IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Civil Revision No. S – 207 of 2010

(Muhammad Mian @ Raja & another vs. Mst. Noor Fatima & others)

Date of hearing: 28-02-2022
Date of decision: 28-02-2022

M/s Abdul Naeem and Faisal Naeem, Advocates for the Applicants
Mr. Sajjad Muhammad Zangejo, Advocate for Respondents 1 to 4
Mr. Zulfiqar Ali Naich, Assistant Advocate General

O R D E R

Muhammad Junaid Ghaffar, J. – Through this Civil Revision Application, the Applicants have impugned order dated 28-10-2010 passed by 3rd Additional District Judge, Sukkur in Appeal No.61 of 2010, whereby, order dated 20-04-2010 passed by 1st Senior Civil Judge, Sukkur in F.C Suit No.99 of 2002 on an Application under Order 7 Rule 11 CPC, rejecting the plaint has been set-aside and matter has been remanded to the Trial Court to proceed on merits.

2. Heard learned Counsel for the parties and perused the record.

3. It appears that Respondents 1 to 4 had filed a Suit for pre-emption, cancellation and injunction and their precise case as set-up in the plaint was to the effect that Applicant No.1 without knowledge of the said Respondents who had a right of *Shafi-e-Sharik* in the Suit property has gifted the same to the extent of his share to the remaining Applicants, whereas, it was prayed that Applicants 1 and 2 shall be directed to execute sale deed in favour of these Respondents and at the same time further prayer was sought regarding cancellation of the gift deed.

4. It is not in dispute, rather appears to be an admitted position that the right so asserted by these Respondents was under the pre-emption law; and notwithstanding the fact that the gift deed was also challenged with a prayer of cancellation; but primarily the right as asserted in Suit was only to the extent of such right, if any, being purportedly accrued to them under the pre-emption law. The learned Trial Court allowed the Application under Order 7 Rule 11 CPC by holding that the Suit was barred in terms of

para 231 (wrongly mentioned as 221 in the order) of the Muhammadan Law, which states as under;-

> "**231**:- Sale alone gives rise to pre-emption; The right of Pre-emption arises only out of a valid, complete, and bonafide sale. It does not arise out of a gift (hiba), Sadaqah, Wakf, inheritance, bequest, or a lease even though in perpetuity".

5. On the other hand, the Appellate Court has come to the conclusion that the issue of bifurcation of the property was to be decided between the co-sharers and requires evidence. To this, it may be observed that insofar as the very maintainability of the Suit is concerned, it was supposed to be tested on the touchstone of the pre-emption law as above. If a case for exception was made-out; then perhaps the Suit could have been proceeded and the averments of the said Respondents could have been proved by them. This is not the case in hand. Admittedly, as per the averments in the plaint and documents so annexed, it is a matter of record that the property was never sold by way of any sale deed; but was a gift amongst the parties. As to the valuation of the gift deed is concerned, it would suffice to observe that the same was apparently in respect of affixation of Court fee and was not a consideration by itself. Any other conclusion and acceptance of the argument of Respondents Counsel that in evidence it could have been proved that the gift was managed and was an outcome of fraud to deprive the right of pre-emption to the said Respondents, again it would suffice to hold that this would lead to an absurd an anomalous situation, besides being against the law. The right asserted was under the pre-emption law, and was admittedly not available to the said Respondents; hence, any challenge to the gift deed, which otherwise was not available to them on their own and independently; could not be continued. If this is permitted, then in all cases, a Suit would become competent until leading of the evidence, and the provision of Order 7 Rule 11 CPC would become redundant and will not be available to the Court for exercising the same in any case. Notwithstanding, the Applicants Counsel has correctly relied upon the case of ***Government of N.W.F.P***[1] of the Shariat Appellate Bench of the Hon'ble Supreme Court wherein it has been held that right of Pre-emption can only be claimed in respect of alienation of a property by way of sale or purchase; and not in cases of hiba / gift and so also inherited properties. In the present case the property has been gifted and not sold. The learned Appellate Court

[1] PLD 1986 SC 360

has failed to look into this aspect of the matter. Therefore, the finding of the learned trial Court appears to be correct in law, whereas, the Appellate Court has erred in setting-aside the same with a remand order to decide the Suit on merits.

