JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT
ABBOTTABAD BENCH
(Judicial Department)

C. R No. 384-A/2020

Syed Jaffar Shah and others.

(Petitioner/s)

VS

Mst. Gulshan and others.

(Respondents)

Present: *Mr. Fazalullah Khan, Advocate, and Mr. Hamayun Khan, Advocate, for petitioners.*

Respondents are not represented being a motion case.

Date of hearing: 11.03.2024

JUDGMENT

MUHAMMAD IJAZ KHAN, J.- Through the instant civil revision petition, petitioners have challenged the judgment and decree of learned Additional District Judge-II, Battagram dated 30.07.2020, whereby, the appeal filed by the present petitioners was dismissed and thereby maintained the judgment and decree of learned trial Court dated 08.02.2018, who vide the same had dismissed the suit of petitioners/plaintiffs.

2. Precisely, the facts leading for the filing of the instant revision petition are that the

present petitioners filed a suit against Shamshad and others (respondents herein) for recovery of possession through enforcement of right of pre-emption in respect of suit property which was purchased by respondents/defendants vide mutation No. 6841 dated 26.04.2016 and the respondents/defendants were dully summoned, however, they failed to appear and thus were proceeded ex-parte and the petitioners/plaintiffs led their ex-parte evidence, however, the learned trial Court vide one of the impugned judgment and decree dated 08.02.2018 dismissed the suit of petitioners/plaintiffs. Feeling themselves aggrieved of the aforesaid judgment and decree, the petitioners preferred an appeal before the Court of learned Additional District Judge-II, Battagram, however, the same was also dismissed vide the second impugned judgment and decree dated 30.07.2020. Petitioners have now challenged the aforesaid judgments and decree of the two Courts below before this Court through the instant petition.

3. Arguments of learned counsel for petitioner were heard in considerable detail and the record perused with his able assistance.

4. During the course of arguments, learned counsel for the petitioners argued that petitioners/plaintiffs have been non-suited by both the Courts below on the ground that they have filed a pre-emption suit against a dead person, however, the stance of the petitioners before this Court was that the respondents have mala fidely entered the subject mutation in the name of a dead person as as per the pension record of the respondent/vendee he had passed away way back on 05.11.2010, whereas, the mutation No. 6841 has been attested on 26.04.2016, however, such stance of the petitioners is not legally sustainable as on one hand such plea has not been agitated by the present petitioners neither in their plaint nor in their Court's statement and on the other presumption of correctness and regularity is attached to the revenue record under Section 52 of The West Pakistan Land Revenue Act, 1967 read with Article 129(e) of the Qanun-e-Shahadat Order, 1984 and thus no legal weight could be attached to the oral/verbal assertions of the petitioner as against the documentary evidence.

5. As far as the merit of the case are concerned, it is a matter of record that when the present petitioners sent notice through a registered

AD to the respondent/vendee in order to perform Talab-i-Ishad and the same has returned back with a report dated 18.07.2016 that the respondent/ vendee has passed away (دریافت سے معلوم ہوا کہ وصول کنندہ فوت ہو چکا ہے لہزا بلا تقسیم واپس ارسال ہے) however, the petitioners/pre-emptors did not bother for the same and straightaway filed the pre-emption suit against a dead vendee and thus the petitioners have filed a suit against a man who was already dead, therefore, his suit is nullity in the eyes of law and as such was not maintainable. It would be relevant to mention here that under Order I Rule 1 CPC stipulates that who may be joined as a plaintiff while Order I Rule 3 CPC stipulates that who may be joined as defendant, whereas, Order I Rule 10 authorize the plaintiff that where a suit has been instituted in the name of a wrong person as a plaintiff or even if there is any doubt that whether the plaintiff is a right person or not and at any stage of the suit if the Court is satisfied that the suit has been instituted through a *bona fide* mistake may order any other person to be substituted or added as a plaintiff if the Court consider it necessary for the determination of the real dispute. Same is the case with the wrong defendant as well. Similarly, Order

