing of appeal by stranger is subject to two conditions:

- (i) The rights/title of the appellant must have been effected;
- (ii) By leave of the Court. [PLD 1996 Lah. 99].

Consolidated suits. Suits consolidated and one judgment passed single appeal against the same competent. [2001 YLR 2773; 1990 MLD 2203; PLD 1957 Pesh. 129] Value of same for purpose of pecuniary jurisdiction as also of Court-fee would be the same as emerged on amalgamation of the subject matter. [1990 MLD 2203]. Appeal against two decrees based on one consolidated judgment, one appeal permissible against such decrees. [2000 YLR 1296; 2004 YLR 239].

Appeal under Land Acquisition Act. Memorandum of appeal should accompany copy of award made by District Judge, appeal cannot be dismissed for non-filing of decree sheet. [PLD 2000 S.C. (AJ&K) 34]. High Court is empowered to exercise all the powers and jurisdiction conferred on the Appellate Court u/S. 107 and O. XLI, C.P.C. read with S. 151, C.P.C. [PLD 2001 Kar. 442].

Conversion of civil revision into appeal. A civil revision can be converted into second appeal, the relevant date on which such appeal would be deemed to have

been filed would be the date on which misconceived, revision petition is initially instituted. [PLD 1990 S.C. 859]

Valuation. Valuation for the jurisdiction of the Appellate Court is the same as fixed in the plaint, unless the lower Court has determined specifically in which case the later will govern valuation in appeal. Minor error pertaining to jurisdictional value of appeal is hardly sufficient to warrant rejection of appeal. [1991 CLC 84].

Court-fee. Court-fee in appeal is to be calculated in accordance with law in vogue at the time of filing of appeal and not on law which prevailed at the time of filing of suit, S. 107(2) of the Code is also applicable to memo, of appeal. [PLD 1984 S.C. 289; 2000 CLC 82].

Supply of deficient Court-fee. Order VII, R. 11(b) and (c) applies to plaints as also to memorandum of appeals. [PLD 1984 S.C. 289].

Second appeal, Procedure. The Rules of Procedure applicable to second appeal under O. XLI, R. 1 of the Code are the same as are admissible in case of first appeal contemplated under O. XLI, R. 1 of the Code. [PLD 1991 AJ&K 14] Filing of copy of judgment with memo, of appeal is mandatory unless dispensed with. [1984 CLC 1696].

2. Grounds which may be taken in appeal.--The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule:

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

COMMENTS

Grounds to be taken in appeal. Rule (2) O. XLI of the Code insists upon the appellant to set forth all the grounds of objection in the memo., of appeal. He is precluded to urge or heard of any ground of objection not set forth in the memo., of appeal except with the leave of the Court. [1970 SCMR 471]. Grounds not set out in the memo., of appeal cannot be urged. [1986 CLC 1724, 1587]. Application to take additional grounds in memo, of appeal filed long after expiry of limitation, cannot be allowed. [1996 MLD 553].

3. Rejection or amendment of memorandum.--(1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the judge, or such officer as he appoints in this behalf, shall sign or initial the amendment.

COMMENTS

Refiling of appeal. Time required for removal of objection should be adhered to and failure to refile appeal, revision, application, as directed by office would become time-barred for time required for removal of objection would not be excluded while computing period of limitation under Limitation Act, 1908, but the same is to be granted under R. 4, Chap. 1, High Court Rules and Orders, Vol. V and O. XLI, R. 3 of the Code. [PLD 1996 Lah. 158]. The period of time taken beyond the time specified by the office would neither be excluded nor added to the limitation while computing the limitation for filing the appeal and if in the meanwhile the appeal had become barred by time, the only course open to the appellant would be to apply for condonation of delay by furnishing explanation therefor. [PLD 1996 Lah. 702].

4. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all.--Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

COMMENTS

Appeal by one of the defendants. Where there are more defendants than one in a suit and the decree appealed from proceeded on any ground common to all the defendants, any one of the defendants, could file an appeal from the whole decree and thereupon appellate Court could reverse or vary the decree in favour of all the defendants as the case may be. [PLD 1989 S.C. 541].

Stay of proceedings and of execution

5. Stay by Appellate Court.--(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

(2) Stay by Court which passed the decree.--Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied--

- (a) that substantial loss may result to the party applying for stay of execution unless the order is made;
- (b) that the application has been made without unreasonable delay; and
- (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) Notwithstanding anything contained in sub-rule (3), the Court may make an ex parte order for stay of execution pending the hearing of the application.