6. Learned Counsel for Respondents had also made an attempt to raise an objection as to the very competency of the Application under Order 7 Rule 11 CPC which earlier was dismissed for Non-prosecution. As per settled law if a Suit is barred in law then the Court is required to decide the same on its own even without any Application for rejection of the plaint. Even in cases where there is no formal Application under Order VII Rule 11 CPC, the question of maintainability of Suit can be raised and examined by the Court at any stage of the proceedings. While doing so, the Court has to keep in mind the parameters as laid down in law; specially Order VII Rule 11 CPC, which provides that the Plaint **shall** be rejected where it does not disclose a cause of action, or where the relief claimed is under-valued or where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped and finally *where the Suit appears from the statement of the plaint to be barred by any law*. It is a settled proposition of law that the Court is duty bound to see that whether the Suit which has been filed before it, is barred by any law or not. If a specific objection is taken through an application under Order VII Rule 11 CPC, or otherwise, the Court is bound to examine the plaint and reject it forthwith, if it appears from the statement made therein, to be barred by any law. The Court is duty bound by the use of the mandatory word “Shall” under Order VII Rule 11 CPC, to reject the plaint if it “appears” from the statement in the plaint to be barred by any law. The Court while examining the averments in the plaint is not obligated to accept as correct, any manifestly self-contradictory or wholly absurd statement of the plaintiff. The Hon’ble Supreme Court in the case of ***Haji Abdul Karim Versus Messers Florida Builders (Pvt) Limited (PLD 2012 SC 247)***, has upheld the order of rejection of plaint under Order VII Rule 11 CPC passed by the Trial Court in a case of specific performance of an agreement and has laid down certain guidelines to be followed while examining the contents of plaint and its rejection under Order VII Rule 11 CPC and has held as under:

> 9. We have already noticed that the court is bound by the use of the mandatory word “shall” to reject a plaint if it “appears” from the statements in the plaint to be barred by any law.

What is the significance of the word "appears"? It may be noted that the legislative draftsman has gone out of his way not to use the more common phraseology. For example, in the normal course, one would have expected that the language used would have been "where it is established from the statements in the plaint that the suit is barred by any law" or, alternatively, "where it is proved form the statement in the plaint that the suit is barred by any law". Neither of these alternatives was selected by the legislative draftsman and it must be assumed that this was a deliberate and conscious decision. An important inference can therefore be drawn from the fact that the word used is "appears". This word, of course, imports a certain degree of uncertainty and judicial discretion in contradistinction to the more precise words "proved" or "established". In other words the legislative intent seems to have been that if prima facie the court considered that it "appears" from the statements in the plaint that the suit was barred then it should be terminated forthwith. This great advantage of this would be twofold".

12. After considering the ratio decidendi in the above cases, and bearing in mind the importance of Order VII, Rule 11, we think it may be helpful to formulate the guidelines for the interpretation thereof so as to facilitate the task of courts in construing the same.

Firstly, there can be little doubt that primacy, (but not necessarily exclusivity) is to be given to the contents of the plaint. However, this does not mean that the court is obligated to accept each and every averment contained therein as being true. Indeed, the language of Order VII, Rule 11 contains no such provision that the plaint must be deemed to contain the whole truth and nothing but the truth. On the contrary, it leaves the power of the court, which is inherent in every court of justice and equity to decide whether or not a suit is barred by any law for the time being in force completely intact. The only requirement is that the court must examine the statements in the plaint prior to taking a decision.

Secondly, it is also equally clear, by necessary inference that the contents of the written statement are not to be examined and put in juxtaposition with the plaint in order to determine whether the averments of the plaint are correct or incorrect. In other words, the court is not to decide whether the plaint is right or the written statement is right. That is an exercise which can only be carried out if a suit is to proceed in the normal course and after the recording of evidence. In Order VII, Rule 11 cases the question is not the credibility of the plaintiff versus the defendant. It is something completely different, namely, does the plaint appear to be barred by law.

Thirdly, and it is important to stress this point, in carrying out an analysis of the averments contained in the plaint the court is not denuded of its normal judicial power. It is not obligated to accept as correct any manifestly self-contradictory or wholly absurd statements. The court has been given wide powers under the relevant provisions of the Qanun-e-Shahadat. It has a judicial discretion and it is also entitled to make the presumptions set out, for example in Article 129 which enable it to presume the existence of certain facts. It follows from the above, therefore, that if an averment contained in the plaint is to be rejected, perhaps on the basis of the documents appended to the plaint, or the admitted documents, or the position which is beyond any doubt, this exercise has to be carried out not on the basis of the denials contained in the written statement which are not relevant, but in exercise of the judicial power of appraisal of the plaint. ***(Emphasis added)***

7. In view of hereinabove facts and circumstances of this case, it appears that the Appellate Court was misdirected in allowing the Appeal through impugned judgment dated 28-10-2010; hence by means of a short order this Civil Revision Application was allowed by setting aside the said judgment in the earlier part of the day and these are the reasons thereof.

Judge

ARBROHI