

IN THE HIGH COURT OF SINDH AT KARACHI

SECOND APPEAL NO.233/2019

Date

Order with signature of Judge

1. For order on office objection as at A.
2. For order on CMA No.6969/2019
3. For hearing of CMA No.6970/2019
4. For hearing of main case.

26.01.2021

Mr. Qayyum Nawaz Kundi advocate alongwith appellant,
Mr. Muhammad Rashid advocate alongwith respondent No.1.

.....

J U D G M E N T

SALAHUDDIN PANHWAR, J. Heard learned counsel for respective parties.

2. Precisely relevant facts are that controversy started when Muhammad Khalid brother of appellant passed away; SMA was preferred by Mst. Sultana Kausar wife of the deceased; that was allowed with the consent of all legal heirs and first wife of deceased with regard to payment of compensation as deceased died in an Air Blue airplane crash in 2012 as well amount available in other accounts of company being sole proprietor of Muhammad Khalid; that order was challenged by brother of deceased/present appellant in M.A.; while dismissing M.A. this court observed that **“while dismissing petition and leaving the parties to approach competent court of civil jurisdiction for redressal of their respective grievances in respect of both immovable as well as movable properties/assets in question”** with direction that the amounts in respect whereof SMA was partly allowed, shall be invested by court till fate of civil proceedings is decided.

3. Since 2012 legal heirs are in litigation to receive inherited amount [Tarka] but due to controversy raised by present appellant (brother of deceased) whereby special plea was taken by him that he, being partner in M/s M.K Builders is entitled to receive 50% of amount lying in such account; that suit was decreed and plea of the present appellant (defendant No.3(a)) was answered in **NEGATIVE**. The appellant/defendant No.3(a) preferred an appeal but that, too, was dismissed. It is pertinent to mention that in the Suit filed by the respondent No.1/plaintiff regarding divorce to second wife (respondent No.2/defendant No.1) issue was considered as affirmative.

4. I have heard the respective parties and have also examined the record, *carefully*.

5. Learned counsel for appellant has mainly relied upon registration of present appellant with Engineering Council and has emphasized on two partnership deeds; insisted on admissions of the respondent No.1/plaintiff regarding existence of partnership as well pleaded that report of forensic expert has been relied without his examination which resulted in wrong conclusion of the issue No.3, so he prayed for allowing the appeal.

6. In contra, learned counsel for respondent including first wife contends that they consented SMA; appellant intends to deprive the legal heirs of his brother; concurrent judgments are in accordance with law.

7. Before going into merits of the case, in hand, I would like to examine the scope of the 2nd Appeal in the matter of concurrent findings of the two courts below. The scope of the 2nd appeal also appears to be not at much variance with that of the revision because

for succeeding in the 2nd appeal the appellant has to establish, *prima facie*, that **decision was either contrary to law or substantial error or defect in the procedure was committed while deciding the matter**. I am guided in my such view with the case laws, reported as **Anwar Textile Mills Ltd vs. PTCL and others (2013 SCMR 1570)** wherein it is held as:-

“15. Thus, by reading of this provision, it is apparent that the High Court will be **justified to interfere with the decision of the lower Courts when it is contrary to law or failed to determine material issue of law or commits substantial error or defect in the procedure**, which may have resulted in error or defect in the decision of the case on merits.”

8. Since, through instant 2nd Appeal, the findings onto issue no.3 (*framed regarding existence of partnership*) have been challenged therefore, it would be conducive to make a direct referral to operative part of findings of two court (s) below before attending the *plea (s)*, so raised by appellant’s counsel:-

Findings of trial Court on Issue no.3

“This is the crux of litigation, the Issue no.03 is the bone of contention as accordingly the issue as framed thereto is that wheter the deceased Muhammad Khalid and contesting defendant no.03(a) Muhammad Asghar were partners to extent of 50% each in M.K. Builders and account No.010-1914-4 maintained with UBL Korangi industrial Area Branch was exclusive business account of M/s M.K Builder..... Thus the issue accordingly been framed and **the burden squarely is on shoulder of contesting defendant No.03(a) in the case, as this element transpires qua his contention hence under the law it is his burden to show that he was partner with deceased in respect of M/s M.K. Builders and in relation to such business venture, the account in relation thereto was account No.010-1914-4.**

