

IN THE HIGH COURT OF SINDH KARACHI

Present:

Mr. Justice Muhammad Ali Mazhar

Mr. Justice Adnan Iqbal Chaudhry.

H.C.A. No. 285 of 2007

[Mst. Nafeesa Siddiqui and others versus Danish Rafique and others]

Appellants : Mst. Nafeesa Siddiqui and others, through
Mr. Abdul Qayyum Abbasi, Advocate.

Respondent No.1 : Danish Rafique, through Mr. Khalid Javed,
Advocate.

Respondents 2&3 : Nemo

Date of hearing : 16-08-2018

Date of Decision : 16-10-2018

JUDGMENT

ADNAN IQBAL CHAUDHRY J. -

1. Pursuant to order dated 16-11-2007 passed in Suit No.1279/2004 (said Suit), the learned Single Judge passed a compromise decree as between the plaintiff and defendants 10 and 11 of the said Suit (the Respondents herein) while keeping the said Suit pending against the other defendants (the Appellants herein). Against the said compromise order dated 16-11-2007, the other defendants (Appellants) preferred a Review application which was dismissed by the learned Single Judge vide order dated 03-12-2007. By this appeal the other defendants (Appellants) have assailed both the compromise order and decree dated 16-11-2007 and the order dated 03-12-2007 passed in Review.

2. The said Suit is by the Respondent No.1 (plaintiff) against the Appellants (defendants 1 to 9) and the Respondents 2 and 3 (defendants 10 and 11) for *inter alia* specific performance of a sale agreement for House No.83/L, Block-2, P.E.C.H.S., Karachi (the Suit

Property). The Appellants, the Respondent No.2 [now survived by the Respondents 2(a) to 2(d)], and the Respondent No.3 were co-owners of the Suit Property by way of inheritance.

3. Both, Mr. Abdul Qayyum Abassi, learned counsel for the Appellants, and Mr. Khalid Javed, learned counsel for the Respondent No.1, requested that since this appeal was an old matter which had not been admitted to regular hearing to-date, this appeal be heard for disposal at the *katcha peshi* stage. A counter-affidavit by the Respondents 2 and 3 to oppose the appeal is on record, however, their counsel was called absent at the hearing. In fact, the order sheet shows that the counsel for the Respondents 2 and 3 has appeared only once throughout the appeal. Therefore, with the consent of the counsels present, we heard this appeal for disposal at the *katcha peshi* stage.

4. Mr. Khalid Javed, learned counsel for the Respondent No.1, objected to the maintainability of this appeal. His first objection was that this appeal is from the order dated 16-11-2007 passed on the compromise application, and not from the decree passed pursuant thereto, and therefore, since the decree has gone unchallenged, this appeal is not maintainable. But we find that the first recital of the memo of appeal categorically states that this appeal is also against the decree dated 16-11-2007; that the grounds taken in the appeal specifically challenge the decree as well; a certified copy of the decree has been filed with the appeal; and the appeal against the said decree is within limitation.

The second submission of Mr. Khalid Javed Advocate on the non-maintainability of this appeal was that pursuant to the compromise decree, and before the filing of this appeal, the Respondents 2 and 3 transferred their share in the Suit Property to the Respondent No.1 vide a registered conveyance deed dated 01-12-2007, and that since such conveyance deed remains unchallenged, this appeal is not maintainable.

The third objection of Mr. Khalid Javed Advocate was that once the Appellants opted for a Review application against the compromise order instead of an appeal, and once that Review application was rejected by the learned Single Judge, then by virtue of Order XLVII Rule 7 CPC, this appeal was not maintainable.

5. Adverting to the parties as in the said Suit, the defendant No.1 (Appellant No.1 herein), is the mother of the defendants 2 to 9 (Appellants 2 to 9 herein) and the step-mother of the defendants 10 and 11 (Respondents 2 and 3 herein). It is the case of the plaintiff in the said Suit that the defendants 2 to 11 had appointed their mother as their Attorney for the Suit Property vide a registered General Power of Attorney dated 23-04-1997; that as such Attorney the mother entered into a Sale Agreement in 2004 to sell the Suit Property in its entirety to the plaintiff for a total sale consideration of Rs.18,000,000 out of which she received a pay-order of Rs.2,000,000 as part payment and issued a receipt; that the Suit was filed when the seller avoided conveyance of the Suit Property to the plaintiff.

