Judgment Sheet

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Rev. Application No.S-105 of 2023

Applicants	:	Imtiaz Ahmed and others,
	:	through Mr. Zulfiqar Ali Arain, Advocate
Respondent No.1-a to 1-j & 7(a) to7(g)	:	Abdul Raheem (deceased) through LRs through Mr. Ch. Shahid Hussain Rajput, Advocate
Respondents No.2 to 6 & 9:		Mukhtiarkar (Revenue) Khangarh and others through Mr. Ahmed Ali Shahani, AAG
Date of hearing	:	18.12.2023
Date of Decision :	:	12.02.2024

J U D G M E N T

ARBAB ALI HAKRO, J: Through this Revision Application under Section 115, the Civil Procedure Code 1908 ("the Code"), the applicants/defendants have called into question the Judgment and Decree dated 12.4.2023, passed by the Court of Additional District Judge-I, Mirpur Mathelo ("the appellate Court") whereby, an appeal preferred by the respondent No.1/Plaintiffs was allowed, consequently the order dated 27.01.2022, passed in F.C. Suit No.79/2021 by Senior Civil Judge, Ghotki ("the trial Court") rejecting the plaint under Order VII Rule 11 of the Code was set-aside and case was remanded to trial Court for decision on merits after framing issues and recording evidence.

2. The facts, in short, are as follows: The legal representatives (LRs) of respondent No.1 filed a suit for Declaration and Permanent Injunction against the applicants. The applicants/defendants are the children/legal representatives of their aunt (who is also the sister of their father), namely Mst. Zulekhan. The suit pertains to agricultural

land bearing Survey Nos. 226 (2-00 acres), 227 (4-00 acres), Block Nos. 127/1,2 (8-00 acres), 128/1 to 4 (16-00 acres) to the extent of 50 Paisa, B. No.129/1(4-00 acres), 129/2 (1-03 acres), 129/3 (2-20 acres), and 129/4 (4-00 acres). This land is situated in Deh and Tapo Qazi Badal, Taluka Khanghar District Ghotki (**"suit land"**). The suit was filed with the following prayers:

a) To declare that the plaintiffs and legal heirs of defendant No.11 are owners of an agriculture land bearing S. No.226 (2-00 acres), 227 (4-00 acres), Block Nos. 127/1,2 (8-00 acres), 128/1 to 4 (16-00 acres) to the extent of 50 Paisa, B. No.129/1(4-00 acres), 129/2 (1-03 acres), 129/3 (2-20 acres), and 129/4 (4-00 acres) situated in Deh, Tapo Qazi Badal, Taluka Khanghar, District Ghotki, while defendant No.1 to 5 have not got any concern with the same property in any manner whatsoever.

b) To declare that the order dated 29.3.2019, passed by Assistant Commissioner Khangarh @ Khanpur Mahar (defendant No.7), order dated 28.10.2019, passed by Additional Commissioner-II Sukkur Division Sukkur (defendant No.9) and order dated 26.3.2021, passed by Member Board of Revenue Sindh, Hyderabad are illegal, unlawful and malafide, hence liable to be adjudged as such and set-aside and order dated 16.5.2019, of Additional Deputy Commissioner-I Ghotki at Mirpur Mathelo is proper and maintainable.

c) To grant Permanent injunction, restraining the defendant No.1 to 5 from selling, dispossessing, mortgaging or alienating the suit land to person other then the plaintiffs unless through due process of law.

d) Costs.

e) Relief.

3. Upon receiving the summons, the applicants filed an application under Order VII Rule 11 of the Code. They stated, among other things, that the suit is not maintainable and is barred under the provisions of the Muslim Family Laws Ordinance, 1961 ("**the Ordinance, 1961**"). That the suit is incompetent and should be dismissed at its inception. The respondents/plaintiffs contested this application by filing their Counter Affidavit/Objections. After hearing both the learned counsel for the parties, the trial Court rejected the plaint vide an order dated 27.01.2022. Aggrieved by this order, the respondents/plaintiffs appealed to the appellate court. However, the

appeal was allowed vide impugned judgment and decree dated 12.4.2023. The applicants are now challenging the appellate court's findings through this instant revision application.