I Rule 10 (2) CPC authorize a Court at any stage of proceedings either on his own or on the application of a party, order that the name of any party improperly joined be struck out and then the name of any other person who ought to have been joined may be added and these powers being part of procedural law are required to be exercised liberally, however, where the plaintiff despite knowledge joined a person as a defendant who is dead before the date of institution of a suit then such suit could not legally proceed and the same shall be considered as a still born suit. Over the period of time much jurisprudence has been established on the subject that if there is a single defendant and the same was found dead on the date of institution of a suit then the suit would be nullified in the eyes of the law, however, if there are several defendants and out of them one is dead then such suit as a whole would not be nullified and in such an eventuality the Court may provide an opportunity to the plaintiff to implead the LRs of such deceased defendants, however, the case of the present petitioner falls in the former part where there is only one defendant and he was dead on the date of institution of the suit, therefore, his suit

shall be nullity in the eyes of law as a whole and thus the same has rightly been held as not maintainable. In the case of "***Muhammad Yar (deceased) through LRs and others vs Muhammad Amin (Deceased) through LRs and others"*** reported as ***2013 SCMR 464*** the apex Court has held as under;

> *3. "Heard. attending to the first question, the legal position by now is quite settled and explicit, in that, where a suit/lis is against only one defendant/respondent of the case, undoubtedly it shall be invalidly instituted being against a sole dead person (defendant) and shall be a nullity in the eyes of the law as a whole; it shall be a still born suit/lis; an altogether dead matters, which cannot be revived; it shall, thus not merely be a defect which can be cured, rather fatal blow to the cause. However, the position shall be different where the lis is initiated against more than one defendants/respondents and out of them only one or few are dead, while the other(s) is/are alive. In such a situation, it shall be a validly initiated suit/lis in respect of the respondent(s), who are alive, but invalid qua those, who are dead. To cater for such a situation, it has been held in* ***Malik Bashir Ahmad Khan and another***

v. Qasim Ali and 12 others *(PLD 2003 Lahore 615):---*

> ***"Obviously, if a suit has been filed against the only defendant, who was dead at the time of the institution, such suit shall be still born, non-existent, and a nullity in the eye of law, therefore, it could not be merely defective and thus, could not be revived by impleading the legal heirs of the deceased defendants. The plaintiff, in such a situation, subject to law, may have the option to bring a fresh suit against the heirs on the basis of the same cause of action. But, this rule shall not be applicable in a case, where the suit has been instituted against more than one defendants and one of them was dead at the relevant time. The suit shall not be nullity in totality, but would be validly instituted against the living defendants, however, it would be defective qua the deceased party, which defect shall be curable by the plaintiff, bringing on record the heirs of the deceased defendant. To support this view, reliance can be placed on the following judgments:---***

Prim Pala Mul-Narain Mal v. Fauja Singh (AIR 1926 Lahore 153).

Roop Chand v. Sardar Khan and others (AIR 1928 Lahore 359)

Ghulam Qadir Khan v. Ghulam Hussain and others (AIR 1937 Lahore 794)

Nabi Bakhsh v. Malik Muhammad Akram, Settlement Commissioner and others (PLD 1969 Lahore 880), and

The Province of East Pakistan v. Major Nawab Khawaja Hasan Aksary and others (PLD 1971 SC 82)."

The above is the apt and correct exposition of law and such judicial opinion of the Lahore High Court is upheld and approved in its letter and spirit and should be taken to the view of this Court.

Recently, the aforesaid dicta has further been elaborated by the Apex Court in the case of "***Farzand Ali and another vs. Khuda Bakhsh and others***" reported as ***PLD 2015 SC 187,*** where further clarification has been made to the effect that where a *lis* is initiated against more than one person and out of whom one defendant was dead then the *lis* as a whole is not a nullity, but it is a defect which is curable.