COMMENTS

Stay of proceedings. Rules 5 and 6 of O. XLI of the Code are in respect of appeals preferred against the decrees. Rule 5 empowers the Appellate Court to stay proceedings under a decree or order appealed from for sufficient cause. The operation of decree is not automatically suspended on mere filing of appeal. [PLD 1966 S.C. 983]. The Court is to pass specific order in this respect which can be passed at a later stage. [1970 SCMR 672].

Appellate Court is possessed of power to grant interim relief. Exercise of such a power is in discretion of a Court either to grant interim relief or to order stay which depends on circumstances of each case and it is for Appellate Court to decide for relief whether a case for stay is made out or not. [1987 SCMR 1661].

Stay of execution of decree. Admission of appeal for regular hearing does only mean that a party filing the same has a prima facie case in its favour. The operation of the impugned order is not automatically suspended unless expressly ordered to be so. [2001 CLC 838].

Government Department. Where appeal is filed by Government or any public officer, there cannot be automatic grant of stay of execution of decree. Such a party can be ordered to furnish security. [2001 SCMR 377].

Appeal. An order vacating status quo granted earlier affects the rights of the parties as such appealable as a 'judgment'. [PLD 1971 Kar. 228].

6. Security in case of order for execution of decree appealed from.--(1) Where an order is made for the execution of a decree from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, required security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security.

(2) Where an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the

Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

7. [No security to be required from the Government or a public officer in certain cases].--*Rep. by the A.O.; 1937.*

8. Exercise of powers in appeal from order made in execution of decree.--The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree:

[Provided that, where such appeal has been preferred by the judgment-debtor, he shall be required, unless the Court is of opinion that prima facie the appeal is one which must succeed owing to an error apparent on the face of the record,--

- (a) in the case of a decree for the payment of money, to deposit the decretal amount or to furnish security for its payment; and
- (b) in the case of any other decree, to furnish security for the due performance of the decree.]

Procedure on Admission of Appeal

9. Registry of memorandum of appeal.--(1) Where a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

(2) Register of Appeals. Such book shall be called the Register of Appeals.

COMMENTS

Scope. Rule 9 provides procedure on admission of appeal. When a memo., of appeal is admitted the Court is to endorse thereon the date of presentation and register the same in book called register of appeal.

10. Appellate Court may require appellant to furnish security for costs.--(1) The Appellate Court may, in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both:

(2) Where appellant resides out of Pakistan, etc.--Provided that the Court shall demand such security in all cases in which the appellant is residing out of Pakistan and is not possessed of any

sufficient immovable property within Pakistan other than the property (if any) to which the appeal relates.

(3) Where such security is not furnished within such time as the Court orders the Court shall reject the appeal.

11. Power to dismiss appeal without sending notice to lower Court.--(1) The Appellate Court, after sending for the record if it thinks fit so to do, and fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

COMMENTS

Dismissal of appeal in limine. First appeal is not to be dismissed in limine is not an inflexible rule. [*NLR 2003 Civil (S.C.) 149*]. The language of Rule 1, Chapter 3-B, Vol. V, of the High Court Rules and Orders (Lahore) does indicate that a Judge of the High Court sitting alone has the power "to hear and dispose of a motion for the admission of a first appeal"; but, according to the practice followed by the Lahore High Court and all other Judges of the Karachi seat of the W. P. High Court, the "disposal" has been restricted to "admission" or "reference" to a Division Bench for preliminary hearing under O. XLI, R. 11 of the Code. The language of this rule could certainly have been more specific; but since it does not clearly exclude the possibility of a restricted interpretation being put upon it in the manner in which it has been done by the consistent practice of the Court itself which framed the Rule, it would not be proper to depart now from this practice. [*PLD 1973 S.C. 1*]. The dismissal of first appeal in limine is not a general rule but can be resorted to squarely, [*PLD 2002 S.C. 720*] in which case the Court is under obligation to record a proper judgment complying with the requirements of law. [*PLD 1967 Lah. 807*]. Where facts narrated in impugned judgment are not disputed and appeal can be decided on basis of available record, then summoning of record from Trial Court would not be necessary. [*PLD 2004 S.C. 10*].

Appeal not sufficiently stamped. Plaint or memo., of appeal cannot be treated as properly presented so long as the proper Court-fee is not paid. [*PLD 1983 Kar. 537*]. Insufficiently stamped memo., of appeal is just a piece of paper and is liable to be dismissed where in spite of extension proper Court-fee not paid by specified time. [*1996 MLD 1074*].

12. Day for hearing appeal.--(1) Unless the Appellate Court dismisses the appeal under R. 11, it shall fix a day for hearing the appeal.

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time

necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day.