.....In present suit, defendant No.03(a), he has within written statement as been filed jointly otherwise, has contended vide paragraph No.02 he and his deceased brother were partners in M.K. Builders which account was being used for transaction on behalf of company since 1995 till death of deceased. He has stated that such partnership was registered. Defendant No.03(a) vide his pleadings and in evidence has stated that an

amount of Rs.3 million within the account is the loan amount taken from the GSK which amount shall be deducted and remaining be distributed. Now the defendant NO.03(a) was required to show he and deceased were partners in M/s M.K. Builders. He has produced partnership deed in relation thereto. It is observed that there are two partnership deed; one pertains to year 2002 and one to year 2010. Now virtue these documents it is observed that if there was a partnership between the defendant No.03(a) and the deceased Muhammad Khalid , then it incepted in year 2002. **If a partnership incepted in year 2002 then this is contradiction to own stance vide paragraph no.02 of written statement which in specific mentioned supra that account (disputed account) was used for transaction of business concern since 1995 whereas per own contention business incepted in year 2002 then how the transaction for a business emerging years later can take place earlier in time thus own document is contradictory to own stance.** Now one wonder when partners incepted in year 2002 then why the defendant No.03(a) has mentioned year 1995 in pleading. Now adverting to the document of the defendant No.03(a) as stated he has produced registration certificate duly exhibited as Exhibit-D/03 in the case. It is license / registration with Pakistan Engineering Counsel which pertains to year 2010 and it appears that though partnership incepted in year 2002 per own documents but registration of such partnership concern with PEC only transpired in year 2010 , otherwise, no previous renewal is on record. The **partnership deeds are self not registered as the defendant No.03(a) has admitted in cross examination as “It is correct to suggest that partnership deed is not registered and there is no certificate issued by the Joint Stock register”.** Thus the defendant is to show himself being partner with deceased, and for what has been discussed so far herein above, apart the self-contradiction as in pleadings with document as highlighted supra, **the partnership deeds are not registered one.** The defendant in his cross examination has denied suggestions in respect of deceased being in construction business since 1989 **and has stated that account is being maintained since 1995.** Thus the mentioning of year **1995 surfaces as the account was maintained by deceased since 1995 as contended by the defendant.** Now, as stated that the defendant was to prove that he was partner with deceased Muhammad Khalid in M/s MK Builders and account NO.010194-4 was account of M/s M.K. Builders. Now in this regard apart everything else the cross of plaintiff shows that she admitted in cross-examination that account No.0101914-4 was account of M/s M.K. Builders, however as observed even if it is presumed as an admitted fact that the account was being used since 1995 **but how in the world it is to be justified that how the transaction for a venture which 07 years later is to be formed can act for it earlier in time.** The defendant No.03(a) is absolutely silent to such contention within pleadings or otherwise however it is an admitted position on record since admitted not only by defendant No.03(a) but his witness who is also cited as defendant namely Muhammad Ramzan has admitted in cross examination deceased Muhammad Khalid was indeed into construction business since 1989. Now where the deceased Muhammad Khalid into construction business since 1989 and where it becomes an admitted position on record per plaintiff or defendant that account No.010-1914-4 was opened up for M/s M.K. Builders and where it is self-

