

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Qazi Faez Isa
Mr. Justice Sardar Tariq Masood

CIVIL APPEAL NO. 472 OF 2013

(On appeal against the judgment dated 6.02.2013
passed by the Lahore High Court, Lahore, in
C. R. No. 489/2009)

Mirza Abid Baig

... *Appellant*

Versus

Zahid Sabir (decd.) through L.Rs

... *Respondents*

For the Appellant:

Mr. Muhammad Atif Amin, ASC
Mr. M. S. Khattak, AOR

Respondent Nos. 1(a) to (d):

Mr. Mustafa Ramday, ASC
assisted by Mr. Zaafir Khan, Ms. Zoe
Khan and Mr. Akbar Khan,
Advocates
Syed Rifaqat Hussain Shah, AOR

Respondents No. 2-5:

Ex parte

Dates of Hearing:

10th and 12th February 2020

ORDER

Qazi Faez Isa, J. Mirza Sultan Baig died on 22nd March 1975 leaving behind a widow Mst. Tahira Sultana, two sons, namely Mirza Abid Baig and Mirza Imran Baig, and four daughters, namely Abida Azam, Zahida Sabir, Naveeda Sultan (Pasha) and Fakhira Tariq. A suit for the administration of the estate of their father and rendition of accounts was filed by Abida Azam (plaintiff No. 1) and Zahida Sabir (plaintiff No. 2) on 28th May 1980. They mentioned the properties in the plaint which were left by their father and sought their shares therein as per *shariah*.

2. The suit was decreed on 26th March 1992 with regard to two properties, that is house No. 69 (its previous number was 118), Garden Block, situated in the New Garden Town, Lahore, measuring 6 *kanals* and a shop situated in Ram Gali No. 2, Lahore

("the said house and shop"). Mirza Abid Baig filed an appeal challenging the judgment and decree. Another appeal was filed by his mother, brother and two sisters, namely Naveeda Pasha and Fakhira Tariq. Both the appeals were dismissed *vide* judgment dated 3rd January 1995. Thereafter, civil revision petition was filed by Mirza Abid Baig and during its pendency he entered into a compromise with his sister Abida Azam (plaintiff No.1 in the suit) who upon receipt of one million and four hundred thousand rupees withdrew her suit and the said petition was disposed of on 22nd November 1995.

3. On 21st October 1997 Naveeda Pasha, Zahida Sabir and Fakhira Tariq filed an application under section 12 (2) of the Code of Civil Procedure ("**the Code**") in the High Court followed by a similar application filed the other brother/son, Mirza Imran Baig. The learned Judge of the High Court recalled the order disposing of the revision petition and remanded the matter to the Appellate Court to record evidence to verify whether a statement was made by the counsel on behalf of their clients to bind them. Evidence was recorded by the Appellate Court which was transmitted to the High Court for consideration. The learned Judge of the High Court on 9th August 2003 concluded that the person who had affected the compromise on behalf of the sisters was not legally authorized as a counsel to do so and, consequently by consent, both applications under section 12 (2) of the Code were accepted and the revision petition stood revived.

4. Thereafter, when the revision petition was fixed for hearing it was pointed out to the learned Judge of the High Court by Mirza Abid Baig that an application under Order XXIII rule 1 of the Code was filed by Zahida *Siddiqi*, which was stated to be another name of Zahida Sabir, ("**the purported compromise application**") before the Appellate Court on 20th October 1993 which had escaped the attention of the learned Judge of the Appellate Court. Therefore, the matter was again remanded to the Appellate Court to consider the purported compromise application and whether it was filed

under undue influence or coercion. Zahida Sabir/Siddiqi, who allegedly signed the purported compromise application, had died in the year 2003 before any order was passed on it. Zahida Sabir's legal heirs withdrew the purported compromise application on 11th July 2008. Then on 30th July 2008 Mirza Abid Baig filed an application under Order XLI rule 27 of the Code to bring on record additional evidence which was a two-page agreement dated 16th October 1993 ("**the purported agreement**") which said that Zahida Sabir had given up her claim on payment of seven hundred thousand rupees. After recording of evidence Mirza Abid Baig's appeal was accepted to the extent of the claim of Zahida Sabir. The legal heirs of Zahida Sabir challenged this decision by filing a civil revision petition before the High Court and the learned Judge of the High Court set aside the finding and decision of the Appellate Court *vide* impugned judgment dated 6th February 2013.

