

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

IInd Appeal No. 03 of 2014

Applicant : Abdul Samad Soomro
through Mr. Bisharat Ali Memon, Advocate

Respondents : Mst. Nazir Bano and others
through Mr. Mazhar Ali Kalwar, Advocate

Date of hearing : 05.11.2021

Date of Decision : 29.11.2021

ORDER

ADNAN-UL-KARIM MEMON, J:- Through instant IInd Appeal, the appellant has called in question the judgment and decree dated 26.10.2013 passed by learned District Judge Matiari in Civil Appeal No.15 of 2013 whereby the learned Judge while dismissing the appeal maintained the Judgment and Decree dated 31.10.2011 passed by learned IV-Senior Civil Judge, Hyderabad in F.C. Suit No. 115 of 2008, hence the instant II-Appeal under Section 100 CPC.

2. Brief facts of the case are that respondent No.1 through legal heirs filed suit for declaration, partition, and recovery of share from the amount of rent against the appellant. In the memo of plaint, it was stated that their father Din Muhammad Soomro passed away on 26.2.2008, leaving behind the appellant as son, respondents Mst.Karima widow, and Aziz Bano as daughter, while respondent No.1 / plaintiff Mst. Nazeer Bano the mother of plaintiffs/respondent No.1 died before the death of her father on 19.1.2007; that deceased Din Muhammad was the owner and shareholder in ancestral joint properties bearing C.S. Nos. 423 (126-6 sq.yds), 427 (121-3 sq.yds), 429 (03-0 sq.yds), 431 (49-7) sq.yds, 432 (3-00 sq.yds) and 435 (139-00 sq. yds) situated in Taluka Hala District Matiari; that Mst. Nazeer Bano was entitled to her share in the joint suit properties to the extent of 245.7/8 sq. ft, therefore, plaintiffs demanded their legitimate right from the suit properties left by their maternal grandfather; they have demanded a share of rent from the properties which were/are rented out but in March 2008 the defendants/appellant and others refused to pay, hence the suit was filed.

3. The appellant and defendant / other respondents filed written statement denying the claim of plaintiffs/respondent No.1 in respect of suit properties. It was stated that the suit is not maintainable being not in proper form; that all the co-sharers are not joined and some have received the shares privately; that the documents attached with the plaint are forged and fabricated as the same have been prepared by one Abdul Rahim with his handwriting who obtained seal of certified copies of the Extracts and the signatures of defendants by fraud and that all the properties were to be mutated within the knowledge and notice of all the legal heirs of deceased Din Muhammad; that husband of Mst.Nazeer Bano received sale produce of properties and he was to account for the same with Din Muhammad and others and that Abdul Sattar also accounted for the increase of agricultural land, which he had leased out, and its amount was utilized by him without settling the account with others and now the defendants are entitled to receive heavy amount from said Abdul Sattar and that when the demand was made from him he hired the service of Abdul Rahim and got the forged and fabricated extracts, death certificates, foti khata Badal without any notice of defendants and filed the present suit.

4. From the pleadings of the parties, learned trial court framed the following issues:

1. Whether the suit is not maintainable?
2. Whether the suit is time-barred?
3. Whether the plaintiffs are entitled to inherit the shares from the suit properties left by their maternal grandfather Din Muhammad Soomro and Grandmother Mst. Karima under Section 4 of Family Law Ordinance, 1961, if so, what is its effect?

5. Learned trial court recording evidence on the above issues and hearing the parties decreed the suit in favor of the plaintiff. The appellant and respondents filed Appeal No. 15 of 2013 which was also dismissed by learned District Judge, Matiari, hence the instant IInd Appeal. As excerpt of Judgment dated 26.10.2013 passed in Civil Appeal No. 15/2013 is reproduced as under:-

“..... In view of above discussion and looking to the circumstances of the case it's clear that respondents are entitled to get the share from the suit properties and learned trial Judge has rightly decided the matter and there is no need to interfere in the Judgment and Decree passed by the 4th Senior Civil Judge, Hyderabad dated 31.01.2011 and 18.11.2011 respectively, hence my findings on this point as accordingly is in affirmative.

POINT NO.02:

In view of my finding on point No.1 and looking to the circumstances of the case the present appeal is hereby dismissed with no order as to costs”.