admitted by the contesting defendant no.3 that from year 1994 to year 2002 he was working different jobs then it gets apparent that even if disputed account is sole account of M/s M.K. Builders then it gets established that it was opened by the deceased Muhammad Khalid as by that time there was no partnership with the defendant no.03(a) and all transaction thus had no concern with defendant no.03(a). To all surprises it was contended only in cross examination that he having worked over the years handed over his entire earnings to deceased Muhammad Khalid for such investment and apparently there is neither any document nor any specification as to what tune he invested within business and what profit in years was settled between partners, neither any account statement nor any other document to such stance is available on record which factum otherwise was neither within pleading nor within examination in chief but was divulged by the defendant No.03(a) and surfaced only in cross-examination and admitted that he has no document to show as to what amount was invested by him. Admittedly, the unregistered document also does not show that what amount was invested by what partner. Where it becomes admitted position that deceased was into construction business since 1989 where it becomes otherwise admitted position that account No.010-1914-4 was being used for M.S M/K Builders prior in time then allege partnership then on perusal of partnership in year 2002 shows it is silent as if to in a running concern joint venture been procured. Rather it shows a new inception of a company. It is admitted by the defendant No.03(a) that despite partnership all the cheques were issued under the signatures of the deceased Muhammad Khalid as he has admitted as **“It is correct to suggest that cheques were signed, encashed with signatures of deceased Muhammad Khalid. Vol. says it had company seal as well”**. This piece of reply of defendant no.03(a) signifies that signing Authority to cheques under the partnership was deceased Muhammad Khalid while on contrary what is observed that allege partnership deed 09.07.2002 vide its terms NO.04 speaks that account was opened jointly on 03.01.1995 and further was to be operated with two signatures. The own document through very clause therein signifies nothing but makes it dubious to understanding as to when partnership is being effected in year 2002 then how the account can jointly be opened in year 1995 which as discussed signifies nothing but makes it apparent that deceased was indeed ding business of construction with disputed account as account for his business concern as well. However with regards observation qua defendant No.03(a) and deceased being partners one hand admits sole signatures of deceased on partnership account whereas very own partnership deed speaks of two signatures being of partners upon transactions within account (disputed account) thus own document is in contradiction to own stance and he admits that he has no signature over any transaction within account. However, as stated that burden is on defendant nO.03 to show himself as partner with deceased. Now the defendant No.03(a) as stated that is relying heavily on the partnership deed which **firstly are not registered under the law whereas are document which were required to be compulsorily registered under the law.** The defendant No.03(a) has produced two attesting witnesses thereto. Now perusal of the evidence of the attesting witnesses as produced by the defendant NO.03(a) shows that

witness Jumma Khan neither could identify any of signatories to document nor accompanied during time of purchase of stamp papers or its reduction into writing or even at its attestation and stated he was called by a lawyer to sign and does not remember who the lawyer was, what the office was. The other witness is the brother of defendant NO.03(a) who is witness as alleged to both partnership deed. Now firstly both witnesses had given no detail except to extent that defendant no.03(a) and deceased entered partnership in their presence and to extent that they verify their signature and except this element no explanation or other material is provided by the within their evidence. In cross examination the witness namely Muhammad Ramzan cited as defendant no.3(c) has stated in cross examination that **stamp paper was purchased by deceased Muhammad Khalid yet the stamp paper is issued in name of Jameel Burni having been issued from Stamp Vendor Zafar Alam.** Thus oral version is in negation to document itself. Further this witness in cross examination has further stated that "it is correct to suggest that deceased Muhammad Khalid is into business with name of M/s M.K. builders". **However the witnesses have admitted they were not present when attestation was done.** The witness Jumma has stated that at the time of execution of partnership deed dated 09.07.2002 it was him along with other witnesses and defendant & deceased which version is also taken by the other witness. However, the witness Jumma cited that he was called upon by the lawyer to sign on the deed about whose presence there at, is neither mentioned by witness himself nor by the other witness. **The other witness Muhammad Ramzan state that deed was reduced in office of Tahir Plaza whereas the co-witness thereto is silent while the witness Ramzan who speaks of reduction of deed at Tahir Plaza otherwise is silent to presence of such person who typed the deed.** Admitted such person neither cited as witnesses in the case nor specified from any corner. Now another element is that upon application of the defendant No.03(a) the partnership deeds were sent for verification to hand writing expert who has opined that the signatures thereon are forged signatures. There is no cavil with proposition that under article 59 of the Qanun-e-Shahadat the Court can give consideration to such report and per contention of the defendant the expert has given vague report for firstly contending the signature as of deceased then in opinion divulging it as forged, which shows it being vague. Now on perusal of the report of expert it is observed that deed pertaining to year 2002 been found forged and deed pertaining to year 2010 found containing signature with similar pattern and in opinion has termed both deed as with forged signatures. Now the contention of counsel is that Court can self-verify the signatures in terms of article 84 of the Qanun-e-Shahadat. Indeed the Court has authority to make comparisons of the signatures over the admitted and denied documents pertaining to signatures or other element. On such element, it is observed that written statement was filed jointly on behalf of defendant No.03(a)(c) signed by all three defendants as appearing on written statement. The signatures are that of present Defendant No.03(a) Muhammad Asghar, Defendant No.03(c) Muhammad Arshad and defendant No.03(d) Muhammad Ramzan. Now as stated that Muhammad Ramzan being witness to such deeds been cited as witness in the case and in this regard his signatures allegedly over deed and his deposition before the Court show **that he has done**

