
APPOINTMENT OF MUTAWALLI OF A WAQF PROPERTY



RCBHC



RESEARCH CENTER, HIGH COURT OF BALOCHISTAN

COURT: HON'BLE MR. SARDAR AHMED HALEEMI
SUBJECT: CIVIL LAW/SHARIA
DATE: 08 NOVEMBER 2024
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QUERIES:

- 1. *What is the procedure and forum and who is the authority for appointment, removal or declaration vis-à-vis a trustee (Mutwali) of a public charitable and religious trust?***
- 2. *What course should the appellate Court undertake if the trial Court has failed to frame consolidated issues in cases where two or more suits have been consolidated or failed to render its findings and decision on each issue?***
- 3. *Whether it is mandatory to draw separate decree sheets in consolidated suits?***
- 4. *Where a common/consolidated judgement dismisses or decrees one suit and does not explicitly address and decide the outcome of the other suit, how should the problem be dealt with by the appellate Court?***
- 5. *What course should the appellate Court undertake if the trial Court has failed to frame consolidated issues in cases where two or more suits have been consolidated or failed to render its findings and decision on each issue?***

In response to the above queries, it is submitted as under: -

What is the procedure and forum and who is the authority for appointment, removal or declaration vis-à-vis a trustee (Mutwali) of a public charitable and religious trust?

A **waqf** under Muhammadan Law is defined as a permanent dedication of property for purposes recognized by Islamic law as religious, pious, or charitable. Waqf has been defined in section 2 of the Mussalman Waqf Validating Act 1913 as “ “Waqf” means the permanent dedication by a person professing the (Muslim) faith of any property for any purpose recognized by the (Muslim) law as religious, pious or charitable. This definition has also been adopted by D. F Mulla in Principle of Muhammadan Law in paragraph number 173.

A **Mutawali** is the manager or caretaker of a waqf property, responsible for its administration and management. This role includes overseeing the maintenance of the property, ensuring that the income generated is used according to the stipulations of the waqf deed, and managing any related affairs of the institution or property.

The appointment or removal of Mutawali is basically governed by the principle of Muhammadan Law enshrined in paragraph number **204 of the Muhammadan Law** *ibid* which runs that “(1) The founder of the waqf has power to appoint the first mutawali, and to lay down a scheme for the administration of the trust and for succession to the office of mutawali. He may nominate the successors by name, or indicate the class together with their qualifications, from whom the mutawali may be appointed, and may invest the mutawali with the power to nominate a successor after his death or relinquishment of the office. (2) if any person appointed as mutawali dies, or refuses to act in the trust, or is removed by the Court, or if the office of mutawali otherwise becomes vacant, and there is no provision in the deed of waqf regarding succession to the office, a new mutawali may be appointed: -

- (a) By the founder of the waqf;
- (b) By the executor (if any);
- (c) If there be no executor, the mutawali for the time being may, subject to the provisions of section 506 below, appoint a successor on his death-bed;
- (d) If no such appointment is made, the Court may appoint a mutawali. In making the appointment the Court will have regard to the following rules:
 - (i) *the Court should not disregard the direction of the founder except for the manifest benefit of the endowment;*
 - (ii) *the Court should not appoint a stranger, so long as there is any member of the founder's family in existence qualified to hold the office;*
 - (iii) *where there is a contest between a lineal descendant of the founder and one who is not a lineal descendant, the Court is not bound to appoint the lineal descendant, but has a discretion in the matter, and may in the exercise of that discretion appoint other claimant to be mutawali.*

Appointment by Waqif

The Wakif has the authority to appoint the first Mutawalli and to lay down the scheme for the administration of the trust, including succession to the office of Mutawalli. This can be done either by naming successors or by indicating a class of individuals from whom the Mutawalli may be appointed. Such powers of waqif have been discussed in the following cases.