6. The Suit is being contested by the Appellant No.s 1, 2, 3, 5, 6, 7 and 9 including the mother. It is their case (so also of the mother) that no agreement to sell the Suit Property had ever been executed; that the Sale Agreement and receipt are forged and fabricated by the plaintiff in collusion with the defendants 10 and 11 (Respondents 2 and 3 herein); that the plaintiff was a tenant in the outer portion of the Suit Property and the payment of Rs.2,000,000 made by him was towards advance rent and security deposit; that the plaintiff defaulted in the payment of rent after November 2004 and filed the Suit to cover his default; and that ejectment proceedings had been initiated against the plaintiff before the Rent Controller. Though the said defendants (Appellants) do not deny execution of a General Power of Attorney in favour of the mother, it is their case that the said General Power of Attorney was time-bound and had expired prior to the Sale Agreement; and that since the General Power of

Attorney was in the custody of the defendant No.10, he has tampered with it to support the plaintiff.

7. Issues in the said Suit were settled and a Commissioner was appointed to record evidence. Thereafter, on 17-11-2006, two CMAs were presented in the said Suit, both praying for a compromise decree under Order XXIII Rule 3 CPC. CMA No.8411/2006 was by the plaintiff and the defendants 10 and 11 (the Respondents) stating *inter alia* that the defendants 10 and 11 had agreed to sell their share in the Suit Property to the plaintiff. Though this compromise application was signed only by the plaintiff and the defendants 10 and 11, the terms thereof also dealt with the rights of the other defendants, so much so that the prayer made in this compromise application was as follows:

"It is therefore prayed that the above suit be decreed as between the Plaintiff and Defendants No.s.10 & 11 alongwith defendant Nos.1, 2 & 4 to 9 and the above suit be proceeded according to law against the Defendant No.3 only."

8. The other compromise application filed in the said Suit on 17-11-2006 was CMA No.8412/2006 said to be between the plaintiff (Respondent No.1) and the defendants/Appellants 1, 2, 5, 6, 7, 8 and 9. Such compromise application also recited that the defendants 1, 2, 5, 6, 7, 8 and 9 too had agreed to sell their share in the Suit Property to the plaintiff. But when this compromise application (CMA No.8412/2006) came up before the Court for orders on 20-11-2006, it was disputed by the counsel for the defendants 1, 3, 5, 7 and 9 on the ground that the defendants disown the signatures on the said compromise application. Subsequently, on 27-11-2006, counter-affidavits were filed on behalf of the said defendants (Appellants) to contest both compromise applications.

9. On 14-02-2007, both the compromise applications in the said Suit were fixed for hearing. After recording the disputed facts and

competing contentions of the counsels as to the compromise applications, the following order was passed by the Court :-

“Be as it may, the valuable rights of the contesting defendants are involved in the suit, it will be just that the fate of the above application is determined after recording of the evidence by commissioner, therefore, both the applications are deferred and shall be heard and decided after the exercise of recording of the evidence of the parties is concluded before the final adjudication of the case. Defendant No.10 has protested that rest of the defendants excluding defendant No.11 are not allowing him to enter into the suit premises and are causing interference in his right, he is entitled to have right of entry and residence into the suit premises being one of the legal representative of deceased Manzaruddin Siddiqui, in this view of the matter Nazir is hereby directed to open the lock of the 1st floor of the disputed building and hand over the possession of two rooms and one bath room to the defendant No.10 within one week. Nazir fee shall be Rs. 5000/- which shall be borne by the defendant No.10. The matter shall be placed for final disposal after the evidence of the parties is recorded by the commissioner. Orders accordingly.”