5. Mr. Muhammad Atif Amin, the learned counsel representing the appellant Mirza Abid Baig, states that the Appellate Court after recording evidence had concluded, on the basis of testimonies of witnesses and documents, that Zahida Sabir had executed the purported compromise application and the purported agreement. The learned counsel referred to the testimonies of Muhammad Siddiq (AW-1) and Anwar Khan (AW-3) and stated that these witnesses had testified to the execution of the purported agreement and that cash payment of seven hundred thousand rupees was paid by Mirza Abid Baig to Zahida Sabir. He further states that in the application under section 12 (2) of the Code, which was filed by Zahida Sabir in her lifetime, she had admitted signing the purported compromise application.

6. Mr. Mustafa Ramday, the learned counsel for the respondent Nos. 1(a) to 1(d), who are the children and legal heirs of Zahida Sabir, states that Mirza Sultan Baig died on 22nd March 1975 and on his death his legal heirs immediately became owners of his estate and entitled to receive their shares in accordance with *shariah*, however, some of the legal heirs were deprived and were

compelled to file a suit for administration and rendition of accounts, which was decreed by the learned Civil Judge, Lahore in accordance with law. Mirza Abid Baig however left no stone unturned in keeping the legal heirs deprived of their inheritance on tenuous grounds. The learned counsel submits that Mirza Abid Baig took one false plea after another to deprive his sisters of their inheritance; in his written statement he even denied that the plaintiffs were the legal heirs of Mirza Sultan Baig; he also denied that Mirza Sultan Baig "*was the legal real owner*" of the said house and shop and that when these false pleas collapsed the purported compromise application and the purported agreement emerged. The purported compromise application was stated to have been filed on 20th October 1993 however the learned Appellate Court Judge proceeded to decide the case on merits on 3rd January 1995, which, learned counsel submits, incontrovertibly establishes the absence of the purported compromise application from the Court record, because the learned Judge would not needlessly decide a case on merits which had already been compromised. The only purported record of the filing of the purported compromise application was a note made in the margin of the order sheet maintained by the Court Reader which note, according to the learned counsel, was fraudulently inserted, which was discussed and discarded by the learned Judge of the High Court in the impugned judgment. He further states that, the purported compromise application did not refer to the purported agreement; the purported compromise application simply stated "*the applicant has settled her dispute with the appellant outside the Court*" and that "*the applicant intends to withdraw her suit and also has no objection in the acceptance of the appeal as prayed for*" and did not refer to any purported agreement, which if it had been executed would have been mentioned therein; the purported agreement first surfaced on 30th July 2008 after the matter was remanded the second time, confirming that it was not executed by the late Zahida Sabir. He also referred to the signatures on the purported compromise application and the purported agreement which were signed in Urdu and showed to be signed as *Zahida Siddiqi* and not

Zahida Sabir which is how she signed [emphasis added]; the learned counsel referred to the plaint and other documents which were signed as *Zahida Sabir*.