In the case **Muhammad Aslam Javed and another v. Abdul Hameed and another (2005 Y L R 3056, Lahore)**, the Lahore High Court dealt with the issue of the appointment of a **mutawalli** (trustee) for a **waqf** property after the death of the original mutawalli. The Court reinforced the principle that the **founder of the waqf** (wakif) holds the power to appoint the first mutawalli and to lay down a scheme for the administration and succession of the waqf. If the founder

is not alive or has not nominated a successor, the court has the authority to appoint a new mutawalli, but it should not appoint a stranger to the position. It was held as below:

“7.Under Article 204 of Mohammedan Law by M. Hidayat Ullah, the founder of the Wakf has power to appoint the first Matwalli and to lay down a scheme for administration of the trust and for succession to this office. He can nominate the successors, but in absence of it, if an appointed Matwalli dies or refuses to act in the trust or is removed by the Court, new Matwalli is to be appointed by the founder. Neither the founder of the alleged trust is alive nor any successor of the Matwalli was nominated and the person in office having died, the Court no doubt can appoint any person to fill in the vacancy, but it could not appoint a stranger.....”

In *Province of Punjab through Secretary, Social Welfare v. Mirza Khalid Shafique Baig and others* (PLD 2016 Lahore 28), the Lahore High Court addressed the power of a wakif (founder of a wakf) to appoint a mutawalli (trustee or manager) and establish administrative succession of the wakf property. The court affirmed that under Islamic law, the wakif has the authority to appoint the initial mutawalli and even designate themselves as such, along with others, provided they are the property owner. Furthermore, the wakif may set up a scheme for future mutawalliship.

Appointment of successors by Mutawali

The existing Mutawalli has the authority to appoint a successor, but this appointment is typically valid only if made on **his death-bed**. The general rule is that a Mutawalli cannot appoint a successor while in good health. This limitation is rooted in the understanding that the appointment should occur in a context of urgency, ensuring that the Waqf property is not left unattended. In addition, reliance may be placed on the following cases:

In case *Mirza AKBAR ALI vs Mirza IFTIKHAR ALI and others* (P. L. D. 1951 Lahore 368) the case addresses the power of a *mutawalli* (trustee) to appoint a successor. The court ruled that the mutawalli does not have the authority to appoint a successor while in good health except on death bed. It was ruled that: We have no doubt that the majority of the family were in the plaintiff's favour at the time of the suit, but we cannot hold that an election was announced or that it was held in the manner claimed. On some subsequent day before the institution of the suit there certainly was an ex-parte canvassing of support for the plaintiff, resulting in the preparation of the document. Eah. P. 18. Now since the plaintiff's case was that he was elected in pursuance of a properly convened meeting following an announcement, and he has failed to prove it, we cannot, but agree that he is not entitled to a declaration in terms of his plaint.

“In the result we hold :

- (1) that by the terms of the wakf deed the right of mutawalliship vests in. the entire family,*
- (2) that by established practice the mutawalli is approved of by the entire family,*
- (3) that Sir War Ali did not make a death-bed appointment but that even if he had made one, it would have had .,only a temporary effect,*
- (4) that the mutawalli. cannot appoint a successor while he is in, health, and*

(5) that the plaintiff was not elected a mutawalli in pursuance of a properly convened meeting following an announcement to the entire family."

Appointment or removal etc. by Court

The appointment of mutawali by a Court is regulated under Section 92 of the Civil Procedure Code, which outlines the procedures for managing waqf properties. A suit under Section 92 is a suit of a special nature which presupposes the existence of a **public Trust of a religious or charitable character**. Such a suit can proceed only on the allegation that there was a **breach of such trust or that the direction of the court is necessary for the administration of the trust** and the plaintiff **must** pray for one or more of the **reliefs that are mentioned in the section**.¹

In the case of *Jamia Masjid Muhammadiya and Madrassa Faizia v. Shamsher Khan and others* (2003 CLC 682), the key issue revolved around the applicability of Section 92 of the Civil Procedure Code (C.P.C.) regarding public charities. The Court observed that"

"I have considered the arguments advanced by the learned counsel for the applicant as well as learned counsel for the respondent. I have also gone through the impugned judgment and orders and other material placed on record and the case-law cited by the respective learned counsel.

It will be advantageous to reproduce section 92, C.P.C. as under:--

"Section 92. C.P.C

Public charities.--- (1) in the case of any alleged breach of any express or constructive trust create for public purpose of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the (Provincial Government) within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree:---

- (a) removing any trustee,,*
- (b) appointing a new trustee,*
- (c) vesting any property in a trustee,*
- (d) directing account and inquiries,*
- (e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust,*
- (f) authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged,*
- (g) settling a scheme, or*
- (h) granting such further or other relief as the nature of the case may require. "*

It is only to be seen whether the provisions of section 92, C.P.C. are applicable in this case or not. As per section 92, C.P.C. it is manifest that there is a Trust for a public purpose of a charitable or religious nature and if there is a breach of trust or the directions of the Court are necessary for administration of the Trust.

