

Stereo.HCJDA 38.
JUDGMENT SHEET.

LAHORE HIGH COURT
RAWALPINDI BENCH, RAWALPINDI.
JUDICIAL DEPARTMENT

W.P.No.1475 of 2023

SABIRA BIBI, ETC.

Versus.

Mst. SAFURA JAN, ETC.

JUDGMENT.

Date of hearing: **07.12.2023**

Petitioners by: *Raja M. Faisal Ghani, Advocate.*

Respondents No.1 to Mr. Iftikhar-ul-Hassan, Advocate.
3 by:

Mirza Viqas Rauf, J. *This petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 assails the vires of order dated 9th December, 2022, whereby the learned Additional District Judge, Rawalpindi, while dismissing the revision petition filed by the petitioners, affirmed the order dated 19th May, 2022 passed by the learned Civil Judge Class-I, Rawalpindi.*

2. *Facts in brief necessary for adjudication of instant petition are that a suit for declaration was instituted by respondents No.1 to 3 (hereinafter referred to as “respondents”) showing the petitioner No.1 as one of plaintiffs therein averring that they are legal heirs of Arif Hussain, who died on 9th November, 2018 and after his death, they are only legal heirs to be entitled for the legacy of the deceased. Suit was decreed ex-parte vide judgment dated 19th March, 2019. The petitioners, on attaining the knowledge, moved an application under section 12 (2) of the Code of Civil Procedure (V of 1908) (hereinafter referred to as “CPC”) seeking annulment of the judgment and decree on the ground that name of petitioner No.1 was though reflected in the plaint as plaintiff No.1 but actually she never filed the suit and all the proceedings were conducted by*

respondent No.1 without any authorization and ultimately succeeded in obtaining an ex-parte decree, which is detrimental to the rights of the petitioners. The application was resisted by the “respondents” and in view of divergent stance taken by both the sides, the trial Court proceeded to frame issues and fix the matter for evidence of the petitioners. The petitioners then moved an application for summoning of the Superintendent, Abandoned Babies & Destitute Children Home, Rawalpindi as court witness. The trial Court, by way of order dated 19th May, 2022 not only dismissed the said application but also dismissed the application under section 12 (2) “CPC”. Feeling dissatisfied, the petitioners though filed revision petition before the learned Additional District Judge but of no avail as the revision petition was also dismissed through order dated 9th December, 2022.

3. Learned counsel for the petitioners contended that ex-parte decree was obtained through misrepresentation. He added that on attaining the knowledge, the petitioner moved an application under section 12 (2) “CPC” upon which the trial Court framed necessary issues. Submitted that on moving the application for summoning of witness, the trial Court adjourned the proceedings for 19th May, 2022 for arguments on the said application but on the date fixed not only the miscellaneous application was dismissed but the main application was also turned down. Learned counsel emphasizes that since the main petition was not fixed for the said date, so at the most the trial Court could dismiss the miscellaneous application. It is contended that despite patent illegality committed by the trial Court, the revisional Court failed to exercise the jurisdiction and only played the role of post office. In order to supplement his contentions, learned counsel placed reliance on Qazi MUHAMMAD TARIQ v. HASIN JAHAN and 3 others (1993 SCMR 1949).

4. Conversely, learned counsel representing the “respondents” submitted that the Courts below did not commit any illegality warranting interference by this Court in constitutional jurisdiction. He added that the application under section 12(2) “CPC” was totally misconceived and as such rightly dismissed. Learned counsel has placed reliance on Mst. LAILA

QAYYUM v. FAWAD QAYUM and others (PLD 2019 Supreme Court 449).

5. *Heard. Record perused.*

6. *Suit was shown to be filed by the “respondents” alongwith petitioner No.1. The matter in issue canvassed in the suit was relatable to the estate of Arif Hussain, who died on 9th November, 2018. Suit was decreed ex-parte vide judgment dated 19th March, 2019. The petitioners, on attaining the knowledge about the ex-parte decree, moved an application under section 12 (2) “CPC” asserting therein that though name of petitioner No.1 was reflected in the suit but actually she never appeared before the Court and all the proceedings were conducted by respondent No.1 without any authorization and while practicing fraud and misrepresentation she succeeded in getting the suit decreed ex-parte. The application was resisted by the “respondents” who submitted their reply. After examining counter claims of the parties, the learned Civil Judge proceeded to frame issues by way of order dated 18th December, 2020. For the purpose of convenience, relevant part of order is reproduced below: -*

“2. Perusal of record shows that it is contention of petitioners that Muhammad Ali was not real son of deceased Muhammad Arif Hussain, rather, he was adopted son of Muhammad Arif Hussain, so, decree holders did not become legal heirs of deceased Muhammad Arif Hussain but they have fraudulently succeeded to get decree for declaration/ legal heirship dated 19.03.2019. In support of their version, petitioners have annexed report of Superintendent, Abandoned Babies & Destitute Children Home, Rawalpindi and attestation report of Magistrate dated 29.09.1985, whereas respondents relied on nikkahnama of deceased Muhammad Ali, family registration certificate issued by NADRA & CNIC of deceased Muhammad Ali. Both the parties have documents in pro & contra in support of their versions, so, contentions of both the parties requires evidence, therefore, out of divergent pleadings of the parties, following issues are hereby framed:

