HIGH COURT OF SINDH AT KARACHI

Suit No.241 of 2008

Date Order with signature of Judge

Hearing of CMA Nos.

1. 12837 of 2014.
2. 12838 of 2014.
3. 73 of 2015.
4. 74 of 2015
5. 75 of 2015
6. 6107 of 2011
7. 5399 of 2014
8. 15662 of 2014
9. 1064 of 2015
10. Examination of Parties / Issues.
11. For order of CMA No.14938 of 2015.

Date of hearing 24.11.2015.

Mr. Asghar Bangash, Advocate for the Plaintiff.

Mr. Maroof Hussain Hashmi, Advocate for the Applicants/Objectors.

Mr. Yaqoob Nasir, Advocate for the Applicants.

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MR. MUHAMMAD FAISAL KAMAL ALAM J: Out of these eleven (11) Applications (CMAs), except for CMA No.6107/2011 (Contempt Application against Defendant No.1), CMA

No.5399/2014 (for passing the preliminary decree) and CMA No.1064/2015 (directions to Nazir for implementing the order dated 18.12.2014), which are filed by the Plaintiff, the rest have been preferred by the Applicants/Interveners namely, M/s. Shabbir Ahmed and Saeed Ahmed. The gist of contention/stance as mentioned in these CMAs of above named persons can be categorized into two categories; first category is of above named Shabbir Ahmed, who has allegedly purchased 130 square yards, which is a portion of the **suit property** (1237-A, M-II/E), admeasuring 1250 square yards, Street No.77, Sher Shah, Karachi from Defendant No.1 (Islamuddin, one of the legal heirs) and as per said Shabbir Ahmed that for remaining portion of the suit property the present Plaintiff and Defendants who are legal heirs/co-owners have agreed to sell out the same to him.

The second category of claim of above named Saeed Ahmed is that the Plaintiff has allegedly misled the Nazir of this Court and instead of sealing the above suit property, the property bearing No. M-II-E-A, 14-C, Sher Shah, Karachi, purportedly belonging to said Saeed Ahmed has been sealed, which is causing immense hardship to him.

2. In the earlier order dated 08.10.2013, controversy between the said Applicant/Objector Shabbir Ahmed and the Parties (Plaintiff and defendants) of the present Suit has been laid to rest, inter-alia, by determining that the defendant No.1 had no right to sell the suit property on the basis of a purported Sale Agreement dated 05.09.2011 and consequently earlier CMA

No.278/2012 filed by the said Applicant / Intervener Shabbir Ahmed, under Order 1, Rule 10 of CPC, for becoming party in the present suit, was dismissed and it was also held that the said Applicant / Intervener Shabbir Ahmed cannot become a party in the instant Suit being the Suit for Administration amongst the legal heirs and thus the above Applicant / Intervener is a stranger as far as present cause is concerned. Subsequently, the Applicant/Objector Shabbir Ahmed filed a High Court Appeal No.129 of 2013 against the order dated 08.10.2013, which was also dismissed by the learned Division Bench of this Court while maintaining the findings of the learned Single Judge. Subsequently, it is also a matter of record that the above named Shabbir Ahmed had unsuccessfully agitated his claim before the Honourable Supreme Court, which was pleased to dispose of his Civil Petition No.2179 of 2014 by the order dated 13.08.2015, with the observation that, inter alia, a separate suit may be preferred with regard to such a claim.

3. In the intervening period, both the above named persons have instituted two different suits having Nos. 1055 and 1056 of 2015 against the present Plaintiff and Defendants/ legal heirs, which are pending adjudication in the Original Side of this Court.

4. CMA No.14938 of 2015 is filed by Shabbir Ahmed (Applicant / Intervener) under Section 144 of CPC seeking restitution to the effect that the Suit property be de-sealed and possession whereof be handed over to the said

Applicant/Intervener – Shabbir Ahmed. Learned counsel for the said Shabbir Ahmed has tried to justify filing of the said CMA by arguing that since new facts have surfaced, which warrant that his client (Shabbir Ahmed) position in respect of the suit property should be restored. In support of his contention he has placed on record three documents, viz. (i) sale agreement dated 5.9.2011), (ii) Irrevocable Deed of Compromise dated 30.08.2011 and (iii) Deed of Compromise dated 30.08.2011. As per plea of Applicant-Shabbir Ahmed, the last two documents of same date preceded the alleged sale agreement.