.....
A suit under section 92, C.P.C. is of special nature which presupposes the existence of a public Trust of a religious or charitable character. Such suit can proceed only on the allegations that there is a breach of such trust or that directions from the Court are necessary for the administration of the Trust. It is quite clear that none of the reliefs claimed by the applicant/ plaintiff fall within the ambit of section 92, C.P.C. The declaration which were sought could not

possibly attract the applicability of section 92, C.P.C. In view of this position, it is held that non-compliance of section 92, C.P.C. will not affect the maintainability of the suit and two Courts below have illegally and wrongly held that the suit comes within the ambit of section 92, C.P.C. as such permission of Advocate General, Sindh was necessary, is without jurisdiction vested to them. The applicant/plaintiff has legal character to file or institute suit though the suit has been filed by the trustee of the Trust in question and it was not filed a suit by some outsider.

In the case *Ashfaq Hussain Lahori v. Lal Bux & Others* (2019 YLR 297), the Sindh High Court addressed issues around the appointment of a Mutawali (trustee) for Waqf properties, per Section 92 of the Civil Procedure Code (CPC). The court affirmed that without registration or formal notification under Sind Wakf Property Ordinance 1979 disputes concerning the appointment of a Mutawali must be taken to a Civil Court under Section 92 of the CPC, rather than under the Ordinance. It stated that:

“15. Admittedly, the applicant is seeking his appointment as a Mutawali on the Waqf properties so also seeking direction for incorporating the entry in his name in city survey record therefore, such relief (s) would squarely fall within relief(s) included in the Section 92 of the Code. Whenever, the relief (s), sought, are prima facie falling within meaning of Section 92 of the Code the aggrieved shall have the remedy of 'instituting a suit' before Civil Court.....”

Appointment of Mutawalli through Congregation

Islamic law stipulates that, ideally, a *Mutawalli* should be appointed by the founder of the *waqf* or through nomination by an existing *Mutawalli*. However, when the role becomes vacant without a successor designated by the founder or previous trustee, the congregation or community may take the initiative to fill this role. In *Masjid Ahl-e-Hadees v. Province of Punjab* (2009 CLC 1421), the Lahore High Court ruled that the position of a *Mutawalli* (trustee) of a religious endowment cannot be left vacant. Under *Mahomedan Law*, if a *Mutawalli* does not appoint a successor during their lifetime, the community or congregation can appoint a new *Mutawalli*. The Court observed that:

“8. The office of Mutawalli cannot remain vacant. According to para.203 of Mahomedan Law by D.F. Mulla, any other person can be appointed as Mutawalli, if the incumbent had not appointed his successor in his life time. In the instant case neither the founder has nominated the successor of Moulvi Abdul Ahad nor Moulvi Abdul Ahad has nominated anyone as his successor Anjuman-e-Ahl-e-Hadees, through its office-bearers, took over Mutwalliship by congregation. Such appointment is valid. As authority for this proposition, reference can be made to the cases of Piran v. Abdool Karim (1891) 19 Cal. 203, Dilawar Hussain v. Subhan Khan (31) A.O. 375, Ghulam Muhammad v. Abdul Rashid (1933) 14 Lah. 558 and Khagum Khan v. Mohd. Ali Sahib (55) A. Andh. Pia. 209.”

DISTICTION BETWEEN WAQF PROPERTY AND INSTITUTION OPERATING IN SUCH WAQF PROPERTY

It is crucial to note that a suit filed under Section 92 of the Code of Civil Procedure (CPC) would pertain specifically to matters related to the wakf property itself, rather than the operations or governance of any institution (like a madressa or school) that operates on that property. Section 92 CPC allows for

a suit in cases where there are allegations of mismanagement, breach of trust, or other issues concerning the administration or management of a charitable or religious trust property, including *wakf* property. Contrariwise, an institution operating on wakf property, such as a *madrassa* or school, is typically registered under the **Societies Registration Act** or similar legislation. *This institution has its own governing body, bylaws, and administrative structure, which are separate from the management of the wakf property itself.* The institution may have its own objectives, rules, and regulations that govern its operations.

