

IN THE HIGH COURT OF SINDH, KARACHI

Revision Application No. 88 of 2020

Applicant : Farhat Aqeel (*now deceased*) through his legal heirs Mst. Bahija Farhat and 2 others, through Mr. Laiq Ahmed, Advocate.

Respondents : Mst. Qamer Jehan & Mst. Shahana Rana
No. 1 & 2 Mansoor (*Nemo*)

Date of Hearing : 19.05.2022
Date of Order : 19.05.2022

ORDER

ZAFAR AHMED RAJPOT, J: - This Civil Revision Application, filed under Section 115, CPC is directed against the order, dated 03.03.2020, whereby the learned Vth Additional District Judge, Karachi-Central (**“Appellate Court”**), dismissed the Civil Appeal No. 09 of 2018 (**“Civil Appeal”**), filed by the applicant against the order, dated 23.05.2017, thereby the learned VIIIth Senior Civil Judge, Karachi-Central (**“Trial Court”**), while allowing an Application under Order VII, rule 11, CPC, filed by the Respondents No.1 & 2, rejected the plaint in Civil Suit No. 960 of 2016 (**“Suit”**), filed by the Applicant.

2. Briefly stated facts of the case are that the Applicant instituted the Suit against the Respondents No. 1 & 2 for administration, declaration and permanent injunction, averring therein that he was the real brother of deceased Mazhar Aqeel, who died issueless about ten years ago leaving behind him, as his surviving legal heirs, the Applicant and Respondent No. 1, being his brother and sister, respectively, while his wife, namely, Mst. Rukhsana Mazhar, died on 09.02.2016. The deceased was the absolute and lawful owner of Flat No. H-15, Al-Naseer Square, situated at Sharafabad, Block-1, F.B. Area, near Al-Azam Square, Karachi (**“suit property”**), which was let out to Mst. Razia alias Lube. Accordingly, after the death of his sister-in-law, the Applicant approached the tenant of the suit property and requested her to pay his share of the monthly rent, who refused to do so and informed him that the Respondent No. 2 was claiming ownership of the suit property. The Applicant, thereafter, issued a notice dated 13.05.2016 to the said tenant and forwarded a copy thereof to the Respondent No.2. Later, the Applicant instituted Rent Case No. 353 of 2016 against the said tenant, which was rejected by the VIth Rent Controller (Central), Karachi. Upon coming to know that the Respondent No. 2 was attempting to sell the suit property without the knowledge or consent of the legal heirs of the deceased Mazhar Aqeel and with the alleged

intention of usurping their rights therein, the Applicant instituted the instant suit, *inter alia*, seeking the following relief:

- a) *Declare that the plaintiff is one of the legal heirs of late Mazhar Aqeel s/o. Mahmood Ali.*
- a) *To restrain the defendants not transfer or execute any documents or create third party interest in respect of the suit property till the disposal of the suit/case.*
- b) *To appoint Nazir of this Hon'ble Court as Administrator of property regarding Flat No. H-15, Al-Naseer Square, Sharafabad, Block-1, F.B. Area (Near Al-Azam Square), Karachi for sale of Flat/Suit property or hand over the possession to the lawful owner as declare by this Hon'ble Court.*
- c) *To pass preliminary and final decree of the Administration of the suit property left behind by deceased Mazhar Aqeel, in the name of Plaintiff.*

3. The Respondent No. 2, for herself and on behalf of the Respondent No. 1, being her duly constituted attorney, contested the suit by filing a joint written statement, wherein the claim of the Applicant was denied, by averring that the deceased Mazhar Aqeel had predeceased his wife and, therefore, under Sharia, his brother and sister were not entitled to inherit the property left behind by the deceased; that Mst. Rukhsana Mazhar was the absolute and exclusive owner of the suit property and that, upon her death, Letters of Administration was granted in favour of the Respondent No. 2 and the other legal heirs by the learned District Judge, Karachi-Central, in S.M.A. No. 621 of 2016; that the Respondent No. 2, being a legal heir of the deceased Mst. Rukhsana Mazhar, was entitled either to retain possession of the suit property or to dispose of the same, and that the Applicant had no right to interrupt or interfere with her peaceful possession thereof or her title thereto.

4. The Respondent No. 2 also filed an application under Order VII, rule 11, CPC, seeking rejection of the plaint in the Suit, *inter alia*, on the grounds that the Applicant had failed to disclose a valid cause of action and that the suit was barred by limitation. The Applicant filed his counter-affidavit in opposition to the said application. Vide order dated 23.05.2017, the Trial Court allowed the said application and rejected the plaint. Aggrieved by the said order, the Applicant preferred Civil Appeal No. 09 of 2018, along with an application under Section 5 of the Limitation Act, 1908 (“**Act of 1908**”), seeking condonation of five months and twenty days delay in filing the Appeal. The Respondents No. 1 & 2 filed counter-affidavit in opposition to the said application. Vide order dated 03.03.2020, the Appellate Court dismissed the application under Section 5 of the

Act of 1908, as well as the main appeal, holding the same to be barred by limitation. Hence, the Applicant has preferred the instant Civil Revision Application.

