Chapter XI

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE

162. No new trial for improper admission or rejection of evidence.--The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independent of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

COMMENTS

Object.--The object of the Article is that the Court of appeal or revision should not disturb a decision on the ground of improper admission or rejection of evidence, if in spite of such evidence, there are sufficient materials in the case to justify the decision. In other words, technical objections will not be allowed to prevail, where substantial justice appears to have been done.

Principle.--The improper (a) admission, or (b) rejection, of evidence is no ground for a new trial, or reversal, of any decision, if:

(i) in the case of improper admission--

there is sufficient evidence to justify the decision, independently of the evidence objected to and admitted; or

(ii) in the case of improper rejection;

the decision could not be varied, if the rejected evidence had been received.

Civil and criminal cases.--The provisions of this Article are made applicable by the clearest possible words to all judicial proceedings in or before any Court. The Article applies to civil cases and to criminal cases whether or not the trial has been had before a jury.[1]

Civil cases.--In the case of first appeals, the provisions of this Article have to be read with Section 99 of the Civil Procedure Code, which provides: "No decree shall be reversed or substantially varied nor shall any case be remanded, in appeal on account of any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case ....". *(See also O.XIII, Rules 27 to 29).*

A Court is to decide the preliminary question of admissibility of secondary evidence on consideration of the evidence and the surrounding circumstances. Where it so decides, the question decided is a question of fact, and not of law; and it is proper to be decided by the Judge of the first instance, as it depends very much on his discretion and

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1. (1920) 47 Cal. 671.

Chapter XII

DECISION OF CASE ON THE BASIS OF OATH

163. Acceptance or denial of claim on oath.--(1) When the plaintiff takes oath in support of his claim, the Court shall, on the application of the plaintiff, call upon the defendant to deny the claim on oath.

(2) The Court may pass such orders as to costs and other matters as it may deem fit.

(3) Nothing in this Article applies to laws relating to the enforcement of Hudood or other criminal cases.

COMMENTS

Scope.--This Article is applicable in civil cases only. A plaintiff can take oath in support of his claim. The defendant then can take oath to deny the claim. In other words once both the plaintiff and the defendant take oath the whole process has to start from the clean slate.

Provision of Article 163, Qanun-e-Shahadat Order, 1984, does not provide for any penal consequence in the case of refusal of the defendant to take oath at the demand of the plaintiff. The Court would not be precluded from recording evidence of party in spite of oath by both the parties or either of them. The Court was thus justified in ignoring refusal of the defendant to take oath at the behest of the plaintiff and direct parties to adduce evidence in support of their respective stands.[1]

Where both the parties supported their claim on oath, dismissal or decree of a suit is not contemplated under Article 163. The Court may pass any order as it may think fit regarding costs and other matters. The Court is not precluded from recording evidence of the parties in spite of oath by both the parties or either of the parties. Where the trial Court did not frame issue nor any evidence on behalf of the parties was recorded, remand order was unexceptionable.[2]

Application to implead transferee pendente lite as party with a prayer under Art. 163 of Qanun-e-Shahadat, 1984 to administer oath to parties in this regard.--Alleged sale was neither supported by any document nor shown as to when or by which process or against what consideration was finalized. Plaintiff was not having any positive basis to *prima facie* indicate creation of such transferee's interest in suit property. Application under Art. 163 of Qanun-e-Shahadat, 1984 was not relating to plaintiff's claim as made in the suit, but was relating to other fact or event relatable to subject of suit. Both such applications were rejected in circumstances.[3]

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1. 1991 MLD 1011.
2. 1987 CLC 1512.
3. 2006 CLC 144 (a).

Chapter XIII
MISCELLANEOUS

164. Production of evidence that has become available because of modern devices, etc.--In such cases as the Court may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques.

COMMENTS

The examples of modern devices for the production of evidence are (1) tracker dogs, and (2) tape-recordings.

