

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

RFA 57/2022

**Reserved on: 23.2.2023
Pronounced on: 07.4.2023**

Sheikh Mohammad Amin and another

... Petitioner/Appellant(s)

Through: Mr. S. R. Hussain, Advocate

V/s

Yasir Farooq and others

Through: Ms. M. S. Latief, Advocate with Mr. Zahid Advocate
Mr. Aasif Wani, Adv. vice Mr. Altaf Haqani, Sr. Advocate

CORAM: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

JUDGMENT

1. The instant appeal has been filed in terms of section 384 of the Indian Succession Act, 1925 (hereinafter referred to as the Act of 1925) against the order dated 3.11.2022 (hereinafter impugned order) passed by the court of District Judge, Srinagar, (hereinafter court below) in case titled as “Yasir Farooq and another versus public at large and others”.
2. Before advertng to the grounds urged in the memo of appeal, a brief background of the facts becomes imperative hereunder:
 - The appellants claim to be parents of one Sheikh Sajad Amin, who is stated to have died on 17.8.2017 (hereinafter referred to as the deceased) and is survived by a minor son – respondent 2 herein.
 - The deceased is stated to have divorced his wife - respondent 1 herein - during his lifetime and also executed a divorce deed dated 29.10.2016 in this regard.

- The deceased is stated to have been an employee of the Transport Department, having left behind an amount of Rs. 6 lakhs in his CP Fund account.
- The respondent 1 herein is stated to have filed an application on her behalf and on behalf of respondent 2 under section 372 of the Act of 1925 before the court below for grant of succession certificate in respect of debts/securities to the deceased without initially impleading the present appellants as party non-applicants in the said application.
- The appellants herein are stated to have become party non-applicants on 24.9.2021 in the application filed by the respondent 1 and 2 before the court below, and filed objections in opposition to the application resisting the claim of respondent 1 herein on the ground that she stood divorced by the deceased in the year 2016 while admitting the respondent 2 herein to be legal heir/son of the deceased.
- The court below after providing an opportunity to the parties to lead evidence, passed the impugned order issuing succession certificate in favour of the applicants - respondents 1 and 2 herein, as also in favour of non-applicants 3 and 4, appellants herein, apportioning the amount of Rs. 6 lakhs of the deceased as follows:

“Out of amount of Rs.6,00,000/-, petitioner no. 1 as widow of the deceased would be entitled to 1/8th of the said amount i.e. Rs. 75,000/-, respondent no. 2 and 3 would be entitled to 1/6th share each i.e. Rs. 1,00,000/- each and petitioner no. 2 as residuary shall be entitled to rest of the amount i.e. Rs. 3,25,000/-.”

- The court below while issuing aforesaid certificate in terms of the impugned order further directed in the impugned order filing of an indemnity bond by the parties to the effect that they shall indemnify the person(s) who may at any time prove that he/she was also entitled to this amount, besides providing that the share of the minor applicant, respondent 2 herein, shall be put in a fixed deposit in some nationalized bank till he attains

majority and on behalf of the minor applicant 2, the indemnity bond shall be filed by the applicant one, her mother.

- The impugned order is being questioned *inter alia* on the following grounds:

a. That the order/award passed by the Ld. Court below is illegal to the extent it holds the respondent No. I entitled to 1/8th of CP Fund amount left behind by the deceased Sajad Amin. It is submitted that the court below has assumed respondent No. I to be the widow of the deceased Sajad Amin, which is contrary to the facts. As stated hereinbefore, the deceased son of the appellants Sajad Amin had divorced the respondent No. I during his lifetime much before his death. The divorce had taken place through intervention of the civil society. The appellants in this context seek to place on record copy of the memo dated 28-03-2017 recorded by the civil society of Bachhi Darwaza Makhdoom Sahab Srinagar Falah Walslah Committee bearing the signatures of the respectable citizens of the locality as Annexure-III. The contention of the appellant is fortified by another memo recorded in presence of the civil society of the locality which bears the signature of respondent No. I as well, wherein the respondent had admitted the receipt of her entire belongings from her husband. Copy of the memo bearing the signatures of the respectable citizens of the civil society, respondent No. 1, as also the president of the welfare Committee Bacchi Darwaza is also placed on record as annexure-IV

b. That the trial court has, in its order clearly observed that the factual position with respect to whether respondent no. I was divorced by her late husband or not can only be established by a civil court. Having rightly reached this conclusion, it is difficult to comprehend how the trial court has gone ahead to hold that respondent no. 1 is the deceased's widow and not a divorcee. These

contrary stands are a clear and unambiguous indication that the impugned order suffers from acute lack of application of mind and reasonability.

