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JUDGMENT SHEET
LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

W.P. No.50316 of 2023

Asmat Bibi Versus Addl. District Judge, etc.

J U D G M E N T

Date of Hearing:	15.11.2023
Petitioner by:	Mr. Nasir Abbas Zafar Malik, Advocate.
Respondents No.3 to 5 by:	Ms. Rabia Bajwa, Advocate.

Anwaar Hussain, J. This constitutional petition is directed against judgment dated 06.07.2023, passed by the Additional District Judge, Ferozewala, who proceeded to accept the appeal of respondents No.3 to 5 and has upended the order dated 15.12.2022, passed by the Civil Judge 1st Class, Ferozewala and the application of the petitioner, under Order XXXIX Rules 1 & 2 of the Code of Civil Procedure, 1908 (“CPC”), filed alongwith her suit for declaration and cancellation of the document as also recovery of possession and permanent injunction, was dismissed.

2. By way of factual background, it has been noted that the petitioner, deceased Muhammad Sharif [(predecessor-in-interest of respondents No.3(a) to 3(f)], deceased Nazir Ahmad [(predecessor-in-interest of respondents No.4(a) to 4(g)] and Manzoor Ali, were real brothers and sister who were children of one Noor Din. For facility of reference, predecessors of respondents No.3(a) to 3(f), 4(a) to 4(g) and respondent No.5, are collectively referred as “**the respondents**”.

3. The dispute relates to part of total property, measuring 40-*Kanals*, detail whereof is given in the headnote of the plaint of the suit which was owned by Noor Din. Apart from the petitioner and the respondents, Noor Din also had other children namely, Munawar Bibi,

Zuhran Bibi and Bashiran Bibi. The petitioner instituted the suit laying challenge to the oral gift mutation bearing No.86 dated 28.04.1984, in favour of the respondents, on ground of fraud as a result of which the petitioner was deprived from her share of inheritance in the property left by her father, Noor Din.

4. Learned counsel for the petitioner submits that findings of the Courts below are at variance and well-reasoned order of the Trial Court has been upset by the Appellate Court below merely on the technical ground that while laying challenge to the impugned oral mutation in favour of her brothers (the respondents), the petitioner has not arrayed other legal heirs of Noor Din in her suit, as defendants, which is not a plausible ground for dismissing the application of the petitioner, under Order XXXIX, Rules 1 & 2, CPC as said legal heirs of Noor Din are neither necessary party nor any relief was claimed against them.

5. Conversely, learned counsel for the respondents submits that the petitioner has failed to establish a *prima facie* case as she intentionally has not arrayed her other siblings as defendants. Adds that the respondents are in possession of the disputed property for the last 38-years and nothing has been brought on record to establish as to when the petitioner came to know about the sanctioning of impugned oral gift mutation and whether the petitioner was ever given any share in the produce (حصہ بٹائی). Places reliance upon cases reported as “Mst. Sheedan Begum and others v. Muhammad Usman Khan and others” (2021 MLD 1937) and “Ashiq Muhammad and others v. Mst. Suhagan” (2023 SCMR 1171) in support of her contentions.

6. Arguments heard. Record perused.

7. It is settled principle of law that in order to succeed in obtaining temporary injunction in a case, a plaintiff has to establish co-existence of three conditions/ingredients i.e., (i) *prima facie* case; (ii) possibility of suffering irreparable loss if temporary injunction is declined; and

(iii) that the balance of convenience leans in favour of the plaintiff. Of the above referred three conditions, existence of *prima facie* case is foundational and the other two conditions are considered only once the plaintiff establishes a *prima facie* case in his favour. This assessment is to be carried out by the learned Trial Court while examining the pleadings of the parties. In plaint of her suit, the petitioner alleged commission of fraud by stating that she had not transferred the disputed property by way of oral gift to the respondents and when written statement was filed, plea was taken that the share of the petitioner in the property left by the father of the petitioner was purchased by the respondents. Para No.5 of the written statement is reproduced hereunder:

"5- ضمن نمبر 5 اس حد تک درست ہے کہ اراضی متدعوئہ زرعی ہے اور مدعا علیہم کے قبضے میں ہے۔ باقی ضمن غلط ہے اس سے انکار ہے۔ مدعا علیہم بطور مالک اراضی متدعوئہ پر قابض ہیں مدعیہ و دیگر بانعان نے اراضی متدعوئہ کی اپنے اپنے حصہ کی قیمت وصول کر کے انتقال نمبر 86 مورخہ 1984-28-04 روبرو مجاز افسر پیش ہو کر تصدیق و تکمیل کروایا مدعا علیہم نے آج تک کسی کو کوئی منافع یا حصہ / پٹہ ادا نہ کیا ہے کیونکہ مدعا علیہم 1984 سے قانونی طور پر مالک و قابض آرہے ہیں۔ باقی ضمن غلط ہے اس سے انکار ہے۔"

(*Emphasis supplied*)

There is an apparent disconnect, in respect of the nature of the transfer by the petitioner in favour of the respondents, between the impugned gift mutation in favour of the respondents and the stance taken by the respondents in written statement that clearly establishes the existence of *prima facie* case in favour of the petitioner as there was no justification for the respondents for getting the impugned oral gift mutation sanctioned in their favour instead of a sale mutation if the petitioner received price of her share and sold the disputed property. The petitioner being weaker segment of the society has been deprived of her share in inheritance in the property left by her father. She will certainly face inconvenience due to multiplicity of litigation if interim relief is not granted restraining the respondents from further alienating the disputed property and creating third party interest in respect thereof.

This fact had rightly been appreciated by the learned Trial Court, *vide* order dated 15.12.2022, operative part whereof is reproduced hereunder:

“4.....In the instant case, plaintiff has called in question the transaction whereby she has been deprived of her rights to property and onus is shifted upon defendants to prove genuineness of transaction through cogent and convincing evidence. Moreover, it is settled practice in our society that females are deprived of their rights to property by their family as well as close male relatives. Perusal of mutation shows that the same has been sanctioned on basis of oral gift whereas defendants in their written statement took stance that they purchased property after payment of its value. In cases of gift, no value is to be paid. Transaction of sale and gift are totally different to each other. Thus stance taken by defendants is ambiguous and against revenue record. Hence plaintiff has proved her prima facie case. If temporary injunction is not granted and property is further alienated, plaintiff would face irreparable loss and it would give birth of future complications and multiplicity of litigation.”

(Emphasis provided)

8. On the contrary, the Appellate Court below has dismissed the application of the petitioner, under Order XXXIX Rules 1 & 2, CPC on the ground, that petitioner has not arrayed her other siblings in the suit as defendants, which is alien to the ingredients required for grant or refusal of the temporary injunction. The said siblings, at the most, were proper parties and non-impleading thereof is an irregularity, which is not a non-curable defect. Needless to mention that the general rule is that the plaintiff in a suit is *dominus litis* and may choose the person against whom he wishes to litigate and cannot be forced to sue a person against whom he does not seek any relief. Even otherwise, the learned Appellate Court below lost the sight of settled legal position regarding the distinction between the non-joinder who ought to have been joined as a party and the non-joinder of a person whose joinder is only a matter of convenience or expediency, as is the position in the instant case where the petitioner is not claiming any right against her siblings

who have not been arrayed as the defendants, since the disputed property, forming part of the inheritance share of the petitioner in the property left by her father, is being claimed by the respondents and not the said other siblings of the petitioner. Judgments relied upon by the respondents' side, having been considered, are found distinguishable, on account of facts as well as legal question involved.

9. In view of the above discussion, this constitutional petition is **allowed** and the impugned judgment of Appellate Court below is set aside and the order passed by the Trial Court is upheld. No order as to costs. Before parting with, it is also made clear that the observations and findings in this judgment are tentative in nature and made for deciding the application of the petitioner for grant of interim injunction, only. The learned Trial Court shall not be prejudiced by the said observations while finally deciding the suit of the petitioner.

(ANWAAR HUSSAIN)
JUDGE

Approved for reporting

Judge