signature in Urdu while the written statement contains signature in English, which all three signatures on loose perusal appear to be same and in one hand writing virtue the strokes and movement of alphabets. However, the report sole cannot be made basis for decision rather is a corroboratory.

Though the defendant No.03(a) Claims that **he is partner since 2002 but there is nothing to show that since 2002 how the account was operated and what income profit or loss was occasioned over the years to firm**. There is neither any document to show contract taken in such span nor any transaction for that sort. The contention of defendant that in 2010 contract was undertaken with GSK then it is observed that there is nothing on record with regard the same rather very own certificate shows that till demise of the deceased Muhammad Khalid it was about 12 years that deceased had worked with GSK. Deceased died in year 2010 and per certificate allegedly issued by GSK as produced by defendant No.03(a) deceased worked with GSK for over 12 years which **means that deceased Muhammad Khalid was working with GSK since 1998 which means prior to allege partnership with defendant**. Though the defendant contents that account contains an amount which was given by GSK but surprisingly the certificate issued by the GSK in year 2012 is silent to such effect of outstanding amount if any. Thus the defendant was required to show that he was partner with the deceased Muhammad Khalid. **He produced two deed which apart having contained forged signature as observed by Expert and even if such report of expert is kept aside, the very partnership deeds which alleged were required to be registered are not registered under the law. Rather in terms of section 69 of Partnership Act, no right to sue or counter claim or set-off can be adjudicated or brought about on basis of unregistered partnership under the law.** The very defence of the defendant No.03(a) is hit with section 69 sub section () of the Partnership Act 1932. **The witnesses as produced to show the execution of document have not been able to support the very execution rather have given versions which are contrary to documents as highlighted supra.** There is nothing to show existence of partnership firstly and above all if the account was opened up as partnership account then it would have been ought to be opened up in year 2002 when partnership incepted. **However what more is observed in total contrast to version of defendant, the plaintiff has produced a certificate as Exhibit P/08 which has not been rebutted by the contesting defendants rather affirmed the contentions and the same certificate of Bank as Exhibit-P/08 shows that the account No.010-1914-4 of deceased Muhammad Khalid maintained with UBL Korangi Industrial Area Karachi stands blocked (deceased) now if it was company account then a company is non-living entity which cannot die and despite change of directors or management the company account survives does not get blocked due to demise of company who though a juristic person but cannot die like human, so the certificate thus suffices that account was individual account which was also used for transactions in respect of M/S M.K Builders since its inception in early 1990.** Thus the burden was on defendant No.03(a) to show that he was partner with deceased, and for what been discussed above, the contradiction & omission on part of the defendant apprises that he has miserably failed to show himself being partner and to show that account No.010-19114-4 is not exclusively meant

for M/S M.K. Builders and amount there is not exclusive to MK Builders as otherwise it is self-admission of the defendant No.03 that an amount of Rs.03 Million be deducted and remaining be distributed which suffices to show that amount within account is not sole for MK Builders. The defendant having failed hence the issue No.03 is replied in negative accordingly. “

