

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 425 of 2009

[Rizwan Ahmed v. Jameel Ahmed and others]

Dates of hearing : 29.01.2019.

Date of Decision : 23.05.2019.

Plaintiff : Rizwan Ahmed, through Mr. S. Rafiq-un-Nabi, Advocate.

Defendants 3,5-8 : Mst. Shakeela Naz and 4 others, through Mirza Rafiq Baig, Advocate.

Defendants 1,2 and 4 : Nemo.

Decisions relied upon by Plaintiff's Counsel

1. P L D 1988 Karachi page-460
[*K. A. H. Ghori v. Khan Zafar Masood and another*] – Ghori Case.

Case law relied upon by the Counsel of Defendants No.3, 5-8.

1. P L D 1962 Supreme Court page-291
[*Syed Mehdi Hussain Shah v. Mst. Shadoo Bibi and others*] – Mehdi Case.

Other precedents

Law under discussion:

1. Civil Procedure Code, 1908 (“CPC”)
2. Qanun-e-Shahadat Order, 1984 (Evidence Act, 1872); Evidence Law.

JUDGMENT

Muhammad Faisal Kamal Alam, J: - The present suit, *inter alia*, for Administration has been filed by the Plaintiff in respect of the estate left by deceased Jumma Khan son of Late Sandal Khan (the “Deceased”). Plaint contains the following prayer clause_

1. *A preliminary decree be passed to administer/partition and/or sale of the estate of the deceased Jumma Khan son of Sandal Khan so as to distribute the share of each and every legal heirs of the Deceased i.e. the Plaintiff and the Defendants per pro ratio prescribed by sharia.*
2. *A final decree for partition of the immovable property of the Deceased Jumma Khan son of Sandal Khan and in absence of available partition the said immovable property being House No.2456, admeasuring 91 sq. yds., situated in Ghandi Nagar (Presently Ghazi Nagar) Lyari Quarters, Karachi, be sold through the Nazir of this Hon'ble Court and share of the Plaintiff be provided to him.*
3. *Appointment of Receiver/Commissioner to call for record, investigate and inquire into the immovable property/assets and business of dyeing and bobbing of thread left by the Deceased running at ground floor of said House No.2456 admeasuring 91 sq. yrd., situated in Ghandi Nagar (Presently Ghazi Nagar) Lyari Quarters, Karachi, taking over the possession of the same for sale on a better sale price and proper distribution of the same in accordance with the respective shares of all the legal heirs of the Deceased according to Sharia.*
4. *Permanent injunction restraining the Defendants from alienating or creating any third party interest in the inherited property / assets and business and from withdrawal of any amount / account therefrom till the decision of these proceedings.*
5. *Cost of the Suit.*

2. Upon issuance of summons, the matter was not seriously contested by Defendants except Defendants No.1, 2 and 4.

3. A preliminary decree was drawn up in view of the order dated 19.04.2010 and the following Issues were settled_

- i. *Who are the legal heirs of the deceased Juma Khan?*
- ii. *What estate, assets and property / share left behind by the deceased Juma Khan?*
- iii. *Which of the legal heirs are in possession and occupation of the estate, property and cash or otherwise?*

iv. Which of the party is accountable to the other, if so, to what extent?

v. To what share, if any, each of the legal heirs is entitled out of estate left behind by the deceased in possession of any of the party or any of the third party?

4. The present *lis* is about partition, or, alternatively disposition of an immovable property, viz. a built up property on Plot No.2456, Ghazi Nagar, Lyari Quarters, Karachi (“**Suit Property**”), belonging to the deceased father, namely, Juma Khan son of Sandal Khan. Similarly, it is claimed by the Plaintiff that business of dyeing and bobbing (“**Subject Business**”); being carried out at the ground floor of the Suit Property since owned and belonged to the deceased father, thus now it is a joint family business. Further averred that since Defendants No.1 and 2 have usurped the Subject Business, they are liable to account for the income, so far pocketed by them.

5. The Defendants No.1, 2 and 4 in their Written Statements and have come up with the plea that the common business on the ground floor of the Suit Property belongs to Defendants No.1 and 2 to the exclusion of other legal heirs; Plaintiff and remaining Defendants. Defendant No.4 has supported the version of Defendants No.1 and 2, that they have not done any misappropriation, whereas, Defendants No.1 and 2 have filed their joint Written Statement, wherein it is not disputed that the Suit Property belongs to the deceased father but the business carried on thereat on the ground floor belongs to Defendants No.1 and 2 only. It is also alleged that Plaintiff misappropriated a sum of Rs.400,000/- after the death of the deceased father and took other gold ornaments for which the Plaintiff is liable.

6. Site Inspection Report dated 23.02.2010 of the Nazir is also on record, to which no objection is filed. On behalf of the Plaintiff and

Defendants, the evidence was led. Defendants supported the case of the Plaintiff except Defendants No.1, 2 and 4, who contested the claim as averred in plaint.

