

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.418 of 2016

Muhammad Ayub

Versus

Muzaffar Khan (Deceased) and others

Date of Hearing: 07.11.2019

Petitioner by: Mr. Imran Ali Kayani, Advocate

Respondents by: Mr. Naseer Anjum Awan, Advocate for
respondent No.4

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner, Muhammad Ayub, impugns the order dated 09.06.2015 passed by the Court of the learned Additional District Judge, (West), Islamabad, whereby his revision petition against the judgment and decree dated 07.01.2015 passed by the Court of the learned Civil Judge (West), Islamabad was dismissed. Vide the said judgment and decree dated 07.01.2015, the learned Civil Court had dismissed the petitioner's suit for recovery of possession of property under Section 9 of the Specific Relief Act, 1877 ("the 1877 Act") and permanent injunction.

2. The primary reason why the petitioner's suit was dismissed was because it was held not to be maintainable for want of satisfying the requirements of Section 92 of the Code of Civil Procedure, 1908 ("C.P.C."). It was held that the mandatory permission from the Advocate General prior to the institution of the suit with respect to *waqf* property had not been obtained by the petitioner. This ground also found favour with the learned Revisional Court while dismissing the petitioner's revision petition against the said judgment and decree dated 07.01.2015.

3. Learned counsel for the petitioner submitted that the learned lower Courts concurrently erred by not appreciating the fact that the suit instituted by the petitioner was not under Section 92 C.P.C. and therefore prior permission of the Advocate General was not required; that the suit instituted by the petitioner was under Section 9 of the 1877 Act for recovery of possession of immovable property since he had been dispossessed therefrom and was seeking the restoration of his possession; and that reliance by the learned Civil

Court on the judgment reported as PLD 1989 S.C. 282 was misconceived and that the judgment and decree passed by the learned Civil Court was not in consonance with the requirements of Order XX, Rule 5 C.P.C. as several issues had remained undecided.

4. Learned counsel for the petitioner further submitted that the learned Courts below concurrently erred by not appreciating the evidence available on the record (i.e. Exh.P1) which showed that Baba Sain Khushi Muhammad was the petitioner's ancestor / predecessor-in-interest; that the learned Courts below also disregarded Exh.P2 which showed that the petitioner, as the descendant of Baba Sain Khushi Muhammad, was the undisputed lawful owner of the suit property; that the suit for declaration and payment of compensation filed by respondents No.2 and 3's father and respondent No.4 had been dismissed by the learned Civil Court; and that the learned Courts below also did not give any evidentiary value to Exh.P4 which is a police report stating therein that the petitioner was the owner of the suit property. Learned counsel for the petitioner prayed for the concurrent judgments/orders passed by the learned Courts below to be set-aside.

5. On the other hand, learned counsel for respondent No.4 submitted that the private respondents are in lawful possession of the suit property; that the petitioner has got nothing to do with the suit property; that the concurrent judgments/orders passed by the learned Courts below do not suffer from any jurisdictional irregularity; that the petitioner had not been able to prove that he had been dispossessed from the suit property; that the private respondents and their families are administering the affairs of the suit property since the past sixty years being the administrator/*mutawalli*; that the suit property is *waqf* property; and that the private respondents do not claim to be the owners of the suit property. Learned counsel for the private respondents prayed for the writ petition to be dismissed.

6. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

7. The record shows that on 27.07.2010, the petitioner filed a suit for possession of the suit property under Section 9 of the 1877 Act. The details of the suit property are given in the first paragraph of the suit. The petitioner's case was that the suit property was owned by Baba Sain Khushi Muhammad, and that the petitioner was his descendant/successor-in-interest. The petitioner had pleaded that he had been dispossessed from the suit property on 09.07.2010 by the private respondents. The petitioner had prayed for physical possession of the suit property (i.e. Shrine, house and agricultural land falling in *khasra* Nos.1403 and 1216 in *Mouza* Seir Saral, Islamabad) to be restored to him.

