

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Constitution Petition No. D- 1420 of 2021

(Mst. Shabana & others v. Akhtar Hussain & others)

DATE OF HEARING	ORDER WITH SIGNATURE OF JUDGE
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1. *For orders on O/objection at flag-A.*
2. *For hearing of CMA No.7286 /2023*
3. *For hearing of main case.*

Mr. Adnan-ul Karim Memon, J:
Mr. Mohammad Abdur Rahman, J:

Dated of hearing. **14 May 2023**
Date of Order. **30 May 2023**

Mr. Abdul Ahad Buriro, Advocate for Petitioners.
Mr. Alam Sher Bozdar, Advocate for Respondents.
Mr. Ghulam Abbas Kubar, AAG.

O R D E R

MOHAMMAD ABDUR RAHMAN, J. Through this Petition, maintained under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the Petitioners have impugned an order dated 26 August 2021 passed by the IInd Additional District Judge II Sukkur in Civil Revision Application No. 6 of 2020 emanating from an order dated 11 November 2019 that had dismissed an application under Order IX Rule 13 of the Code of Civil Procedure, 1908 which had been maintained by the Petitioners in F.C. Suit No. 219 of 2013 before the 1st Senior Civil Judge Sukkur seeking to set aside an Exparte Judgment and Decree dated 25 August 2014 passed in that Suit.

2. The Petitioner No. 1 was married to the Respondent No. 1. He contends that before their marriage had been solemnized, he had entered into an Agreement with the brothers of the Petitioner No. i.e. the Petitioners No. 2 and the Petitioner No. 3 in the following terms:

(i) *That the Respondent No. 1 would purchase one plot at Sukkur in the name of his then fiancé the Petitioner No. 1 and which would be registered in her name;*

(ii) *That the Respondent No. 1 would purchase ten tolas of gold ornaments for the Petitioner No. 1 and which would be worn by her at the time of her marriage;*

(iii) *That the Petitioner No. 1 would be solely responsible to finance the construction of a structure on the property purchased by the Respondent No. 1 in her name;*

(iv) *That if the Respondent No. 1 would separate from the Petitioner No. 1, he would forgo any right, title or interest that he*

had in the immovable property and in the ten tolas of gold ornaments;

(v) That if the Petitioner No. 1 sought to be separated from the Respondent No. 1 then she would forgo any right, title or interest that he had in the immovable property and in the ten tolas of gold ornaments;

(vi) That whoever breached this Agreement would be entitled to a penalty of Rs.100,000

3. The Respondent No. 1 contends that he honoured his obligation and caused to be registered a Sub-Lease of the immovable property in the name of the Petitioner No. 1. The Petitioner No. 1 thereafter filed a lis before the Family Judge Kahirpur bearing Family Suit No. 83 of 2013 seeking the dissolution of her marriage from the Respondent No. 1 and during the pendency of which the Respondent No. 1 contends that as the Petitioner No. 1 was attempting to sell the immovable property, he maintained F.C. Suit No. 219 of 2013 before the 1st Senior Civil Judge, Sukkur. While notices were affected both through the bailiff and through substituted service, as no one entered appearance on behalf of the Petitioners, they were declared exparte. The Respondent No.1 and his witnesses caused themselves to depose before the 1st Senior Civil Judge, Sukkur and which Suit was decreed exparte on 25 August 2014 in favour of the respondent No.1.

4. The Petitioners contend that when they came to know of the Judgment and Decree dated 25 August 2014 passed in F.C. Suit No. 219 of 2013, they maintained an Application under Order IX Rule 13 of the Code of Civil Procedure, 1908 seeking to set aside both the Judgment and Decree on the grounds that:

(i) they never received the summons issued by the Court in F.C. Suit No. 219 of 2013;

(ii) no one in their family ever refused to receive the summons issued by the Court in F.C. Suit No. 219 of 2013;

(iii) that as notice had not been affected or rejected, no question of substituted service could have been ordered by the Court in F.C. Suit No. 219 of 2013;

(iv) that there was no report of a bailiff available on the file to indicate as to whether service had been affected on the Petitioners in F.C. Suit No. 219 of 2013;

(v) that the pendency of F.C. Suit No. 219 of 2013 was not brought to their attention in Family Suit No. 83 of 2013 before the Family Judge Khairpur;

(vi) that the Petitioners are “urdu speaking” and hence service of a notice through newspaper published in Sindhi could not be considered as proper service;

(vii) that there was multiple litigation that was pending as between the Petitioner No. 1 and the Respondent No. 1 and despite of which no mention of F.C. Suit No. 219 of 2013 was made by the Respondent No. 1 in any of those litigations;

(viii) that the Petitioner No. 1 had purchased the immovable property from her own resources and the purported agreement that had been shown by the Respondent No. 1 was a forged document and the signature of the Petitioner No. 2 and the Petitioner No. 3 that exist on that document are also forged; and

(ix) That the Petitioner No. 1 was never party to the Agreement and hence it was not enforceable as against her.

