

IN THE HIGH COURT OF SINDH, KARACHI

Suit No.1247 of 2011

[Muhammad Saleem Ibrahim v. Ibrahim and others]

Present:

Mr. Justice Zulfiqar Ahmad Khan

Plaintiff : Through Mr. S. Abid Hussain, Advocate
Defendant Nos.1 to 4 : Nemo
Defendant Nos.5 to 7 : Through Parvez Ahmed Mastoi, AAG
alongwith Ms. Nazia Dastagir, State Counsel
Date of Short Order : 12.09.2018
Date of Reasons : 12.11.2018

ORDER

Zulfiqar Ahmad Khan, J:- Through this order CMA No.10478 of 2011

filed under order XXXIX Rule 1 & 2 CPC is being disposed of.

2. Brief facts of the case are that the applicant's father Ibrahim son of Ahmed acquired property bearing No.G1 & G2 Ground floor Nishter Road, Rambhawan Building No.IV-C 77, City Survey No.LR 8/7-P, near Ranchore Lane Bus stop, Saddar Town, District South, Karachi, (hereinafter referred to as the "suit property") by virtue of an order passed by Deputy Settlement Commissioner dated 23.10.1961 in auction proceedings and made payments through Receipt No.KCY/C/2866 dated 27.03.1963. At the said property, the applicant's father later an established a business under the name and style of "Café Saleem" (keeping in mind that "Saleem" was name of his son, the plaintiff/applicant). Per counsel, during life time of his father, the suit property was let out to one E. K. Moosa (survived by defendant No.2) through an agreement dated 08.11.1966.

3. After the death of late Ibrahim, one Sharif son of Jan Muhammad, introducing himself as nephew of the deceased, alleging that late Ibrahim did not leave behind any legal heir, filed Civil Suit No.2064 of 1968 before Civil Judge IIInd Class Karachi for administration and accounts of estate left by the deceased. The said suit was defended by the present applicant along with other defendants (including his mother) who challenged claim of Sharif as to heirship. With regard to Issue No.2/4 that whether late Ibrahim died issueless and whether plaintiff/defendant are his legal heirs and entitled to a share in the properties left by the deceased, or whether Saleem (the present applicant) was real son of the deceased, Court reached to the conclusion that deceased Ibrahim did not die without leaving any issue rather Saleem, the present applicant was his son, thus eligible to inherit the estate. The said suit was disposed of through judgment dated 30.10.1972.

4. The said judgment however was challenged through Appeal No.55 of 1973, which was decided vide judgment dated 19.07.1975 by the Court of Civil Judge IIInd Class Karachi, where the case was remanded for fresh findings, which came in the shape of judgment dated 30.11.1980 holding that present applicant was infact real son of Ibrahim, thus eligible to inherit deceased's property.

5. Per learned counsel, tenant E.K. Moosa, after death of late Ibrahim, filed suit bearing No.960 of 1977 in the Court of Civil Judge IIInd Class Karachi seeking declaration that he was not a tenant, rather owner of Café Salim. In paragraph 5 of the plaint, E.K. Moosa though admitted that after the death of late Ibrahim, his son (the applicant) and his widow were receiving monies from him. A prayer was made that upon having acquired possessory right in Café Salim, the defendants be restrained

from ejecting the plaintiff. Along with the said suit, an application under order XXXIX rule 1 & 2 CPC was also made. The trial Court through order dated 20.07.1978 dismissed the said application against which appeal No.228 of 1978 was preferred, which was decided through judgment dated 16.01.1985 where appeal was dismissed with costs.

6. After expiry of tenant E.K. Moosa, his son Ghulam Mustafa (defendant No.2) stepped into his father's shoes, to whom the plaintiff/present applicant sent a notice on 11.03.2005 seeking eviction.

7. Plaintiff/applicant also filed a suit bearing No.1251 of 2005 for possession, declaration and permanent injunction before II-Senior Civil Judge District South, Karachi where Defendant No.4 filed an application on 01.01.2006 under order VII rule 11 CPC, which application vide order dated 01.04.2006 was dismissed and it was directed that the case falling within the domain of Sindh Rented Premises Ordinance, 1979 be dealt by the concerned Rent Controller, on which the applicant filed Rent Case under section 15 of SRPO bearing No.461 of 2006, which was decided vide order dated 07.05.2007. The Rent Controller allowed the application and directed the opponent (present defendant) to vacate the premises within 60 days from the date of the order.

8. Against the said order, a Revision bearing R.A. No.119 of 2007 was preferred by defendant No.4 who is father of defendant No.3 where the father claimed to have purchased the suit property from his son acting as sub-attorney of Ghulam Mustafa, son of E.K. Moosa (the tenant) vide conveyance deed dated 01.02.2006, at which juncture the case was remanded for fresh judgment through order dated 17.10.2008.