ISSUES

- (i) *Whether impugned judgment & decree dated 19.03.2019 is liable to be set aside on the ground mentioned in petition? OPA*
- (ii) *Whether this petition is not maintainable and liable to be dismissed? OPR*
- (iii) *Relief.*

(underlining supplied for emphasis)

7. *The petitioners in the process of producing their evidence, moved an application for summoning of concerned officer of the office of*

the Superintendent, Abandoned Babies & Destitute Children Home, Rawalpindi as court witness. It is apparent from the record that on the date prior to the date when the application under section 12(2) "CPC" was dismissed alongwith miscellaneous application, the proceedings were adjourned only for the arguments on miscellaneous application. There thus remains no cavil at all that on 19th May, 2022 when the impugned order was passed, application under section 12 (2) "CPC" was not fixed for hearing.

8. *It is an oft-repeated principle of law that whenever some miscellaneous application is pending before the Court, it shall decide the same in the first stance before finalizing the lis and passing the final order/judgment. Failure to decide the miscellaneous application before passing the final verdict would render the same nullity in the eye of law. To this effect, one can seek guidance from the case of MUHAMMAD UMER vs. MUHAMMAD QASIM and another (1991 SCMR 1232). The relevant extract from the same is reproduced below: -*

"6. The same point has been urged before us. The learned Civil Judge while dismissing the suit of the petitioner mainly relied upon the order of the Deputy Land Commissioner whereby the land allotted in the name of the petitioner was cancelled. But this order of cancellation was set at naught by the Land Commissioner. As per the record, the petitioner sought to produce the same vide application made under Order XLI, rule 27, C.P.C., and we think that once the Appellate Court was seized of the matter, i.e. the application under Order XLI, rule 27, C.P.C., it ought to have adjudicated upon the same before disposing of the appeal. In support of his case, the learned counsel for the petitioner had rightly relied upon the decision of this Court reported as Amina Begum v. Ghulam Dastgir (PLD 1978 SC 220) wherein it was held:--

"Indeed in our considered opinion a discretion is vested in this behalf in the Courts to be judicially exercised in proper cases in order to avoid multiplicity of proceedings, to shorten litigation, and to do complete justice between the parties and mold the relief according to the altered circumstances in the larger interest of justice."

Further, we do not find any negligence on the part of the petitioner in bringing to the notice of the trial Court the order of the Land Commissioner. The order of the Land Commissioner could not be brought on the file of the trial Court because the same was under review before the Commissioner and the final order was passed by him on 15-10-1987 when the matter stood decided in the trial Court."

Reference to the above effect can also be made to MUHAMMAD YOUSUF and 12 others vs. ABDUL KHALIQ and others (1991 SCMR 1981) and Mst. IMTIAZ BEGUM v. Mst. SULTAN JAN and others (2008 SCMR 1259).

9. *So far judgment in the case of Mst. LAILA QAYYUM v. FAWAD QAYUM and others (supra) is concerned, in the said case, the matter in issue was related to the paternity of a child for the determination of which an application seeking a deoxyribonucleic acid (DNA) test was moved, which was allowed by the trial Court, which order was, however, set aside by the appellate Court and ultimately when the matter went before the Peshawar High Court, the order of the appellate Court was set aside while restoring the order of the trial Court. The matter then went to the Supreme Court of Pakistan, it was thus held that in terms of Article 128 of the Qanun-e-Shahadat Order, 1984, suit was barred and, in this background, suit was also dismissed. The facts in the said case were thus not alike to the present case. Even otherwise, the proposition in hand is fully covered in the light of law laid down in Qazi MUHAMMAD TARIQ v. HASIN JAHAN and 3 others (1993 SCMR 1949).*

10. *For the foregoing reasons, this petition is **allowed**. As a result thereof, orders dated 9th December, 2022 as well as 19th May, 2022 passed by the learned Additional District Judge and learned Civil Judge are **set aside**. Consequently, the application under section 12 (2) of “CPC” shall be deemed to be pending before the learned Senior Civil Judge (Civil Division), Rawalpindi, who shall decide the same afresh on its own merits, strictly in accordance with law.*

11. *Needless to observe that if the Court seized with the matter is of the view that the application can be decided while treating the issues already framed as legal/preliminary issue or some new issue is required to be framed, the Court shall proceed accordingly and decide the application under section 12 (2) “CPC” within three months from the date of first appearance of the parties before the Court. The parties are directed to*

W.P.No.1475 of 2023

*appear before the learned Senior Civil Judge (Civil Division) on
10.01.2024. No order as to costs.*

(MIRZA VIQAS RAUF)
JUDGE

Approved for reporting.

JUDGE

Zeeshan