8. The private respondents contested the said suit by filing a written statement. In the said written statement, it was pleaded *inter alia* that the private respondents and their families had been administering the affairs of the suit property since the past sixty years as administrator/*mutawalli*. It was also pleaded that as per mutation No.438, dated 18.02.1918, the suit property was *waqf* property and that the petitioner had concealed this important fact while obtaining an inheritance mutation in his favour.

9. On 20.03.2013, the learned Civil Court framed the issues. As mentioned above, vide judgment and decree dated 07.01.2015, the petitioner's suit was dismissed primarily on the ground that since the suit property was *waqf* property, permission of the Advocate General under Section 92 C.P.C. had not been obtained by the petitioner before filing the suit. It is pertinent to mention that in the said judgment, the learned Civil Court did not give any finding as to the petitioner's claim of ownership over the suit property.

10. Against the said judgment and decree dated 07.01.2015, the petitioner preferred a revision petition before the Court of the learned Additional District Judge, Islamabad. Vide order dated 10.04.2015, the said revision petition was dismissed on the ground that the judgment and decree dated 07.01.2015 was appealable and that the petitioner's revision petition could not be converted into an appeal since the revision petition had been filed on a date which was beyond the limitation period for filing an appeal against the said judgment and decree.

11. Against the said order dated 10.04.2015, the petitioner filed a review petition under Section 114 read with Order XLVII C.P.C. Vide order dated 09.06.2015, the learned Revisional Court adjudicated upon the matter on merits and dismissed the revision petition. In the said order dated 09.06.2015, it was held *inter alia* that the petitioner had not been able to produce any evidence to show that he was in actual possession of the suit property before 09.07.2010 or that the private respondents had forcibly dispossessed him. The petitioner's assertion claiming ownership of the suit property on the basis of mutation No.562 entered in his favour was negated by the Court of the learned Additional District Judge by holding that the said mutation had subsequently been cancelled.

12. Learned counsel for the petitioner's arguments centered around the petitioner's stance that he was the lawful owner of the suit property, and that he was the descendant/successor-in-interest of Baba Sain Khushi Muhammad. No arguments were advanced on the question as to whether and how the petitioner had been dispossessed from the suit property by the private respondents on 09.07.2010. Therefore, I am not inclined to interfere with the finding of the Court of the learned Additional District Judge, Islamabad that the petitioner had not been able to prove that he had been dispossessed from the suit property.

13. The private respondents do not claim to be the owners of the suit property but only its administrators/*mutawallis*. The learned Courts below have concurrently dismissed the petitioner's suit for possession of the suit property filed under Section 9 of the 1877 Act. In such a suit, the Court has only to determine whether the plaintiff was in possession of the suit property before he was dispossessed from the same by the respondents. In such a suit, the Court cannot determine questions of title, right or legal character. The dismissal of a suit for possession does not debar a plaintiff from filing a suit for declaration as to his ownership of the suit property. Where a plaintiff fails to get relief under Section 9 of the 1877 Act, he was not debarred from filing a suit on the basis of title and recovery of possession of the property. In holding so, reliance is placed on the following case law:-

