

Judgment Sheet

IN THE LAHORE HIGH COURT,
BAHAWALPUR BENCH BAHAWALPUR BENCH
JUDICIAL DEPARTMENT

C.R.No.408-D of 2023

Sabiha Bibi
Vs.
Abdul Wahab, etc.

J U D G M E N T

Date of hearing	11.11.2024
Petitioner By:	Mr. Abdul Basit Khan Balouch, Advocate
Respondent Nos. 1, 2, 6 to 8, 10 to 16 by:	Mr. Nadeem Iqbal Ch., Advocate
Respondent Nos. 3, 4, 5 and 9 by:	Nemo.

Faisal Zaman Khan, J:- Through this civil revision order and decree dated 28.05.2022 and judgment and decree dated 29.03.2023 passed by the learned Civil Judge, Khanpur and learned Additional District Judge, Khanpur, respectively, have been assailed. By virtue of the former order the suit of the petitioner has been dismissed under Order VII Rule 11 CPC and through the latter judgment the same has been upheld.

2. Succinctly, the facts of the case are that in order to assail multiple mutations of gift etc. petitioner instituted a suit for declaration alongwith permanent injunction against the respondents, in which respondent Nos.1 to 3, 6 to 8 and 10 to 16 filed their written statement denying the claim of the petitioner whereas respondent Nos. 4, 5 and 9 filed conceding written statements, whereafter, on 28.05.2022 when the case was fixed for argument on the application for temporary injunction, the learned trial court while invoking the

provisions of Order VII Rule 11 CPC rejected the plaint being barred by time. Feeling aggrieved, petitioner preferred an appeal, which also met the same fate and was dismissed vide judgment and decree dated 29.03.2023, hence, this civil revision.

3. Learned counsel for the petitioner submits that when the plaint was rejected the case was fixed for argument on an application under Order XXXIX Rules 1 and 2 CPC and the maintainability of the suit was not in question before the trial court at that point in time, therefore, the trial court was supposed to decide the application for temporary injunction first, however, without confronting the petitioner with the fact that the suit is not maintainable, the same could not have been dismissed. Further adds that on the date when the plaint was rejected, it was not a date of hearing for the purposes of maintainability of the suit, thus, no order *qua* maintainability of the suit could be passed. Places reliance on judgments reported as Tariq Mahmood Chaudhry, Kamboh v. Najam un Din (1999 SCMR 2396), Mst. Hameedan Bibi and others v. Ch. Atta Ullah (1999 SCMR 2266), Qazi Muhammad Tariq v. Hasin Jahan and 3 others (1993 SCMR 1949), Hashim Khan v. National Bank of Pakistan (1992 SCMR 707), Munawar Ali and others v. Umar Daraz and others (2022 CLC 920), Mujahidabad Welfare and Development Organization Jutal through Members v. Provincial Government through Chief Secretary Gilgit-Baltistan and others (2022 YLR 565), Mst. Khanai and 4 others v. Ghulam Rasool and 9 others (2022 CLC 433), Shahid Mashmood v. Mehtab Khan (PLD 2015 Lahore 71) and Mushtaq Hussain v. Province of Punjab through Collector Jhelum District and 6 others (2003 MLD 109).

4. Replying to the above, learned counsel for the respondents submits that it is the foremost duty of the courts to look into the question of maintainability of the suit including the question of limitation and thereupon proceed with the suit, therefore, the trial court has rightly invoked its powers under Order VII Ruel 11 CPC

while rejecting the plaint on the ground of limitation, thus, the impugned order/judgment and decrees are in accordance with law. He places reliance on judgments reported as Syed Kausar Ali Shah and others v. Syed Farhat Hussain Shah and others (2022 SCMR 1558), Mst. Rabia Gula and others v. Muhammad Janan and others (2022 SCMR 1009), Salamat Ali and others v. Muhammad Din and others (PLD 2022 S.C. 353), Faqir Ali and others v. Sakina Bibi and others (PLD 2022 S.C. 85), Nasir Fahimuddin and others v. Charles Philips Mills and others (2017 SCMR 468), Agha Syed Mushtaque Ali Shah v. Mst. Bibi Gul Jab and others (2016 SCMR 910), Muhammad Rustam and another v. Mst. Makhan Jan and others (2013 SCMR 299), Kala Khan and others v. Rab Nawaz and others (2004 SCMR 517), Abdul Haq and another v. Mst. Surrya Begum and others (2002 SCMR 1330), Mir Salah ud Din v. Qazi Zaheer ud Din (PLD 1988 S.C. 221), Hakim Muhammad Buta and another v. Habib Ahmad and others (PLD 1985 S.C. 153), Muhammad Yasin v. Muhammad Ismail and others (2024 CLC 922) Mst. Sheedan Begum and others v. Muhammad Usman Khan (2021 MLD 1937), Noor din and another v. Additional District Judge, Lahore and others (NLR 2015 Civil 81), Haji Abdul Karim through Attorney and 4 others v. Messrs Florida Biuilders (Pvt.) Ltd. Karachi (2009 YLR 451), Asghar Ali v. P.K. Shahani and 2 others (1992 CLC 2282) and Muhammad Shafi v. Punjab Province through Collector, Vehari and another (1982 CLC 55).

