

IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Mohammad Ali Mazhar** and **Agha Faisal, JJ.**

HCA 279 of 2018 : Mrs. Afroze Shah & Another vs.
Advocate General Sindh & Others

HCA 321 of 2018 : Mohammad Hussain Qureshi vs.
Advocate General Sindh & Others

HCA 137 of 2019 : Khalid Rehman Qureshi & Another
vs. Islamic Education Trust & Others

For the Appellants : Mr. Mureed Ali Shah, Advocate
(in HCA 279 of 2018)

Malik Naeem Iqbal, Advocate
(in HCA 321 of 2018)

Mr. Mohammad Mansoor Mir
Advocate
(in HCA 137 of 2019)

For the Respondents : Mr. Salman Talibuddin
Additional Advocate General

Mr. Adnan Ahmed, Advocate
For Respondents 2, 6, 7, 8 & 10
(in HCA 279 of 2018)

Date of Hearing : 19.03.2019

Date of Announcement: 05.04.2019

JUDGMENT

Agha Faisal, J: These three appeals were filed assailing the judgment dated 07.08.2018 ("**Impugned Judgment**"), and decree prepared in pursuance thereof dated 30.08.2018, delivered by a learned Single Judge of this Court in Suit 203 of 2012 ("**Suit**"). Since the controversy in all three appeals is predicated upon the Impugned Judgment, hence, the said appeals shall be determined vide this common judgment.

2. Briefly stated, the relevant facts herein are that the Suit was filed by the Advocate General Sindh in respect of the administration of the Islamic Education Trust Karachi (“IET”). The prayer clause in the Suit *inter alia* sought the removal of the defendants from the trusteeship of the IET and the appointment of new trustees in respect of IET. Pleadings were exchanged between the parties *inter se* and thereafter the matter was listed on 11.05.2018 for hearing of seven applications, examination of parties, settlement of issues and for orders upon one application. The relevant order sheet reflects that the learned Single Judge heard the respective learned counsel on the listed applications and then reserved the same for orders. The Impugned Judgment was delivered on 07.08.2018 wherein the learned Single Judge was pleased to conclusively decree the Suit. It may be pertinent to record the operative observations of the learned Single Judge in this regard.

“22. In view of the foregoing, this is a clear case for passing a decree for measures enumerated under sub-section 1(a), (b), (c), (g) and (h) of Section 92 CPC. Given the fact that from the year 1972, when the Islamic College was nationalized, the College and the College Building remained under the control of the Government of Sindh, and thereafter to-date it was/is under the control of the Official Assignee, this is not a case that requires the taking of accounts under sub-section 1(d) of Section 92 CPC from persons claiming to be trustees. Therefore, the following decree is passed:

(a) The private defendants and/or any other person claiming to be trustee of the Islamic Education Trust (IET) are hereby removed.

(b) In view of the facts recorded in para 6 of this judgment, the new board of trustees of IET shall comprise of seven (7) persons, two (2) of whom shall be nominees ex officio of the Karachi Municipal Corporation (KMC). For such purpose, the Advocate General shall communicate this judgment to the KMC. However, in the event the KMC does not opt to make said nomination, then the new board of trustees of IET shall comprise of five (5) persons.

(c) The Advocate General Sindh shall for the consideration of this Court submit a list proposing names and credentials of new trustees for IET after taking the consent of such persons. With this direction, CMA No.5927/2016 stands disposed off.

(d) On the appointment of the new trustees as aforesaid, all assets of IET shall vest in such trustees. Thereafter, the Official Assignee shall deliver the trust property and its record to the new trustees, including the record of all cases instituted by and against him as Receiver/custodian of the trust property.

(e) The first order of the new trustees shall be to

consider amendments to the trust deed dated 04-03-1958 and to frame fresh Regulations for the day to day affairs of the IET. Such first amendment and first set of Regulations shall be made by the new trustees unanimously.

(f) Until the new trustees amend the original trust deed as aforesaid, the scheme of IET shall be as per the original trust deed dated 04-03-1958 save as is provided herein. All subsequent deeds of trust purporting to amend the original trust deed dated 04-03-1958 are hereby annulled, so also all Regulations framed by the previous trustees. Any person holding any instrument that purports to amend the original trust deed 04-03-1958 shall be required by the Advocate General for deposit for cancellation. A copy of this direction be also sent by the Advocate General to the concerned Registrar of documents for information and record.

In view of the above decree, CMAs listed in paras 5(i) to (vii) have become infructuous.”