(Underlying and bold has been applied for emphasis)

9. Perusal of the above findings, *prima facie*, show that the learned trial court has attended each and every aspect including claimed admissions of respondent No.1 / plaintiff regarding existence of the status of partnership. Though the evidence of the respondent/plaintiff does not show any *categorical* admission in this regard rather she categorically stated as **“It is incorrect to suggest that Khalid and Muhammad Asghar / Defendant No.3-A were business partners. Vol. says; that he only used to look after the work.** Even otherwise, it would be relevant to add that admission of the respondent no.1 / plaintiff shall not be of much consequence because such admission was effecting rights of all the legal heirs, including *second wife* and her son, therefore, learned trial court was quite justified in demanding discharge of burden by the appellant / defendant no.3(a) wherein he failed. The learned trial court was quite justified in not appreciating the plea, attempted through cross-examination, because the same was never part of the ***pleadings***. Legally, what was not part of pleadings can't be allowed to be introduced during examination or trial rather was / is to be excluded from consideration while evaluating the evidence. Reference may be made to case of *Muhamamd Iqbal v. Mehoob Alam* (2015 SCMR 21) wherein it is affirmed as:-

“It is a settled principle of law that a fact admitted needs no proof, especially when such admission has been made in the written statement (*see PLD 1975 SC 242*), and **it is**

also settled that no litigant can be allowed to build and prove his case beyond the scope of his pleadings. ...”

10. The learned trial court also *properly* appreciated the factum of subsistence of the account much prior to claimed partnership; as well factum of operation of the account by deceased *alone*; the document (partnership deed) claimed that it should be operated jointly hence the learned trial court committed no illegality in concluding that the stances of the appellant / defendant no.3(a) was contradicted by his own pleaded facts and document (s) because it was admitted that account was *solely* operated by deceased till his death which (disputed account) after death of deceased stood blocked which, *normally*, shall not be the case if the same (disputed account) would have been of the ***‘firm.*** This aspect, too, was properly appreciated by the trial court. Not only this, but the learned trial court also *rightly* appreciated that partnership deed was not registered one hence effects of relevant provision of Act was also given due weight. The evidence (s) of the witnesses of the appellant / defendant No.3(a) regarding partnership were also appreciated properly in view of the guidelines, provided in the case of **Shabbir Hussain v. Asghar Hussain Shah** (2007 SCMR 1884) wherein it is held as:-

“According to Article 78 of the Qanun-e-Shahadat, 1984, execution of a document is to be proved to be in the handwriting or signature of thumb-mark of the alleged executant, which would mean signing or putting thumb-mark over a document as consenting party thereto. Execution of document would not only mean mere signing or putting thumb-impression but something more than mere signing or putting thumb-impression by the executant. **It must be proved that thumb-mark was made in the presence of witness in whose presence the document was written and read over and it was**

understood by the vendor and would not only be limited to merely signing a name or placing thumb impression upon a blank sheet of paper so as to prove the document to have been executed whose identification should also be proved by reliable and authentic evidence that a person who has affixed thumb mark or signature was the same person who owned the land and sold the same to the vendee. Execution would mean series of acts, which would complete the execution. Mere signing or putting thumb mark would not amount to execution in terms of Article 78 of Qanun-e-Shahadat, 1984. A document which is not proved is inadmissible in evidence, unless strict proof of it is waived. “

The relevant portion of cross-examination of the witness of the appellant/defendant no.3(a) namely Jumma Khan would make the failure of appellant/defendant no.3(a) in proving claimed document.