The management of wakf properties is governed by specific laws, such as the Muhammadan Law, Mussalman Wakf Validating Act, 1913, and the Civil Procedure Code. These laws outline the rights and responsibilities of the Mutawali and the legal framework for the administration of wakf properties while the institution's operations are governed by the **Societies Registration Act** now succeeded by **Balochistan Charities (Registration, Regulation & Facilitation) Act 2019**, which provides the legal framework for the establishment, registration, and governance of societies, including educational institutions. This act outlines the procedures for appointing administrators and managing the affairs of the society.

In *Syed Arif Ali v. Syed Firdous Ali and others* (2002 MLD 908), the Karachi High Court addressed a dispute involving the plaintiff's attempt to continue as the administrative head of an educational institution run by a trust. The case was deemed to be about the plaintiff's personal rights, and not a public interest matter as distinction has been created by the plaintiff as regards the trust and institution.

“Having gone through the plaint, the judgment and prayer contained therein one would require analysis as to whether the conditions contained in section 92 are fulfilled for the purposes of seeking permission from the Advocate-General, Sindh. There is no cavil to this proposition that only if a suit falls within the domain of the provision of section 92 permission would be required to be taken. The present suit has been filed by the plaintiff stating that he is General Secretary/I, Trustee of the Institute of Scientific Management Education Trust (ISM) and he is presently the Administrative Head of the institution set up under auspicious of the Trust. Paragraph 1 is the crucial paragraph, which needs some analysis read with the prayer clause. A distinction has been created by the plaintiff as regards the trust and institution. The plaintiff is admittedly a General Secretary and trustee of the Trust, but an Administrative Head of the Educational Institution created by the trust. He seeks to continue as the Administrative Head of the Educational Institution. I am, therefore, of the view that the case does not relate directly to the management of the trust and is thus covered by the provision of section 92, application is, therefore, dismissed.

Alienation of waqf property

Under Islamic law, the alienation of waqf property is generally prohibited unless the waqf deed explicitly grants the Mutawalli the power to sell or mortgage the property. The court grants permission for such alienation, ensuring that it aligns with the charitable purposes of the waqf.

In *Zahid Farooq v. Anjuman Jamia Masjid* (1995 SCMR 1584), the Supreme Court of Pakistan considered the validity of a mutawalli's (trustee's) authority to transfer waqf (endowed) property. The court emphasized that in the absence of express authority in the waqf deed, any transfer of waqf property must have judicial sanction, a principle rooted in Islamic law that treats the state (through civil courts) as a successor to the role of the qazi (Islamic judge) in overseeing waqf property. The court affirmed that this requirement safeguards waqf property from unauthorized transactions by the mutawalli and maintains its dedication for charitable or religious use. Thus, the sale by Muhammad Din was declared invalid, underscoring that mutawallis must seek court permission for transfers of waqf property. It is held:

"It is a piece of substantive Mahomedan Law that a Mutwalli whether the Waqf be a public or a private one cannot, practically speaking, transfer (Waqf) property without the sanction of the Qazi."

It was held also that:--

"in the present day, the Mutwalli has to go to a Civil Court to obtain the sanction".

In case **Nadeem Ahmed vs Chief Administrator, AUQAF, AIWAN-E-AUQAF, LAHORE and 2 others (2004 C L C 599)** the court cited in D.F. Mulla's *Muhammadian Law*, and held that a Waqf property is permanently dedicated to charitable or religious purposes and cannot be sold or transferred, except under strict conditions. Specifically, a *Mutawalli* (trustee) lacks the authority to mortgage, sell, or lease the property beyond specific terms unless permitted by court or expressly authorized by the Waqf deed.

What course should the appellate Court undertake if the trial Court has failed to frame consolidated issues in cases where two or more suits have been consolidated or failed to render its findings and decision on each issue?