COMMENTS

Hearing of appellant. Scheme of law is such that once an appeal is admitted to regular hearing under R. 12 of O. XLI, it becomes incapable of being disposed of on merits without hearing the appellant and the Court has no escape therefrom for deciding it on merits, it may, of course, dismiss it in default of appearance of the appellant but cannot proceed to decide it on merits, just behind his back. [1990 CLC 549].

13. Appellate Court to give notice to Court whose decree appealed from.--(1) Where the appeal is not dismissed under R. 11, the Appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred.

(2) **Transmission of papers to Appellate Court.--**Where the appeal is from the decree of a Court, the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch, all material papers in the suit, or such papers as may be specifically called for by the Appellate Court.

(3) **Copies of exhibits in Court whose decree appealed from.--**Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of, and given to, the applicant.

14. Publication and service of notice of day for hearing appeal.--(1) Notice of the day fixed under R. 12 shall be affixed in the Appellate Court house, and a like notice shall be sent by the Appellate Court to the Court from whose decree the appeal is preferred, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons to appear and answer; and all the provisions applicable to such summons, and the proceedings with reference to the service thereof, shall apply to the service of such notice.

(2) **Appellate Court may itself cause notice to be served.** Instead of sending the notice to the Court from whose decree the appeal is preferred, the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the provisions above referred to.

High Court Amendments, N.-W.F.P. Added the following proviso to sub-rule (1):- "Provided that with the permission of the Court no notice need be served upon a respondent who was a proforma defendant in a suit which was decided ex parte against him."

Sindh. Add the following as sub-rule (3):-"(3) The Appellate Court may, however, in its discretion, dispense with the service of notice of the appeal or interlocutory application therein, on a respondent or opponent who has made no appearance at the trial Court."

Add the following as Rule 14-A:-"14-A. Subject to the leave of the Appellate Court nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent, where such opposite party or respondent did not appear, either at the hearing in the Court whose decree is complained of or at any proceedings subsequent the decree of that Court."

Lahore. Add the following as sub-rule (3). "(3) It shall be in the discretion of the Appellate Court to make an order, at any stage of the appeal whether on the application of any party on its own motion, dispensing with service of such notice on any respondent who did not appear, either at the hearing in the Court whose decree is complained of or at any proceeding subsequent to the decree of the Court, or on the legal representatives of any such respondent:

Provided that--

(a) the Court may require notice of the appeal to be published in any newspaper or newspapers or in such other manner as it may direct:

(b) no such order shall preclude any such respondent or legal representative from appearing to contest the appeal.

15. Contents of notice.--(1) The notice to the respondent shall declare that, if he does not appear in the Appellate Court on the day so fixed, the appeal will be heard *ex parte*.

Procedure on Hearing

16. Right to begin.--(1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply.

COMMENTS

Right to begin. Rule 16 prescribes procedure on hearing which expression presumes compliance of all earlier steps envisaged by Rr. 11 to 16. [PLD 1982 Lah. 616].

17. Dismissal of appeal for appellant's default.--(1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(2) **Hearing appeal ex parte.**--Where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte.

COMMENTS

Dismissal of appeal. Appeal admitted for regular hearing efforts should be made to dispose of same on merits. Law favours adjudication on merits. Principle of natural justice violated, such order would be deemed to be in excess of jurisdiction. [1998 MLD 150].

18. Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs.--(1) Where on the day fixed, or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, the Court may make an order that the appeal be dismissed:

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing.

19. Re-admission of appeal dismissed for default.--(1) Where an appeal is dismissed under R. 11, sub-rule (2), or Rule 17 or Rule 18, the appellant may apply to the Appellate Court for the re-admission of the appeal; and where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

²[(2) The provision of Section 5 of the Limitation Act, 1908 (IX of 1908), shall apply to an application for re-admission of an appeal dismissed under sub-rule (2) of Rule 11 or sub-rule (1) of Rule 17.]

COMMENTS

Sufficient cause. Sufficient cause is not susceptible of an exact definition and no hard and fast rule can be laid down to cover all possible cases. For "sufficient cause" very strict view should not be taken and the discretion of the Court is to be exercised on judicial principles. [2001 CLC 333]. Each case must be judged upon its merits and its peculiar circumstances. Where the non-appearance is not intentional and the counsel or his client has made genuine efforts and taken reasonable precautions to be present at the hearing, a very strict view as to "sufficient cause" should not put him out of Court. [PLD 1955 FC 178].

Limitation. Which runs from the date of dismissal and not from the date of knowledge. [PLJ 1997 Lah. 710].

Restoration of revision. Counsel engaged dying during pendency of appeal order to be restored, matter to be decided on merits. [2009 MLD 67].

