

ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

WP No. 8728 of 2023

Syed Saqlain Shahana (deceased) through his legal heirs etc.
vs
ADJ, Okara etc.

S.No. of Order/ Proceeding	Date of order/ proceeding	Order with signature of Judge and that of parties or counsel where necessary
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09.02.2023	Mr. Falak Sher Khan Niazi, Advocate. Mir Haroon Rasheed, Assistant Attorney General. Rana Sher Zaman Akram, A.A.G. Ch. Muhammad Naseer, Syed Ali Allow ud Din, Abrar Ahmad Chaudhry and Mirza Shehryar Farhan Baig Advocates as Amici Curiae.
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Through this constitutional petition, the petitioners have called in question order dated 02.11.2022 passed by the trial court, whereby application under Order I Rule 10 CPC, filed by Shumaila Syed/respondent No.3 (**“respondent”**) was allowed with the result that she being wife/widow was allowed to be impleaded as party to the pending suit as legal heir of deceased Syed Saqlain Shahana (**“deceased”**), predecessor-in-interest of the petitioners and respondents Nos. 6 to 8. The petitioners have also challenged the order dated 10.01.2023 passed by the revisional court, whereby revision petition filed by the petitioners against the aforesaid order had been dismissed.

2. The contention of the petitioners is that respondent No.3 had been divorced by deceased in his lifetime and this was the reason that said respondent was not provided share in his inheritance, as evident from Mutation No. 510 dated 24.07.2007, by virtue of which property of deceased was inherited by only Bushra Begum (mother),

Hassan Ali (son) and Amna Syed (daughter) to the exclusion of respondent No.3. Besides previously during lifetime of Bushra Begum, mother of the deceased, respondent No.3 was never impleaded as a party to any legal proceedings, therefore, she could not later on claim to be widow and legal heir of deceased to be impleaded as a party.

3. Perusal of record shows that both the courts below have taken the said aspect into consideration while deciding the matter. The learned trial court allowed the application under Order I Rule 10 CPC for impleading Shumaila Syed, respondent as a party by observing as under:

“Assertion of the Applicant Shumaila Syed is that she is the wife of deceased Syed Saqlain Shahana therefore, she may be impleaded as plaintiff to the suit being a necessary party in the suit whereas contention of the respondents/plaintiffs no. 1Ai to 1Aiii is that Applicant Shumaila Syed was divorced by the deceased Syed Saqlain Shahana since 17 years ago. Respondents/Plaintiffs no. 1Ai to 1Aiii have admitted that Applicant was the wife of deceased Syed Saqlain Shahana but she got divorced from the court. In this regard respondents/Plaintiffs no. 1Ai to 1Aiii have not produced a decree of the court or effectiveness certificate issued by concerned union council. In such circumstances, where factual controversy involved between the parties, the same should be decided after recording of evidence. So, considering the Applicant a necessary party to be impleaded in this case in the array of plaintiffs. Hence, application in hand is accepted.

4. The learned Court that decided the revision upheld the order of trial court by observing as under:

“The impugned order dated 02.11.2022 is with respect to the impleadment of respondent No.1 Shumaila Syed as party to the suit on account of being widow of deceased Saqlain Shahana. There is no denial to the fact that respondent No.1 remained in matrimonial ties with deceased Saqlain Shahana however there is no such valid record which could justify that deceased Saqlain Shahana prior to his death had pronounced divorce to said respondent No.1 Shumaila Syed. Though during the course of arguments, learned counsel for the petitioners has produced copy of mutation No.510 dated 24.07.2007 by virtue of which the property of deceased Saqlain Shahana

was inherited by only Bushra Begum (mother), Hassan Ali (Son) as well as Amina Syed (daughter), however this document could not be treated as a valid proof of divorce to respondent No.1 Shumaila Syed. The other documents including power of attorney in favour of respondent No.1 Shumaila Syed and agreement to sale of property by her as well as copy of suit titled "Shumaila Syed. Vs. Bushran Begum etc" filed at Renala Khurd, Okara could also not be treated as proof of divorce. Factual controversy between the parties could not be attended while exercising the revisional jurisdiction as this domain pertains to learned trial court and same could be redressed through recording of evidence and same has been observed by the learned trial court through impugned order.

For what has been discussed above, I find neither any illegality or irregularity in the impugned order nor the jurisdictional error. Instant civil revision is hereby dismissed."