6. In this case, the two Courts below have concurrently recorded their findings of facts and law, which this Court found them as perfectly in accordance with the available evidence of the parties and thus the same neither suffer from any misreading or non-reading of evidence nor the same suffer from any illegalities or material irregularities, so as to warrant the interference of

this Court in a revisional jurisdiction under section 115 CPC. The scope, extent and domain of revisional jurisdiction of this Court has elaborately been dilated upon by the Hon'ble Apex Court in its recent judgment titled "***Nasir Ali vs. Muhammad Asghar"*** reported as ***2022 SCMR 1054***, it was also held that section 115, C.P.C empowers and mete out the High Court to satisfy and reassure itself that the order of the subordinate Court is within its jurisdiction; the case is one in which the Court ought to exercise jurisdiction and in exercising jurisdiction, the Court has not acted illegally or in breach of some provision of law or with material irregularity or by committing some error of procedure in the course of the trial which affected the ultimate decision. If the High Court is satisfied that aforesaid principles have not been unheeded or disregarded by the Courts below, it has no power to interfere in the conclusion of the subordinate Court upon questions of fact or law. The scope of revisional jurisdiction is limited to the extent of misreading or non-reading of evidence, jurisdictional error or an illegality of the nature in the judgment which may have material effect on the result of the case or if the conclusion drawn therein

is perverse or conflicting to the law. Furthermore, the High Court has very limited jurisdiction to interfere in the concurrent conclusions arrived at by the courts below while exercising power under section 115, C.P.C. Similarly, in the case of "***Salamat Ali and others vs. Muhammad Din and others"*** reported as ***PLD 2022 Supreme Court 353***, it was also held that a revisional Court cannot upset a finding of fact of the Court(s) below unless that finding is the result of misreading, non-reading, or perverse or absurd appraisal of some material evidence. The revisional Court cannot substitute the finding of the Court(s) below with its own merely for the reason that it finds its own finding more plausible than that of the Court(s) below. Similar view also reiterated by the Hon'ble Apex Court in case titled "***Muhammad Sarwar and others vs. Hashmal Khan and others"*** reported as ***PLD 2022 Supreme Court 13***, where in para-6 it was held that it is well settled exposition of law, deducible from plethora of dictums laid down by superior Courts that section 115, C.P.C. empowers and meted out the High Court to satisfy and reassure itself that the order of the subordinate court is within its jurisdiction; the case is one in which the Court

ought to exercise jurisdiction and in exercising jurisdiction, the Court has not acted illegally or in breach of some provision of law or with material irregularity or by committing some error of procedure in the course of the trial which affected the ultimate decision. If the High Court is satisfied that aforesaid principles have not been unheeded or disregarded by the Courts below, it has no power to interfere in the conclusion of the subordinate Court upon questions of fact or law. It was also held by the Hon'ble Apex Court in para-10 of the judgment rendered in the case of **"*Mst. Zarsheda vs. Nobat Khan*"** reported as ***PLD 2022 Supreme Court 21***, that in the case of Shahbaz Gul and others v. Muhammad Younas Khan and others (2020 SCMR 867), this Court declared that where two different interpretations were possible of the evidence brought on record, then appraisal of facts of lower Courts should not be overturned by the High Court in its revisional jurisdiction under section 115 C.P.C. Between two possible interpretations, the one adopted by the trial and appellate Courts should have been maintained, keeping in mind the limited scope of revisional jurisdiction. In the case of "***Khudadad vs. Syed Ghazanfar Ali Shah alias S.***

Inaam Hussain and others" reported as ***2022 SCMR 933***, it was also held by the Hon'ble Apex Court that the High Court has a narrow and limited jurisdiction to interfere in the concurrent rulings arrived at by the Courts below while exercising power under section 115, C.P.C. These powers have been entrusted and consigned to the High Court in order to secure effective exercise of its superintendence and visitorial powers of correction unhindered by technicalities which cannot be invoked against conclusion of law or fact which do not in any way affect the jurisdiction of the Court but confined to the extent of misreading or non-reading of evidence, jurisdictional error or an illegality of the nature in the judgment which may have material effect on the result of the case or the conclusion drawn therein is perverse or contrary to the law, but interference for the mere fact that the appraisal of evidence may suggest another view of the matter is not possible in revisional jurisdiction, therefore, the scope of the appellate and revisional jurisdiction must not be mixed up or bewildered.

7. In view of the above discussion, the impugned judgments and decree of the two Courts

below respectively dated 30.07.2020 and 08.02.2018 are neither the result of misreading and non-reading of evidence nor the petitioners could point out any material irregularity nor jurisdictional defect in the same, therefore, the same are upheld and maintained and consequently the instant revision petition is dismissed.

Announced
11.03.2024

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