6. Learned counsel for the appellant argued that both the courts below without applying its judicious mind towards oral and documentary evidence placed on record, passed the impugned judgments; that the impugned judgments and decrees are the result of misreading and non-reading of oral and documentary evidence; that learned courts below have not appreciated the relevant law under which the appellant / defendant is also entitled to his legal and lawful share in the suit properties; that both the courts below have failed to exercise the jurisdiction conferred upon them and acted beyond their lawful powers and authority conferred upon them by law; that the suit of the plaintiff was not maintainable but learned trial court erroneously held that the suit was maintainable and not barred by law of limitation and the said findings on both the issues are not sustainable in law and liable to reversed. He lastly prayed for allowing the instant appeal.

7. Heard learned counsel for the parties and perused the material available on record.

8. Pivotal question involved in the present appeal is whether respondents had been deprived of their inheritance, the entire estate of their maternal grandfather Din Muhammad Soomro and Grandmother Mst. Karima shall be distributed amongst their legal heirs under the shares as determined by Islamic Shari’ah. As they died long ago and during this long period their legal heirs remained deprived of their inheritance.

9. I have also gone through the judgment and decree dated 31.10.2011 passed by the learned IVth Senior Civil Judge Hyderabad in F.C Suit No.115 of 2008. The learned trial Judge premised his findings and held that the respondents are entitled to get the share from the suit properties under section 4 of the Family Law Ordinance, 1961. The learned appellate Court vide judgment dated 26.10.2013 passed in Civil Appeal No. 15/2013 concurred with the view of learned trial Court on the same analogy and maintained the judgment and decree passed by learned trial Court by relying upon section 4 of Muslim Family Law Ordinance, 1961. As well as the decision of the Hon’ble Supreme Court in the case of Kaneeza Bibi v. Muhammad Ramzan (2005 SCMR 1534). The Hon’ble Supreme Court has held as under:

“2. It is not disputed and also proved on record that the property originally belonged to Amir Khan, the grandfather of the petitioner ladies. Amir Khan had five sons named Muhammad Ramzan, Muhammad Hussain, Muhammad Hassan, Abdul Aziz and Wali Muhammad. Wali Muhammad was the father of the present six petitioners who had predeceased his father Amir Khan. Amir Khan had died in the year, 1975.

3. After the death of Amir Khan, his inheritance Mutation No.65 was attested on 23-3-1979 whereby, under the provisions of section 4 of Muslim Family Law Ordinance, the petitioners were jointly granted 1/5th share in the property of Amir Khan. After the attestation of inheritance mutation, Muhammad Ramzan brought a declaratory suit to the effect that during the lifetime of his father he had purchased the suit property from his father on 26-2-1960 and thereafter, had sold the same to respondents Nos.2 to 9 that included his brothers etc. This suit was withdrawn on 15-11-1980.

4. After withdrawal of the aforesaid suit, the present petitioners, the daughters of Wali Muhammad brought the instant suit claiming title to 1/5th of property on the basis of inheritance mutation dated 23-3-1979.

5. After contest between the parties, the learned trial Court passed a decree as prayed for on 19-6-1990 which was set aside by the learned Additional District Judge on 25-11-1992. The same was concurred by the learned Judge of High Court through the impugned order and hence this petition.

6. The registered deed in question was never produced in original and no marginal witness of sale-deed was ever examined in Court and hence the registered deed cannot be said to have been proved, especially when the same was got executed during pendency of the suit brought by Muhammad Ramzan. Muhammad Ramzan has also failed to prove the sale in his favour from his father and also as to why it was kept secret for as many as 15 years. On factual aspect, the learned trial Court have arrived at correct conclusion which was wrongly interfered with by First Appellate Court as well as the High Court.

7. The question of 'limitation is not attracted at all because through inheritance mutation dated 23-3-1979, the petitioners were granted due share and hence they were never supposed to become alarmed about anything which was never in their knowledge. Even otherwise, they had become co-sharers in the property to the extent of the Sharai share the moment Amir Khan died and hence could not have agitated any cause unless the right was denied or interfered with. For the first time such right was denied, and so came to the knowledge of the petitioners, when Muhammad Ramzan filed a suit aforesaid which was contumaciously withdrawn after when he manoeuvred to get the deeds registered. From such knowledge that happened to be obtained in the early 1980, the instant suit of the petitioners on 22-11-1980 was perfect and well within time. Ramzan had allegedly sold the property on 12-4-1980 and therefrom, as well, the suit was within time.