7. Making his legal submissions the learned Mr. Mustafa Ramday submits that Order XXIII rule 1(4) of the Code states that the 'consent' of the other plaintiffs was needed before withdrawing a case where there are more than one plaintiff, however, the consent of Abida Azam, the other plaintiff, was not obtained. Learned counsel refers to a decision in the case of *Umar Bakhsh v Azim Khan*¹ which held that, "*Court would consider the document to be compromise when both parties signing it agree and reiterate the contents before the Court. If before the Court one party to the document resiles from it, then the document can be called anything but an agreement or compromise*"². Learned counsel states that the purported compromise application was not accepted by the Court and it had been withdrawn, therefore it was of no legal effect and should not have been considered. He alternatively submits that since the purported compromise application was wholly without consideration it was void in terms section 25 of the Contract Act, 1872 and relies on the case of *Sadar Din v Khatoon*³ where relinquishment of rights in property without consideration was, "*found to be a nullity in the eye of the law on account of section 25 of the Contract Act, 1872*". He says, that relinquishment of rights could not be lightly implied and cogent evidence in this regard had to be produced; there was no evidence of the payment of seven hundred thousand rupees and the entire story was false. He submits that this Court has always taken great exception when ladies are denied their property rights by male members of the family and in this regard referred to the case of *Ghulam Ali v Ghulam Sarwar Naqvi (Mst.)*⁴. Concluding his submissions, the learned counsel submits that the Appellate Court had exceeded the

¹ 1993 SCMR 374

² 1993 SCMR 374, 380E

³ 2004 SCMR 1102

⁴ PLD 1990 Supreme Court 1

directions of the High Court when the case was remanded to it and unnecessarily widened the controversy of the suit and that the learned Civil Court Judge and the learned High Court Judge had correctly decided the matter.

8. We have heard the learned counsel and with their assistance examined the documents on record. This case is yet another sad example of a brother denying and resisting the claim of his sisters to their legal entitlement to inheritance. Mirza Sultan Baig died on 22nd March 1975 and when he died his properties came to vest in his legal heirs and should have been distributed among them in accordance with *shariah* but this was not done compelling two of his daughters to file a suit to get what was due to them. Mirza Abid Baig stooped to denying that his sisters were the legal heirs of Mirza Sultan Baig. He also, without any proof, claimed that his father was not the legal owner of the said house and shop, insinuating but without stating, let alone establishing, that he was their real owner and that his father was the *benami* (ostensible) owner. The learned Civil Judge, Lahore decreed the suit in respect of only two of the properties, that is the said house and shop, but this too was not acceptable to Mirza Abid Baig who continued to throw one unnecessary challenge after another to prevent his sisters from getting their inheritance and regrettably succeeded by such tactics as Zahida Sabir passed away and it is now forty-five years since she and then her children have remained deprived of inheritance. Such conduct of the appellant contravened the law and also the dictates of Almighty Allah; *shariah* expounds that legal heirs immediately on the death of their predecessor become owners of the estate left behind as per their predetermined shares.

9. The rights of Zahida Sabir to the extent of the said two properties had been determined by the Court however Mirza Abid Baig then produced the purported compromise application and long afterwards emerged the purported agreement. No explanation was forthcoming why these documents remained under wraps. It is unbelievable that counsel would have kept silent and let the

learned Judge decide the case on merits when Zahida Sabir had already withdrawn her claim against her brother. It is thus quite clear to us that Mirza Abid Baig had staged the whole thing; the purported compromise application was neither executed nor filed and the purported agreement was not executed. The purported agreement is dated 16th October 1993 but is brought forward after fifteen years, in the year 2008. The purported agreement left blank the place where the consideration amount was to be written. Mirza Abid Baig testified that he had inserted in his hand an amount of "700,000/= " which he said was paid in cash but failed to establish the particular fact of payment having been made to Zahida Sabir⁵. Mirza Abid Baig further destroyed his credibility by preposterously alleging that his sister was not entitled to inherit from her father's estate. He further stated that the amount paid by him to her was not in settlement of her inheritance, which then raised the question why was payment made, but no answer was forthcoming.