3. Mr. Mureed Ali Shah, Advocate argued on behalf of the appellants in HCA 279 of 2018 and submitted that the Impugned Judgment was otherwise than in accordance with law as the findings recorded therein, in respect of the controversy pending before the learned Single Judge, were in disregard of the facts. It was argued that no issues were framed and no evidence was led and notwithstanding the same the Suit was decreed, which manner of adjudication is not sanctioned under the provisions of the Civil Procedure Code. Learned counsel relied on *Haji Farmanullah vs. Latif-ur-Rehman* reported as 2015 SCMR 1708 and argued that the procedure prescribed in the CPC, required to be followed from institution of the plaint till rendering of the judgment, could not be disregarded. Learned counsel cited *Province of Sindh through Secretary (LU) & Others vs. Haji Ghano Khan Jatoy & Others* reported as 2012 CLC 1372 and *Ghazala Rahman vs. Najma Sultana & Others* reported as 2012 MLD 188 (“**Ghazala Rehman**”) in support of his contention that a decree cannot be passed at a preliminary stage. The learned counsel delved into the factual controversy and sought to demonstrate that the Impugned Judgment did not address the same.

4. Mr. Naeem Iqbal, Advocate appeared for the appellant in HCA 321 of 2018. It was submitted that the appellant had no cavil with the Impugned Judgment in so far as removal of all the trustees was concerned, however, the only ground sought to be agitated was that in the appointment of new trustees the appellant ought to have been taken

into consideration as he was the only surviving original trustee. It was contended by the learned counsel that after the original trust deed numerous other deeds were purportedly executed to incorporate numerous trustees in respect of the IET. But that all such instruments were either forged or executed otherwise than in accordance with law. It was argued that the Impugned Judgment had rightly dismissed all deeds seeking to modify the original trust deed and hence maintained the sanctity of the original trust deed. It was thus argued that the appellant only sought the modification of the Impugned Judgment to the extent that the appellant be ascribed a role in the determination of the new trustees of IET.

5. Mr. Mansoor Mir, Advocate represented the appellant in HCA 137 of 2019. This appeal was filed in February, 2019 notwithstanding the fact that the Impugned Judgment was delivered in August, 2018. Learned counsel had also filed an application under section 5 of the Limitation Act seeking condoning of the delay and in such regard had filed a copy of passports showings that the appellants had entered Pakistan on 20.02.2019. No document was filed to demonstrate when the appellants had left the country. Per learned counsel the appellants were also trustees of the IET and yet had not been impleaded as defendants in the Suit. Learned counsel submitted that the appellants were aware of the Suit, however, since no prayer had been made there-against therefore they never sought to be impleaded therein and that the present appeal has only been filed because the Impugned Judgment has removed all trustees, disclosed and undisclosed, of IET and therefore the appellants were aggrieved as they have been condemned unheard.

6. Mr. Salman Talibuddin, learned Advocate General Sindh, appeared and controverted the arguments advanced on behalf of the respective appellants. Learned Advocate General argued that the question before the Court is the preservation of a public trust and not that preservation of an individual interests, which may otherwise be in conflict with the larger interest of the trust itself. Learned counsel submitted that section 92 of the CPC permitted the Court to issue directions for the purpose of preserving the objects of a trust and it is that very action that has been undertaken by the learned Single Judge

in the Impugned Judgment. Learned Advocate General stated that there are numerous people claiming to be trustees of the IET and in the presence of competing claims to such effect the Impugned Judgment was imperative to preserve the interests of the trust itself. It was submitted that letters of consent, *inter alia* from senior retired members of the judiciary and the accounting profession, have been received for such stellar personalities to act as trustees and to administer the IET and it was for this Court to determine whether the control of the trust could be trusted to such people of unimpeachable credentials or the trust could be left in the hands of bickering self-serving purported heirs of the original trustees of the IET. Per learned counsel, there were two different distinctive constituents to section 92 of the CPC and whereas evidence was required for the first segment, the same could be dispensed with when dealing with the second segment. It was also argued that HCA 279 of 2018 was purportedly filed by the IET, as the appellant No.2, however, it is evident from the record that no authority in such regard was available on file and hence the said appeal was discrepant from its very inspection. Learned counsel also referred to HCA 137 of 2019 and submitted that it was prima facie a time barred appeal and no cogent grounds were cited for the condoning of delay sought therein. In so far as HCA 321 of 2018 was concerned it was contended that while the arguments of the learned counsel were restricted to assigning a role to the appellant therein in the determination of new trustees for IET, nothing was demonstrated from the record or gleaned from the law to require the said contention to have been taken into account by the learned Single Judge. It was thus argued that all the three appeals were misconceived, hence, merited dismissal forthwith.