To substantiate his stance, the learned counsel for the Applicant / Intervener-Shabbir Ahmed has relied upon following case law.

i. 2015 CLC Page 1306

ii. PLD 1964 Dhaka Page 177

iii. PLD 1999 Quetta Page 56

5. The contention on behalf of the Applicant/Intervener – Shabbir Ahmed about purported sale of Suit property to him by the present Defendant No.1 on the basis of above alleged Sale Agreement dated 05.09.2011 has already been decided by the above order dated 08.10.2013, which was never over ruled by the Appellate Fora. Secondly, the Plaintiff side has disputed the above stance of the Applicant/Intervener – Shabbir Ahmed. Thirdly, the earlier order of 21.03.2014, whereby above Applicant (Shabbir Ahmed) filed a Review Application under Order 47, Rule 1 (of CPC) was also dismissed with an

observation that under the purported sale agreement (of 05.09.2011), no right has accrued in favour of the said Shabbir Ahmed. Fourthly, the Applicant/Intervener – Shabbir Ahmed has attempted to validate the above purported Sale Agreement dated 05.09.2011 on the basis of the documents at Sr. No.(ii) and (iii) (***supra***). The document at Sr. No.(ii) above is the Deed of Compromise (dated 30.08.2011) amongst the present Plaintiff and the Defendants No.1 and 4, whereby the present Plaintiff Mst. Zarina and the Defendant No.4 Mst. Farida being sisters have given their "No Objection" with regard to the transfer of the suit property in the name of present Defendant No.1, whereas the document at Sr. No.(iii) is the Deed of Compromise (of same date, that is, of 30.08.2011), which is an Annexure "C" (Page 25, Second Part) of the above CMA No.14938/2015 is in the nature of Relinquishment Deed, as also evident from its Paragraph-04, but admittedly this document has not been registered in terms of Section 17 of the Registration Act, and, therefore, it is devoid of any legal sanctity, as enjoined by Section 49 of the Registration Act. Fifthly ex-facie stance of said Shabbir Ahmed is self-defeating, as, in his earlier CMA No.1555 of 2014 (seeking review of order dated 04.01.2014), which was dismissed by the order dated 21.03.2014, the said Intervener/Applicant in paras 10 and 11 of such application states that his aforesaid alleged portion of 130 Square Yards is away from the suit property. This assertion of said Applicant Shabbir Ahmed that too on oath speaks about the credibility and shows that he is not even sure

about the physical location of the suit property, which is a further ground to reject his claim.

The above case law cited in support of application for restitution being CMA No.14939 of 2015, do not support the case of the said Applicant / Intervener (Shabbir Ahmed) as basic principle explained in these decisions, that the wrong done to a party by act of Court should be rectified, is not present in the instant case. In the last of the cited case-PLD 1999 Quetta Page 56, the learned Judge has quoted a judgment from the Indian jurisdiction; 23 Madras 306, by Sabrahmania Ayyar, J, explaining the principle in the following words-

> *"The principle of the doctrine of restitution is that on reversal of a judgment law raises an obligation in the party to the record who received the benefit of erroneous judgment to make restitution of the other party for what he had lost.........That obligation it is duty of the Courts to enforce unless it is shown that restitution would be clearly contrary to the real jurisdiction of the case."*

More so, the other Judgments also reiterate the same principle that if by an act of the Court a party has lost the possession of the property to which he is entitled to (***emphasis added***), can ask for restitution of the same after the decree and order on the strength of which he has been dispossessed reversed or otherwise comes to an end as being null and void. Conversely, in the present case none of the earlier orders passed by this Court have been either over-ruled or set-aside, therefore, the principle of Section 144 of CPC is not applicable to the case at hand of said Applicant / Intervener-Shabbir Ahmed and

consequently the CMAs of Shabbir Ahmed are dismissed being meritless.

Although Section 11 of Civil Procedure Code (Act V of 1908) relating to the principle of Res judicata applies to a final decision given in a Suit, but there are judicial pronouncements, whereby by creating exception the principle of Res judicata has been made applicable to the interlocutory orders (deciding applications) even.