5. Despite service, none has entered appearance on behalf of respondent Nos. 3, 4, 5 and 9, therefore, they are proceeded against *ex parte*.

6. Arguments heard. Record perused.

7. From the perusal of the available record, it transpires that on 28.05.2022 the case was fixed before the trial court for arguments on

the application for temporary injunction and not for determining the question of maintainability of the suit on the point of limitation.

8. It has been held in judgments reported as Jewan and 7 others v. Federation of Pakistan through Secretary, Revenue, Islamabad and 2 others (1994 SCMR 826), Shahid Iftikhar and another v. Mst. Tasneem Rani and 4 others (2017 CLC 264), Muhammad Saeed v. Syed Muhammad Baqir Bukhari and 2 others [2017 CLC (NOTE) 153], Mst. Amina v. Muhammad Easa and 11 others (2008 YLR 1405), Iftikharul Haq v. District Canal Officer and others (2005 CLC 1740), Muhammad Tariq Mahmood and 2 others v. Anjuman Kashmiri Bradari Khisht Faroshan through President Abdul Ashfaq and 21 others (2003 CLC 335), Mushtaq Hussain v. Province of Punjab through Collector Jhelum District and 6 others (2003 MLD 109), Hakim Ali v. Muhammad Amin and 2 others (1981 CLC 673), Mst. Zainab Jan v. Abdul Rashid (1981 CLC 1012), Amtul Batool and another v. Qamar Sultana (PLD 1980 Lahore 647) and Mst. Khurshid Begum and 7 others v. Inam Rabbani and another (1979 CLC 570) that it is improper to reject a plaint while deciding an application for temporary injunction for the reason that there is a material difference in the scope of Order VII Rule 11 and Order XXXIX Rules 1 and 2 CPC as while exercising jurisdiction under the former provision, the Court will have to decide whether there is any cause of action or the suit is barred by law whereas while deciding under the latter provision, the Court will only see *prima facie* case, balance of convenience and irreparable loss.

9. There is no cavil to the proposition that the courts have ample power to look into the question of maintainability of the suit under Order VII Rule 11 CPC or the question of limitation keeping in view Section 3 of the Limitation Act, 1908, however, it is the foremost duty of the court to apply these provisions at the outset when the suit is filed, however, once the court decides to proceed with the suit and issue notice to the other side then the court without affording an

opportunity to the plaintiff to address the question of maintainability of the suit including the point of limitation should not decide the same, merely because an objection is raised by the other side, which is only a contention and not conclusive as no adjudication is made or the court has a change of heart and it wants to re-consider its previous decision of entertaining the suit, as in such eventuality if without putting the plaintiff on notice an order of rejection of plaint is passed it will violate/militate the mandate of Article 10-A of the Constitution of the Islamic Republic of Pakistan and the rule of *audi altrem partem*.

10. Another circumstance for deciding the maintainability of the suit can be that defendant files an application under Order VII Rule 11 CPC upon which the plaintiff can be put to notice and thereupon the fate of the suit could be decided or after the framing of the issues, the issue of the maintainability of the suit can be treated as preliminary issue under Order XIV Rule 2 and decided at the outset, however, in both the circumstances the court has to put the plaintiff to notice for decision of such question.

11. It is cardinal principle of law that for rejection of a plaint only its contents are to be seen and no other document can be considered. An exception to the rule is that the documents, which are admitted between the parties can be looked into by the court while exercising its power under Order VII Rule 11 CPC. For reference, reliance is placed on judgments reported as Haji Abdul Karim and others v. Messrs Florida Builders (Pvt.) Limited (PLD 2012 SC 247), Mrs. Anis Haider and others v. S. Amir Haider and others (2008 SCMR 236) and Abdul Waheed v. Mst. Ramzanu and others (2006 SCMR 489).