Appellate Courts hold a critical position in civil litigations, serving as a forum to rectify errors made in trial courts and ensure that justice is duly served and one of the most crucial powers vested in the appellate court is the *power to remand a case back to the trial court* if the case is covered by the provisions of Rule 23 or Rule 25 of Order XLI of the Code. By now, however, ***it is established that non-framing of an issue is inconsequential if the parties have presented their evidence on the matter and the trial court has considered this evidence in its judgment.*** It equally settled proposition of law that the appellate Court may by leveraging the provisions of section 99, Rule 24 and 33 of the Order XLI of the Code ***overlook any defect or irregularity in any proceedings in suits not affecting the merit of the of the case, decide a case on the merits if the record provides sufficient material to address all relevant issues comprehensively.***

In this regard, there are innumerable precedents of the superior Courts in which the Courts have stressed that ***remand order should be not be passed***

lightly unless factual determination essential to the merits of the case cannot be based on the available evidence.

In Abdul Karim v. Haji Noor Badshah, (2012 SCMR 212), the Hon'ble Supreme Court held that ***the absence of a specific issue does not invalidate a judgment if both parties have fully presented their evidence on the contested point and the trial court has considered this evidence in its judgment.*** Citing Fazal Muhammad Bhatti v. Saeeda Akhtar, 1993 SCMR 4, the Court reiterated that unless non-framing of an issue results in a miscarriage of justice, the judgment remains valid. The Court observed that:

“7. In the absence of miscarriage of justice due to non-framing of issue on a particular controversy in the matter; like where Court did not allow the parties to lead their evidence in support of their contentions for want of issue, if on a question of fact a specific issue required to be framed in the light of the pleadings of the parties is not framed but parties have led evidence in support of their respective stances, the decision on such question can be rendered in the light of evidence available on record without framing the issue.”

In the case of Fazal Muhammad Bhatti v. Saeeda Akhtar, (1993 SCMR 4), it was held:--

"The pleadings and the issues as originally framed show that the parties were fully aware what was the subject-matter of controversy and what evidence was to be led by each one. The Court did not prevent the parties from leading evidence at the trial with regard to the defects in the gift. The non-framing of a specific issue in such circumstances is inconsequential."

In Mst. Shahida Zareen v. Iqbal Ahmed Siddiqui, (2010 SCMR 1119) the Supreme Court of Pakistan clarified the limited scope of remand orders under Order XLI, Rule 23 of the Civil Procedure Code (CPC). It observed that:

*“12. Remand of the case should be ordered in exceptional circumstances when it is found necessary by the Appellate Court to determine the question of fact which appears to the Appellate Court to be essential for a right decision of the suit upon the merits. **However, where evidence on record is sufficient for the Appellate Court to decide the question involved, then order of remand ought not to be passed.**”*

In Muhammad Dervash Al-Gilani v. Muhammad Sharif, (1997 SCMR 524), the Supreme Court of Pakistan established that the power to remand a case should be exercised cautiously and only when necessary. **The Supreme Court held that, in cases where there is sufficient evidence on record to allow the appellate court to reach a decision, remanding the case is unwarranted.** The Court emphasized that remand should only be ordered if the evidence is inadequate for a proper judgment, or if further factual determinations are required. Citing cases such as PLD 1965 SC 434 and 1975 SCMR 221, the Court reiterated that if the evidence adequately addresses the issues, the appellate court should resolve the case directly instead of remanding it.

“2. The learned counsel for the petitioners contended that as the evidence on record was sufficient to pronounce the judgment there was no occasion to remand it for re-writing

*the judgment by the learned Controller. The learned Judge in Chamber could have decided the case on merits on the material on record as from the impugned judgment it does not appear that there was any deficiency in evidence or the evidence was not sufficient to pronounce the judgment. In such circumstances the learned Judge instead of remanding case should have pronounced the judgment on merits. The principles for remand of the case to the lower Court for deciding on merits or retrial are well-settled. This power should not be exercised lightly but sufficient care should be taken in remanding the case. The Court should examine the evidence and if it comes to the 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. But if on record there is adequate and sufficient evidence on which decision can be made, the remand would not be justified. Reference can be made to *Paratnatha Nath Chowdhry and 17 others v. Kamir Mondal and others* (PLD 1965 SC 434), *Fateh Ali v. Pir Muhammad and another* (1975 SCMR 221), *Sher Muhammad and others v. Jamadar Ghulam Ghaus* (1983 SCMR 133), *Arshad Ameen v Messrs Swiss Bakery and others* (1993 SCMR 216) and *Syed Abdul Hakim and others v. Ghulam Mohiuddin* (PLD 1994 SC 52). In view of the aforesaid discussion, we convert the petitions in appeals and allow them. The High Court should hear the appeal after notice of the parties and decide the matter on merits.”*

