

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
 Suit No.1886 of 2016

DATE

ORDER WITH SIGNATURE OF JUDGE

For hearing of CMA No.12074/16 (U/O 39 Rule 1 & 2 CPC)

31.10.2017.

Mr. Mian Abdul Majeed, Advocate for Plaintiff.
 Mr. Abdul Wajid Wyne, Advocate for Defendant.

This is a Suit for Declaration, Possession and Permanent
 Injunction, wherein, the Plaintiff seeks the following prayers:--

- (A) To declare that the deceased Abrar Ahmed was ostensible/benamidar owner of the property viz ! double Storey House on Plot No.F-87, Block-6, P.E.C.H.S, Karachi and further declare that the plaintiff is 70% share holder in the property and having share in the remaining 30% as legal heir of the deceased Late Abrar Ahmed.
- (B) To direct Mst. Shakra Bano and Mubhammad Mudassir to hand over the possession of extra portion of the property in their possession to the plaintiff.
- (C) To direct the defendants not to create third party interest or hand over the possession of the property in their possession to third party.
- (D) Cost of the suit.
- (E) Any other relief which this Honourable Court may deem fit and proper.

Notices were issued in this matter and written statements as well as counter affidavits have been filed. On the last date of hearing the Counsel for the Defendant had raised an objection regarding the maintainability of this Suit as previously the parties were engaged in litigation in respect of the same property. Counsel for the Plaintiff was confronted and today I have heard the learned Counsel for the plaintiff on the issue of maintainability of instant Suit.

Learned Counsel submits that this Suit is competent as in the earlier Suit, the claim was not to the effect that the Plaintiff's father was a benami owner of the property in question to the extent of 70% share. According to learned Counsel the substance of the earlier Suit was different from the present Suit as it was filed by one of the defendants

and not by the plaintiff. He further submits that due to illness of the Plaintiff's Counsel in that Suit, the matter was not proceeded properly and therefore, this Suit is competent.

I have heard the learned Counsel for the Plaintiff and perused the record. It appears to be an admitted position that earlier a Civil Suit No.365/2011 was filed before this Court for partition and specific performance by Defendant No.1 against the Plaintiff and other legal heirs. The said Suit was thereafter transferred to the Court of IXth Senior Civil Judge, East Karachi and was numbered as 636/2011. The following Issues were settled and Judgment was passed:-

- i. Whether the suit is maintainable?
- ii. **Whether property bearing No.F-87, Block-6, P.E.C.H.S, Karachi measuring 400 sq. yds was purchased through benami transaction by defendant No.2 in the name of his father?**
- iii. Whether the plaintiff is entitled for the mense profit at the rate of Rs.20,000/- per month since February, 2010?
- iv. Whether plaintiff is entitled for the relief claimed by him?
- v. What should the decree be?

From perusal of the aforesaid Issues it appears that Issue No.2 exactly covers the present controversy as to whether the Plaintiff had purchased the property in question as benami in the name of his father. Such Suit was decreed vide Judgment dated 04.09.2014, whereby, Issue No.2 was decided against the present plaintiff which was further impugned in Civil Appeal No.64/2015 before the Additional District & Sessions Judge by the present Plaintiff, and such Appeal was also dismissed vide Judgment dated 28.11.2016 and against that Judgment a IInd Appeal bearing No.01/2017 was preferred before this Court by the Plaintiff. The said IInd Appeal also stands dismissed vide Order dated 17.01.2017 and it is informed that the said order has now been impugned before the Honourable Supreme Court.

After going through the record and proceedings of the earlier Suit as well as the plaint in the present matter it appears to me that the controversy regarding the claim of the Plaintiff as to the benami ownership of his father already stands decided by three forums and now the matter is pending before the Honourable Supreme Court. It is

not in dispute that the property in question is the same, whereas, the prayer made in this Suit, was already a subject matter in the earlier Suit as Issue No.2, which already stands decided against the Plaintiff, and therefore, the principles of Resjudicata would squarely apply to the present in terms of Section 11 CPC which provides that No Court shall try any Suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former Suit between the parties or between the parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent Suit or the Suit in which such issue has been subsequently raised and has been finally heard and decided by such Court. Notwithstanding this, the Plaintiff, if advised, could have raised a counter claim in the earlier Suit of partition as has now been pleaded by the Counsel for the Plaintiff. But under no circumstances a second Suit could be termed as competent.

In view of such circumstances, I am of the view that instant Suit being a subsequent Suit, whereas, the issue raised already stands decided in the earlier Suit, is not competent and is therefore dismissed with pending applications if any.

J U D G E

Ayaz P.S.