HIGH COURT OF SINDH, CIRCUIT COURT AT HYDERABAD

C.P No.S-569 of 2021

[Kirshan versus Mst. Samina Shaikh & Ors]

DATE	ORDER WITH SIGNATURE OF JUDGE

Petitioner	**:**	**Through Mrs. Rehana Siddiqui advocate**
Respondent No.1	**:**	**Through Mr. Ahsan Zahoor advocate** **Mr. Wali Muhammad Jamari, Assistant A.G**
Date of hearing	**:**	**20.02.2023**
Date of Decision	**:**	**24.02.2023**

O R D E R

KAUSAR SULTANA HUSSAIN, J. – On 18.10.2021 above constitutional petition has been filed by Krishan S/o Natho Deoomal Eisrani, challenging therein the Order dated 19.10.2020 passed by the learned Senior Civil Judge-VII, Hyderabad in First Class Suit No.1185 of 2019, whereby plaint of said Suit was rejected on an application filed by the Respondent No.1 Mst. Samina Shaikh under Order VII Rule 11 CPC being hit by the provisions of law as contemplated in the impugned Order.

2. Briefly stated facts of the case are that petitioner had filed a suit for declaration against the public at large, seeking declaration to the effect that he is Hindu practitioner and his name is Krishan; that one lady namely Samina Shaikh (Respondent No.1) had filed a Family Suit against him (Petitioner) wherein she claimed him as her husband having name as Muhammad Saleem Shaikh, as he after embracing Islam from Hindu to Muslim, contracted marriage with her but failed to maintain her and pay her dower amount; that said Family Suit of Mst. Samina Shaikh (Respondent No.1) was decreed in her favour and later it was maintained by the learned Appellate Court, hence he filed Suit No.1185 of 2019 for declaration against public at large. The respondent No.1 effected appearance therein and filed an application under Order VII Rule 11. The learned trial Court after hearing arguments of the parties on said application passed the impugned Order as follows:

> *" The Claim of the Plaintiff as stated above that he Hindu and not a Muslim and the sole question raised in the application in hand is that the relief claimed as within ambit of section 42 of Specific Relief Act 1881 or not. In my humble opinion upon bare perusal of the plaint it validly surfaces that the instant relief through the f clearly does not fall within the ambit of section 42 of the Specific Relief Act 1881 as it neither pertains to any legal status or right to property but pretension under the suit is with regards to*

profession religion which is neither synonym to legal status or to legal character. A suit under the law can be brought up for the right recognized under the law no doubt right to profess any religion is constitutionally safeguarded. However, in present case obstruction to profess religion in not available rather Declaration is for the choice of the religion. Apparently one hand plaintiff is seeking Declaration that he is Hindu thus negating that he is not a Muslim which negation is directly related to the admitted fact on record in the Family suit against him. It is an admitted fact that the family suit filed by the contesting defendant no.1 against the present plaintiff wherein he was shown as Muslim stands decreed and appeal filed there against stands dismissed as well thus the plaintiff has already failed to touch conscious of not one but two courts of law to show that he is not Muslim and in fact a Hindu. Rather the essence of such judgment against the plaintiff enshrines that he admittedly is a Muslim and even if he has reverted back as he claims, even then such element cannot be sought under declaration and otherwise if as he claims that he never turned Muslim or entered with marriage with defendant then present declaration rather is an attempt to nullify the decree of family Court or effect the same when he already failed even before the appellate forum to show himself as Hindu. Irrespective of decree of family Court against plaintiff wherein he been shown as Muslim, within present suit, the entitlement being claimed as stated supra does not relate to a right but rather related to choice and choice of person cannot be declared under section 42 of the specific relief act."

3. The learned counsel for the petitioner argued that the petitioner had neither embraced Islam nor contracted marriage with respondent No.1 Mst. Samina Shaikh, hence the learned Family Court and the learned Appellate Court have failed to consider the family matter and the appeal on merit, however, the petitioner in order to seek declaration in this regard approached to the learned trial Court but once again his pleas have not been considered on merits and on technical grounds his plaint was rejected under Order VII Rule 11 CPC. Learned counsel for the petitioner prayed for setting aside the impugned Order dated 19.10.2020.