c. That the assumption by the trial court that the respondent No. I is the widow of deceased Sajad Amin is, therefore, unfounded and contrary to the facts and thus, the impugned order, to the extent it holds the respondent No. I entitled to the 1/8th the CP Fund, being contrary to facts and beyond the jurisdiction of the trial court, deserves to be set aside.

d. That there is much evidence existing in favour of the contention of the appellants that the petitioner had already divorced the respondent No. 1 during his lifetime which has not been taken into account by the trial court. The appellants seek to invite the attention of this Hon'ble court to a public declaration made by the appellants herein at the time of death of deceased Sajad Ahmad whereby it has been made abundantly clear that the respondent No. 1 has since been divorced by the deceased son of the appellant. The declaration was published in the local dailies which went un-rebutted by the respondents. Copy of one such publication published in a local daily "Rising Kashmir" on 26-8-2017 which has a wide circulation in the U.T. of J&K is also annexed herewith as Annexure-V

e. That once the appellants in clear terms raised the contention that the respondent No. I had since been divorced to the deceased it is not open to trial court to proceed on an assumption with respect to this complex question of fact. The trial court exercising powers under the Succession Act has no jurisdiction to decide whether respondent no. 1 was the deceased's widow or a divorcee and it is only a civil court which can determine and record a finding, after examining the evidence from the parties. The court, while deciding the issue of Succession

certificate, has no jurisdiction to embark on the fact finding realm and return a finding in respect of a marital status of the parties. That being so, the assumption by the trial court of Principal District Judge in respect of the marital status of respondent No. 1 is illegal and not sustainable under law. The trial court could at best have advised the parties to get their status determined by a civil court instead of embarking and taking on itself to make a presumption on the disputed issue of marital status of respondent. That being so, the impugned order of the trial court, in so far as it relates to respondent No. 1 holding her to be the widow of deceased and entitled to 1/8th amount of CP Fund of the deceased is totally illegal and without jurisdiction. On this count, the impugned order stated above is liable to be set aside.

f. That furthermore, another pertinent fact for the consideration and perusal of this Hon'ble court is the publication in local daily, at the instance of Naib Tehsildar Khanyar, wherein the State Road Transport corporation, where the deceased son of the appellants was working, had got a notice published giving the details and names of the family members of the deceased Sajad Ahmad Sheikh which excludes the respondent No. 1 from the list of the family members of deceased Sajad Amin. Copy of the said publication issued to local daily on 11-09-2018 is also annexed herewith as Annexure-w.

g. That in presence of sufficient material establishing that the respondent No. 1 had since been divorced by the deceased son of the appellants during his lifetime, the finding recorded by the trial court and the resultant order in so far as it relates to respondent is illegal, contrary to law, hence liable to set-aside.

h. That as stated hereinbefore, the appellants had already filed affidavits of their witnesses in support of their contention, however, neither the court called upon the

appellants to produce the witnesses for cross-examination nor the counsel engaged by the appellants instructed the appellants at my point of time to produce the said witnesses before the said court for cross-examination. It is pertinent to mention that the appellants are senior citizens and in the absence of any direction from the court or their counsel, the appellants had absolutely no way of knowing when they were required to be present, along with their witnesses in court for examination. The Ld. Trial court, therefore, is wrong in holding that the witnesses were not produced before the court for cross-examination. Had the trial court directed the appellants to produce the witnesses for cross-examination, the appellant would have definitely produced the said witnesses before the court to face cross examination, in any case, the statements made by the witnesses of the appellants before the court below on affidavit cannot be completely brushed aside by the trial court and hence forth Ld. Trial court has erred and committed a procedural irregularity in not directing or instructing the appellants to produce the said witnesses before the court for cross-examination. Hence the intervention of this Hon'ble court is sought to over-set the impugned order passed by the Ld. Trial court to the extent it holds the respondent No. 1 to be widow of the deceased of Sajad Amin and thus entitled to 1/8th of amount of CP Fund left behind by the deceased.

i. That the trial court, while proceeding on an assumption with respect to the marital status of respondent no. 1, without an iota of proof much less any cogent evidence, has grossly prejudiced the appellants' interests not only with respect to the CP Fund but also with regard to other inheritance rights of the appellants. The appellants apprehend that this baseless order might be misused by respondent no. 1 in laying claim to other inheritable

property of the deceased, which she otherwise is not entitled to.

