

Order Sheet
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

IInd Appeal No.110 of 2023

DATE

ORDER WITH SIGNATURE OF JUDGE

1. For orders on office objection
2. For orders on CMA 3495/2023
3. For orders on CMA 3496/2023
4. For hearing of main case

19.12.2023

Mr. Rashid Raees advocate for appellants.

Briefly stated, F.C. Suit 79 of 2009 was filed before 1st Senior Civil Judge Hyderabad and the same was decided vide Judgment dated 21.05.2014. Civil Appeal 56 of 2014 was then filed and the same was allowed vide Judgment dated 11.04.2016. Per learned counsel, the aforementioned judgment was not assailed by the present appellants, hence, appears to have attained finality.

Subsequently, the appellants claim to be aggrieved by order dated 17.04.2023 passed in Execution Application 92 of 2016 by the 1st Senior Civil Judge Hyderabad. Content whereof is reproduced herein below:

“By this order I intend to dispose of an application under section 47 CPC filed by advocate for applicant/defendant/J.D. He was directed to argue the point of maintainability on instant application.

Heard and perused the material available on record. Perusal of record reflects that J.D/defendant has filed instant application on the ground that Appellate Court decreed the suit without calling the record but the order / judgment of appellate court cannot be question before the trial court. J.D/defendant availed proper remedy by challenging the order before Honourable High Court of Sindh Circuit Court Hyderabad through R.A No.204 of 2016 but Judgment of Honourable Appellate Court is still in the field therefore, instant application is misconceived hence, is dismissed in limine.”

Upon dismissal of the said application, Civil Appeal 7 of 2023 was filed before 9th Additional District Judge Hyderabad and the same was dismissed vide order dated 08.09.2023, content whereof is reproduced herein below:

“1. This order will dispose of above noted Civil Appeal whereby the appellants have impugned the order dated 17-04-2023 passed by the learned 1st Senior Civil Judge, Hyderabad on application under section 47 read with section 151 CPC and same was dismissed by the learned lower court.

2. The Learned Counsel for applicant argued that the learned trial court rightly dismissed the suit of the respondents/plaintiff/D.H. while the Honourable 9th Additional District & Session Judge Hyderabad/Appellate Court did not call any record from any government department and decree the suit of the respondents/plaintiff/D.H, while proper plot or property neither came in the knowledge of the respondents/plaintiff/D.H. nor in the knowledge of the Learned Trial Court. The impugned order dated

17-04-2023 passed by the learned trial court is based on presumptions, suppositions which have not basis in the eyes of law. The learned trial court has acted in material irregularities while passing the impugned order dated 17-04-2023, hence the same is not sustainable under the law, he prayed for civil appeal may be allowed.

3. On the other hand, learned counsel for respondents/plaintiff argued that order impugned is lawful and legal, therefore, the appeal may be dismissed.

4. Heard learned counsel for applicant, learned counsel for respondents and perused the material made available on record.

5. From perusal of the record, it appears that the matter had been already decided by the appellate court, it is necessary to be noted that the learned executing court while exercising its jurisdiction, cannot travel beyond the scope of the decree or re-determine the liabilities of the parties though appellants/J.D/defendants had already availed remedy by challenging the order of the appellate court before the Honorable High Court of Sindh. I am of the view that at this stage if instant application is allowed then the nature of this suit will be become change. No illegality or irregularity is pointed out which may call for interference of this court. Therefore, instant appeal fails and same is dismissed. Let true copy of this order be sent to the trial court for information.”

Learned counsel submits that the orders / judgments passed in the underlying suit / appeal were discrepant, hence, merited interference in execution proceedings. The said contention did not find favour before the trial court or the appellate court, hence, the present appeal.

Heard and perused. The learned counsel was confronted with the narrative contained in the impugned orders, as particularized supra, and asked as to whether it was commensurate with the facts; he replied in the affirmative. Learned counsel was then asked to demonstrate any infirmity in the appellate order meriting interference under Section 100 of the Code of Civil Procedure, however, he remained unable to do so.

It is settled law that an executing court does not travel beyond the decree, which in any event is stated to have never been challenged, hence, attained finality. Under such circumstances no case has been made out to warrant any interference in the order impugned; upon the grounds articulated.

It is settled law that a second appeal may only lie if a decision is demonstrated to be contrary to the law; a decision having been failed to determine some material issues; and / or a substantial error in the procedure is pointed out. It is categorically observed that none of the aforesaid ingredients have been identified by the learned counsel. In such regard it is also important to advert to section 101 of CPC, which provides that no appeal shall lie except on the grounds mentioned in the Section 100 of CPC. While this Court is cognizant of Order 41 Rule 31 CPC, yet at this stage no case has been set forthwith to entertain the present appeal in view of the reasoning stated above. As a consequence hereof, in *mutatis mutandis* application of Order XLI Rule 11 C.P.C, this appeal is hereby dismissed *in limine*. The office is instructed to convey a copy hereof to the executing court.

Judge