In *Muhammad v. Hasham Ali*, (PLD 2003 SC 271), the Supreme Court of Pakistan emphasized that remand should be avoided if the existing evidence suffices to resolve the main issues in a case, even when specific issues were not explicitly framed by the trial court. The Supreme Court held that, when parties are aware of the core issue and have fully presented their evidence, the court may decide the case without remanding it for additional issue framing or further evidence. Citing precedents such as *Fazal Muhammad Bhatti v. Saeeda Akhtar* (1993 SCMR 2018), **the Court reiterated that the omission to frame an issue does not necessitate remand if the evidence on record sufficiently addresses the controversy.**

In case reported as Pramatha Nath Chowdhury and 17 others v. Kamir Mondal and others (PLD 1965 SC 434), the full bench of the apex Court of Pakistan at page 442 of the report observed as under:-

*"It remains now to examine one other argument advanced on behalf of the appellant, namely, that in any event the learned Judges should not have decided the case themselves but should have remanded the case to the proper Court for determination of the question as to whether there was a valid tenancy in this case. We are unable to accept this contention. **A remand should not be lightly ordered if the evidence on the record is sufficient for the appellate Court to decide the question itself. There can be no bar to the Court doing so.** Having examined the reasons given by the learned Judges of the High Court for deciding the question we are unable to say that the evidence was not so sufficient. There was adequate evidence on the record upon which the decision of the learned Judges in the High Court could have been based. We see no reason, therefore, to interfere only on this ground."*

In *Noor Muhammad v. Mst. Umar Wadi*, (2023 YLR 532), the Lahore High Court underscored that a remand under Order XLI, Rule 23 of the Civil Procedure Code (CPC) should not be ordered lightly when the appellate court itself has sufficient evidence to decide the case. The court referred that this principle was emphasized in cases such as *PLD 1965 SC 434* and *1975 SCMR 221*, establishing

that remand is unnecessary if the trial court's findings are well-reasoned and sufficient evidence supports the judgment.

In *Muhammad Hayat v. Muhammad Khan*, (2011 MLD 1646), the Lahore High Court listed specific circumstances where remand may be warranted, including the erroneous exclusion of evidence, misplacement of the burden of proof, misunderstandings by the trial court, or failure to resolve material issues. In this case, remand was deemed inappropriate as the appellate court overstepped by directing the plaintiffs to amend their plaint without addressing the time-bar issue. The Court outlined specific criteria under which remand by an appellate or revisional court is permissible.

It is also not out of place to express here that when the lower court omitted to frame an issue before trying a matter in controversy, the appellate court can frame the issue and refer it for trial to the lower court and in such case there is no need to remand the entire case. In case *Muhammad Yousaf and others v. Haji Murad Muhammad and others* (PLD 2003 Supreme Court 184) it has been held:-

“The provisions as contained in Order XIV, Rule 5, C.P.C. were not kept in view and ignored completely by the learned trial Court while framing the issues as a result whereof controversy regarding removal of household articles could not be set as naught. There is no cavil to the proposition which was settled decades ago and still hold field “that where an issue, though in terms covering the main question in the cause, does not sufficiently direct the attention of the parties to the main questions of fact, necessary to be decided, and the parties may have been prevented from adducing evidence, or fresh issue may be directed to try the principal question of fact”. (Olagappa v. Arbuthnot (1875) 14 BLR 115-142, 14/268, 316. “The duty of raising issues rests under the Code of Civil Procedure on the Court and it would be unsafe to presume from the failure of the Court to raise the necessary issues an attention of the defendant to admit the fact, which the plaintiff was bound to prove.” (Ganou v. Shri Devsidhes War, 1902 AIR 26 Bom. 360-361).”

Whether it is mandatory to draw separate decree sheets in consolidated suits?