- (i) In the case of Mst. Majeedan Vs. Muhammad Naseem (2001 SCMR 345), it was held *inter alia* that a suit under Section 9 of the 1877 Act is an entirely different kind of action, and that in case a plaintiff is dispossessed from immovable property, Section 9 of the said Act entitles him to be put in possession simply by proving (i) that he was in possession, (ii) that he had been dispossessed by the defendant, (iii) that the dispossession is not in accordance with the law, and (iv) that the dispossession took place within six months of the suit. It was also held that in such a suit, no question of title either of the plaintiff or of the defendant can be raised or gone into by the Court.
- (ii) In the case of Canal View Cooperative Housing Society Vs. Javed Iqbal (PLD 2004 S.C. 20), the Hon'ble Supreme Court after making reference to Section 9 of the 1877 Act, held as follows:-
- “7. Legally speaking object of this provision is clearly to discourage forcible dispossession and to provide a quicker remedy for recovery of possession where a person is dispossessed from immovable property otherwise than in due course of law. The plaintiff under this section is not required to establish his title to the property and he can succeed by merely showing his previous possession and wrongful dispossession. However proceedings under this provision of law do not constitute a bar against any of the parties suing to establish his title to the property to recover possession thereof.”*
- (iii) In the case of Debendra Mohan Das Vs. Muhammad Afrazuddin (PLD 1965 Dacca 269), it was held *inter alia* that the use of the words *“notwithstanding any other title that may be set up in such suit”* in Section 9 of the 1877 Act clearly indicate that the question of title to the land cannot be raised in a suit for recovery of possession.
- (iv) In the case of Abdul Aziz Vs. Dolat Bibi (PLD 1973 Lahore 125), it was held *inter alia* that a judgment and decree passed in a suit under Section 9 of the 1877 Act cannot be *res judicata* on the question of title but it is certainly *res judicata* to the extent that it decides that the decree holder was dispossessed by the judgment debtor otherwise than in due course of law.

- (v) In the case of Muhammad Rafique Vs. Muhammad (1989 CLC 1318), it was held *inter alia* that Section 9 of the 1877 Act deals with the summary procedure for the grant of relief to persons dispossessed from immovable properties without their consent, and that no question of title of the parties can be raised or gone into in such a suit. It was also held that the scope of such a suit is limited, and that the title deeds and other documents could be incidentally looked into as evidence in relation to possession, but any observation about their authenticity will not affect the right of the parties in a suit based on title.
- (vi) In the case of Zahir Hussain Vs. Bashir Muhammad (2012 CLC 377), it was held by the Division Bench of the Hon'ble Peshawar High Court that in a suit under Section 9 of the 1877 Act, the Court can only adjudicate upon the claim of possession alone and not that of title, right or legal character of the claimant or *mesne* profit.
- (vii) In the case of Tehseen Asghar Vs. Additional District Judge, Burewala (2018 MLD 617), it was held as follows:-

"[I]n a suit under Section 9 of "the Act" the Court is only required to see if the plaintiff was in possession of the property and was he dispossessed by the defendant. The fundamentals to be proved by the plaintiff in order to succeed in getting relief in such suit would be his possession of the immoveable property and that he was dispossessed from the property without his consent and such dispossession was otherwise than due course of law. The object of Section 9 of "the Act" was to discourage people from forcibly occupying immoveable property by taking law in their own hands and further to safeguard the possession of a person to the immoveable property, irrespective of his title. Such remedy could not be used as a tool to dispossess a person already in possession of the property. ... The Court in a suit under Section 9 of "the Act" could decide only the claim of possession and is not required to decide title, right or legal character of claimant of the property. The question of title was ancillary to the proceedings under Section 9 of "the Act" which could not be looked into for restoring the possession. The version of the respondent was not supported by any evidence."

14. The suit under Section 92 C.P.C. is of a special nature which pre-supposes the existence of a public trust of religious or charitable character. The object of Section 92 C.P.C. is to protect a public trust of a charitable and religious nature from being subjected to

harassment by suits filed against them. Public trusts for charitable and religious purposes are run for the benefit of the public. No individual should take benefit from them. When the plaintiffs do not sue to vindicate the right of the public but seek a declaration of their individual or personal rights, Section 92 C.P.C. has no application.

15. The question of whether permission from the Advocate General under Section 92 C.P.C. is required can only be determined once it is established that the property with respect to which the suit had been filed is *waqf* property. Where the Court holds on the basis of evidence that the property in question is *waqf* property, and the relief sought by the plaintiff falls within the scope of clauses (a) to (h) of sub-section (1) of Section 92 C.P.C., the suit can be dismissed on the sole ground that consent under Section 92 C.P.C. had not been obtained prior to the filing of the suit. If on the other hand, the Court holds that the property is not *waqf* property, or that the relief prayed for does not fall within the scope of Section 92 C.P.C., then consent under Section 92 C.P.C. for filing a suit would not be necessary.