5. In the aforesaid orders it is specifically mentioned that despite claim of the petitioners that respondent No.3 had been divorced by deceased, there was no document to that effect available on record to establish the factum of divorce and merely because she was not included in inheritance of the deceased while entering mutation No.510 dated 24.07.2007 in the revenue record, the same does not amount to be a conclusive proof of the fact as to whether she had been divorced by deceased in his lifetime. Besides said aspect of the matter, as to whether she had been divorced or not cannot be determined summarily and has to be decided after recording of evidence and in the meanwhile while proceeding with the matter for the reason that she was shown to be previously the wife of the deceased the Applicant has to be assumed to widow of the deceased, in view of Illustration "d" of Article 129 of Qanun-e-Shahadat Order, 1984, which provides that a thing that previously existed may be presumed to continue till it was established that its existence had come to an end. The relevant part of the said Article is reproduced below:

“129. Court may presume existence of certain facts.—
The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case--

Illustrations

The Court may presume—

(a)

(b)

(c)

(d) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence.

..... ”

6. Similar matter came up for hearing before the Supreme Court of Pakistan in case titled Haji Allah Ditta through Legal heirs and others versus Ahmad Nawaz and others reported as 2003 SCMR 981, where it was observed as under:

“2. The facts relevant to the present case are that the petitioners late Haji Allah Ditta and late Haji Allah Rakha (represented by their legal heirs/successors-in-interest) filed a suit of declaration that they were owners in possession of the suit-land as described in the heading of plaint and that Mutation No.361, dated 12-6-1985 in favour, of respondents as legal heirs of Ghulam Qadir deceased was illegal and inoperative qua their rights. It was stated in the plaint that late Ghulam Qadir was the original owner of the suit-land. He died issueless on 11-2-1985. Therefore, the, petitioners being his real brothers were the only legal heirs of the deceased under the Muslim Law of Inheritance mutation of inheritance was initially entered in their favour. It was subsequently altered and Mutation No.361 was sanctioned in favour of the respondents showing them as sons and widow of Ghulam Qadir deceased. However, the petitioners admitted in para. 6 of the plaint that Ghulam Qadir had married respondent No.4, in the year 1932 but stated that she was minor at that time.

4. We have heard the learned counsel at length. The factum of marriage of Mst. Pathani, the respondent No.4 with Ghulam Qadir stands proved. No documentary evidence was produced to show dissolution of their marriage. The High Court as well as the trial Court were justified in taking the view on the basis of evidence on record that respondent No.4 Mst. Pathani was the widow and respondents Nos, 1 to 3 were the sons of Ghulam Qadir deceased who were entitled to inherit his property. In the case of Ismail Ahmed Peepadi v. Momina Bibi and others

(AIR 1941 Privy Council 11; 1990 Pakistan Supreme Court Cases (PSC) 837) the Privy Council held that it was open to the Court upon the proof of the marriage having taken place on a certain date to regard as proved the subsistence of the marriage on a subsequent date unless and until it should be disproved. It was further held that continuance of marriage need not be shown in any special manner. The same view was taken by a Division Bench of the Calcutta High Court in the case of Chandu Lal Agarwal and another v. Bibi Khatemonnessa and others (AIR 1943 Calcutta 76). Illustration (d) of Article 129 of the Qanun-e-Shahadat Order, 1984 (10 of, 1984) also makes it clear that the Court may presume that a thing or state of things which has been shown to exist to be in existence within a period shorter than that within which such things or state of things usually cease to exist is still in existence.

5. The High Court has taken the correct view that the petitioners nowhere averred in their plaint that Mst. Pathani had been divorced and was subsequently married to Muhammad Nawaz. It was also not pleaded that the respondents Nos 1 to 3 were the sons of Muhammad Nawaz. It is also in evidence that marriage of Ghulam Qadir was in exchange of marriage of his sister Mst. Rehmatan with the brother of Mst. Pathani”

7. In view of the principles laid down in the judgment of the Supreme Court and the illustration(d) of Article 129 of the Qanun-e-Shahadat Order, 1984 reproduced above, as it is an admitted fact that the respondent Shumaila Syed was earlier married to Syed Saqlain Shahana (deceased) and nothing is available on the record such as decree of divorce passed by the court or divorce effectiveness certificate to show that she had been divorced by the deceased, she is to be presumed to be his widow and that marriage subsisted till death of the deceased, until and unless it is established on record through evidence that respondent No.3 had been divorced by deceased failing which factum of divorce or its effectiveness cannot be assumed. Therefore, there is no illegality or jurisdictional defect in the impugned orders passed by both the courts below, whereby application under Order I Rule 10 CPC filed by respondent No.3 to implead her as a party has been rightly allowed.

8. For what has been discussed above, this petition being devoid of any force is *dismissed*.

(MUZAMIL AKHTAR SHABIR)
JUDGE

*Naveed **