7. The Plaintiff examined himself and Defendants No.3, 5 and 6, who are real sisters of Plaintiff, have filed their separate Affidavit-in-Evidence and were examined. In effect, these Defendants have supported the case of the Plaintiff for distribution of inheritance. The contesting Defendants did not come forward to lead the evidence, which is reflected from the Nazir Report dated 11.09.2012, that despite providing ample opportunities, the Defendants, who were objecting to the present proceeding, did not come forward to be examined. Learned Nazir of this Court was appointed Commissioner to record the evidence.

ISSUE NO.1:

8. From the pleadings and evidence, it is an undisputed fact that Plaintiff and Defendants No.1 to 8 are the sons and daughters of late Juma Khan, who left the above mentioned estate, which is to be distributed accordingly. With regard to Defendant No.9, it is pleaded that she was the second wife of the deceased father, who also passed away during the life time of deceased father and her surviving legal heirs (if any) are not known to the Plaintiff. It is also an undisputed fact that the parents of deceased Juma Khan have died long ago. In the evidence, the Plaintiff has deposed that Defendant No.9 died issueless. This fact has not been disputed by other Defendants in their evidence. Consequently, reply to Issue No.1 is that the Plaintiff and Defendants No.1 to 8 are the surviving legal heirs of Deceased Juma Khan son of Sandal Khan.

ISSUE NO.2:

9. The evidence of the parties leads to the conclusion that following assets and property are left by the deceased father_

- i. The Suit Property, being House No.2456, admeasuring 91 sq. yds., situated in Ghandi Nagar (Presently Ghazi Nagar) Lyari Quarters, Karachi, with ground plus 2 upper floors.
- ii. The Subject Business of dyeing and bobbing being carried out by Defendants No.1 and 2 on the ground floor of the Suit Property.

10. It is specifically deposed by the Plaintiff that original lease document was kept with one of the family friends, namely, Uncle Muhammad Usman, but when prior to filing of the present proceeding, S.M.A. No.171 of 2007 was filed and the said Muhammad Usman was summoned to produce the original documents, the latter disappeared and therefore, the original title documents could not be produced by the present Plaintiff in the evidence proceeding of present *lis*. In his evidence, Plaintiff has produced the original Search Certificate as Exhibit P/1, which confirms that the Suit Property still vests in the name of Juma Khan son of Sandal Khan, the deceased father. The extract of entries of City Register of Deaths in the Saddar Town, is produced as Exhibit P/2, to prove that the deceased father passed away on 30.07.2003. The copy of the Lease of the Suit Property has been produced as **Exhibit P/3**. Perusal of this document shows that the Lease was granted on 03.03.1976 by Karachi Municipal Corporation in favour of the deceased father for a period of 99 years. The category of the property is mentioned as Residential. In order to substantiate his claim, the Plaintiff also produced certified copy of earlier S.M.A. No.171 of 2007, filed by him in respect of the Suit Property, as Exhibit P/4. Application for production of document and order thereon has been produced in the evidence; Exhibit P/5. Copy of the adjournment application filed by present Defendant No.1 in the above S.M.A. No.171 of 2007, has also been produced as Exhibit P/6, to show that it was moved by present Defendant No.1 seeking adjournment on the ground that the above named Uncle, who was summoned to produce the original title document,

was ill at that time. The Plaintiff has produced application for withdrawal of the above S.M.A. and the order dated 22.12.2008, passed thereon, as Exhibit P/8.

11. As already stated in the preceding paragraphs, the Plaintiff was not cross examined by the contesting Defendants No.1, 2 and 4 and, therefore, the cross examined was marked as Nil, as also mentioned in the above referred Nazir's Report. Since Plaintiff in his evidence has produced a copy of the original Lease document (Exhibit P/3) and if the same is considered with the original Search Certificate (Exhibit P/1), which is an official document, carrying the presumption in terms of Articles 90 and 92 of the Evidence Law and the unrebutted stance of the Plaintiff, that the original Lease document is with the above named Uncle, the above document Exhibit P/3 (Lease of the Suit Property) does carry an evidentiary value.

12. Mr. S. Rafiq-un-Nabi, learned counsel representing the Plaintiff, has argued that since the contesting Defendants did not lead the evidence, therefore, their respective Written Statements do not carry any evidentiary value. He has cited the above referred decision of Ghori Case (*ibid*).

13. The case law relied upon by the Plaintiff is relevant and the rule laid therein is applicable to the facts of present case. It would be advantageous to reproduce the relevant portion of the reported decision herein under_

“ None of the defendants have ventured into the witness-box to contradict the evidence of the Plaintiff.

I am of the opinion that It is the bounden duty of a party personally knowing the whole circumstances of the case, to cross-examine the plaintiff and to give evidence on his own behalf and to submit to cross-examination. His non-appearance as a witness would be the strongest possible circumstances going to discredit the truth of his case.

The failure of the defendants to go into the witness-bix without any explanation whatsoever at once puts them out of Court.

Adverse inference can be drawn against him, that is, the defendant No.1 agreed to the sale of the plot in suit to the Plaintiff. ”

14. It is a settled Rule that pleadings themselves cannot be considered as evidence unless the Plaintiff or Defendant, as the case may be, enters the witness Box and leads the evidence in support of his / her claim or defence. In the present case, despite providing ample opportunities, the contesting Defendants No.1, 2 and 4 have not come forward to testify and discharge the onus of proof, hence, the stance of the said Defendants is meritless.

