

Stereo.HCJDA-38
JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P. No.30762 of 2022

Amina Bibi and another
v.
Province of Punjab and others

J U D G M E N T

Date of hearing	22.10.2024
Petitioners by	Mian Ghulam Shabbir Saleemi, Advocate
Respondent No.1 by	Mr. Waheed Alam, Asst. Advocate General
Respondent Nos.2 and 3 by	Ch. Khadim Hussain Gehlan, Advocate

Rasaal Hasan Syed, J. The instant constitutional petition is directed against order dated 23.4.2022 of the learned Addl. District Judge, Sahiwal whereby the plaint in the suit of the petitioners against private respondents was rejected under Order VII, Rule 11, C.P.C.

2. The petitioners filed a suit for declaration with consequential relief of permanent injunction against respondent Nos.2 and 3, Riaz Hussain and Niaz Ahmad, their brothers, to assail mutation of gift bearing No.2408 dated 15.12.2000. It was averred that the gift to their brothers attributed to their father Allah Yar was based on fraud and misrepresentation which was liable to be annulled and that the petitioners were entitled to their Islamic share qua the suit property. The suit was resisted by the

respondents who in their written statement took an objection as to its maintainability on account of withdrawal of a previously filed suit by their father Allah Yar which objection was turned down by the learned Civil Judge vide order dated 26.3.2022. The respondents filed a revision petition thereagainst which was accepted and the plaint was rejected vide order dated 23.4.2022 of the learned Addl. District Judge, Sahiwal.

3. The reason recorded in the impugned order is to the effect that the father of the present petitioners Allah Yar had filed a suit for cancellation of mutation of gift which was subject-matter of the petitioners' suit against the respondent Nos.2 and 3 that was later withdrawn vide order dated 29.5.2021, as such, the petitioners' suit was not maintainable.

4. Perusal of the said order shows that late Allah Yar, father of the litigants, allegedly recorded his statement as plaintiff that he did not want to further prosecute the suit and to withdraw the same. The order dated 29.5.2021 in the said suit also reflects that petitioners who were present before the trial court contested this request with the plea that their brothers had "snatched" their father from them and that he was not mentally/physically fit at the time, as such, his stance could not be accepted, which was without free consent. Order dated 29.5.2021 records that after hearing arguments of both sides all present except Allah Yar were ordered

to vacate the courtroom who was asked to sit there for fifteen minutes. The case was again called in the presence of both sides thereafter i.e. the sons and daughters and their learned counsel and it was recorded that the plaintiff Allah Yar was seventy years old, and his physical condition did not look good. The court, then, to ascertain the mental/physical condition of the plaintiff posed some questions; who was asked if he had gifted the land to the sons. He answered in the affirmative. He was further asked whether he wanted to get the land back, which he answered in the negative. In response to the question as to whom he was living with him, he stated that he was living with his sons. Based on these questions and answers it was assumed by the court that he looked mentally stable and statement was, accordingly, entered and the suit was dismissed as withdrawn. As it transpires Allah Yar died on the very same day i.e. 29.5.2021 after withdrawal of the suit which spoke volumes for his mental/physical health.

5. In the previous hearing, learned counsel for the petitioners submitted that he was willing to move an application under section 12(2), C.P.C. to challenge the order and proceedings dated 29.5.2021 in the earlier suit which resulted in dismissal of suit of Allah Yar on grounds of fraud and misrepresentation by withdrawing the instant constitutional petition provided the petitioners are

protected from the rigor of limitation in that eventuality. At the time of dictating judgment, it was observed that certain important questions will have to be addressed in this case, for considering the question of maintainability of suit which has not been attended by the court below; the case was accordingly fixed for re-hearing/further hearing. In pursuance thereof, the parties' learned counsels were heard.

6. The attendant circumstances of withdrawal of suit by Allah Yar have been carefully weighed who died on same day i.e. 29.5.2021 when his statement is claimed to have been recorded for disposal of the suit which raised serious doubt as to the mental and physical condition, to record any statement of his free will and consent. Counsel for the petitioners and the petitioners themselves were shown to be present on the date of proceedings who seriously objected and pointed out to the court that Allah Yar was not in a position to record his statement and that he is mentally and physically feeble and, therefore, his statement could not be recorded but despite that the proceedings were held which gave rise to the question as to whether the court was not under obligation to seek medical assistance in the matter before recording the statement of Allah Yar to verify his soundness of mental condition, particularly, when it was pointedly disputed by the petitioners and whether in these

circumstances the proceedings and the order passed in consequence thereto shall be deemed to be illegal and void ab initio. In Jeewan Shah v. Muhammad Shah (PLD 2006 SC 202) it was observed as under:

5. There is no cavil with the proposition that in a civil suit the question of insanity cannot be determined without recording evidence by affording proper opportunity of hearing to the party concerned to substantiate the factum of insanity by leading evidence. The Court is duty bound to protect the interest of a lunatic person...