12. It has also been held by the Apex Court that question of limitation is a mixed question of law and facts, which can only be resolved after recording of evidence of the parties. Reliance can be placed on judgments reported as Messrs Anwar Textile Mills Limited

v. Pakistan Telecommunication Company Limited and others (2013 SCMR 1570), Haji Abdul Sattar and others v. Farooq Inayat and others (2013 SCMR 1493), Collector of Customs E & S.T. and Sales Tax v. Pakistan State Oil Company Ltd. (2005 SCMR 1636), Tariq Mahmood Chaudhry, Kamboh v. Najam un Din (1999 SCMR 2396), Government of the Punjab through Secretary, Education, Lahore v. Shahida Begum (1994 SCMR 1488) and Irshad Ali v. Sajjad Ali and 4 others (PLD 1995 SC 629).

13. In the above backdrop, from the perusal of the contents of the plaint, it is evident that it is the case of the petitioner/plaintiff that the mutations in dispute are fraudulent and came to her knowledge 2/3 months before filing of the suit and the said contention was acknowledged by respondent Nos.4, 5 and 9 while filing their conceding written statements, therefore, the trial court was obligated to determine the said questions for which evidence was definitely required instead of rejecting the plaint merely on the ground that since the person on whose behest the mutations in dispute were sanctioned did not challenge the same during his life time as it is yet to be proved/decided that such person was even aware of sanctioning of mutations.

14. Perusal of the case law on the subject mentioned supra and placing the same in juxtaposition with the facts of the present case, makes it abundantly clear that both the courts below erred in law in interpreting Order VII Rule 11 CPC. Since the questions upon which the plaint was rejected were disputed and factual in nature and the same could not have been resolved without putting both the parties to notice and recording of evidence, therefore, for the purpose of rejecting the plaint under Order VII Rule 11 CPC and keeping in view the case law mentioned in paragraph No.10 *supra*, the learned trial court was supposed to look into the contents of the plaint only and could not have decided about the maintainability of the suit on the point of limitation, which is mixed question of law and facts in view

of the case law mentioned in paragraph No.11 *supra*, which it failed to do.

15. Even otherwise, from the perusal of the available record, it is manifest that on 28.05.2022 the suit was not fixed for deciding the question of maintainability of the suit on the point of limitation, rather the same was fixed only for deciding the application for temporary injunction, therefore, without confronting the petitioner being plaintiff regarding the question of maintainability of the suit on the ground of limitation or giving him an opportunity to defend himself, on mere argument of the other side that too on the application of temporary injunction, the plaint could not have been rejected.

16. In the attending circumstances, the proper course available to the trial court was to have decided the application of temporary injunction, framed the issues and treated the issues of maintainability of the suit and limitation as preliminary as contemplated in Order XIV Rule 2 CPC and decide the same at the outset (with or without recording of evidence).

17. Last but not the least, if the trial court was convinced that the suit was not maintainable it could have fixed the case for arguments on maintainability of the suit so that parties should get an opportunity to defend themselves.

18. In the above perspective, this Court is of the view that since the contents of the plaint make out a *prima facie* case as it was the case of the petitioner that disputed mutations were fraudulent, that the predecessor of the parties never appeared before the revenue authorities for sanctioning of mutations, ingredients of gift were not complete and the donor was incapacitated to make a gift which were conceded to by respondent Nos.4, 5 and 9 in their written statements, therefore, there was no occasion for the trial court to have rejected the plaint at the outset that too on the question of limitation especially so when the suit was not listed for hearing so as to determine the question

of maintainability of the suit as the case was fixed for arguments on an application for temporary injunction, hence, the impugned order/judgment and decrees cannot sustain.

19. As regards the judgments referred by the learned counsel for the respondents, the same having different facts and circumstances are not applicable to the case in hand. Moreover, they may have some impact, as and when the court considers the question of maintainability of the suit after putting the parties to notice.

20. For what has been discussed above, this civil revision is **allowed** as a sequel to which the impugned order/judgment and decrees are **set aside** resultantly the suit filed by the petitioner shall be deemed to be pending before the trial court, who shall decide the same in accordance with the observations made in this judgment.

(FAISAL ZAMAN KHAN)
JUDGE

APPROVED FOR REPORTING

JUDGE