8. It appears that nothing remained unusual till the lifetime of Amir Khan and thereafter everything was manoeuvred only and only to deprive the daughters of predeceased son Wali Muhammad of their Sharai share of inheritance.

9. Consequently, the petition, after conversion into appeal is hereby accepted, the impugned judgment is set aside, that of the trial Court is restored and the petitioners are hereby declared to be the legal heirs of Amir Khan to the extent of 1/5th share subsequently recognized through Mutation No.65 attested on 23-3-1979. Costs to be borne by the respondents throughout.”

10. So far as to challenge the concurrent findings of courts below in the Appellate jurisdiction of this Court is concerned, the Honourable Supreme Court has held in the case of Ahmad Nawaz Khan Vs. Muhammad Jaffar Khan and others (2010 SCMR 984), that High Court has very limited jurisdiction to interfere in the concurrent conclusions arrived at by the courts below while exercising power under section 100, C.P.C. A similar view was taken in the case of Sultan Muhammad and another. Vs. Muhammad Qasim and others (2010 SCMR 1630).

11. Primarily the concurrent findings of the two courts below are not opened to question at IInd Appellate stage.

12. In the light of aforesaid judgment of the Hon'ble Supreme Court, I am of the firm view that under the Muslim Family Law the respondents have rightly been held entitled to share from suit properties, thus no further indulgence of this Court is required in the matter.

13. The Honourable Supreme Court in the case of Mst. Hayat Bibi and others Vs. Alamzeb and others (in Civil Appeal No. 438 of 2021) vide judgment dated 26.10.2021 has held as under:

“8. The learned Civil Judge was impressed by the fact that the suit was belatedly filed but without realizing that under Islamic Shari'ah heirs become owners of their predecessor's property immediately on his death. The legal heirs of Habib Khan filed the suit and asserted their right to inheritance themselves, unlike some cases filed long after the first generation of heirs have passed away. The suit was filed by the daughters of the late Habib Khan claiming what was rightfully theirs. They had also not relinquished their rights. Therefore, it was both factually and legally wrong to hold that the suit was time-barred. The learned Civil Judge further erred by accepting the authenticity of the suspect Meharnama and that it and the Razinama could deprive legal heirs from their inheritance. In any event, the execution of neither document was established. These mistakes were not corrected either by the Appellate Court or by the High Court. Therefore, all three impugned judgments are not sustainable and have to be set aside by allowing this appeal. Consequently, the suit filed by the appellants, who had been deprived of their

inheritance, is decreed by holding that the entire estate of Habib Khan shall be distributed amongst his legal heirs in accordance with the shares as determined by Islamic Shari'ah. As Habib Khan died about 35 years ago and during this long period his legal heirs remained deprived from their inheritance we expect that this judgment will be promptly implemented. Since we have set aside three concurrent judgments there shall be no order as to costs.”

14. It appears from the evidence that respondent No.1(a) Faraz Akhtar, who is one of the legal heirs of deceased Mst. Nazeer Bano (respondent No.1) examined himself and produced heirship certificate of legal heirs of deceased Din Muhammad Soomro and six extracts from the property register card. He also examined witnesses namely Ghulam Muhammad and Sikandar Ali and their cross-examination was conducted, however, their testimony remained intact. While appellant was examined and he admitted that his deceased father Din Muhammad had left two daughters and one son. He also admitted that Mst. Nazeer Bano was his sister who had passed away during lifetime of deceased father and she had two daughters and two sons and she expired in the year 2007. He also admitted that his father passed away in the year 2008 and during intervening period he received rental amounts from the shopping centre. He also admitted that he did not pay any share from the rental amount received from shopping centre by him to the respondents. The learned trial Court has elaborately dealt with the issues and gave finding against the appellant. The learned appellate court appreciated the evidence brought on record and concurred with the view of learned trial court. In addition to that it is well-settled law that during the lifetime if the daughter claims inheritance / share in the property of father who later on passed away then the legal heirs of deceased daughter are entitled for their respective share in the property of deceased father.

15. In my considered view, the orders passed by the two courts below do not suffer from any misreading or non-reading of evidence nor any other illegality and or irregularity has been pointed out to call my attention for any interference. Consequently, this second appeal fails, as such same is dismissed. Accordingly, the judgments and decrees passed by both Courts below are maintained.

JUDGE

Hafiz Fahad