The relevant portion is as follows:-

“.... It was not typed in front of me but it was brought as typed. The stamp paper was not purchased in my presence. I have made the signatures in Tahir Plaza office at 1st floor. It is correct to suggest that the Deed only contains only my signatures does not mentioned my CNIC or address. Vol. says; the signatures are genuine. ... I do not know the other witness Muhammad Ramzan. I do not know Khalid prior to execution of this deed and met on the day for 10-15 minutes. I don't know where the deed got attested from and who did so. I am acquainted with one Muhammad Asghar. .. I have not myself gone through the contents of deed but I was made over the contents. .. I was called by the lawyer for signing the Deed but don't recall his name. It is correct to suggest that CNIC of the both parties to the deed is not mentioned therein. **It is correct to suggest that I don't know both parties prior to execution of the deed and have seen them at the time of making signatures thereon.** It is correct to suggest that I was called upon by lawyer to sign the Partnership Deed. **It is correct to suggest that I cannot say that the person signing the deed was deceased Muhammad Khalid or someone else..”**

No prudent mind shall believe that for execution of such material document the party shall make a passerby a witness who, even, admitted that parties were not known to him prior to execution of document for which he was called by some *unknown* advocate. Such admissions are sufficient to *safely*

conclude the failure of appellant / defendant no.3(a) in proving the document (partnership deed), so was rightly done by two courts below.

11. Further, it was the appellant / defendant No.3(a) *himself* who had sought for verification of signature from forensic expert hence he was to swallow the conclusion. If he, otherwise, aggrieved he was required to have sought examination of the expert as it was his move which resulted into report. Thus, plea of non-examination of the expert was / is also not containing much weight. I would also add that partnership was not a matter of issue as matter was revolving round estates, so left by deceased, therefore, it was to be proved by appellant / defendant no.3(a) that account was **joint** i.e of Firm but he failed to produce a single document to prove that it (account) was that of **firm** wherein he was partner; he also failed in proving that it was opened and operated **jointly** only for purpose of Firm. Such failures have properly been appreciated by the two courts below hence findings on issue no.3, being well reasoned and legal, are not open to any interference.

12. While parting, I would also add that findings of two courts below on issue no.2 (regarding divorce to respondent/ defendant No.1) also appear to be not reasoned one. For convenience the same is reproduced hereunder:-

“2. Whether deceased Muhammad Khalid in his life had divorced his second wife/defendant No.1 Mst. Sultana Kausar d/o Abdul Rehman?”

Issue No.2:

The issue No.2 as framed is with regards the defendant No.2 having been divorced by the deceased in his lifetime. The reason of this issue is the determination qua entitlement of defendant No.1 in respect her share if any being widow of deceased in respect of his assets. The issue since formulated from pleading of plaintiff **hence the burden is on plaintiff to**

show that defendant No.1 was divorced by deceased in his lifetime. The plaintiff in her evidence has produced the photocopy of the certified copy of documents pertaining to divorce as given by the deceased Muhammad Khalid in his lifetime to defendant No.1. The fact which is admitted on record that defendant No.1 Mst. Sultana Kausar preferred a SMA for assets of deceased Muhammad Khalid which was contested by the parties as in person litigation before court. It is fact which is not denied by the contesting defendant No.3(a) that documents as produced by the plaintiff before this court in respect of the divorce to defendant No.1 were produced in such earlier litigation by defendant No.3(a) himself. In cross examination the defendant No.3(a) has admitted that defendant No.1 was divorced in year 2009. The order passed upon very SMA which being an admitted fact on record and certified copy whereof available shows that such an element was indeed raised therein as well as before honourable high court of Sindh by contesting defendant No.3 (a) himself. The defendant No.1 despite being served in ordinary as well as substituted manner has not appeared and contested these documents otherwise even after decision of the MA the honourable high court of Sindh, she has not preferred any cause for her right otherwise this court is notified for same. **The document as produced in relation to stance of defendant No.1 which element is not denied by defendant No.3 (a, c and d)** which element is also surfacing from documents as on record, which document not denied from any corner and under article 87 and 88 of Qanoon-e-Shahadat being certified copy becomes an admissible piece of evidence and when there is nothing in rebuttal there remains nothing but to hold that the defendant No.1 namely Mst. Sultana Kausar was divorced by the deceased Muhammad Khalid on 07.04.2009 and divorce matured on 09.07.2009 while deceased Muhammad Khalid passed away in air plane crash on 28.07.2010 thus defendant No.1 having attained the status of a former ex-wife firstly not entitled for any relief in respect of assets of deceased Muhammad for having been divorced in his lifetime by deceased. Therefore the issue No.2 stands replied in affirmative.”