10. After evidence in the said Suit had been recorded, the said Suit came up before the learned Single Judge on 16-11-2007 for hearing of the compromise applications and for final arguments. The compromise application being CMA No.8412/2006 on which signatures were being disputed, was adjourned as counsel for the contesting defendants was on general adjournment. That CMA No.8412/2006 is still pending in the said Suit. However, as regards the other compromise application (CMA No.8411/2006) between the plaintiff and the defendants 10 and 11 (Respondents herein), the same was allowed by the learned Single Judge while observing *inter alia* as follows:

“Learned counsel for the plaintiff has identified the signature of the plaintiff and submits that in his Vakalatnama the power to compromise is there. He submits that he is not pressing the prayer with regard to the defendants Nos. 1, 2 and 4 to 9. He further submits that this compromise application may only be considered as compromise between the plaintiff and the defendants Nos. 10 and 11.

Learned counsel for the defendants Nos. 1, 3, 5, 7 and 9 requests for adjournment on the ground that Mr. Hassan Akbar, Advocate is on general adjournment.

Since this compromise application does not relate to the defendants for whom Mr. Hassan Akbar is appearing the request for adjournment has been declined and the matter has been proceeded.

The compromise application between the plaintiff and the defendants Nos. 10 and 11 is accepted and the suit stands decreed against the defendants Nos. 10 and 11 in terms of the compromise.”

11. The decree that was drawn up and passed pursuant to the aforesaid compromise order was as follows:

“1. That the Defendant Nos. 10 and 11 in the above suit, alongwith Defendants Nos. 1, 2 & 4 to 9 (except Defendant No.3 namely Salim Siddiqi), do hereby acknowledge the execution of Sale Agreement dated 06.03.2004 executed by the Defendant No.1 for self and as Attorney of Defendants No. 2 to 11 in respect of the suit property on the terms and conditions as contained in paragraph Nos. 1, 2 & 3 of the compromise application submitted on behalf of the Defendants No. 10 & 11 also disown the Written Statement filed by the Defendant No. 3 on their behalf.

2. That the plaintiff shall get the Pay Order drawn in the names of the Defendants Nos. 10 & 11 in the sums of their legal entitlement i.e. Rs. 20,00,000/- and Rs. 10,00,000/- respectively and the said pay orders shall be handed over to the said Defendants at the time of acceptance of compromise application by this Hon’ble Court and orders passed thereon.

3. That vacant and peaceful possession of the first floor of the suit property excluding one room and kitchen, shall immediately be handed over by the defendants Nos. 10 & 11 to the plaintiff above named and in case of any resistance by the Defendant No.3, the possession of the suit property shall be handed over by the Nazir of this Hon’ble Court alongwith Police aid to the Plaintiff.

4. That the Defendant Nos. 10 & 11 alongwith Defendant No. 1, 2 & 4 to 9, shall execute the Deed of Conveyance in respect of their share in favour of the Plaintiff or his nominee within one week of the acceptance of the compromise application, failing which the Nazir of this Hon’ble Court is hereby authorized by the Hon’ble Court to execute the same on behalf of the said Defendants except Defendant No. 3 without any further reference to the Court.

5. That after the execution of the Sale Deed, as stated above, and obtaining vacant and peaceful possession of the suit property except one room and kitchen on the first floor, the Plaintiff shall be

entitled to occupy and deal with the same as co-owner of the suit property alongwith the Defendant No.3.

6. That the Defendant Nos. 10 & 11 adopts the other terms of the compromise application filed on behalf of the Defendants Nos. 1, 2 & 4 to 9.