Heard learned counsel for the parties and perused the record.

3. The fundamental issue/ground urged by the appellants in the memo of appeal is about the status of respondent 1. The appellants have contended that the court below has erred in law while holding the status of respondent 1 as widow of deceased instead of a divorcee in presence of the divorce deeds and public declaration and publication dated 11.9.2018 produced with the reply filed by the appellants herein before the court below in opposition to the application filed by the applicants - respondents 1 and 2 herein. The court below is stated to have no jurisdiction to embark on the fact finding realm and return a finding in respect of marital status of respondent 1 herein.

It is also being urged in the memo of appeal by the appellants that the court below did not provide any chance to the appellants to produce witnesses for cross-examination though the appellants had filed affidavits of their witnesses in support of their contentions and thus the court below erred and committed a procedural irregularity in the process of passing of the impugned order.

It is being lastly urged in the grounds by the appellants that the court below has determined the marital status of respondent 1 without any iota of proof much less for any

cogent reasons resulting into gross prejudice to the interests of the appellants not only in respect of CP Fund of the deceased but also with regard to other inheritance.

4. Before advertng to the grounds supra, it is significant to note that the proceedings for grant of succession certificate under the Act of 1925 are of summary nature and do not confer any title to the amount in favour of certificate holder. The court under the Act has to confine itself entirely to the question of a right to certificate and not to decide upon the title, reality or character of the claim. This position of law has been laid down by the Apex court in case titled as **C. K. Prahalada and others v. State of Karnataka and others, (2008) 15 SCC 577** wherein at para 17:

“17. A succession certificate is granted for a limited purpose. A court granting a succession certificate does not decide the question of title. A nominee or holder of succession certificate has a duty to hand over the property to the person who has a legal title thereto. By obtaining a succession certificate alone, a person does not become the owner of the property.”

Sections 373 of the Act being relevant is reproduced hereunder:

373. Procedure on application.

(1) If the District Judge is satisfied that there is ground for entertaining the application, he shall fix a day for the hearing thereof and cause notice of the application and of the day fixed for the hearing

(a) to be served on any person to whom, in the opinion of the Judge, special notice of the application should be given, and

(b) to be posted on some conspicuous part of the court-house and published in such other manner, if any, as the Judge, subject to any rules made by the High Court in this behalf, thinks fit, and upon the day fixed, or as soon thereafter as may be practicable, shall *proceed to decide in a summary manner the right to the certificate.*

(2) When the Judge decides the right thereto to belong to the applicant, the Judge shall make an order for the grant of the certificate to him.

(3) If the Judge cannot decide the right to the certificate without determining questions of law or fact which seem to be too intricate and difficult for determination in a summary proceeding, he may nevertheless grant a certificate to the applicant if he appears to be the person having prima facie the best title thereto.

(4) When there are more applicants than one for a certificate, and it appears to the Judge that more than one of such applicants are interested in the estate of the deceased, the Judge may, in deciding to whom the certificate is to be granted, have regard to the extent of interest and the fitness in other respects of the applicants.

A reference to section 387 of the Act of 1925 also becomes imperative which he reads hereunder:

387. Effect of decisions under this Act, and liability of holder of certificate thereunder.—

No decision under this Part upon any question of right between any parties shall be held to bar the trial of the same question in any suit or in any other proceeding between the same parties, and nothing in this Part shall be construed to affect the liability of any person who may receive the whole or any part of any debt or security, or any interest or dividend on any security, to account therefor to the person lawfully entitled thereto.

These sections make it clear that the proceedings for grant of succession certificate are summary in nature and

that no rights are finally decided in such proceedings. Furthermore, section 387 puts the matter beyond any doubt. It categorically provides that no decision under Part X upon any question of right between the parties shall be held to bar the trial of the same question in any suit or any other proceeding between the same parties. Thus Section 387 permits the filing of a suit or other proceeding even though a succession certificate might have been granted.

The words “in any other proceeding” employed in this section enable the parties to file a separate suit challenging any decision arrived at under the Act.

5. Keeping in mind the aforesaid position of law and reverting back to the case in hand, the fundamental ground/s urged by the appellants is the observation made by the court below qua the status of respondent 1 as widow instead of divorcee. The said observation of the court below in the light of the law laid down by the Apex court in the case of **C. K. Prahalada**, *supra*, cannot said to be the determination of the title or status of respondent 1. However, the said observation even if assumed to have determined the status of respondent 1 as widow instead of a divorcee, same will be subject to determination and adjudication by the civil court under and in terms of provisions of section 387 *supra*. The said observation made by the court below cannot said to be final determination of status by any stretch of imagination, in that, the court below in terms of the Act of 1925 has conducted an enquiry of summary nature without deciding the title, reality or character of the claim/counter claims made before

it by the parties. The grounds thus urged by the appellants in this regard thus are misconceived and are not acceptable.