15. The other Defendants, except the contesting Defendants, also examined themselves. These Defendants, who are real sisters of Plaintiff, have basically corroborated the version of Plaintiff and in their cross-examination (though formal), by the learned counsel for Plaintiff, they have specifically testified that Gold Ornaments, belonging to second wife / step mother of the parties hereto, were gifted by her to the wife of Plaintiff on her marriage ceremony. These Defendants / sisters have also testified that the keys of Almirah of deceased father were in the custody of Defendant No.1 and it is a frivolous allegation by the said Defendant No.1, that present Plaintiff took Rs.400,000/- (Rupees Four Hundred Thousand only).

16. From the appraisal of the above evidence, it is not difficult to conclude that the Suit Property belonging to the deceased father has to be distributed in accordance with the Hanafi Law of Inheritance amongst all the legal heirs, viz. Plaintiff and Defendants. With regard to the stance of contesting Defendants No.1, 2 and 4, that Plaintiff misappropriated some amount and so also the gold ornaments, the same stand disproved, in view of the above unchallenged testimony of Plaintiff and other Defendants. In addition to the above, it is also proven by Plaintiff that the Subject Business of dyeing and bobbing, which is being carried out by the Defendant No.1

and 2, does not belong to them, but after the death of late Juma Khan, the entire business is to be run as a joint family business. Therefore, the Defendants No.1 and 2 have usurped the Subject Business to the utmost disadvantage of other legal heirs and hence are liable to render the accounts of the business income to Plaintiff and other Defendants.

Issue No.2 is answered accordingly; that the Suit Property and Subject Business are the estate left by the deceased.

ISSUES NO.3 AND 4:

17. Both issues are interlinked and, therefore, they are answered accordingly. The Plaintiff in his evidence has basically reiterated the claim mentioned in his plaint and has further deposed (on oath), that Defendants No.1 and 2 are illegally in occupation of first and second floors, for which they are liable to pay a rent to the Plaintiff and other legal heirs, that is, sisters, who have been impleaded as Defendants. The Plaintiff himself has offered to pay Rs.2,500/- per month for the third floor, which he is occupying in the Suit Property.

The Defendants No.1 and 2 are liable to render complete accounts of the business, they are in illegal occupation of and from which they have earned income of Rs.40,000/- per month, as testified by Plaintiff and corroborated by other Defendants and the said version has gone unrebutted. The Site Inspection Report of Nazir (as mentioned in the foregoing paragraphs) further substantiates the fact that Defendant No.1 and 2 were / are in possession of Subject Business; the Report was not objected to by these Defendants. Even otherwise, the Suit Property and the Subject Business located in a densely populated area of City of Karachi, and it is a matter of common knowledge that the said business must be generating at least an income of Rs.40,000/- per month. These Defendants No.1 and 2 are thus liable to pay an amount of Rs.40,000/- from the date of institution of

suit till the realization of amount, to the Plaintiff and other Defendants No.3, 5, 6, 7 and 8, from the date of Decree, which comes to Rs.4,880,000/- (Rupees Forty Eight Lacs Eighty Thousand only).

ISSUE NO.5:

18. The present suit is decreed and the parties to the proceedings are entitled for their respective share in the inheritance, in accordance with Hanafi Law.

19. M/s. S. Rafiq-un-Nabi and Mirza Rafiq Baig, learned counsel for the parties have relied upon the case of Syed Mehdi Hussain Shah (*supra*), *inter alia*, to support their contention about the procedure to be adopted in the present *lis*.

20. Nazir is hereby appointed Administrator to take all steps for partitioning of the Suit Property amongst the legal heirs; viz. Plaintiff and Defendants No.1 to 8, and if the same is not practically possible, then Nazir shall sell / dispose of the Suit Property. But at the same time, if any of the legal heir or set of the legal heirs (Plaintiff and Defendants) are interested to buy the Suit Property and / or the business, they can purchase the same after its proper evaluation and after adjustment of their respective / proportionate share therein. If it is required, Nazir will obtain the fresh certified copy of the original Lease (Exhibit P/3) from the official record for the purpose of implementing the directions mentioned herein.

It is further clarified that while distributing the sale proceeds of the Suit Property and the business, the above amount, which the Defendants No.1 and 2 are liable to pay to the Plaintiff and other Defendants, shall be deducted and adjusted **from the share of Defendants No.1 and 2 and they will be entitled to remaining balance amount as their respective / proportionate share in the inheritance.**

21. If any of the legal heirs, *particularly*, aforementioned Defendants No.1 and 2 attempt to create any impediment, then Nazir is empowered to take strict action against them, including seeking Police aid, as Conduct of these Defendants (No.1 and 2) is dishonest.

22. Since the conduct of Defendant No.1, 2, and 4 is completely uncalled for and they obstructed the just distribution of inheritance in time, therefore, this suit is decreed with costs.

Judge

Karachi,
Dated: 23.05.2019.

Riaz / P.S.