4. Learned Counsel for the Applicants, at the outset, contended that learned Appellate Court has seriously erred by passing impugned judgment and decree without considering material irregularities and has decided the matter in a hypothetical manner; that there is serious misreading and non-reading of evidence available on record; that the claim of the applicants rests on Section 4 of Ordinance, 1961, which provides that heir of pre-deceased children are entitled to inherent that their parents would be inherent during their lifetime; that the learned trial Court rightly rejected the plaint under Order 7 Rule 11 on the ground that relief sought in the suit cannot be granted. In the end, learned Counsel for the Applicants has prayed that instant revision application may be allowed by setting aside impugned judgment and decree passed by learned Appellate Court. In support of his contention, learned Counsel has placed reliance upon the case laws reported as 2005 CLC 1160, 2007 CLC 1787, 2021 SCMR 772, 2007 SCMR 741, 2021 SCMR 179.

5. Learned Counsel for the Respondents submits that learned Appellate Court has rightly allowed the appeal filed by the Respondents by remanding the matter to decide it on merits; that there is no gross irregularity or illegality committed by learned Appellate Court; that father of Respondents had already provided to Mst. Zulekhan, the mother of Applicants, had due share during his lifetime in the form of gold, cattle and cash; hence, she is not entitled to claim further share in the suit land. That the learned trial Court, without going through the facts straightway, rejected the plaint under Order 7 Rule 11 is illegal and unlawful; that the scope of Section 115 CPC is very narrow and limited; that the learned Appellate Court has rightly reappraised the fact and evidence on record. Lastly, he prayed for dismissal of instant revision application.

6. Learned A.A.G, while adopting the arguments advanced by learned Counsel for the Applicants, submits that the learned trial Court has rightly rejected the suit under Order 7 Rule 11 CPC; however, the Appellate Court has committed serious illegalities and irregularities by remanding back the case to the trial Court for its re-decision.

7. The contentions have been fastidiously scrutinised, and the accessible record has been carefully assessed.

8. To determine whether a thorough and comprehensive administration of justice was achieved, it is essential to analyse the findings documented by the lower courts.

9. Upon reviewing the contents of the plaint, it becomes evident that the primary relief sought by the respondents/plaintiffs is that the applicants/defendants are the children of Mst.Zulekhan (a predeceased daughter of Muhammad Siddique Mahar) are not entitled to inherit share from the suit land. This is based on the ground that the deceased Muhammad Siddique had already provided her due share during his lifetime in the form of gold, cattle, and cash.Her claim rests on Section 4 of the Ordinance, 1961, reproduced hereunder:

> *"Succession. - (1) In the event of the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive."*

10. The bare reading of Section 4 of the Ordinance, 1961 was enacted to address the needs of grandchildren and alleviate their hardships. However, this provision should not be interpreted in a way that affects the shares of other descendants in the property, as per the law of Shariah. This was clarified by the Supreme Court of Pakistan in the case of Zainab vs. Kamal Khan (PLD 1990 SC 1051), wherein the case revolved around the interpretation of Section 4 of the Ordinance, 1961. The Supreme Court of Pakistan held that in accordance with the law of Shariah, the heirs of predeceased children are entitled to

inherit what their parents would have inherited during their lifetime upon the opening of succession. This ruling resolved the controversy surrounding the provision and provided clarity on the inheritance rights of the heirs of predeceased children.

