

IN THE HIGH COURT OF SINDH, KARACHI

IInd Appeal No. 20 of 2007

Mst. Rukhsana Tabbasum Shaikh

Versus

Kazim Imam Jan and others

Before: Mr. Justice Zulfiqar Ahmad Khan

Date of Hearing : 02.11.2016.
Date of Announcement : 08.11.2016
Appellant : Through Mirza Sarfaraz Ahmed,
Advocate
Respondent No.1 : Through Mr. Amir Saleem, Advocate
Respondents No. 3 & 4 : Malik Altaf Javed, Advocate

JUDGMENT

Zulfiqar Ahmad Khan, J.:- This second appeal has been agitated against the judgment of the Ist Additional District Judge (C) Karachi in C.A No. 169 of 2005.

2. Leaned counsel for the appellant put forward the case of the current appellant and by his version of facts, the disputed property was gifted to the appellant by respondent No.1, who was the original allottee of the property in question. There seems to be a chain of litigation between the parties, which commenced by the present appellant filing a suit before this Court (bearing No. 515 of 1993) for permanent injunction and declaration. It is interesting to note that while the appellant (the plaintiff in the above referred suit) at one hand is claiming to have obtained right to the disputed property through a Gift Deed, she states in paragraph-4 of the plaint that she entered into agreement with respondent No.1 in respect of the same property and made certain advances pursuant to the said sale agreement.

3. It is pertinent to note through paragraph-5 of the plaint that the appellant was never in the possession of the property in question and it could be seen that when the suit was filed on 23.08.1993 the property (by her own version) was on rent. Accordingly a rent case was filed against the said tenant by the appellant, which litigation reached till the Hon'ble Supreme Court of Pakistan where the apex Court vide its order dated 18.07.2000 vacated the tenant and ordered the property's possession be handed over to respondent No.3.

4. The main prayer made in the above referred suit is of categorical importance and it is reproduced in the following:-

“a). to restrain the defendant Nos. 1 to 6 by using any documents issued in between from 20.6.1972 to 16.12.1992 from any office in respect of property bearing No.C/79, Block 4, Federal 'B' Area, Scheme No.16, Karachi. Further restrain the defendants to sell, transfer, gift or mutation of the said property in any court of law, Govt. or Semi-Govt Agency”.

5. As it could be seen that the said prayer seeks a negative declaration against certain documents in *rem*. Taking cognizance of the fact that such a prayer could not be granted, the appellant (plaintiff in the above suit) moved an application under Order VI Rule 17 CPC on 18.09.2004 for the substitution of its main prayer with the following prayer:-

“To restrain defendant No.1 to 6 by using alleged sale deed of immovable property of Rs. 76,500/- (Rupees seventy six thousand five hundred only) dated 22nd November 1972 alleged to be executed by defendant No.1 through alleged attorney Noor Muhammad S/O Lal Muhammad in favour of defendant No.4 being registration No. 5576 and the alleged deed of declaration of gift of immovable property dated 15th November 1980 alleged to be executed by defendant No.4 in favour of original defendant No.3 Mr. Gul Muhammad S/O Lal Muhammad being registration No. 2693 in respect of property No. C/79 Block 4, Federal “B” Area, Scheme No. 16, Karachi.

Further restrain the defendants to sell, transfer, gift or mutation of the said property in any court of law, Government or Semi Government Agency”.

6. Notwithstanding therewith, the defendants No.3 & 4 in the above referred suit, who had bought the said property, filed an application under Order VII Rule 11 CPC during the pendency of the above referred suit for rejection of the plaint on the following grounds:-

- “1. That suit in the present form was filed on the basis of Gift Deed which has been declared as void and the appeal filed against it has been dismissed, consequently the plaintiff has no right or cause of action for the purposes of prosecuting the case as such the plaint is liable to be rejected.
2. The suit is further barred under section 54 of the Transfer of Property Act as well as Section 42 of Specific Relief Act as the agreement of sale does not create any interest in the property.
3. The suit even otherwise is barred under the law and specifically Limitation”.

7. The first order in the current chain of litigation is passed on the said order VII Rule 11 application on 29.10.2005 in terms of which after giving lengthy dossier of reasoning, Court rejected the plaint under Clause (a) & (d) of Order VII Rule11, alongwith all pending interlocutory applications. The first appeal against the said order was filed, which was also dismissed vide the impugned order.

8. In summary, the learned counsel for the appellant agitated the following points of law:-

- i). In the circumstances when evidence in the matter was being taken and an application under Order VI Rule 17 was pending, the trial Court ought not to have passed orders on the Order VII Rule 11 application and should not have rejected the plaint, but should have passed a final and conclusive order;

- ii). While rejecting the plaint, the trial Court should not have considered statements made by the defendants in written statement and the Court should have rejected the plaint without recursing to the averments made in the written statement; and
- iii). Through the impugned order, plaint has been rejected on the grounds, which were not agitated in the Order VII Rule 11 application.

9. In support of his contention he placed reliance on 1985 PLD SC 345, 1989 CLC 1467 and 1993 CLC 1084.

10. Opening his side of arguments, learned counsel for respondents No. 3 & 4 submitted that a prayer of negative declaration is not maintainable unless any specific relief is sought by the plaintiff itself. He contended that it was the reason behind the fact that an application under Order VI Rule 17 was filed after the lapse of 11 years to rectify this error. However, by that time an application under Order VII Rule 11 was already pending before the trial Court, wherein placing reliance on 2003 CLC 189, the Court had concluded that the Gift Deed on the basis of which the appellant had made her claim was void, therefore, the plaintiff was left with no cause of action.

11. With regard to negative declaration, the counsel placed reliance on PLD 2012 Sindh 92 and referred to the cases between the said parties, which were decided and reported viz. 2003 CLC 189 and 2003 CLC 200, where in the first case, the Gift Deed was held to be illegal and also, the Court observed that since the appellant had never been in possession, such a Deed is of no benefit. Per counsel, in the second reported case, the appellant challenged the title of respondents No. 3 & 4, but such challenge also failed.

12. With regard to the assertions of the counsel for the appellant that the Court cannot consider other material before passing an order under Order VII Rule 11, the learned counsel placed reliance on 1989 CLC 15, where it was held that there is no restriction on the Court to consider any material before Order VII Rule 11 application is determined. Learned counsel for respondent No.1 adopted the arguments of the Appellant's counsel.

13. Heard the counsel and perused the record.

14. To me, it is a simple case of "trying her luck" by which the instant second appeal has been filed as there are at least three judgments, which are against the appellant and favouring the title of respondents No.3 & 4 in the property. Looking through the eyes of Section 100 CPC, a perusal of the order underneath shows that the grounds on which such an appeal would lie, as provided in the said section, do not exist in this case. The only question that merit consideration was the pendency of Order VI Rule 17 application, while the Order VII Rule 11 application was determined. As I have taken the opportunity of reproducing main prayer of the appellant in the original plaint and as sought to be amended by the said Order VI Rule 17 application, I do not see any practical possibility of allowing the amended prayer even if I were to do so at this instant. Through the amended prayer, the documents which are challenged are as old as 1972 and 1980 and the prescribed time limit to challenge and seek declaration against these documents had expired long ago, even at the time when the original suit No. 157 of 2003 was filed.

15. With regard to the contention that the Court should have first concluded the evidence and not to have abruptly passed Order

VII Rule 11 application, I do not find any merit in such assertions, as there is no bar on the Court to do the same to facilitate the end of justice meet without any loss of time.

16. For the aforesaid reasons, I hereby dismiss the instant appeal.

Judge