(1) **Tracker-dogs:** On a charge of stealing telegraph wire, the evidence of a tracker dog handler was held to have been rightly received. He said that the dog was efficient, and then stated how it had tracked a scent from the case of a telegraph pole to the vehicle in which the accused were seated. Points sought to be made in the course of the arguments were:

(1) that the acceptance of the evidence of the dog's behaviour amounted to the reception of hearsay evidence, and

(2) that the evidence was unreliable.

The Court refused to equate the dog's behaviour with the statement of a human being not called as a witness, and regarded the handler's evidence as equivalent to reports of tests with scientific instruments. The reliability of the dog's behaviour was treated as something that concerned the weight rather than the admissibility of the evidence.

(2) **Tape-recording:** A tape-recording would be real evidence if tendered in order to give the Court an idea of the speaker's intonation. In other cases it may be admissible under exceptions to the rule against hearsay or as original evidence. A tape-recording of an incriminating conversation between the two accused, taken without their knowledge, after they had been left together in a room by a police officer and a Liaison Officer, was held to have been rightly admitted in evidence. It evidenced an admission and was receivable under an exception to the hearsay rule. The Court of Criminal Appeal stressed the fact that such evidence must be treated with caution, but laid down no fetters on its admissibility. An example of the reception of a tape-recording as original evidence would be a case in which the speaking of a slanderous words is proved by this means.

Application for permission to produce cassette in evidence.--In the present case an effort to get audio-cassette produced in evidence was made earlier by the submission of an application on 10th March, 1983. This application was dismissed by the Trial Court on 17th April, 1983, not on the ground that an audio-cassette was not admissible in evidence but on the ground that as this piece of evidence was not relied

Bail, Grant of.--Case against accused, according to F.I.R. neither was a trap case nor was of illegal gratification. Evidence procured through modern devices like video cassette, though had been made admissible under Art. 164 of Qanun-e-Shahadat Order, 1984 but in view of possibility of mimicry and camera trick available, it would be risky at bail stage to exclusively rely upon a video-cassette which could be an outcome of a camera trick. Such evidence could be taken into consideration in evidence at the stage of trial. F.I.R. having been lodged after delay of more than two years, case against accused, which was without independent corroboration, was to be viewed with suspicion, at least, at the stage of bail and benefit, if any, should go in favour of accused. Maximum punishment provided for alleged offence being seven years, refusal of bail to accused would be punishment in advance to accused, which was not the intent of Legislature. Accused was admitted to bail in circumstances.[1]

165. Order to override other laws.--The provisions of this Order shall have effect notwithstanding anything contained in any other law for the time being in force.

COMMENTS

Scope.--Provisions of the Qanun-e-Shahadat Order, 1984 are applicable to the proceedings under the Criminal Law (Special Provisions) Ordinance, 1968 and provisions of Section 3(2) of the Criminal Law (Special Provisions) Ordinance (II of 1968) shall have no effect on applicability of provisions of the Qanun-e-Shahadat Order, 1984 to proceedings under the Ordinance.[2]

According to this Article the provisions of the Order (Qanun-e-Shahadat) shall apply to all judicial proceedings in or before any Court except proceedings under the Arbitration Act.

Judicial proceedings.--The term "judicial proceedings" is not defined by the Qanun-e-Shahadat Order, but, it is defined by Section 4(m) of the Criminal Procedure Code as a "Proceeding in the course of which evidence is or may be legally taken on oath". An enquiry is judicial if the object of it is to determine a jural relation between one person and another or a group of persons or between him and community.[3]

Special law to prevail over general law.--All statements recorded on oath by authorised persons containing the official certificate of facts are admissible under Section 9, Extradition Act (XXI of 1972). Hearsay evidence is not admissible.[4]

Making of oath by plaintiff. Mode and manner stated.[5]

166. Repeal.--The Evidence Act, 1872 (I of 1872) is hereby repealed.

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1. 1995 PCr.LJ 1919; PLD 1997 SC 545; PLD 1969 Pesh. 49; PLD 1996 Lah. 624 and 1997 MLD 2613 *ref.* 1998 PCr.LJ 1990.
2. PLD 1987 Quetta 141.
3. ILR 12 B. 26.
4. PLD 1989 SC 519.
5. PLD 1994 Kar. 492.