5. On 26.10.2020, Ms. Ayesha Hanif, Advocate, filed her power on behalf of Respondent No. 1 and undertook to file power on behalf of the Respondent No. 2 as well; however, she thereafter neither appeared before this Court nor filed any objection or reply to the instant Civil Revision Application.

6. Learned counsel for the Applicant has contended that the Trial Court misconstrued the facts and circumstances of the case and erred in law by rejecting the plaint without recording evidence; that the matter required determination on the basis of evidence in accordance with the provisions of the Qanun-e-Shahadat Order, 1984; however, the Trial Court failed to apply its judicial mind to the matter and in haste rejected the plaint; that the Trial Court failed to appreciate the law laid down by the superior courts with regard to the rejection of a plaint; that the findings of the Trial Court, whereby the plaint was rejected, have resulted in a miscarriage of justice and caused serious prejudice to the Applicant; that after the passing of the order by the Trial Court, the Applicant was unable to remain in contact with his counsel on account of a hip fracture sustained by him, which rendered him incapable of moving freely, and he was advised complete bed rest by the doctor; however, on recovery of his health, he immediately filed the Civil Appeal, duly supported by a medical certificate evidencing the circumstances that occasioned the delay and his non-appearance; that the impugned order passed by the Appellate Court is ambiguous and suffers from infirmities both on facts and in law; that the Applicant had duly established his case through cogent documentary evidence; however, the same was neither properly considered nor appreciated by the Appellate Court; that the impugned order passed by the Appellate Court is the result of misreading and non-reading of the material available on record; that the Appellate Court failed to properly discuss, examine, and appreciate the documents produced by the parties; that the impugned order is neither proper nor sustainable in law, rather, the same is founded on an unreasonable basis; that both the Courts below erred in law by failing to properly consider and appreciate the submissions advanced by learned counsel for the Applicant and proceeded in a cursory manner in recording their respective findings on the points in issue before them, resulting in a miscarriage of justice; that both the Courts below acted illegally, with material irregularity, and in excess of the jurisdiction vested in them.

7. I have heard learned counsel for the Applicant as well as perused the material available on record.

8. At the onset, it is necessary to appreciate the limited scope of jurisdiction vested in this Court under Section 115, CPC. In exercise of its revisional jurisdiction, this Court does not sit as a further court of appeal over the findings of the courts below. Interference is warranted only where the court whose order is impugned has exercised a jurisdiction not vested in it by law, has failed to exercise a jurisdiction so vested, or has acted illegally or with material irregularity in the exercise of its jurisdiction. Mere possibility of a different view being taken on the same facts does not constitute a ground for interference in revisional jurisdiction.

9. It is an admitted position that the plaint in Suit was rejected by the Trial Court vide order dated 23.05.2017. The Applicant preferred Civil Appeal against the said order after a considerable delay of five months and twenty days, necessitating an application under Section 5 of the Act of 1908 for condonation thereof. The explanation offered by the Applicant was that he had sustained a hip fracture, rendering him unable to move freely or remain in contact with his counsel, and that he had been advised complete bed rest. However, no convincing material was placed on record, either before the Appellate Court or this Court, to demonstrate that the said medical condition, even if taken at face value, persisted throughout the entire period of delay, or that it rendered the Applicant, or any person duly authorized on his behalf, incapable of taking even minimal steps, such as instructing counsel or an authorized representative, to file the appeal within the prescribed period of limitation or shortly thereafter. It is settled law that an application for condonation of delay under Section 5 of the Act of 1908 requires the Applicant to disclose sufficient cause accounting for the delay with reasonable particularity. A bald plea of illness, unsupported by contemporaneous material establishing a nexus between the alleged incapacity and the entire period of delay, does not, by itself, constitute sufficient cause in law.

10. The finding of the Appellate Court declining to condone the delay and, consequently, dismissing the Civil Appeal as time-barred, was arrived at upon consideration of the material placed before it, including the medical certificate relied upon by the Applicant. No jurisdictional error, illegality, or material irregularity has been pointed out in the manner in which the Appellate Court reached the said conclusion. Nor has it been shown that the Appellate Court failed to exercise jurisdiction vested in it or exceeded the jurisdiction lawfully vested in it. Once the appeal itself was held to be barred by limitation, the question of

examining the merits of the order dated 23.05.2017, including the arguments advanced regarding rejection of the plaint without recording evidence, did not arise for consideration before the Appellate Court and, for the same reason, cannot be gone into by this Court in exercise of its limited revisional jurisdiction.

11. As regards the contention that the Trial Court erred in rejecting the plaint without recording evidence, it is well settled that an application under Order VII, rule 11, CPC is to be decided on a meaningful reading of the plaint and the documents filed therewith and, by its very nature, does not ordinarily require the recording of evidence. In any event, this contention goes to the merits of the order dated 23.05.2017 and, once the appeal against the said order has been found to be time-barred, the same cannot be examined by this Court under its revisional jurisdiction.

12. For the foregoing reasons, I do not find any illegality, material irregularity, or jurisdictional infirmity in the impugned order dated 03.03.2020 warranting interference by this Court in exercise of its revisional jurisdiction. The instant Civil Revision Application, being devoid of merit, is accordingly dismissed, along with the pending application, if any.

13. Above are the reasons of my short order dated 19.05.2022.

JUDGE

Athar Zai