5. The Application under Order IX Rule 13 maintained by the Petitioners in F.C. Suit No. 219 of 2013 by was considered by the 1st Senior Civil Judge Sukkur and who on 11 November 2019 dismissed that Application holding that the Application was barred under Article 164 of the First Schedule read with Section 3 of the Limitation Act, 1908 taking the date from which time would commence as being the date of the purported refusal of the notice or from the date of the publication of a notice in the newspaper affecting substituted service.

6. The Petitioners thereafter maintained Civil Revision Application No. 6 of 2020 before the IInd Additional District Judge Sukkur seeking to revise the order dated 11 November 2019 passed by the 1st Senior Civil Judge Sukkur on the application maintained by the Petitioners under Order IX Rule 13 of the Code of Civil Procedure, 1908 in F.C. Suit No. 219 of 2013. Civil Revision Application No. 6 of 2020 was dismissed by the IInd Additional District Judge Sukkur holding that service had properly been effected on the Petitioners in F.C. Suit No. 219 of 2013 and that the Application under Order IX Rule 13 of the Code of Civil Procedure, 1908 was barred under Article 164 of the First Schedule read with Section 3 of the Limitation Act, 1908.

7. Mr. Abdul Ahad Burrio, Advocate entered appearance on behalf of the Petitioners and contended that the order dated 26 August 2021 passed by the IInd Additional District Judge Sukkur could not be sustained. He maintained the application under Order IX Rule 13 of the Code of Civil Procedure, 1908 was clearly maintainable and could not have been dismissed on the sole ground of limitation as it was incumbent on the court to take into account the obvious fraud that had been perpetuated as against the Petitioners. He said the facts and circumstances of this Petition warranted the setting aside both of the order dated

26 August 2021 passed by the IInd Additional District Judge II Sukkur in Civil Revision Application No. 6 of 2020 and the order dated 11 November 2019 passed by the 1st Senior Civil Judge Sukkur on the application under Order IX Rule 13 of the Code of Civil Procedure, 1908 maintained by the Petitioners in F.C. Suit No. 219 of 2013. He did not rely on any citations in support of his contentions.

8. Mr. Alam Khan Bozdar entered appearance on behalf of the Respondent No. 1 and contended that the Petitioner had assailed concurrent orders that had been passed by the IInd Additional District Judge Sukkur in Civil Revision Application No. 6 of 2020 and the order passed by the 1st Senior Civil Judge Sukkur on the application under Order IX Rule 13 of the Code of Civil Procedure, 1908 maintained by the Petitioners in F.C. Suit No. 219 of 2013. He contended that the Applicants had been duly served and as having maintained the application well after the time period prescribed in Article 164 of the First Schedule of the Limitation Act, 1908, the Application under Order IX Rule 13 of the Code of Civil Procedure, 1908 was clearly not maintainable and had correctly been dismissed.

9. We have heard both Mr. Abdul Ahad Burrio and Mr. Alam Khan Bozdar and have perused the record.

10. The dispute as between the Applicant No. 1 and the Respondent No. 1 is not one that is new to this Court. During the pendency of a marriage, a husband and wife arrange the financial affairs on the basis of trust in one another and once the marriage and the trust fails it is left to this Court to unravel each of those financial affairs in litigation before the Courts. F.C. Suit No. 219 of 2013 that had been instated by the Respondent No. 1 before the 1st Senior Civil Judge Sukkur is necessarily one such litigation and needs to be considered in such a light. It has come on record that after the end of their marriage, there was litigation as between the Applicant No. 1 and the Respondent No. 1 regarding their financial affairs. The fact that this litigation was not disclosed, while not mandatorily required under any law, is of some concern to this Court.