7. That the parties shall bear their own costs respectively.”

12. Mr. Abdul Qayyum Abbasi, learned counsel for the Appellants submitted that even though the Appellants were not party to the compromise application (CMA No.8411/2006), yet the decree that followed prejudiced the rights of the Appellants both in the Suit Property and in the said Suit. Further, referring to Clause 1 of the decree, Mr. Abbasi submitted that the impugned compromise order and decree are premised on a forged and fabricated Sale Agreement; that the authenticity of such Sale Agreement had yet to be adjudicated in the said Suit, and therefore till such time the impugned compromise order and decree could not have been passed. Mr. Abbasi pointed to the order dated 14-02-2007 (reproduced in para 9 above) to submit that since a decision on the compromise applications had been deferred till after evidence, it was incumbent on the learned Single Judge to decide the compromise applications after perusing the evidence. In support of his submissions Mr. Abbasi relied on the cases of *Ahmed Din v. Ghulam Muhammad* (1990 SCMR 387), and *Miandad v. Abdul Qadeer* (2002 CLC 1367). The case of *Ahmed Din* was a leave refusing order whereby the Supreme Court upheld concurrent findings of the courts below to the effect that the property being jointly owned, one of the co-owners could not have entered into an agreement to sell the same, and that in any case such agreement had not been proved. In the case of *Miandad* a learned Single Judge of this Court had held *inter alia* that where the sale agreement by the co-owner was not a genuine document, the question of its specific performance did not arise. As discussed *infra*, both of the cases cited are not relevant in the circumstances of this case.

13. Having noticed at the outset that parts of the compromise decree (underlined in para 11 above) also refer to the other defendants who were not party to the compromise, we first proceed to determine whether the impugned decree is in accord with the compromise order itself.

As discussed in para 7 above, though the compromise in CMA No.8411/2006 was only signed by the plaintiff and defendants 10 and 11 (Respondents *inter se*), it had been drafted as if the defendants 1, 2, 4, 5, 6, 7, 8 and 9 were also party to it. However, the order dated 16-11-2007 shows that when CMA No.8411/2006 was taken up for hearing, the plaintiff's counsel stated (a) that he did not press the prayer therein with regards to the defendants 1, 2, 4, 5, 6, 7 and 9; and (b) that such compromise application may only be considered to the extent it was between the plaintiff and the defendants 10 and 11. Though the terms of the compromise set out in CMA No.8411/2006 were not restated to eliminate the clauses that affected the other defendants, the order dated 16-11-2007 shows that the learned Single Judge accepted the compromise application only to the extent it was between the plaintiff and the defendants 10 and 11 and it was also observed that the compromise did not affect the other defendants. Nevertheless, and as would be seen from the underlined parts of the decree reproduced above, the decree that was eventually drawn up and passed also affected those defendants who had not signed the compromise application. This much is sufficient to hold that the impugned decree cannot be sustained at least in its present form. In other words, this is in the very least a case where the decree needs to be modified so that it agrees with the compromise order as required of Order XX Rule 6 CPC. Mr. Khalid Javed, learned counsel for the Respondent No.1 (plaintiff) did not attempt to support the said defect in the decree because that would go to demolish the very foundation of his case, which is that the compromise order is unimpeachable as it does not and could not prejudice the other defendants who were not party to it. In these circumstances, where the impugned decree is not in accord with the

compromise order pursuant to which it was passed, and where that much is also acknowledged by learned counsel for the Respondent No.1, his objection that the appeal is not maintainable by virtue of Order XLVII Rule 7 CPC does not detain us as the Appellate Court of the original decree from correcting the decree that is *ex facie* defective so as to see that substantial justice is done.

14. Having held that the impugned decree is defective, the question is whether this appeal merits only a variation/modification in the decree or a complete reversal; and if the former, then to what extent ?

Per Mr. Abdul Qayyum Abbasi, learned counsel for the Appellants contended that the very recording of the compromise was unlawful and thus the compromise order and decree dated 16-11-2007 should be reversed in their entirety. It is this part of the appeal that was vehemently opposed by Mr. Khalid Javed, learned counsel for the Respondent No.1.

15. For a complete reversal (as opposed to a variation) of the impugned order and decree, the first submission of Mr. Abdul Qayyum Abbasi was that since the impugned order and decree were premised on the disputed Sale Agreement which had yet to be proved, the question of its specific performance did not arise. However, our perusal of the order dated 16-11-2007 shows that the learned Single Judge had accepted the compromise in CMA No.8411/2006 as a fresh agreement by the Respondents 2 and 3 to sell their share in the Suit Property to the Respondent No.1 which agreement was independent of the disputed Sale Agreement. It is another matter that the formal expression of the compromise in the decree was defective. In other words, if the Respondents 2 and 3 were independently entitled to sell/transfer their share in the joint Suit Property, the disputed Sale Agreement was no impediment for them.