10. The purported compromise application is dated 20th October 1993 but the learned Appellate Court Judge decided the case on merits on 3rd January 1995, it is therefore clear, that it did not exist on the Court record till 3rd January 1995 because the learned Judge would not have spent time to decide a case on merits which had already been compromised. And, if, for the sake of argument, it is assumed that the learned Judge had overlooked the said application it is unbelievable that neither the learned counsel appearing in the case nor the parties would draw his attention to it, thereby further confirming that the purported compromise application did not exist. Mirza Abid Baig's counsel has referred to a note made in the margin of the order sheet maintained by the Court Reader, however, no credence can be placed on this note because it is completely incongruous with the facts. We have also observed that the purported compromise application did not refer to the purported agreement which is also inexplicable. As if this was not enough the purported agreement surfaced fifteen years

⁵ Article 119 of the Qanun-e-Shahadat Order, 1984

after its alleged execution without an explanation offered as to why it was not disclosed earlier. The signature of Zahida Sabir on both these documents was also different from her signature on the plaint and other admitted documents. Both these documents were also thumb-impressed by her therefore it was relatively easy to establish if she had affixed her thumb impression thereon by sending them for forensic examination but Mirza Abid Baig did not elect to do so and thus an adverse presumption can be drawn against him. The burden to prove the two self-serving documents (the purported compromise application and the purported agreement) lay on Mirza Abid Baig⁶ but he did not discharge the burden of proof⁷. The purported compromise application lay unattended and was in turn withdrawn by the legal heirs of the Zahida Sabir before any order was passed thereon. The filing of an application under Order XXIII rule 1 of the Code, which seeks to withdraw a suit or claim, is not tantamount to the withdrawal of the suit or claim. The purported compromise application and the purported agreement were stated to have been executed on payment of compensation of seven hundred thousand rupees but Mirza Abid Baig failed to establish that such payment was made, therefore, these documents were void in terms of section 25 of the Contract Act, 1872.

11. We cannot be unmindful of the fact that often times male members of a family deprive their female relatives of their legal entitlement to inheritance and in doing so *shariah* and law is violated. Vulnerable women are also sometimes compelled to relinquish their entitlement to inheritance in favour of their male relations. This Court in the case of *Ghulam Ali*⁸ had observed that 'relinquishment' by female members of the family was contrary to public policy and contrary to *shariah*. It would be useful to reproduce the following portion from the decision of this Court:

⁶ Article 117 of the Qanun-e-Shahadat Order, 1984

⁷ Article 118 of the Qanun-e-Shahadat Order, 1984

⁸ PLD 1990 Supreme Court 1

"Here in the light of the foregoing discussion on the Islamic point of view, the so-called "relinquishment" by a female of her inheritance as has taken place in this case, is undoubtedly opposed to "public policy" as understood in the Islamic sense with reference to Islamic jurisprudence. In addition it may be mentioned that Islam visualised many modes of circulation of wealth of certain types under certain strict conditions. And when commenting on one of the many methods of achieving this object, almost all commentators on Islamic System agree with variance of degree only, that the strict enforcement of laws of inheritance is an important accepted method in Islam for achieving circulation of wealth. That being so, it is an additional object of public policy. In other words the disputed relinquishment of right of inheritance, relied upon from the petitioner's side, even if proved against respondent, has to be found against public policy. Accordingly the respondent's action in agreeing to the relinquishment (though denied by her) being against public policy the very act of agreement and contract constituting the relinquishment, was void."⁹

12. The learned Judge of the High Court, exercising revisional jurisdiction under section 115 of the Code, had correctly noted that the Appellate Court had wrongly exercised its jurisdiction, had misread evidence, disregarded crucial evidence, relied on the purported compromise application which Mirza Abid Baig could not establish was part of the Court record, gave credence to purported agreement without the concomitant obligation of making payment and wrongly assumed that a valuable claim was relinquished without proof and without consideration. Therefore, there is no reason to allow this appeal which is dismissed with costs throughout. The costs shall be paid to the respondent Nos. 1(a) to 1(d). Since the said respondents and before them their mother stood deprived of inheritance for forty-five years, we expect that if the matter goes to the Executing Court it will ensure that the matter is promptly concluded without entertaining frivolous objections from the appellant to further procrastinate the misery of the said respondents.

Judge

⁹ PLD 1990 Supreme Court 1, 21 [placitum CC, DD and EE]

Judge

Bench-IV
Islamabad
12.02.2020
(Farrukh)

Approved for Reporting