20. Power to adjourn hearing and direct persons appearing interested to be made respondents.--(1) Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.

21. Re-hearing on application of respondent against whom ex parte decree made.--(1) Where an appeal is heard against and judgment is pronounced against the respondent, he may apply to the Appellate Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

[(2) The provisions of Section 5 of the Limitation Act, 1908 (IX of 1908), shall apply to application under sub-rule (1).]

22. Upon hearing, respondent may object to decree as if he had preferred separate appeal.--(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

(2) Form of objection and provisions applicable thereto.-- Such cross-objection shall be in the form of a memorandum, and the provisions of Rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Unless the respondent files with the objection a written acknowledgement from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be

heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule.

COMMENTS

Cross objection. Under Rule 22, a respondent who does not file an appeal or cross objection against a party of a decree can nevertheless support the decree on any of the ground decided against him by Courts below. [NLR 2003 Civil (S.C.) 19]. Respondent not opting to file appeal against any part of decree has right not only to support decree but take any cross-objection to the decree which he could have taken by way of appeal within one month from the date of service or within such further time as allowed by the appellate Court. The form is the same as provided in R. 1 so far as it relates to contents of the memo., of appeal. In case the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit. An aggrieved party (respondent in appeal) who has not filed appeal can support decree in his favour on any of the grounds decided against him without filing cross objection. [2003 CLC 1756].

Reversal of appeal is not permissible without filing appeal or cross-objections. [PLJ 1986 Pesh. 125].

23. Remand of case by Appellate Court.--Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct that issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with direction to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

COMMENTS

Remand of case. Power of remand is discretionary to be used only in exceptional situation. Where evidence is available on record to dispose of the controversy, the Appellate Court should decide the same for saving parties from unnecessary agony of litigation. [PLJ 2003 S.C. 445].

It should not be adopted as a matter of course to allow any party or Authority to fill in lacuna or to improve its case. [1996 SCMR 230].

If in pursuance of order of remand, subordinate Court decides the case, appeal against order of remand does not become in fructuous, which has to be decided on its own merits. Post remand decision is subject to final decision of pre-remand proceedings. [PLJ 2007 SC 271].

Left out issues. Failure to dilate upon all issues may entail allowing appeal and remanding the suit to the trial Court for decision afresh. [2003 SCMR 1748].

23-A. Power of the Appellate Court.--Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point and the decree is reversed in appeal, and a re-trial is considered necessary the Appellate Court shall have the same powers as it has under Rule 23.

24. Where evidence on record sufficient, Appellate Court may determine case finally.--Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.--Where the Court from whose decree the appeal is preferred has omitted to frame or try an issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor.

COMMENTS

Remand for decision on specific issue. Court should examine evidence and if on examination it comes to conclusion that same is not sufficient to pronounce judgment or decide issues between parties, case should be remanded or Court could itself record evidence and decide the same. Where, however, there is sufficient evidence on record on which decision can be made, remand would not be justified. [1997 SCMR 524].

Power to remand the case. Power to remand the case should not be exercised lightly but sufficient care should be taken in such regard and Court should examine the evidence and if it comes to conclusion that it is not sufficient to pronounce the judgment or decide the issues between the parties, it can remand the case or may itself record the evidence and decide it. [PLJ 2009 SC 285]

26. Findings and evidence to be put on record.--(1) Such evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to any findings.

(2) **Determination of appeal.**--After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.

27. 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,
- (c) Wherever additional evidence is allowed to be produced by an Appellate Court the Court shall record the reason for its admission.

COMMENTS

Additional evidence in appeal. When the available material on record is not enough to pronounce judgment, then additional evidence can be allowed *suo motu* or on the request of a party. [2009 CLC 28]. Petitioner cannot be allowed to fill up the lacuna in the case by relying on Order XLI, Rule 27, C.P.C. [2009 SCMR 221] Acceptance of application to extent of production of cheque and amendment to written statement would open pandara box. [PLJ 2015 Lah. 109].

The *suo motu* power under O. XLI, R. 24 of the Code has been upheld as in absence of that exercise it would have led to a miscarriage of justice. The provisions of this rule are meant to promote substantial justice. [1992 SCMR 1778]. Additional evidence to be allowed where trial Court had improperly refused to admit the evidence which ought to have been admitted or the Appellate Court requires such document or witness and could not pronounced judgment without such additional evidence. [PLD 2004 SC (AJ&K) 35].

Appellate Court to admit additional evidence if same would promote ends of justice and would be required for doing complete justice between parties. [2007 SCMR 1117].