11. The Supreme Court of Pakistan in the decision reported as **Mst. Banori vs. Jillani through Legal Heirs and others** has clarified the jurisdiction of a Revisional Court exercising powers under Section 115 of the Code of Civil Procedure, 1908 and has held that:

- “ ... A perusal of the said provisions would reveal as under:
- (a) that the jurisdiction conferred by section 115, C.P.C. is essentially a supervisory jurisdiction of superintendence and control meant to ensure correction of illegalities and irregularities found in the decisions of the courts subordinate to the revisional court;
 - (b) that in the discharge of its said obligation, the revisional court had not been placed at the mercy of the parties to a lis or of some other person and was required to act even *suomotu*;
 - (c) that no law prescribed any limit of time for such a court within which such an error could be rectified;
 - (d) that there was, however, no bar on any person, laying, through an application any information before the revisional court about any such error, illegality or irregularity in any of the decisions of the subordinate courts and seeking correction thereof;
 - (e) that a person making such an application had, however, been bound to do so within ninety days of the decision sought to be revised;
 - (f) that such a person was required to furnish, along with the said application, copies of the pleadings and other documents and of course a copy of the order being questioned;
 - (g) that the subordinate court making the decision which is sought to be revised, was bound to supply a copy thereof within three days of the making of the same;
 - (h) that the revisional court was then required to dispose such an application within six months and that also, except in exceptional cases, without calling for the record.”

It is therefore clear that the jurisdiction of the IInd Additional District Judge Sukkur while deciding Civil Revision Application No. 6 of 2020 was to “ensure correction of illegalities and irregularities.” A bare perusal of the Application under Order IX Rule 13 read with Section 151 of the Code of Civil Procedure, 1908 indicates that aside from grounds germane to an application under Order IX Rule 13 of the Code of Civil Procedure, 1908 grounds of fraud and misrepresentation had also been specifically taken therein and which would, in our opinion, been better presented in an application under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908. That was, however, not done by the Applicants.

12. Be that as it may, a Court while keeping in mind that the issues pending in the Suit and which clearly are in dispute as between a husband and wife at the time of the termination of the marriage, would have been better off exercising its inherent jurisdiction and treating the Application maintained by the Applicants under Order IX Rule 13 of the Code of the Civil Procedure, 1908 as an Application under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 rather being hidebound by the technicalities of the title of the Application.

We have perused the application and have no doubt that various allegations of fraud have been taken therein and which include:

- (i) *that the petitioners never received the summons issued by the Court in F.C. Suit No. 219 of 2013;*
- (ii) *no one in the petitioners family ever refused to receive the summons issued by the Court in F.C. Suit No. 219 of 2013;*
- (iii) *that as notice had not been affected or rejected by the petitioners, no question of substituted service could have been ordered by the Court in F.C. Suit No. 219 of 2013;*
- (iv) *that there was no report of a bailiff available on the file to indicate as to whether service had been affected on the Petitioners in F.C. Suit No. 219 of 2013;*
- (v) *that the Petitioner No.1 had purchased the immovable property from her own resources and the purported agreement that had been shown by the Respondent No.1 was a forged document and the signature of the Petitioner No.2 and the Petitioner No. 3 that exist on that document are also forged; and*
- vi) *That the Petitioner No. 1 was never party to the Agreement and hence it was not enforceable as against her.*

13. In the circumstances and while keeping in mind the limited jurisdiction of this Court, we are of the opinion that the IInd Additional District Judge Sukkur in Civil Revision Application No. 6 of 2020 while exercising his jurisdiction under Section 115 of the Code of Civil Procedure, 1908 should have examined the Application under Order IX Rule 13 of the Code of Civil Procedure, 1909 and having seen the clear allegations of fraud mentioned therein should have set-aside the order dated 11 November 2019 that had been passed by the 1st Senior Civil Judge Sukkur dismissing the application under Order IX Rule 13 of the Code of Civil Procedure, 1908 and should have remanded the matter directing that it be treated as an application under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908. Such an error is to our mind subject to our jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 as an incorrect exercise of jurisdiction had taken place and which can be rectified in these proceedings. This Petition must therefore be allowed.

14. For the foregoing reasons, we are inclined to allow this Petition and set aside both the order dated 26 August 2021 passed by the IInd Additional District Judge Sukkur in Civil Revision Application No. 6 of 2020 and the order dated 11 November 2019 that had been passed by the 1st Senior Civil Judge Sukkur in C. Suit No. 219 of 2013 dismissing an application under Order IX Rule 13 of the Code of Civil Procedure, 1908 that had been maintained by the Petitioners in

F.C. Suit No. 219 of 2013 seeking to set aside an Exparte Judgment and Decree 25 August 2014 passed in that Suit and further direct that:

- (i) *the application under IX Rule 13 of the Code of Civil Procedure 1908 should be treated as an application under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 and decide be decided after recording evidence within a period of three months;*
- (ii) *the Respondent No. 1 to proper exercise its right to reply, may file a fresh counter affidavit to the contentions raised in that application treating the application as one under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908; and*
- (iii) *the Applicants are at liberty to file their rejoinder to the Counter Affidavit if their deem Appropriate.*

The Petition is therefore allowed and is disposed of, along with all listed applications in the above terms with no order as to costs.

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*M. Ali/steno**