11. As to the question that Section 4 of the Ordinance, 1961 is no longer in the field, it is currently under dispute. The Federal Shariat Court had previously struck down Section 4 of the Ordinance, 1961, in the case of Allah Rakha. However, this decision was challenged in an appeal filed under Article 203F of the Constitution before the Shariat Appellate Bench of the Supreme Court of Pakistan and leave was granted.As the appeal is still pending adjudication, the decision of the Federal Shariat Court has not come into effect. This is due to the second part of the proviso to clause (2) of Article 203(D) of the Constitution, which stipulates that no such decision shall be deemed to take effect before the expiration of the period within which an appeal may be preferred to the Supreme Court or, where an appeal has been preferred, before the disposal of such appeal.As per provisions of Section 4, of the Muslim Family Laws Ordinance, 1961, the predeceased son or daughter shall be entitled to get share which their father would have inherited, had he been alive. The verdict of the Federal Shariat Court has been challenged before the Supreme Court of Pakistan and operation of the verdict stands suspended automatically till the disposal of appeal as provided under Article 203D, of the Constitution of Islamic Republic of Pakistan. In similar circumstances in Case of Mst. Fazeelat Jan and others v. Sikandar through his Legal Heirs and others(PLD 2003 Supreme Court 475), it has been held by the Supreme Court of Pakistan as under:-

> *"No doubt, the theory of Mahjub-ul-Irs has been revived by the Federal Shariat Court and section 4 of Muslim Family Laws Ordinance has been declared as repugnant to the Islamic Sharia yet such verdict has been challenged before the Supreme Court of Pakistan and thereby the operation of the verdict stands suspended automatically till the disposal of the appeal as provided under Article 203D of the Constitution of the Islamic Republic of Pakistan, 1973. The grandson,*

> *therefore can inherit the share of his predeceased father from his grandfather".*
>
> The underlining is supplied.

12. The respondents/plaintiffs have taken a plea in the plaint that deceased Muhammad Siddique had, during his lifetime, already given the due share of his assets to Mst. Zulekhan, the mother of the applicants. This share is given in the form of gold, cattle, and cash; therefore, she is not entitled to claim a further share in the suit land. For the first time, they produced a Bequeath/Will in this court to support their claim. However, this document was not previously produced before either the trial court or the appellate court. According to its contents, Muhammad Siddique had given Mst. Zulekhan a share consisting of ½ K.G Silver, 03-Tola Gold, one buffalo, four goats, and cash amounting to Rs.45,000/-. It also states that she will not claim furthershare from brothers in other properties. Before discussing the validity of the alleged Will, it may be prudent to define it. Wills are defined under Section 2(h) of the Succession Act of 1925. The definition is reproduced below for reference: -

> *"Will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death."*

13. A will is indeed a formal document drawn up by an individual expressing their wishes regarding the distribution of their estate after their death. As such, wills are considered testamentary instruments, coming into effect posthumously. However, if a will is executed and acted upon during the lifetime of the testator, it ceases to be a will and instead becomes an inter-vivo instrument. This could take the form of a gift, which has its own unique requirements and standards of proof. In the case, the plaintiffs have not claimed that the instrument in question was a gift deed. The contents of the plaint and the alleged Will indicate that it was executed and acted upon during the lifetime of the deceased, Muhammad Siddique. This fact alone calls into question the validity of the Will, particularly in light of Section 2(h) of the Succession Act, 1925. Section 2, of the West

Pakistan Muslim Personal Law (*Shariat*) Act, 1962 refers to the application of the Muslim Personal Law, which provides:

> *"Notwithstanding any custom or usage, in all questions regarding succession (whether testate or intestate), special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts, religious usages or institutions, including waqfs, trusts and trust properties, the rule of decision, subject to the provisions of any enactment for the time being in force, shall be the Muslim Personal Law (Shariat) in case where the parties are Muslims".*

The word "succession" in section 2 of the *Shariat* Act of 1962 includes wills and that, consequently, so far as wills go, there has been a change in law in 1962, inasmuch as they are now governed by Muslim Law and not by custom. According to Muslim Law, the testator could not have made a will in favour of any legal heir, except with the consent of other heirs. As per principles of Mulla's Mahomedan Law, it is stated that it is not requisite to the validity of a bequest that the thing bequeathed should be in existence it the time of making the will; it is sufficient if it exists at the time of the testator's death. The reason is that a will takes effect from the moment of the testator's death, and not earlier. There is consequently no question of its becoming final before the testator's death. The sight cannot be lost of the fact that the legatee might die before the death of the testator, in which case the subject-matter of the will would revert to the testator and should, in the ordinary course, be inherited by the legal heirs. Further, it should be noted here that a bequest can be revoked either expressly or by implication as per principles of Mulla's Mahomedan Law, wherein it is stated that a bequest may be revoked by an extinction of the proprietary right of the testator. A bequest to a person can also be revoked by a bequest in a subsequent will of the same property to another. In Case of Abdur Razzaq and 8 others v. Shah Jehan and 5 others (1995 SCMR 1489), it was held by the Supreme Court that:

> *"A will, on the, other hand, takes effect after the death of the testator. It is also settled law that a Will made in favour of an*

heir is not valid unless consented to by other heirs of the deceased testator".

14. To determine if the Will, in this case, adheres to Sharia law, it's essential to examine Sections 117 and 118 of Mullah's Mohammadan Law, which are presented as follows:

> *"**117.**A bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator. Any single heir may consent so as to bind his own share.*
> ***Explanation** - In determining whether a person is or is not an heir, regard is to be had, not to the time of the execution of the Will, but to the time of the testator's death.*
> ***118**. A Mahomedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator."*

15. In view of the above-given circumstances, I, therefore, find that the alleged so-called"Will" drawnup by the deceased Muhammad Siddique is contrary to the principles of Sharia and is null and void. Thus, the trial Court lawfully rejected the plaint in the suit as prayer made in the plaint is against the provision of Section 4 of the Ordinance, 1961. The appellate court has illegally set aside the order of trial Court by remanding the case to the trial for decision on merits after recording evidence of parties. In legal terms, the "prayer of the plaint" refers to the relief sought by the plaintiff in a lawsuit. If the prayer of the plaint is not maintainable, it means that the relief sought cannot be granted under the law. In such cases, the suit should indeed be dismissed at its inception, also known as "*in limine*".

16. This principle is encapsulated in Order VII Rule 11 of the Code, which provides for the rejection of plaints under certain conditions. The underlying object of this rule is to prevent unnecessary protraction of proceedings when a plaint does not disclose a cause of action or is barred by any law.The court has to determine whether the plaint discloses a cause of action by scrutinising the averments in the plaint, read in conjunction with the documents relied upon. If no reliefs sought in the plaint can be granted, such a suit should be thrown out at the threshold.However, the power conferred on the

court to terminate a civil action is drastic, and the conditions enumerated under Order VII Rule 11 of C.P.C. must be strictly adhered to. If clever drafting has created the illusion of a cause of action, and a meaningful reading thereof would show that the pleadings are manifestly vexatious and meritless, in the sense of not disclosing an explicit right to sue, then the court should exercise its power under Order VII Rule 11 of the Code.In summary, if the prayer in the plaint cannot be granted, then such a suit is liable to be dismissed in *limine*. This is to ensure that judicial time is not wasted on suits that are bound to be dismissed due to the non-maintainability of the prayer of the plaint. In the case of Noor Din and another vs Additional District Judge, Lahore and others (2014 SCMR 513), the Supreme Court of Pakistan has held as under: -

> *"The object of the powers conferred upon the trial Court under Order VII, Rule 11, C.P.C. is that the Courts must put an end to the litigation at the very initial stage when on account of some legal impediments full fledged trial will be a futile exercise. In view of the above facts the suit of the plaintiffs/respondents challenging the gift mutation was on the face of the record barred by time and there was no need for recording of evidence."*

17. From the above, it is established that the appellate court did not even consider or discuss consistent law on the subject and passed the impugned judgment and decree by committing misreading and non-reading of record, which also suffers from material illegality and irregularity, as such, the same is not sustainable in the eyes of the law and is liable to be set aside.

18. For the foregoing reasons, this civil revision is allowed. Judgment and decree dated 12.4.2023, passed by the appellate court, is hereby set aside, and order dated 27.01.2022 of the trial Court is hereby maintained; consequently, the plaint is rejected under Order VII Rule 11 of the Code.

JUDGE

Faisal Mumtaz/PS