6. In so far as the ground urged in the memo of appeal that the appellants herein filed affidavits of the witnesses in support of their contentions but were neither called upon by the court to produce the said witnesses for cross-examination or by their counsel, appears to be factually incorrect in that perusal of the record summoned from the court below reveals that the counsel for the appellants appeared before the court below on 27.12.2021 and came to be directed to produce the witnesses after the evidence of the appellants - respondents 1 and 2 herein, came to be closed. Perusal of the record of the proceeding of the court below would further reveal that on the next date fixed in the matter i.e. 27.1.2022, no witness was present on behalf of appellants herein and their counsel again came to be directed to produce the witnesses. It is also noticed from the record of the proceedings that on the next date that 7.2.2022 none appeared for the appellants herein and yet again time was extended for the production of their witnesses. On the next date of hearing i.e. 26.2.2022 the counsel for the appellants herein was present but no witness was present on their behalf and the counsel sought further time in this regard. On the next date i.e. 9.3.2022 none appeared on behalf of the appellants herein again, and consequently the appellants were set *ex parte* and the case was fixed for argument. On the next date of hearing i.e. 17.3.2022

though the counsel for appellants appeared and sought setting aside of *ex parte* proceedings, which were *set aside* with a direction to counsel for appellants herein to produce witnesses on the next date. On the next date i.e. 15.4.2022, three witnesses appeared and copies of their statements came to be furnished to the counsel for the respondents herein for cross-examination. On the next date i.e. 13.5.2022 none of the witnesses of appellants herein appeared. On 10.6.2022 the matter was adjourned at the request of counsel for the respondents herein by the court below for enabling the parties to amicably settle the case. On next date i.e. 27.6.2022 none of the witnesses again appeared on behalf of the appellants herein and again an opportunity was granted to the counsel for the appellants for producing the witnesses. On 25.7.2022 the appearing counsel for the parties prayed for an opportunity to argue the matter and on 1.10.2022 counsel for the parties came to be partly heard by the court in the matter and on 2.10.2022 the hearing of the case came to be concluded and the case was fixed for decision on 3.11.2022 on which date the impugned order came to be passed.

The aforesaid facts belie the ground urged by the appellants that they were not provided any chance by the court below to produce witnesses for cross-examination nor the counsel instructed them at any point of time in this regard.

7. A closer and deeper examination of the impugned order tends to show that the court below has not been oblivious to the stand

taken by the appellants herein before it that the respondent 1 herein had been allegedly divorced by the deceased in the year 2016, yet has rightly not relied upon the said contention of appellants while considering the grant of the certificate in question, in that the appellants had failed to produce any witness to establish the said contention whereas to the contrary the respondent 1 had produced witness cross-examined by the counsel for the appellants herein to establish that beyond date of alleged divorce i.e. 29.10.2016 the deceased in fact had admitted the respondent 1 to be his legally wedded wife in the maintenance proceeding filed by respondent 1 herein before the court of Judicial Magistrate 1st Class/City Munsiff, Srinagar wherein the said court had passed an order on 1.3.2017 and the said court had recorded therein that the counsel for the non-applicant 2 i.e. the deceased, had admitted that the applicant 1 - respondent 1 herein, as non-applicant 2's wife and respondent 2 his child, yet risking repetition making of said observation or recording of a finding about the status of respondent 1 as widow of the deceased instead of a divorcee by the court below yet cannot be said to be a finding binding upon the appellants herein or operating as *res judicata* against the appellants in view of the judgment of the Apex court passed in **Joginder Pal v. Indian Red Cross Society and others (2000) 8 SCC 143**. The appellants, thus, would be well within their rights to question the

said title or status of the respondent 1 in an appropriate proceeding.

8. Viewed thus, what has been observed, considered and analyzed hereinabove, the impugned order does not call for any interference. Resultantly, the appeal fails and is dismissed. Registry to retain the Xerox copy of the record and attach the same with the instant appeal.

**(JAVED IQBAL WANI)
JUDGE**

Srinagar
07-04-2023
N Ahmad

Whether the order is reportable: Yes

