

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

II-Appeal No.85 of 2018

Order with signature of Judge(s)

1. For hearing of CMA No.6855/2018.
2. For hearing of CMA No.6856/2018.
3. For hearing of main case.

13.12.2019

Mr. Mukhtar Ahmed Rahu advocate for Appellants
Mr. Khalid Latif advocate for Respondents No.1 and 2

Salahuddin Panhwar, J. Heard learned counsel for respective parties. Since, the *scope* of the II-appeal against the **concurrent findings** is *limited* one and **concurrent findings** could only be disturbed if the findings of fact, arrived by Courts below, are found to be based upon misreading, non-reading or misinterpretation of the evidence on record. The reference may well be made to the case of Akhtar Aziz v. Shabnam Begum 2019 SCMR 524 wherein the principle has been reaffirmed as:-

“14. Although in second appeal, ordinarily the High Court is slow to interfere in the concurrent findings of fact recorded by the lower *fora*. This is not an absolute rule. The Courts cannot shut their eyes where the lower *fora* have clearly misread the evidence and came to hasty and illegal conclusions. We have repeatedly observed that if findings of fact arrived by Courts below are found to be based upon misreading, non-reading or misinterpretation of the evidence on record, the High Court can in second ‘appeal reappraise the evidence and disturb the findings which are based on an incorrect interpretation of the relevant law...”

2. To show, *prima facie*, illegality in concurrent findings is responsibility of the appellant which, *appellant*, however has failed in the instant case. However, to see whether there is any, *prima facie*, illegality in concurrent findings of the two courts below, it would be conducive to refer paragraphs No.18 and 19 of the judgment dated 08.9.2017 passed by trial Court in Civil Suit No.768 of 2016, which are that: -

“18. From the above discussion on Issues No.1 to 3, I am of the humble view that as per record suit property was left by the deceased father of the parties as his property. Deceased Mu-

hammad Ibrahim S/O Muhammad Ishaq (father of both the parties) was died in the year 1988 and as per Muhammadan Law / Sharia suit property developed upon the legal heirs of deceased Muhammad Ibrahim S/O Muhammad Ishaq. Plaintiffs as well as defendants are the surviving legal heirs of said Muhammad Ibrahim S/O Muhammad Ishaq. As per evidence available on record at the time of death of deceased Muhammad Ibrahim S/O Muhammad Ishaq his son namely Naseem S/O Muhammad Ibrahim was also alive. The evidence of witness Aftab Ahmed also reveals that said Naseem S/O Muhammad Ibrahim has been died living behind his widow and two children as surviving legal heirs. Said Naseem S/O Muhammad Ibrahim or his legal heirs are not impleaded as party to present suit. Therefore, I am of the humble view that as per Muhammadan Law / Law of Inheritance plaintiffs, defendants and the legal heirs of said Naseem S/O Muhammad Ibrahim (son of deceased Muhammad Ibrahim) are entitled to their respective share from the suit property. Plaintiffs have also claimed the mesne profit. During evidence defendant No.1 has admitted that he has started collecting rent from tenants after 2014 and at present he is collecting Rs.16,000/- per month as rent amount. Plaintiffs, defendants and legal heirs of Naseem S/O Muhammad Ibrahim are also entitled to their respective share from the rent amount being collected by the defendant No.1. Therefore, I am of the humble view that plaintiffs are entitled to the relief claimed. Thus Issue No.4 is answered in affirmative.

19. In view of the above discussion on Issue No.1 to 4, suit of the plaintiffs is hereby decreed. Nazir is appointed as commissioner / administrator to administer / partition the suit property and put the legal heirs of deceased Muhammad Ibrahim S/O Muhammad Ishaq (plaintiffs, defendants and legal heirs of Naseem S/O Muhammad Ibrahim) into possession as per their respective share as per law / sharia. If partition is not possible, Nazir is directed to put the suit property into auction as per law / rules and distribute the sale proceeds amongst the plaintiffs, defendants and legal heirs of Naseem S/O Muhammad Ibrahim as per their respective shares. Nazir is further directed to recover the amount of rent from defendant No.1 at the rate of Rs.16,000/- per month from 1st January 2015 till the distribution of shares or deduct the same from the share of defendant No.1 and distribute the same amongst plaintiffs, defendants and legal heirs of Naseem S/O Muhammad Ibrahim as per their respective share according to law / sharia. Commissioner fee is fixed at Rs.10,000/-, the plaintiffs / defendants shall pay Rs.2000/- each to meet the commissioner fee. There is no order as to costs. Let preliminary decree be prepared accordingly.”

