

HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

R.A. No.237 of 2019

Hemant Kumar ..... APPLICANT.

Versus

Assaram and others ..... RESPONDENTS.

For orders on CMA 684/2022  
For orders on CMA 685/2022  
For orders on CMA 1606/2021  
For orders on CMA 1607/2021  
For orders on CMA 317/2021  
For orders on CMA 555/2021  
For hearing of CMA 1091/2021  
For hearing of CMA 2086/2019  
For hearing of main case

18.04.2022

Mr. Barrister Jawad Ahmed Qureshi, advocate for applicant.

Respondent No.1 present in person.

Mr. Irfan Ahmed Qureshi, advocate for respondent No.2.

Mr. Allah Bachayo Soomro, Addl. AG Sindh.

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ORDER

**MUHAMMAD SHAFI SIDDIQUI, J.** This revision application is arising out of judgment of 8<sup>th</sup> Additional District Judge, Hyderabad, passed in Civil Appeal No.162/2018. The applicant filed a suit No.706/2013 for a declaration and injunction that he is the sole owner of the property on the strength of a Will dated 27.03.2001 executed by his grandfather on 27.03.2001. The grandfather, per learned counsel, expired in the year 2013. The suit was filed after a delay of almost 12 years of execution of alleged will. Be that as it may, the notices were served and despite filing written statement the evidence was not adduced by the respondents. The applicant / plaintiff attempted to lead evidence by filing his affidavit-in-evidence and producing the alleged Will. However, in terms of the findings of the appellate court's order, the document was not proved, whereas the

trial court took a view that since the plaintiff was not cross-examined and nothing was said in rebuttal, therefore, the version of the applicant/plaintiff stood proved. The order was challenged by the respondent No.2 in Civil Appeal No. 162/2018 and the appellate court found that the suit was not maintainable in view of section 213 of Succession Act, 1925, which reads as under :

*“213-Right as executer of Legatee when established (1) No right as executer or Legatee can be established in any Court of Justice, unless a Court of competent Jurisdiction in Pakistan has granted probate of the will under which the right is claimed, or has granted letters of Administration with the will or with a copy of an authenticated copy of the will annexed.*

*(2) This section shall not apply in the case of wills made by Muhammadans and shall only apply:*

*(A) In the case of Wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of the classes specified in classes (a) & (b) of section 57 and*

*(B) In the case of Wills made by any Parsi dying after the commencements of succession (amendment) Act 1974 where such Wills are made within the local limits of ordinary civil jurisdiction of Sindh & Balochistan High Court, and where such Wills are made outside those limits, insofar as they relate to immovable property situated within those limits”.*

I have heard the learned counsel for the parties and perused the record. Learned counsel for the applicant has relied upon Section 53 of the Land Revenue Act which provides that any person who considers himself aggrieved of any entry in record of rights as to any right of which he is in possession, he may institute a suit for a declaration of his right. Learned counsel for the applicant is of the view that on the strength of Section 213 of the Succession Act, he cannot be ousted from the court that no probate was obtained from the concerned court before filing a suit. However, learned counsel was unable to satisfy appellate court as well as this court that production of a Will is not sufficient to satisfy the conscious of the trial court as well as appellate court since it has to be proved through impartial and independent evidence as in this case the witnesses who allegedly signed the document did not appear. Property was owned

by grandfather of applicant. Grandfather had two sons as per present record and a will claimed to have been executed by grandfather in favour of one grandson only, whereas the entries demonstrate equal entitlement of sons and their legal heirs. Unless will is transferred into a probate grandson cannot assert his rights on that basis *moreso* when it was not proved. Through probate, rights pertaining to administration of an estate is granted to beneficiary (executor under a will). It is a judicial process through which the validity and authenticity of a will is determined in a court of law. Learned counsel has not been able to express himself as to how the document was proved in terms of Article 78 of the Qanun-e-Shahadat Order, 1984. Thus, even if the suit be considered to be one for enforcement of rights u/s 53 wherein applicant challenged the entries made by respondents, then the document itself ought to be proved independently which has not been done by the applicant as no witnesses have been examined, therefore, the applicant could not gain anything by asserting that section 213 of the Succession Act would not come in the way.

Since the applicant has made challenge to the entries, I am of the view that notwithstanding the ouster clause of section 213 of Succession Act, even on merit the applicant has failed to prove the document of Will under article 78 of Qanun-e-Shahadat Order<sup>1</sup> and hence he cannot succeed on the strength of just producing a document.

No interference as such is required from this court. The revision application is dismissed along with pending applications.

*(1) Civil Appeal No.39-K to 40-K of 2021 of Honourable Supreme Court dated 15.02.2022*

JUDGE