16. In the case at hand, the petitioner (PW.1), in his cross-examination, admitted that the suit property was *waqf* property. The petitioner, in his suit, had prayed for recovery of possession of the suit property from the private respondents. It is well settled that a suit with respect to a *waqf* property could proceed only on the allegations that there was breach of trust or that directions from the Court were necessary for the administration of the trust. If none of the reliefs claimed in the suit fell within the scope of Section 92 C.P.C., permission from the Advocate General was not required. In the case of Fakhir Shah Vs. Mehtab Shah Pir Bukhari (PLD 1989 S.C. 283), it has been held *inter alia* that in order to file a suit under Section 92 C.P.C., the following conditions must be fulfilled:-

- “(1) there must exist a trust for a public purpose or a charitable or religious nature,*
- (2) the plaint must either allege that there is a breach of trust or that the directions of the Court are necessary for the administration of the trust,*
- (3) the suit must be a representative one on behalf of the public and not for the assertion of the personal rights of the plaintiffs,*
- (4) the relief claimed must be one of the reliefs enumerated in Section 92 C.P.C.”*

17. In the case at hand, the petitioner had sought none of the reliefs enumerated in Section 92(1)(a) to (h) C.P.C. From the averments in the plaint and the reliefs sought, it is clear that the petitioner was not suing to vindicate the rights of the public and it has not been filed in the representative capacity. The petitioner instituted the suit for possession for a personal relief and as an individual, and seeking vindication of an alleged individual right and not as a representative of the public. Therefore, the suit could not have been held to have been under Section 92 C.P.C.

18. Restoration of possession is not one of the reliefs for which permission of the Advocate General contemplated by Section 92(1) C.P.C. is required. Therefore, it is my view that the learned Courts below erred by dismissing the petitioner's suit on the ground that he had not obtained the consent of the Advocate General before instituting the suit for recovery of possession. In holding so, reliance is placed on the law laid down in the case of Amina Welfare Trust (Regd.) Vs. Ashfaq Ahmad Qureshi (PLD 2016 Lahore 460) wherein the Hon'ble Lahore High Court, after making reference to Section 92 C.P.C., held as follows:-

“From the plain reading of the above provisions of law, it is crystal clear that these provisions of law deal with the internal management/affairs/disputes of the Trust as well as breach of trust and in that eventuality, the suit can only be filed with the consent of the Advocate General. The object of Section 92 C.P.C. is to regulate the institution of the suits for the relief enumerated in the said Section so that the trust and the rights of the public in such Trusts are safeguarded and if the reliefs mentioned in the said Section are not claimed then the suit can be filed without the consent of Advocate General.”

19. The learned Courts below have concurrently dismissed the petitioner's suit under Section 9 of the 1877 Act. The learned Revisional Court had held that *“no evidence has been produced by the plaintiff/petitioner in this regard to show that he was in actual possession of the suit land before 09.07.2010 and the defendants /respondents have forcibly dispossessed him.”* Learned counsel for the petitioner was not able to convince this Court to interfere with the said findings of the learned Revisional Court. Therefore, I am of the view that the learned Courts below did not commit any jurisdictional irregularity in concurrently dismissing the petitioner's

suit for possession. However, as mentioned above, the dismissal of the petitioner's said suit does not prevent him from filing a suit for declaration as to his ownership over the suit property as well as possession on the basis of ownership. In the event, the petitioner files such a suit, it ought to be heard and decided on merits independent of any observations made in this judgment.

20. In view of the above, the instant writ petition is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON ____/2019

(JUDGE)

*Qamar Khan**

APPROVED FOR REPORTING

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