

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

R.F.A NO. 95 OF 2020

Mrs. Shamim Rehman

VERSUS

Public at large and 2 others.

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DATE OF HEARING: 14.09.2020.

APPELLANT BY: Barrister Suleman Khan,
Advocate.

RESPONDENTS: Mr. Naveed Akbar, Advocate
for respondent No 2
Ch. Aziz ur Rehman, Advocate
for respondent No 3

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FIAZ AHMAD ANJUM JANDRAN, J. - Through the instant Regular First Appeal, appellant impugns judgment and decree dated 10.02.2020, passed by learned Civil Judge 1st Class, Islamabad (West), whereby her suit for declaration & mandatory injunction was dismissed.

2. Facts, relevant for the disposal of instant appeal are that on 26.03.2019, appellant/plaintiff filed a suit for declaration and mandatory injunction with the averments that she is real sister and surviving legal heir of Ms Kaniz Fatima Yusuf (*"herein after to be referred as "the late"*), who passed away on 23.11.2018 leaving behind the estate i.e. house No 14-B, Street No 63, F-8/4 Islamabad (*"suit property"*); that the respondent No 2/defendant No 2 (*Arif T Sufi*) is nephew and surviving legal heir of the late along with the appellant and entitled to inherit the suit property; that the respondent No 2 waived his right of inheritance in the suit property in favour of the appellant; that as per record of respondent No

3/defendant No 3-C.D.A dated 20.11.1993, the late was owner of suit property, appellant, being legal heir of the late, be declared lawful owner of the suit property and the respondent No. 3/C.D.A be directed to transfer the same in her name and issue fresh allotment letter in due course.

3. The respondent No 1 (*public-at-large*) was proceeded against ex-parte after issuance of proclamation in the newspaper vide order dated 15.05.2019, while the respondent No 2 filed conceding written statement on the same date through Special Attorney (*Ms Rehana Sufi/his mother*), who was also representing the appellant as Special Attorney. Subsequently, on 15.07.2019, respondent No. 3/C.D.A filed written statement wherein they testified ownership of the late, qua the suit property, transferred in her name on 20.11.1993. The learned Trial Court framed following issues on 11.09.2019:-

1. *Whether the plaintiff has got cause of action? OPP*
2. *Whether the plaintiff is entitled to decree as prayed for? OPP*
3. *Relief*

4. Thereafter, Special Attorney of the appellant, Ms Rehana Umer Sufi got recorded her statement on 02.10.2019 as PW-1 and tendered in evidence Special Power of Attorney Ex.P-1, Family Registration Certificate ("F.R.C") Ex.P-2, death certificate of late Ex.P-3, C.D.A transfer letter Ex.P-4, utility bills Ex.P-5, and property tax receipt Ex.P-6. As the respondent No. 2 has already conceded claim of the appellant through written statement, the learned counsel representing the said respondent opted not to cross-examine the special attorney of the appellant.

On the next date of hearing i.e. 08.10.2019, learned counsel for respondent No 3/C.D.A recorded statement, whereby she has waived her right of cross-examination upon PW-1 and relied upon the written statement already tendered, while on the same date, learned counsel for respondent No 2 tendered Special Power of Attorney Ex. D-2/1 sworn in favour of Ms Rehana Umer. The learned counsel for the respondent No 2 also made statement to the effect that the respondent No 2 had surrendered his right against the appellant in the suit property and has no objection if the suit of the appellant is decreed. The learned Trial Court after hearing the arguments advanced by learned counsel for the appellant, dismissed the suit vide judgment and decree dated 10.02.2020, being assailed through the instant appeal.