7. In the given circumstances the question would be as to whether the order of the court dated 29.5.2021 in the earlier case could be deemed to be valid or the same was without jurisdiction and ab initio void and, as such, need not be challenged separately particularly when the petitioners were not given an opportunity of evidence. In the order dated 26.3.2022 of learned Civil Judge, impugned in civil revision the learned Addl. District Judge while considering the objection as to the maintainability of suit observed that the objection to the maintainability of the suit was based on order dated 29.5.2021 whereby the predecessor-in-interest of the parties namely Allah Yar got recorded his statement on 29.5.2021 whereby the court specifically mentioned that the condition of his health was not good and this fact was also corroborated from the death certificate of Allah Yar who passed away on the same day i.e. 29.5.2021, hence, his statement may be taken into consideration with context of

other operative factual conditions including his death the same day. The view taken by the learned Civil Judge, as such, appears to be just and fair in the circumstances of the case which could not possibly be disturbed in revisional jurisdiction by the learned Addl. District Judge.

8. As regards the submissions of learned counsel that he was willing to withdraw the constitutional petition to file an application under section 12(2), C.P.C. provided the petitioners are saved from rigor of limitation, which has been seriously opposed by learned counsel for the respondents who submitted that such a request could not be allowed at this stage nor the plaint could be converted into an application under section 12(2), C.P.C. In the case of Noor UL Amin and another v. Muhammad Hashim and 27 others (1992 SCMR 1744) it was observed as under:

It is well settled, that all procedural laws are meant for advancing the cause of justice and they cannot be made a vehicle of oppression to suppress the remedies. It is also well-accepted principle of law that Courts always lean in favour of adjudication on merit rather than stifling proceedings on technicalities. A cursory reading of the plaint in Suit No.231 of 1986 instituted by the petitioners will show that it contained all the ingredients of section 12(2), C.P.C. Mere fact that it was described as a plaint and was registered as plaint could not deprive the Court of its jurisdiction to decide it as an application under section 12(2), C.P.C. if otherwise such jurisdiction was available to the Court under the law. It is not disputed before us

that an application under section 12(2), C.P.C. could be filed for setting aside the decree in suit No.119/1 of 1983 on the grounds mentioned in the plaint in Suit No.231/1 of 1986. In these circumstances the learned District Judge, Peshawar, was absolutely right in treating the plaint in Suit No.231/1 of 1986 as an application under section 12(2) of C.P.C. and remanding it to the Civil Judge who passed the decree in Suit No.119/1 of 1983 for disposal according to law. The learned counsel for respondents Nos.1 to 5 is unable to point out any prejudice which could be caused to respondents by treating the plaint in Suit No.231/1 of 1986 as an application under section 12(2) of C.P.C. The Courts, in order to do justice between the parties, would generally allow treatment/conversion of proceedings of one kind into another, unless there exists some legal bar against such treatment/conversion.

9. It was a case in which the oral gift was challenged on the grounds of fraud and misrepresentation by the petitioners whose case was that everything was done by the brothers fraudulently to deprive the sisters of right of inheritance and in such cases every effort shall be made to avoid technicalities and decide the cases on merits. Reference can also be made to the case of Syed Sadaqat Sultan v. Bahadar and another (2007 YLR 2905) where it was observed that a suit for specific performance and cancellation of decree on the ground of fraud qua the suit property, the court had jurisdiction to decide the plaint as an application under section 12(2), C.P.C. In the light of rule in the case supra there can be no cavil with the proposition that the court is competent to convert the plaint in a

suit into an application under section 12(2), C.P.C. and vice-versa provided just and fair circumstances obtained in the case to do so that also pointed to effective dispensation of justice. Be that as it may, this question will be considered by the court below as and when a request is made for conversion of plaint, into an application under section 12(2), C.P.C.

10. For the reasons supra, the impugned order dated 23.4.2022 passed in revision by the learned Addl. District Judge, Sahiwal is set aside, and the case is remanded to the trial court for decision of question of maintainability of the suit in accordance with law keeping in view the observations made herein and above. The petition is **allowed** accordingly.

(RASAAL HASAN SYED)
JUDGE

Announced in open Court on **01.11.2024**.

JUDGE

Approved for reporting

JUDGE