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JUDGMENT SHEET
IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

W.P.No.4342 of 2012

Muhammad Iqbal etc. Vs. Mumtaz Bibi

J U D G M E N T

Date of hearing	<u>19.04.2012</u>
Petitioners by:	Ch. Abdul Majeed-III, Advocate.
Respondent by:	Mr. Khalid Mian, Advocate for the respondent No.1.

NASIR SAEED SHEIKH, J: A suit for declaration and permanent injunction was instituted by the respondent No.1 Mumtaz Bibi in the Court of learned Civil Judge Jhang on 02.2.2006. It was claimed by the respondent No.1 in the suit that she is widow of one Muhammad Nawaz who belonged to Hanfi sect of the Muslims. The deceased Muhamamd Nawaz left behind the land owned by him and according to the Hanfi law of inheritance she is entitled to $\frac{1}{4}$ share and the mutation No.1001 dated 27.1.2006 got incorporated in the revenue record in favour of the respondents is not sustainable according to the law of inheritance applicable to the deceased Muhammad Nawaz as well as to the plaintiff. The petitioners also instituted a suit against the respondent No.1 denying her widowship of the deceased Muhammad Nawaz. Both these suits are pending before the learned Civil Judge Jhang.

2. An application dated 25.5.2011 was moved before the learned Civil Judge with the signatures of both the parties for getting the decision of the suits as per the statement of one Muhammad Afzal s/o Slabat Khan as the Referee. The learned Civil Judge also recorded the statements of both the parties on

25.5.2011 and appointed the said Muhammad Afzal s/o Slabat Khan as a Referee and fixed the next date on 15.6.2011 for recording his statement.

3. The respondent No.1 moved an application dated 15.6.2011 for cancelling the appointment of the Referee on the grounds that the Referee has called for meeting of the Baradri and he does not have any personal knowledge of the affairs and that he is also not trustworthy for the respondent No.1 as he is related to the other side through Muhammad Iqbal and Parveen. This application was accepted by the learned Civil Judge after hearing the arguments of the parties through order dated 11.1.2012 and the appointment of the Referee Muhammad Afzal s/o Slabat Khan was cancelled.

4. The petitioners assailed the order of the learned Civil Judge through a Civil Revision which Civil Revision came up for hearing before a learned Additional District Judge and was dismissed vide order dated 08.2.2012.

5. Through the instant Writ Petition the orders passed by the two courts below are assailed.

6. It was stated by the learned counsel for the petitioners on 15.3.2012 under instructions from his client that the petitioners are ready to replace the Referee. Accordingly notice was issued to the respondent No.1 whose learned counsel has appeared before this Court today.

7. The learned counsel for the respondent No.1 has stated that he does not have any instructions upon the replacement of the Referee but argued that the original Referee appointed by the court was rightly removed through the impugned orders passed by the two courts below and the matter of fresh appointment of a Referee be left to the consent of the parties otherwise the law should take its own course for decision of the suit in accordance with the prescribed procedure and the law. Thus arguments were heard on merits of the case.

8. The learned counsel for the petitioners contends that the orders passed by the two courts below are not legally correct as the respondent No.1 herself moved an application before the learned trial court for the appointment of a Referee and with the consent of the respondent No.1 the learned Civil Judge appointed Muhammad Afzal s/o Slabat Khan as the sole Referee for the decision of the suits and now she cannot resile from her statement got recorded before the learned Civil Judge on 25.5.2011.

9. The learned counsel for the respondent No.1 contends that although the respondent No.1 agreed to the appointment of the Referee namely Muhammad Afzal s/o Slabat Khan but she learnt that the said Muhammad Afzal Referee was not having any personal knowledge of the matter and he started making inquiries in the controversy entrusted to him and was also found related to the petitioners' side therefore the respondent No.1 at the first opportunity lost her trust and before the Referee could make any statement or submit any finding in the court she has opted to withdraw her consent in the appointment of the Referee Muhammad Afzal. The learned counsel for the respondent No.1 has contended that the impugned orders accordingly passed by the two courts below of removing the appointment of the Referee do not suffer from any illegality.

10. I have considered the arguments of the learned counsel for the parties.

11. The petitioners as well as the respondent No.1 although agreed to the appointment of Muhammad Afzal s/o Slabat Khan as the Referee for the decision of their cases upon his statement but before any statement was got recorded by Muhammad Afzal, the appointed Referee, the respondent No.1 expressed distrust upon him. The learned Civil Judge accordingly was left with no option but to cancel the appointment of the Referee Muhammad Afzal. The orders

passed by the two courts below do not suffer from any illegality. No violation of any law is pointed by the learned counsel for the petitioners on the basis of which this Court can declare the order passed by the learned Civil Judge dated 11.1.2012 and the order passed by the learned Additional District Judge dated 08.2.2012 as having been passed illegally or suffering from lack of authority.