5. Learned counsel for the appellant argued that not only from the plaint but the statement of PW-1 coupled with the documentary evidence, it is established that the late was owner of the suit property and that the appellant and respondent No 2 are legal heirs of the late, while in absence of any other legal heir there was no justification to dismiss the suit; that the objection with regard to having one and same attorney of the appellant and that of respondent No 2 is devoid of force because not only the respondent No 2 had been represented by a counsel who made statement in favour of the appellant but the attorney, too, had no adverse interest against the appellant; that in case of any discrepancy, the appellant could be directed to make good the same but cannot be non-suited when there was no rival claimant. It is further averred that the evidence on record amply proved the case of the appellant regarding heir-ship and ownership of the

property of the late, therefore, impugned judgment and decree are liable to be set aside.

6. Learned counsel for respondent No 2 supported the above submissions, while learned counsel for respondent No 3/C.D.A testified ownership of the late regarding the suit property.

7. Heard the learned counsels for the parties and examined the record with their able assistance.

8. It is settled principle that appeal is considered continuation of trial where reappraisal and scrutiny of the evidence is mandatory. At the same time, it is also to be kept in view that the person who asserts claim has to discharge its onus. Likewise, it is not a set rule to accept the claim of the plaintiff as prayed for when there is nothing available against or where the claim is recognized by the other side. Even in ex-parte matter, the court is under an obligation to apply its independent judicial mind while evaluating the evidence for ascertaining the entitlement of the plaintiff against the property.

9. On examination of record, it transpired that the learned Trial Court declined to grant decree as prayed for on the grounds *that there is an inherent defect in the pleadings as the suit is being pursued by the attorney who is also attorney of the respondent No 2, the other legal heir, which is not warranted under the law, that the appellant and the late are though daughters of Sufi Muhammad Yousaf but from different wives, that the appellant did not bother to mention that whether his father was alive or not and that the respondent No.2 has also not explained his relationship with the late.*

10. It was emphasized that there is no other legal heir of the late and that the appellant had discharged burden to prove by effecting service upon the legal heirs, if any, by arraying public-at-large as respondent No 1 but the record speaks otherwise, as

during pendency of the suit one Ms Noreen Talha wife of Talha Saeed, emerged as claimant of the suit property, by filing an application under Order I Rule 10 CPC for becoming party on the ground that she is also owner of the suit property and the appellant deliberately omitted to implead her as party to the suit. The said application was filed on 10.01.2020 and was ordered to be produced along with main case on the date fixed i.e. 27.02.2020. The case was taken up earlier than the date fixed on 21.01.2020, as application for early hearing filed by the respondent No 2 was allowed and on that very date, arguments of learned counsel for the appellant and respondent No. 2 were heard. The case was then fixed for 28.01.2020 for arguments on behalf of counsel for respondent No 3/C.D.A but no one turned up on behalf of the said respondent and the matter was then set for 08.02.2020 but the position remained the same and ultimately, right of respondent No 3/C.D.A to advance arguments was closed and lastly on 10.02.2020, suit was dismissed vide impugned judgment and decree.

11. The above proceedings clearly show that though application under Order I Rule 10 CPC was made part of the file but no proceedings were conducted on the said application, as neither the appellant was put under notice nor was directed to file reply thereto, which is a glaring jurisdictional defect and cannot be overlooked as it would amount to condemn a litigant unheard and, therefore, on this score alone, the impugned judgment and decree are not sustainable in the eye of law.

12. As the impugned judgment and decree are held to be suffered from jurisdictional defect, there left no need to dilate upon the assertions made basis to counter the impugned judgment and decree

particularly when the appellant will have a right to advance additional evidence, if so desires.

13. In view of above, the instant R.F.A is **allowed**, impugned judgment and decree dated 10.02.2020 are set aside and the case is remanded to the learned Trial Court for decision afresh after the disposal of application, referred to above (*left unattended for reasons unknown*). The appellant shall have a right to advance any additional evidence if so desires, with right of rebuttal to the other side. The learned Trial Court shall make every endeavour to conclude the trial within shortest possible time preferably within a period of two months from the receipt of this judgment. No orders as to costs.

(FIAZ AHMAD ANJUM JANDRAN)
JUDGE

A.R.Ansari

Announced in open Court on 28.09.2020.

JUDGE