13. I am surprised that both the learned lower courts completely failed in appreciating that an ***‘affirmative’*** answer to above issue was likely to bring *monetary* benefit to respondent / plaintiff therefore her assertions *alone* were never sufficient to believe the same even in absence of the respondent / defendant No.1. *Legally*, the duty of the Courts never becomes light because of absence of a party rather the Courts continue under same obligation and duty i.e ***‘ensure proper and legal determination of controversy without being influenced from any circumstance except that of brought up evidence/material’*** which, too, must

either be admitted or established. Thus, absence of party, *normally*, should not be the sole reason to decide a ***disputed question***. Guidance is taken from the line(s), detailed in the case of ***Imran Ahmed Khan Niazi v. Mian Muhammad Nawaz Sharif*** (PLD 2017 SC 265) as:-

“19. Courts of law decide the cases on the basis of the facts admitted or established on the record. Surmises and speculations have no place in the administration of justice. Any departure from such course, however well-intentioned it may be, would be a precursor of doom and disaster for the society.”

Though, the learned lower courts rightly observed that burden to prove this issue was upon the respondent / plaintiff because she (respondent / plaintiff) was / is beneficiary of consequence of such document. Reference is made to case of ***Amjad Ikram v. Asiya Kausar*** (2015 SCMR 1) wherein it is held as:-

“It is an equally settled principle of law that it is the duty and obligation of the beneficiary of a transaction or a document to prove the same. Reference in this behalf may be made from the judgments of this Court, reported as Akhter Ali v The University of the Punjab (1979 SCMR 549), Haji Muhammad Khan and another v Islamic Republic of Pakistan and 2 others (1992 SCMR 2439) and Khan Muhammad v Muhammad Din through LRs (2010 SCMR 1351).”

however, both the learned lower courts, while answering the issue, failed in appreciating *floating* facts i.e:-

- i) it was not the ***divorce deed*** itself but a photocopy of certified copy of a ***certificate***, issued by Union Council;
- ii) it was not obtained by the respondent / plaintiff but it was produced by appellant / defendant No.3(a) in earlier litigation, hence production of photocopy thereof in *instant* litigation by respondent / plaintiff legally can't be taken as sufficient proof for such document, particularly when she (respondent/plaintiff) herself in *earlier* litigation had consented for distribution of assets

amongst all legal heirs, including respondent / defendant No.1.

- iii) the respondent / plaintiff admitted in her cross-examination that “***I don’t know whether Sultana Kauser married or divorced***”. This admission was always sufficient to *safely* conclude that respondent / plaintiff (who was to prove such fact) was *herself* nor sure of credibility and legality of such document;
- iv) Photocopy was purporting to be an official record and since original or certified copy of ***divorce deed*** was never produced on record hence proper course was to summon official record from custodian thereof;

These *floating* legal flaws were never appreciated by two court (s) below though by deciding issue No.2 both the courts were going to decide the status and entitlement of a ***widow***. ***I have to insist that such attitude is not worth appreciating. The learned lower courts also failed in appreciating that mere production of an admissible document, even, is not sufficient to take the same as proved rather contents thereof are to be proved in the manner as required by law.*** Reference is made to the case of ***Dawa Khan v. Muhammad Tayyab*** (2013 SCMR 1113) wherein it is held as:-

“The contention of the learned counsel for the respondent that under Article 81 of the Order, if a document produced is admissible in evidence, the party relying upon it is not required to prove its contents, is without force and misconceived. Admissibility of a document in evidence, by itself, will not absolve the party from proving its contents in terms of Article 79 provided under the scheme of the Order.”