In *Zahid Zaman Khan and others vs Khan Afsar and others* (PLD 2016 Supreme Court 409), the Supreme Court addressed key issues regarding the preparation of decrees in consolidated suits and the maintainability of appeals in such scenarios. The court held that, although there is no explicit requirement in the Civil Procedure Code (C.P.C.) for separate decrees in consolidated cases, it is generally more appropriate to issue separate decrees for each suit. This facilitates the appeal process, as each decree can then be challenged independently. The Supreme Court directed that, moving forward, trial courts should prepare separate decrees for each consolidated suit when they are resolved through a single judgment. On the **Maintainability of Appeals** the Court observed that a consolidated appeal is permissible against a consolidated judgment, provided the appellate court has jurisdiction to address all included decrees. The observations made by the Court in this context are reproduced for ready reference as follows”

“7. With respect to question No.2; it is settled law that it is the inherent power of the court to consolidate suits and the purpose behind it is to avoid multiplicity of litigation and to prevent abuse of the process of law and court and to avoid conflicting judgments.1 No hard and fast rule forming the basis of consolidation can

be definitive and it depends upon the facts and the points of law involved in each and every case, obviously where the court is persuaded that the interests of justice so demand, consolidation can be ordered, provided no prejudice is caused to any litigant and there is no bar in the way of the courts to consolidate the suits. **Reverting to the proposition, there is no provision in the C.P.C. where the court is obliged to prepare a separate decree in the consolidated suits.** However, let us consider the importance of a decree that follows a judgment. Section 33 of C.P.C. stipulates that:-

"33. Judgment and decree.--The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow."

As is evident, a judgment is followed by a decree in a case. But where a common judgment is delivered disposing off two or more suits, how many decrees are to be drawn up in such a case? In this respect it is important to keep in mind the principle that is embodied in the case of *H. M. Saya & Co., Karachi v. Wazir Ali Industries Ltd., Karachi* and another (PLD 1969 SC 65) that the Court ought not to act on the principle that every procedure is to be taken as prohibited unless it is expressly provided for. The Court should proceed on the principle that every procedure which furthers administration of justice is permissible even if there is no express provision permitting the same. Order XX Rule 6 of the C.P.C. provides for the contents of a decree including necessary particulars inter alia, the number of the suit, the names and descriptions of the parties, the particulars of the claim, the relief granted or any other determination of the suit. **In the circumstances it would be more appropriate that separate decrees are drawn up for each of the consolidated suits.**

An appeal lies against the decree and it is the decree which is executed. Additionally, for the purposes of appeal, the contents of the memorandum must state the grounds of objection to a decree. ***The requirement of a decree cannot be dispensed with and has to be filed along with the memo of appeal and it is for this reason that where an appeal is admitted without a copy of the decree, time may be granted by the court in appropriate cases to file the decree sheet***² In the judgment reported as *Siraj Din and 11 others v. Rajada* (1992 SCMR 979) the circumstances were that two consolidated suits were disposed off through a common judgment which was challenged through an appeal before the District Judge. The decree sheet in one of the suits was appended with the memorandum of appeal. When the appeal was allowed the aggrieved party sought to file a second appeal on the basis that the earlier appeal challenged only one decree (the second appeal was accompanied by an application for condonation of delay); the said second appeal was dismissed. This Court granted leave to consider whether filing of one appeal against the consolidated judgment in two consolidated suits relating to same or similar subject, had not satisfied the requirement of law and if not, whether mere technical controversy should not have been resolved in favour of the petitioners. This Court found that "On a question of fact we also find that two separate decrees in the two suits were in fact prepared". **This Court further held that there was no question of treating the earlier appeal as confined to one suit as the substance of the appeal showed that it was a composite attack on both suits.** The point to note here is that this Court considered the preparation of two decrees in the consolidated judgment to be unremarkable and indeed the tenor of the judgment is to the effect that it was a failing of the appellate court not to require the party to attach the second decree at an earlier stage. We direct all the trial courts of the country that where two or more suits have been consolidated and disposed of through a common judgment, that separate decree sheets with all the material particulars as per the requirements of Order XX of the C.P.C. must be drawn up. This direction shall be for the future and consequence of non-compliance thereof shall be considered in appropriate cases.

In *S.D.O./A.M., Hasht Nagri Sub-Division, PESCO, Peshawar v. Khawazan Zad*, (PLD 2023 SC 174), the Supreme Court of Pakistan clarified that procedural errors do not justify reversing a judgment or remanding a case if they do not impact the case's merits or the court's jurisdiction. The Court emphasized that technical defects, if curable, should not impede substantive justice under Section 99 CPC.