12. The concept of making a reference of a matter to be decided upon the statement of a third person to be considered as an admission on behalf of the referring parties is provided for in Article 33 of the Qanun-e-Shahaat Order 1984 which is reproduced below:-

“Admission by persons expressly referred to by party to suit. Statements made by persons to whom a party to the suit has expressly referred for information in reference to matter in dispute are admissions.”

The agreement arrived at between the parties to litigation to refer the matter to a Referee for getting his statement recorded cannot be called an adjustment of the suit within the meaning of Order 23 Rule 3 of CPC. A party to such an agreement is not debarred from resiling from the agreement before the statement is actually made by the Referee. In this respect reliance can be placed upon the judgment reported as **MUHAMMAD BASHIR VS. QAZI BASHIR AHMAD AND 8 OTHERS (1996 MLD 674)** wherein a sole witness had been appointed a Referee upon the defendants’ application before the appellate court and before recording of the statement of the referee, the defendants expressed no confidence in him and it was held that the agreement to refer the matter to the Referee stood abrogated and no judgment and decree could be passed on his statement. The learned single Judge of this Court in the reported judgment after relying upon a judgment of the honourable Supreme Court of Pakistan **PLD 1970 SC 241** and quoting an extract therefrom laid down the following proposition of law:-

“Another important part of the case has not been gone into by the learned Appellate Court that though the parties agreed for appointment of Khan Mushtaq Ahmed Khan as solitary witness but before his statement could be recorded, an application was made by the petitioner that he would not accept the statement of the solitary witness as he had no confidence upon him. The said application was dismissed on 14-9-1991 and after dismissal of the application, the witness was examined and the case was decided there and then on the same date. Even if it is accepted that the parties agreed for appointment of the solitary witness but subsequently by making an application, petitioner resiled therefrom, hence the contract stood abrogated. The decision based on the statement of the solitary witness is illegal on this ground also because the contract ceased to exist between the parties before his statement was recorded. In this connection reference may be made to Muhammad Akbar and another v. Muhammad Aslam and another PLD 1970 SC 241 wherein it was held that “parties to a suit coming to an agreement that suit may be decided in accordance with statement to be made by a third person as to matters in dispute between them - - Agreement later retracted by appellant before recording of statement of third person by trial Court- - Such agreement not covered by any statutory provision- - Held, a contract and does not amount to an adjustment of suit. An agreement that the Court may decide the matter in dispute between the parties in accordance with the statement of a third person is not covered by the provision of any one of these statutes” The relevant observation in this connection is at page 243 which is reproduced below:-

“A number of precedent cases were cited from the Bar both for and against the proposition whether the parties to such an agreement can retract before the third person has made the statement before the Court regarding matters in dispute between them. The decision in some of the cases is based on the Oaths Act, 1873, in some on the provisions of rule 3, Order XXIII, C.P.C. and in others on the provisions of Arbitration Act. In our view an agreement that the Court may decide the matters in dispute between the parties in accordance with the statement of a third person is not covered by the provisions of any one of these statutes.”

In the case in hand also the respondent No.1 expressed dissatisfaction upon the sole Referee previously agreed to be called upon to make a statement in the court about the controversy involved and before the recording of the statement of said sole Referee, the learned Civil Judge was moved with a written application for cancelling the appointment of the referee and the learned Court accordingly did not call upon the Referee to make the statement. No one can be compelled to make an admission against his interest and the respondent No.1 therefore cannot be compelled to agree to the recording of the statement of the Referee on the basis of the apprehension expressed by the respondent No.1 in her application dated 15.6.2011 wherein she mentioned that the Referee was discovered to have no personal knowledge about the matter as he started getting information from the members of the Panchiat. The respondent No.1 further expressed her distrust on account of the suspected inclination of the Referee towards the petitioners i.e. the other side and there was also an apprehension of collusion expressed by the respondent No.1 in the application dated 15.6.2011 between the Referee as well as the present petitioners. The two courts below accordingly cancelled the appointment of the Referee and declined to get the statement of the Referee recorded.

13. In exercise of my writ jurisdiction I am not persuaded to declare the orders passed by the two courts below as illegal or without lawful authority. No case for interference is made out. The instant writ petition is accordingly **dismissed**.

(NASIR SAEED SHEIKH)
JUDGE.

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