3. The judgment was assailed in Civil Appeal No.245 of 2017. After hearing, learned Appellate Judge maintained the trial Court’s verdicts while addressing the Point No.2, which is that: -

“Point No.2. The burden lies upon the appellants to establish this point. Learned counsel for the appellant only mainly contended that the impugned order is not based upon appreciation of evidence and the trial court has appreciated the documents produced by the appellant No.1 and the appellant No.1 is enti-

led for the recovery of Rs.2,50,000/- in addition to his share from the house in question. *The respondent Mst. Salma Bibi and Mst. Aisha had filed a suit for administration, partition and mesne profit of House No.3/448-B, Liaquatabad which was left by their deceased father Muhammad Ibrahim. The respondents No.1 & 3 had filed their written statement and their submission was that defendant No.1 had invested Rs.2,50,000/- on the construction of first floor and repair of ground floor. **The defendant No.1 Saleem in his cross-examination replied, it is correct to suggest that said property was left by his deceased father and as per Sharia my all sisters are entitled to their share from said house.** He further replied, "it is correct that the share amount was not paid to plaintiff No.1 from rent amount. He further replied, "I have no objection if share may be given to remaining shareholders except the sisters who have already taken there. The respondent No.2 Mst. Seema Aftab in her cross-examination replied "I have no objection if share be distributed among all the legal heirs from the property left by my deceased father. The appellant No.2 Mst. Fatima in her cross-examination replied that **"it is correct to suggest that my father left two houses as his property and after selling one house sale consideration was spent in repair of suit property and marriage of one sister.** She further replied that "I have no objection if suit property is distributed in the shareholders. Voluntarily says except those who have already taken their share." The trial court had passed impugned judgment by giving direction to Nazir to administer partition of the suit property and put the legal heirs of deceased Muhammad Ibrahim (plaintiffs, defendants and legal heirs of Naseem S/o Muhammad Ibrahim) into possession. The learned trial court also given direction if partition is not possible, Nazir is directed to put the said property for auction. Further more Nazir is directed to recover rent amount from the defendant No.1 at the rate of Rs.16,000/- from 1st January 2015 up-till distribution and distribute the same after deducting defendant No.1's share amount and distribute the same amongst plaintiffs, defendants and legal heirs of Naseem. The main contention of appellant is that appellant No.1 had invested Rs.2,50,000/- on the construction and repair of suit house. However, as discussed in the foregoing paras, the appellant has failed to establish the source of his income in 1998 that he had gathered Rs.2,50,000/- and invested such amount upon the repair and construction of first floor of the suit property. Moreover, the appellant No.1's counsel has failed to point out any misreading and non-reading of the evidence by the trial Court in the impugned judgment. Furthermore, the learned counsel has failed to point out any illegality or irregularity in the impugned judgment. In the light of above facts and circumstances I am of the view that the appellants have failed to establish this point which is determined as 'not proved'."*

4. ***Prima facie***, the status of parties to be legal heirs of Muhammad Ibrahim (deceased) is not disputed and since it is also not disputed that properties, in question, were owned by deceased at time of his death. In such eventuality both the lower Courts committed no *illegality* while passing appropriate order regarding

entitlement of legal heirs on count of *opening of succession* which stood defined in the case of Mst. Suban v. Allah Ditta & Ors 2007 SCMR 635, as:-

11. It is a proposition too well-established by now that as soon as someone who owns some property, dies, the succession to his property opens and the property gets automatically and immediately vested in the heirs and the said vesting was not dependent upon any intervention or any act on the part of the Revenue Authorities or any other State agencies.....

5. Further, it is also matter of record that dispute was confined, in appeal, to extent of investment over repair etc. Needless to add that if any such plea is taken then same comes with burden of proving the same. Such *plea* was requiring proof of independent source of income and record of spending / investment thereof which, as discussed by *first appellate Court*, was not proved by the claimant.

6. In consequence to what has been discussed above, I am of the clear view that there is no, *prima facie*, illegality in the conclusion, so drawn by both the Courts below, hence instant second appeal has no cogent ground, therefore, same was dismissed by short order dated **11.12.2019**.

JUDGE