“10. It is for this reason that section 99, C.P.C. provides inter alia that no decree is to be reversed nor is any case to be remanded in appeal on account of any error, defect or irregularity in any proceedings in the suit that has not affected the merits of the case or the jurisdiction of the court. Similarly, it is not every irregularity in the exercise of its jurisdiction by a lower court that calls for interference in revisional jurisdiction under section 115(1)(c), C.P.C. but only the material irregularity, and the material irregularity is that which affects the merits of the case or the jurisdiction of the court.”

In case **CHAKAR KHAN and 3 others vs AZAD KHAN and 5 others PL D 2011 Quetta 26**, Hon’ble High Court of Balochistan Quetta, it was ruled that clarified that once suits are consolidated by court order, they lose their independent existence, resulting in a single judgment and decree that covers both suits.

“4. I have heard the learned counsel for the parties and have perused the record. In the first instance, let me dilate upon the objection raised by the petitioner on -the maintainability of the appeal. It is an admitted tact that, initially, both the suits were consolidated by the Trial Court and, finally, these were disposed of through a common judgment and a decree. The respondents have challenged the judgment and decree through a single appeal.”

If common question of law and facts are involved in the suits, with a view of avoiding the conflicting findings, it is just and convenient that the suit be disposed of by one and the same Court. In such like cases, normally, the suits are being consolidated in order to avoid the multiplicity of the litigation and the contrary demands. One of the purposes of consolidation is to minimize the unnecessary cost of the litigation. When by an order of the Court, two suits are consolidated, these have no independent existence. As a result of the consolidation, only one judgment and decree could be passed to regulate both the suits.”

Where common/consolidated judgement dismiss or decree or suit and does not explicitly address and decide the outcome of the other suit, how should the problem be dealt with by the appellate Court?

In **Khalid Mahmood vs. Asghar Ali Bhatti, reported in 2005 CLC 1821**, it was discussed the powers of Appellate Court provided under Order XLI Rule 33 CPC and held that appeal is continuation of suit and Appellate Court in exercise of its powers can pass any order **which ought to have been passed as the case might have required.** It stated that:

*“5. Reverting to the question as to whether at this stage Muhammad Sarwar son of Muhammad Shari, can be impleaded as one of the defendants, in the suit. The appellant did not file any application, before the learned trial Court, for impleading Muhammad Sarwar, however, he has now filed the application (C.M. No.1/C of 2001) along with the appeal for the said purpose. There cannot be any cavil to the proposition that **the appeal is a continuation of the suit and the Appellate Court, in exercise of its powers under Order XLI, rule 33, C.P.C., can pass any order which ought to have been passed or made as the case .nay require.** ¹³ It has been held in the case of Hazrat Khan v. Amanullah Khan and others 1996 SCMR 1217*

that once the Appellate Court has come to the conclusion that a person was necessary party, then the learned Judge ought to have passed order directing him to be joined as a party.....”

In case Hazrat through L.Rs. and others vs Mst. Spogmai and others (P L D 2021 Supreme Court 700) the Apex Court also reiterated about the vast powers of the appellate Court paralleling with the powers of the trial Court and held that”

*“12. Even otherwise, the Appellate Court in terms of Rule 33 of Order XLI of the C.P.C. **enjoys all the powers as may be possessed or exercised by the Court from which the appeal has originated except for imposing cost.** In view of such enabling provision and jurisdiction of the appellate Court, such jurisdiction and powers may also be exercised, within the bounds prescribed by law, by the Revisional Court i.e. the High Court in the matter in hand. Invariably, the remand order should not have been made by the revisional Court in all the cases”.*

If the consolidated judgment provides enough reasoning, the appellate court may, in rare cases, interpret the lower court’s findings to imply the outcome of the undecided suit. However, this option is uncommon and only taken when the lower court’s decision clearly and logically indicates the intended outcome of the consolidated cases.

Short Research Note:

Since the key issues regarding trustee authority and property transfer were conclusively decided, the appellate court can resolve the appeal on its merits, leveraging Order XLI Rule 24. By doing so, the court can confirm the trial court’s findings on these core issues and provide the necessary clarity on the outcome of the defendant’s suit, thus avoiding further delays and ensuring a just resolution of the main controversies.

Reference:

- 1- Vidyodaya Trust vs Mohan Prasad R & Ors on 27 February, 2008 Equivalent citations: AIR 2008 SUPREME COURT 1633**