Admittedly in the lifetime such plea was not taken by the deceased nor the respondent / plaintiff claimed that deceased in her lifetime had told about divorcing the respondent / defendant No.1. Not a single witness to prove such claim was examined. Nothing was produced on record except photocopy of true copy of ***certificate*** but

the basis of such certificate was not produced nor the official record, resulting in issuance of such certificate, was called / produced yet the learned lower courts answered the issue in '**affirmative**'. It needs to be added that such production alone was never sufficient to believe such **claimed fact** even in absence of the respondent / defendant No.1. Nowhere it is mentioned that at what time and in whose presence such divorce was pronounced, therefore, findings on such *issue* appears to be not in accordance with settled principles of appreciation of evidence as well no witness to such claim was examined. Besides though plaintiff merely produced that photocopy in evidence but in cross examination contended that "**I don't know whether Sultana Kauser married or divorced**". As well as in examination in chief there is not a single word by any witness regarding divorce.

14. In absence of witnesses to prove divorce the mere production of photocopy of certified copy of divorce deed was never sufficient particularly when she (respondent/defendant No.1) herself had initiated the cause of SMA while claiming herself to be **wedded wife** of the deceased rather respondent / plaintiff had consented for distribution of **Tarka** amongst all including **second wife**. These were never appreciated by the two courts below though the practice to get women away from their legitimate and lawful rights in inheritance has been a known fact rather noticed by honourable Apex Court. Hence the findings of issue No.2 are hereby reversed with rider that whenever entitlement of a lady is questioned/ involved, the Court (s) must be a *little* more conscious while attending such issue (s). Accordingly, this second appeal is dismissed with modification with regard to declaration of divorce to Mst. Sultana Kauser who was

entitled to receive the amount including her son which is admittedly not disputed by anyone. Nazir of trial court shall ensure compliance within a week after receiving this order, as legal heirs have been deprived of their inherited share since 2012 till today. At this juncture learned counsel for respondent/plaintiff contends that he has no objection if second widow receives her due share.

15. I would not hesitate that preparation of *forged* document *itself* is an offence but production thereof in Court proceedings with a view to prejudice the right and entitlement of a *rightful* person makes the act rather *grave* hence the Courts must take appropriate actions whenever such act surfaces because such actions not only result in delaying the object of timely *justice* but also encouraging such *ill* actions. In the instant matter the appellant /defendant No.3(a) produced the documents (partnership deeds) because of which he kept the *legitimate* and *rightful* persons away from their right which, even, was admitted by the appellant / defendant No.3 (a) in his cross as:-

“It is correct to suggest that the daughter, wife, son and father do fall as the legal heirs of the deceased. It is correct to suggest that as per the order of the Honourable High Court the amount is to be distributed amongst the legal heirs....”

The signature of the deceased Muhammad Khalid on such documents (Partnership deeds dated 09.07.2002 and 16.03.2010), per report of the *expert*, was not matching with routine signature. The report says as:-

“OPINION: The forensic documents examination was carried in peer review with conclusion as follow:

- ❖ The questioned signatures marked as Q-1 **not matched** with the routine signature marked as R-1, R-10 of Mr. Muhammad Khalid.

- ❖ The questioned signatures marked as Q-2, Q-3 and Q-4 **not matched** with the routine signature marked as R-1, R-10 of Mr. Muhammad Khalid.”

16. Since from the forensic report it has come on record that appellant/brother of deceased manipulated the documents and same was produced in a **judicial proceedings** hence the trial court must have issued a notice, *at least*, before closing eyes to such act. Accordingly, the Trial court shall issue notice to appellant and proceed further strictly in accordance with law.

Second appeal is dismissed.

Office shall communicate this order to the Additional District and Sessions Judge and Senior Civil Judge who authored impugned judgments. As well as M.I.T-II shall ensure compliance of paragraph No.14 of this Judgment.

J U D G E

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