4. Conversely, learned counsel for the respondent No.1 has vehemently opposed the contention of the petitioner and submits that instant petition is misconceived and not maintainable and has been filed by the petitioner just to linger on the proceedings of Execution Application No.121 of 2021, pending before the Family Court in Family Suit No.883 of 2015. According to learned counsel for the respondent No.1, the petitioner during cross-examination had admitted before learned Family Court that he embraced the Islam and his Muslim name is Saleem Shaikh, therefore, learned trial Court has rightly rejected the plaint of petitioner under Order VII Rule 11 CPC against which even no appeal was preferred by the petitioner, therefore, present petition is not maintainable and is liable to be dismissed.

5. After hearing arguments and perusal of the available record with able assistance of the learned counsel for the parties, I am of the view that in order to decide the legality or illegality of the Order of rejection of plaint under Order VII Rule 11 CPC, the contents of the plaint, particularly the averments of the plaint made therein by the plaintiff have to be seen and examined carefully. The case of the petitioner as averred in the plaint is that he may be declared as Hindu and has not changed his religion from Hinduism to any other religion. He has not claimed consequential relief in his plaint, while under Section 42 of the Specific Relief Act without claiming consequential relief suit for mere declaration is not maintainable [1991 SCMR 1483]. Section 42 of the Specific Relief Act, 1877 applies only to a case wherein a person files suit claiming entitlement to any legal character or any right to property which entitlement is denied by the defendant(s) or in denying which the defendant(s) are interested. The instant suit of the petitioner for declaration of his religion does not fall within the ambit of Section 42 of the Specific Relief Act 1877 and even petitioner has not filed any appeal against the impugned Order dated 19.10.2020 before the appellate Court and has challenged the impugned Order before this Court under constitutional jurisdiction, as such the present petition is not maintainable. Besides this, the petitioner prior to filing the Suit No.1185 of 2019 for declaration, had contested the proceedings of Family Suit No.883 of 2015 [Re: Mst. Samina Shaikh versus Muhammad Saleem Shaikh], wherein the Family Court and then the Appellate Court had announced concurrent findings on the points raised by the petitioner in this suit for declaration and both the Courts after going through the evidence of both the parties i.e Mst. Samina Shaikh (Respondent No.1) and Muhammad Saleem Shaikh (Petitioner) had declined the version of the petitioner on the premise of his own admission wherein he himself admitted that “he is Saleem Shaikh and did not submit any application regarding his incorrect name.

6. Record reflects that the petitioner alongwith this petition has attached certified true copies of two judgments passed by the Family Court in Family Suit No.883 of 2015 and Appellate Court in Family Appeal No.60 of 2019, which proceedings were contested by the petitioner being defendant and appellant respectively. The contents of the judgment passed in Family Suit No.883 of 2015 do show that Nikahkhuwan Mr. Abdul Sattar, who recited Nikah of the parties, has appeared before the trial Court as witness and while leading his evidence he produced their Nikahnama a Ex.8/1, certificate of conversion to Islam as Ex.8/2, Register of their Nikah having entry No.1928 and their photographs affixed thereon as Ex.8/3. Mst. Samina (respondent No.1) had also examined witnesses of their Nikah namely Bahadur S/o Muhammad Ali, who admitted their Nikah and recognized the parties as same. The issue raised by the petitioner in his Suit No.1185 of 2019 had already been decided by the competent Court of law in family proceedings bearing Suit No.883 of 2015 which judgment had attained

finality, therefore, the Suit No.1185 of 2019 is also barred by the doctrine of resjudicata, as provided by Section 11 of CPC.

7. The learned counsel for the petitioner is failed to convince this Court that the Order passed by the learned trial Court is liable to be set aside being illegal, void, misconceived and not tenable under the law. I therefore, dismiss this petition being meritless and not maintainable, however, with no order as to cost.

JUDGE

Sajjad Ali Jessar