16. Mr. Abdul Qayyum Abbasi Advocate relied on Section 44 Transfer of Property Act, 1882 to submit that the Suit Property was a dwelling house of an undivided family, the Appellants; that the transfer of a part of such property to a person not member of such family, was prohibited by the second part / proviso to Section 44 Transfer of Property Act, 1882, and therefore the very recording of the compromise was unlawful. He submitted that the Respondents 2 and 3 as co-owners of the joint Suit Property could not deal with the same in a manner prejudicial to the rights of the other co-owners without their permission, and that in law each co-owner was interested in every inch of the joint Suit Property as held in the case of *Ali Gohar Khan v. Sher Ayaz* (1989 SCMR 130). However, as per our reading of the case of *Ali Gohar Khan*, that observation of the Honorable Supreme Court was in the context where one of the co-owners was raising construction over the joint property without the consent of the others.

17. Mr. Khalid Javed, learned counsel for the Respondent No.1 submitted that Section 44 Transfer of Property Act, 1882 in fact establishes that the Respondents 2 and 3 were well within their right to transfer their share in the joint Suit Property to the Respondent No.1 without resort to the other co-owners and no exception to that can be taken by the other co-owners. He submitted that the proviso to Section 44 Transfer of Property Act, 1882 cannot be interpreted to make redundant the main section. In other words, he submitted that in the circumstances of the said proviso, what was prohibited was the taking of possession by the transferee, and not the transfer of title to the transferee. Such submission by Mr. Khalid Javed manifests that the Respondent No.1 supports the impugned decree only to the extent it decrees transfer of the share of the Respondents 2 and 3 in favor of the Respondent No.1 and not the part which recites delivery of joint physical possession of the Suit Property to the Respondent No.1, which joint possession could not, and was never intended to be decreed by the compromise order lest it

adversely affects parties not signatory to the compromise. That intent of the compromise order was clarified by the learned Single Judge vide order dated 03-12-2007 whereby the Review application of the Appellants was rejected. We note that in any case, no decree was ever passed for partition of the Suit Property in favor of the Respondent No.1 in terms of Order XX Rule 18 CPC. On the query of the Court, whether the Respondent No.1 was in physical possession of a part of the first floor of the Suit Property pursuant to the impugned decree, Mr. Khalid Javed stated that though that part of the Suit Property was under the lock and key of the Respondent No.1 but he did not physically occupy it.

18. To support his submissions Mr. Khalid Javed cited the cases of *Ilyas Ahmed v. Muhammad Munir* (PLD 2012 Sindh 92); *Ghulam Akbar v. Jehangir Ali* (2011 MLD 803); and *Muhammad Shareef v. Ghulam Hussain* (1995 SCMR 514). In the case of *Ilyas Ahmed*, one of us (Muhammad Ali Mazhar J.) while holding Court on the original side, after discussing the case-law on Section 44 Transfer of Property Act, 1882, had held that Section 44 did not prohibit a co-owner from transferring his share in joint property, but it only prohibited the delivery of possession of such joint property to a stranger if the property was a dwelling house belonging to an undivided family. In the case of *Ghulam Akbar* a learned Division Bench of this Court held that Section 44 Transfer of Property Act, 1882 recognizes the validity of the transfer of a share or interest by a co-owner in immovable property to another co-owner or even to a stranger. In the case of *Muhammad Shareef* the Supreme Court reiterated the principle laid down in the case of *Muhammad Muzafar Khan v. Muhammad Yousuf Khan* (PLD 1959 SC (Pak) 9) to hold that a co-owner was within his right to transfer the part of land in his possession of which he was co-owner, and the transferee was entitled to retain possession of the same till partition of the entire joint property. But we note that the case of *Muhammad Shareef* was not a case of a dwelling house attracting the proviso to Section 44 Transfer of Property Act, 1882.