Additional evidence. No mechanism to enable any party in such revision petition to pray for production of additional evidence in revisional jurisdiction. [PLJ 2013 Lahore 377]

Production of additional evidence. Petitioner moved an application for bringing on record the gift-deed and a copy of Misl-e-Haqiat pertaining to the years 1975-76 as additional evidence. Petitioner also did not furnish any explanation with regard to the non-production of Misl-e-Haqiat at the time of evidence. Under O.XLI, R. 27, C.P.C.

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a document could be produced or any witness could be examined as additional evidence to enable the Court to pronounce the judgment, but at the same time said provision of law had imposed the embargo that said rule would apply only where additional evidence was required by the Court. Power to allow additional evidence was discretionary in nature and same could be exercised by the Appellate Court itself and not by a party to appeal. No sufficient or good cause having been shown by the petitioner for producing the additional evidence, application for production of additional evidence, was rightly rejected by the Appellate Court. [2010 CLC 112]

When the available material on record is not enough to pronounce judgment then of course additional evidence can be allowed *suo motu* or on request of a party. [PLJ 2009 Peshawar 15]

Appellate Court to admit additional evidence if same would promote ends of justice and would be required for doing complete justice between parties. [2007 SCMR 1117]

Though documents pointed out by respondent were in possession of petitioners but non-production of same earlier by itself was not sufficient to dismiss application. [PLJ 2013 Lahore 671]

Question of parentage. Since very basis of claim of petitioner was parentage, therefore, documents were relevant in order to establish his parentage. [PLJ 2013 Lahore 336]

28. Mode of taking additional evidence.--Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.

29. Points to be defined and recorded.--Where additional evidence is directed or allowed to be taken; the Appellate Court shall specify the point to which the evidence is to be confined, and record on this proceedings the points so specified.

Judgment in Appeal

30. Judgment when and where pronounced.--The Appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day of which notice shall be given to the parties or their pleaders.

COMMENTS

Judgments in appeal. Points in controversy requiring determination not formulated in particular form, but appellant Court addressed to such points and recorded findings thereon. Substantial justice had been done in such case. [2010 CLC 14]

31. Contents, date and signature of judgment.--The judgment of the Appellate Court shall be in a 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 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.

COMMENTS

Good judgment. Characteristics of good judgment is that it is to be self evident and self explanatory, containing reasons to justify conclusions arrived at and these reasons are to be such that a disinterested reader can find them convincing and reasonable. [PLD 2007 Pesh. 14].

Judgments in appeal. Points in controversy requiring determination not formulated in particular form, but appellant Court addressed to such points and recorded findings thereon. Substantial justice had been done in such case. [2010 CLC 14]

Agreement to sell. No cause of action against petitioner and therefore, was not entitled to specific performance of agreement. [PLJ 2013 Lahore 190]

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:

⁴[Provided that the Appellate Court shall not make any order under Section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.]

4. Proviso inst. by S. 4 of the Code of Civil Procedure (Amendment) Act, 1922 (9 of 1922). The Act has been brought into force in the Province of Punjab, and Sindh.

Illustration

A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The Appellate Court decides in favour of X. It has power to pass a decree against Y.

COMMENTS

It is the duty of the Appellate Court to decide controversy between parties after applying independent and judicial mind thereto. [2007 SCMR 1394]. While reversing finding of Trial Court. Appellate Court must meet the reasoning of trial Court. [2007 SCMR 554].

Revision. Failure to consider whether the Court should exercise his power under O. XLI, R. 33 is a legitimate ground for interference with the decree under S. 115 of the Code. [PLD 1954 Lah. 490].

Compensatory costs to successful party against defeated party. Appellate Court is stave off granting compensatory costs to successful party. Legality. If the claim or defence is found false, vexatious and successful party has taken the plea at earliest stage of suit. Court of appeal was not legally competent to award punitive or compensatory costs u/S. 35-A & O.XLI, R. 33 of CPC. [PLJ 2010 Peshawar 1]

Cross objection. Legal question. If cross objections are not filed such matters cannot be touched, however, the rule in this context is not absolute but is subject to interference, if the appellate Court perceives, that ultimate relief prayed for, emerges from incidental and collateral issues not under challenge, on which the findings are illegal, but have not been assailed by the other party, however, they effect the maintainability of the suit. It than has manifest powers to set right any illegality committed in law by the Courts below while deciding a specific issue in his context by exercising corrective powers as contained in Order XLI Rule 33, CPC for doing complete justice. [PLJ 2010 Lahore 245]

Discretionary power for grant of relief not a fit case. [PLJ 2014 Lah. 1057]

34. Dissent to be recorded.--Where the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.