In this regard guidance can be taken from an earlier reported case of this Court-2003 CLC page 189 (Karachi), and at page 195 after discussing foreign case law on the issue it was held that-

> *"The dictum laid down in the case of Arjun Singh (supra) by Indian Supreme Court is that (interlocutory) orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation. The principle of res judicata does not apply to the finding on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of, the Court would be justified in rejecting the same as an abuse of the process of Court."*

However, in order to further elucidate the point of law, it would be advantageous to reproduce the discussion mentioned in the above referred case at its pages 194 and 195-

> *"....explained by Indian Supreme Court. Rajagopala Ayyangar, J, speaking for the Court observed as follows:---*

*"(10). That the question of fact which arose in the two proceedings was identical would not be in doubt. Of course, they were not in successive suits so as to make the provisions of S.11 of the Civil Procedure Code applicable in terms. That the scope of the principle of res judicata is not confined to what is contained in Section 11 but is of more general application is also not in dispute. Again, Res judicata could be as much applicable to different stages of the same suit (**underlining is mine for emphasis**) as to findings on issues in different suits. In this connection we were referred to what this Court said in Satydhan Ghosal v. Sm. Deorajin Debi, (1960) 3 SCR 950: AIR 1960 SC 941 where Das Gupta, J. speaking for the Court expressed himself thus:*

"The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter---whether on a question of fact or on a question of law---has been decided between two parties in one suit or proceeding and the decision is final, either because the appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again....The principle of res judicata applies also as between the two stages in the same litigation to this extent that a Court, whether the trial Court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the proceedings."

Mr. Pathak laid great stress on this passage as supporting him in the two submissions that he made: (1) that an issue of fact or law decided even in an interlocutory proceeding could operate as res judicata in a later proceeding, and next (2) that in order to attract the principle of res judicata the order or decision first rendered and which is pleaded as res judicata need not be capable of being appealed against."

"(13) It is needless to point out that interlocutory orders are of various kinds; some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the Court usually take. They do not, in that sense, in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such

> *orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of res judicata does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of the Court would be justified in rejecting the same as an abuse of the process of Court."*

As already mentioned above that since earlier orders passed in the proceedings have not been over ruled or set-aside in appeals thus the principle of Res judicata is of relevance here.

6. Since all the above documents were placed on record as Annexures on behalf of the Applicant/Intervener – Shabbir Ahmed with his above listed CMA No.14938/2015, therefore, it has become necessary to give a finding through this order. Even otherwise, these documents do not require any detailed enquiry or leading of evidence, in order to verify their authenticity, hence, the above findings are based on the availability of record and applicability of law, particularly, Res judicata.

7. With regard to the second category of claim of Applicant / Intervener-Saeed Ahmed through his CMA Nos.12838 of 2014, 73 and 74 of 2015, crux of which is that the said Saeed Ahmed is requesting that this Court may investigate his claim that instead of sealing the suit property, the learned Nazir of this Court has sealed the alleged property, description whereof is mentioned hereinabove, purportedly belonging to the said Applicant / Saeed Ahmed and, therefore, he is primarily seeking de-sealing of "his" property.

Adverting to this second category of claim (of Applicant Saeed Ahmed), it is an admitted that with his aforesaid applications, the said Saeed Ahmed (Applicant / Intervener) has not placed on record any title documents or for that matter even an allotment letter in respect of his alleged property, in order to substantiate his claim. Instead, a PT-1 Challan is annexed with his above CMAs as a proof of ownership. In absence of valid title documents the claim of Said Saeed Ahmed cannot be accepted as a tenable one and, therefore, all his applications are devoid of any merit and are accordingly dismissed.

8. The order dated 17.08.2011 also reveals that the Defendant No.1 has even ousted his real mother (the Defendant No.2) from the suit property. The record of the case is also evident of the fact that even after seven (07) years of filing of the instant suit, lady members / female legal heirs are being continuously deprived of their respective shares in the inheritance and since it is a suit for administration, it would be just and proper to pass a preliminary decree in terms of Order XX Rule 13 of CPC and the Official Assignee of this Court is appointed as Administrator to take further proceedings in the matter and is directed to dispose of the suit property and distribute the sale proceeds amongst the legal heirs. Fee of the Official Assignee shall be as per Rules. Consequently, CMAs No.5399 of 2014 and 1064 of 2015 filed by plaintiff are disposed of and in view of the above discussion, the above listed CMA No.6107 of 2011 (Contempt Application) of Plaintiff is dismissed.

9. The upshot of the above is that all the listed CMAs of the two Applicants / Interveners, namely Shabbir Ahmed and Saeed Ahmed are dismissed being wholly misconceived and untenable in law, rather an abuse of process of law.

10. There is no order as to costs.

Karachi.
Dated: ____________ JUDGE

M.Javaid.P.A