

vide judgment and decree dated 03.11.2017 passed by the Civil Judge, Sadiqabad, as such the petitioner was deprived of her right of inheritance from property of Muhammad Sadiq deceased.

3. The application was contested by the respondents by filing written replies. The trial court after hearing arguments of the learned counsel for the parties, proceeded to dismiss the application vide order dated 09.11.2020. Feeling aggrieved, the petitioner filed revision petition against the said order, which was also dismissed vide impugned order dated 17.12.2020 passed by the Additional District Judge, Sadiqabad. Hence, this writ petition.

3. Arguments heard. Available record perused.

4. The petitioner in her application under Section 12(2) CPC claimed that the respondents fraudulently deprived her from the inheritance of her late husband Muhammad Sadiq and got decree of declaration to usurp all the property left by her husband. It is noted with concern that both the courts below have relied upon the evidence of Muhammad Sadiq deceased and his witnesses got recorded by them in a suit for jactitation of marriage filed by respondent No.9/mother of respondents No.3 to 8 before the Family Court, Bahawalpur against Muhammad Sadiq deceased.

5. The pivotal question that arises for consideration is whether the evidence recorded in the earlier suit for jactitation of marriage could legally be pressed into service against the present petitioner, who was neither a party to those proceedings nor afforded any opportunity of cross-examination. In this regard, relevant is Article 47 of the Qanun-e-Shahadat Order, 1984, which is reproduced below for reference:-

“47. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated: Evidence given by a witness in a judicial proceeding or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under

the circumstances of the case, the Court considers unreasonable

Provided that—

the proceeding was between the same parties or their representatives-in-interest;

the adverse party in the first proceeding had the right and opportunity to cross-examine;

the questions in issue were substantially the same in the first as in the second proceeding.

Explanation: A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this Article.”

A plain reading of the aforesaid provision makes it manifest that the relevancy and admissibility of evidence recorded in an earlier judicial proceeding is conditional and circumscribed, and not absolute. Such evidence can be relied upon in a subsequent proceeding for proving the truth of the facts stated therein only if the following conditions prescribed therein are satisfied: -

- i. that the earlier proceeding was between the same parties or their representatives-in-interest,
- ii. that the adverse party had the right and opportunity of cross-examination,
- iii. that the questions in issue in both proceedings were substantially identical.

In the present case, none of these mandatory pre-conditions stands fulfilled. The petitioner was neither a party to the suit for jactitation of marriage nor afforded any right or opportunity to cross-examine Muhammad Sadiq deceased or his witnesses. Furthermore, the issues involved in the said proceedings were materially distinct from the controversy arising in the application under Section 12(2) CPC. Consequently, the evidence recorded in the earlier proceedings was wholly inadmissible against the petitioner and could not legally form the basis for adjudication of her rights. The courts below, therefore, committed a manifest error of law by treating such evidence as

determinative, in clear disregard of the statutory mandate contained in Article 47 of the Qanun-e-Shahadat Order, 1984.

6. It further transpires from the record that the suit for declaration, culminating in the judgment and decree dated 03.11.2017, was instituted by respondents No.3 to 8 by impleading “public at large” as defendant No.1 and their mother, Mst. Shehnaz Akhtar (respondent No.9 herein), as defendant No.2, wherein they asserted themselves to be the sole legal heirs of Muhammad Sadiq deceased and, on that premise, claimed exclusive entitlement to inherit his estate. The foundational plea taken in the said suit was that their mother had already been divorced by Muhammad Sadiq during his lifetime. If that assertion was indeed correct, the very arraying of respondent No.9 as a defendant appears to be of no legal necessity. Conversely, even assuming that she was impleaded on account of being the former spouse of the deceased, the omission to implead the present petitioner, who claims to be the widow of Muhammad Sadiq at the time of his death, becomes significant and *prima facie* indicative of material concealment. Such selective impleadment, in a suit directly concerning declaration of legal heirship and inheritance rights, strikes at the root of fair adjudication and attracts the mischief contemplated under Section 12(2) CPC.

7. Equally important is the manner in which the trial court dismissed the petitioner’s application under Section 12(2) CPC by recording a categorical finding that the petitioner had been divorced by Muhammad Sadiq as far back as the year 1999. This conclusion was drawn solely on the basis of statements of Muhammad Sadiq deceased and his witnesses recorded in a suit for jactitation of marriage instituted by respondent No.9 against him. Admittedly, the petitioner was not a party to the said proceedings, nor was she afforded any opportunity to contest or rebut the assertions made therein. More so, a careful perusal of the record of the jactitation suit reveals that while Muhammad Sadiq and his witnesses claimed that the petitioner had been divorced earlier, the consistent stance of respondent No.9 in those proceedings was to the contrary, i.e., that petitioner was still living with Muhammad Sadiq, a fact emerging from

the cross-examination of Muhammad Sadiq and his witnesses themselves. Despite such evident contradiction and in the absence of any documentary proof whatsoever to substantiate the alleged divorce of the petitioner in the year 1999, the trial court proceeded to treat the matter as conclusively established.

8. In these circumstances, the controversy squarely involved disputed questions of fact, which could only have been resolved through proper framing of issues and recording of evidence of the contesting parties. The summary dismissal of the application under Section 12(2) CPC, without undertaking this mandatory exercise, reflects a clear misdirection in law and procedure. Therefore, viewed from any angle, the impugned orders passed by the courts below cannot be sustained and warrant interference by this Court.

9. For the foregoing, both the courts below have committed illegality and material irregularity while dismissing the application of the petitioner under Section 12(2) CPC, through the impugned orders. Therefore, while **allowing** this writ petition, the impugned orders dated 09.11.2020 and 17.12.2020 are **set aside** and the matter is remanded to the trial court for decision of subject application under Section 12(2) CPC afresh after framing issues and recording oral as well as documentary evidence of the contesting parties, within **six months**. Office is directed to transmit certified copy of this order to the trial court through the District Judge, Bahawalpur for compliance.

(RAHEEL KAMRAN)
JUDGE

Approved for reporting.

JUDGE

Yasin*