Mr. Khalid Javed Advocate also cited the cases of *Collector of Customs Appraisement v. Gul Rehman* (2017 SCMR 339); *Bakhash Elahi v. Kazi Wasif Ali* (1985 SCMR 291); and *Emmanual Masih v. The Punjab Local Councils Elections Authority* (1985 SCMR 729) which discuss principles of interpreting a proviso to a statutory provision.

19. From the submissions of the learned counsels discussed in paras 16 to 18 above, the question raised for our determination is that where the circumstances of the proviso to Section 44 Transfer of Property Act, 1882 are attracted, does that have the effect of barring the co-owner from transferring his/her share in joint immovable property ?

Section 44 Transfer of Property Act, 1882 reads as follows:

“44. **Transfer by one co-owner.** Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.”

In our view, and also based on the case-law discussed in para 18 above, there is nothing in Section 44 Transfer of Property Act, 1882 that requires a co-owner of a joint/undivided immovable property to obtain consent of the other co-owners before transferring his share of such property or any interest therein to any person. In fact, Section 44 recognizes such right of a co-owner to do so. The word “transferee” in the proviso to Section 44 signifies that a co-owner may even transfer his share in a dwelling house belonging to undivided family. That proviso only entails that where a share in a dwelling house belonging to an undivided family is transferred, then the transferee does not by implication of such transfer become entitled to joint possession or other common or part enjoyment of

such house. That does not mean to say that in the circumstances of the proviso the transferee can never gain possession, but that he can then gain possession only by way of enforcing a partition of the property. The remedy for such partition is provided under Section 4 of the Partition Act, 1893 which appears to be a logical sequel¹ to Section 44 Transfer of Property Act, 1882. Section 4 of the Partition Act, 1893 reads:

“4. Partition suit by transferee of share in dwelling house--(1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section.”

The judgment in the case of *Dorab Cawasji Warden v. Coomi Sorab Warden* (AIR 1990 SC 867) is an excellent discourse on the meaning of the words “dwelling house belonging to an undivided family” as appearing in Section 44 Transfer of Property Act, 1882 and Section 4 Partition Act, 1893. It explains that the object of the proviso to Section 44 is to prevent the intrusion by a stranger into a family residence despite the transfer of a share therein to him. In the facts of that case the property was found to be a dwelling house belonging to an undivided family and therefore it was held that the delivery of possession to such stranger was contrary to the proviso to Section 44, and consequently a mandatory injunction was granted directing the stranger to vacate the property.

20. Having said the above, in the facts of the instant case the question whether the Suit Property was at the relevant time a “dwelling-house belonging to an undivided family” within the

¹ *Alekha Mantri v. Jagabandhu Mantri* (Air 1971 Orissa 127)

meaning of the proviso to Section 44 Transfer of Property Act, 1882, is a question yet to be determined in the said Suit. Therefore, till such time the question of awarding joint possession of any part of the Suit Property to the Respondent No.1 does not arise. However, to reiterate, that is not to say that the Respondents 2 and 3 could not have transferred their share in the Suit Property to the Respondent No.1.

21. The upshot of the above discussion is that even assuming that the proviso to Section 44 Transfer of Property Act, 1882 were attracted, it cannot be a ground to hold that the conveyance deed executed by the Respondents 2 and 3 to the Respondent No.1 of their share in the Suit Property was unlawful; therefore, a reversal of the compromise order and decree dated 16-11-2007 is not required, but due to structural defects in the decree, which on the face of it is beyond the compromise order, the decree requires to be modified in the interest of justice in the terms that the conveyance deed dated 01-12-2007 executed by the Respondents 2 and 3 to transfer their share in the Suit Property in favor of the Respondent No.1 shall only operate to the extent of the quantum of share inherited by the Respondents 2 and 3 in the Suit Property; that such transfer shall not *per se* entitle the Respondent No.1 to joint possession or other common or part enjoyment of the Suit Property; and possession to the Respondent No.1 should be subject to the final outcome of the pending suit.

The appeal is disposed off accordingly along with pending applications.

JUDGE

JUDGE

Karachi

Dated: 16-10-2018