7. Mr. Adnan Ahmed, Advocate appeared on behalf of respondents Nos.2, 6, 7, 8 and 10 and submitted that the said respondents were also legal heirs of the original trustees of the IET, and also trustees of IET, but were also removed by virtue of the Impugned Judgment. Learned counsel adopted the arguments advanced by the learned Advocate General Sindh and submitted that the Impugned Judgment was in due accordance with law.

8. We have considered the arguments of the respective learned counsel and appreciated the record arrayed before us. It is the

considered opinion of this Court that the primary issue to be determined is whether the Impugned Judgment was rendered in consonance with the procedure prescribed by the CPC, therefore, it is considered expedient to frame a singular point for determination, in pursuance of Order XLI Rule 31 CPC, being;

“Whether, in the present facts and circumstances, a decree could be passed without framing of issues and leading of evidence.”

9. It is noted that the Suit was instituted in the year 2002 and after the exchange of pleadings the matter was fixed *inter alia* for consideration of the pending applications, examination of parties and settlement of issues. The order sheet dated 11.05.2018 records that the learned Single Judge heard the respective learned counsel only insofar as the listed applications were concerned and reserved the matter for orders. It is an admitted fact that no issues were framed and no evidence was led in the Suit and notwithstanding the forgoing a final decision was arrived at, in the form of the Impugned Judgment, without the parties having been provided any opportunity to prove and / or disprove their respective claims. An earlier Division Bench of this Court in *Ghazala Rehman* had emphasized the requirement for framing of issues once it was apparent that material facts are affirmed by one party but denied by the other and observed as follows:

“However, there is no bar under the CPC for the court to settle the issues at any particular stage but it is also a fact that the stage of issues arises when a material proposition of fact or law is affirmed by one party and denied by the other. Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or the defendant must allege in order to constitute his defense. Each material proposition affirmed by one party and denied by other shall form the subject of a distinct issue.”

10. The Impugned Judgment, *inter alia*, granted final relief, for removal the trustees and appointment of a new set of trustees, at a preliminary stage while circumscribing the right of the parties to defend themselves against the allegations levelled there against in the Suit. We have considered the purview of section 92 CPC and have noted that neither the learned Advocate General nor the other learned counsel

supporting the Impugned Judgment made any effort to argue that the method of proceeding with a civil suit prescribed in the CPC can be dispensed with if a suit brought under section 92 thereof. It is thus determined that in the present facts and circumstances passing of a decree at a preliminary stage, without having framed the issue/s and / or having provided the parties with the opportunity to lead evidence in order to prove / disprove the respective claims, is not sustainable.

11. In so far as High Court Appeal 137 of 2019 is concerned we are not convinced with the assertion that the appellants had been condemned unheard. It is an admitted fact that the appellants remained aware of the Suit yet opted not to have themselves impleaded therein. The appeal filed is admittedly time barred and the condoning application filed in such regard has not demonstrated any grounds for the same to be allowed.

12. The Impugned Judgment clearly records that the Official Assignee is the receiver / custodian of the trust property and observes that the Official Assignee has been exercising all the requisite functions in such regard. The learned Single Judge has also recorded the contention of the appellant, in HCA 279 of 2018, that the trustees have not been on control of the trust property since 1972. It is further observed by the learned Single Judge that the Official Assignee has been filing references from time to time to seek the assistance of this Court in the discharge of his duties. Therefore, while the trust property remains ensconced with the official Assignee, it is imperative that the Suit may proceed to its conclusion, and determine the rights of competing claimants, after framing of issues and leading of evidence.

13. It is therefore the considered view of this Court, with utmost respect to the learned Single Judge, that the Impugned Judgment and decree prepared in pursuance thereof cannot be sustained, hence, the same are hereby set aside, the matter is remanded back and the Suit restored to the position that it was at immediately prior to 11.05.2018. In view of the reasoning and rationale herein contained, CMA 742 of 2019 is hereby dismissed and as a consequence thereof HCA 137 of 2019 is dismissed on account of being time barred. The other two appeals,

being HCA 279 of 2018 and HCA 321 of 2018, are hereby disposed of in terms herein contained.

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