9. Learned counsel for the applicant stated that through the instant suit, cancellation of the said conveyance deed is sought and through the instant application prayer is made that defendants be restrained from creating third party interest etc., in the suit property. As to the merits of the instant application, the learned counsel stated that the defendant No.4 (the father) claims to have purchased the suit property from his son (defendant No.3) acting as sub-attorney of Ghulam Mustafa, claiming to be attorney of Ibrahim son of Ahmed, alleging that said Ibrahim (not to be confused with Ibrahim, father of the applicant) was the owner of the suit property as per PTO dated 27.03.1963 and the said defendants have annexed following documents in respect of that sale transaction:-

- i) General Power of Attorney dated 31.12.2002 in favour of Ghulam Mustafa S/o E.K. Moosa registered with Sub-Registrar Central Record showing the description of the property is shown as residential premises bearing No.G1 Sheet No.LR8/7-P 450 sq. feet situated at Gulistan-e-Jouhar, Karachi.
- ii) Sub-General Power of Attorney dated 28.02.2005 executed by Ghulam Mustafa S/o E.K. Moosa in favour of Tariq Mian the defendant No.3 registered with Sub-Registrar Central Record wherein the description of property is shown as Shop No.G1 Sheet No.LR 8/7-P 450 sq. feet situated at Lawrence Quarter Nishter Road Karachi.
- iii) Conveyance Deed of Immovable Property dated 01.02.2006 registered with Sub-Registrar Jamshed Town Karachi wherein the description of property is given as shop No.G1 Sheet No.LR 8/7-P 450 sq. feet situated at UC 11 Town Jamshed Karachi.
- iv) All these documents are available as annexures at P-15, P-16 and P-16/2 (Pages 307 to 315), (Pages 323 to 333) and (Pages 291 to 303) of the suit.

10. It is also submitted that alongwith the General Power of Attorney dated 31.12.2002, copy of PTO dated 21.3.1962, NIC copy of the Ibrahim S/o Ahmed are annexed which show that as per NIC the year of birth of the said Ibrahim is 1950 while PTO is dated 21.3.1962 which

means that said Ibrahim was strangely only 12 years old when PTO was issued in his favour.

11. Further, the said Power of Attorney dated 30.12.2002 is executed in favour of Ghulam Mustafa Malbari S/o E.K. Moosa (late) by said Ibrahim while in Sub-General Power of Attorney the parental name of Ghulam Mustafa is shown as E.K. Moosa who admitted in Suit No.960/1977 filed in the Court of XXV Civil Judge IInd Class that Ibrahim expired two years ago and that he was owner of property, and E.K. Moosa was his tenant.

12. Also that the rent agreement was executed by the father of Plaintiff on 12.03.1966 which means that E.K. Moosa was inducted as tenant during the life time of the father of plaintiff. The learned counsel stated that, in fact the defendants No.3 and 4 have managed to fabricate Power of Attorneys and Conveyance Deed by introducing some other Ibrahim who as per his NIC was born in 1950 and was not the true Ibrahim, father of the applicant.

13. Learned counsel, by pointing out the above glaring inconsistencies stated that all the above mentioned transactions between defendant Nos.2, 3 and 4 are collusive in nature, solely based on fraudulent, forged and fabricated documents, having no legality in the eyes of law and on the basis of the said documents, defendants No.3 and 4 have occupied the suit property and there is an apprehension that on the basis of these forged and fabricated documents, defendant Nos.3 and 4 may further create third party interests resulting in multiplicity of litigation.

14. This Court vide order dated 27.10.2011, by way of interim relief ordered that no further interest in the suit property be created.

15. As none has been appearing for the defendants for the last two dates, but since defendant Nos.3 and 4 have filed their written statement as well as the defendants have filed counter statements, it would be worthwhile to reproduce contents of these documents so that their defence could come to surface.

**“Counter Affidavit in reply to the application under Order 39
Rule 1 & 2 read with Section 151 CPC**

*I, Tariq Mian Arain Son of Rasheed Mian Arain, Muslim, adult,
resident of Ram Bhawan Building Nishter Road, Ranchoreline Karachi,
do hereby state on oath as under:-*

- *I say that I am the defendant No.3 in the above noted matter and fully aware with the facts of the case deposed to below.*
- *I say that I have been read over and explain the contents of the injunction application/affidavit filed by the Plaintiff in the above noted matter and I deny the entire allegations leveled in the same. Infact the said application as drafted in the present form is not maintainable and the same is liable to be dismissed with special cost.*
- *That as regard the contents of the injunction application/affidavit as stated by the present plaintiff, infact the said application is totally based upon malafide motives and the entire allegations as leveled in the said application/affidavit are purely false, baseless and mis-conceived and whatever the allegations leveled in the said affidavit are comes within the purview/definition evasive allegation. So the same does not contain any lawful means/significance and the same does not carry any persuasive values. Furthermore the answering defendant already filed a comprehensive written statement in the above noted matter and the same is hereby adopted/re-iterate and re-affirm the contents of the written statement and the same treated as reply of the present injunction application for the sake of brevity of this Honourable High Court.*
- *Unless the injunction application filed by the plaintiff is hereby dismiss I shall be seriously prejudice.*

Statement on behalf of defendant No.3

It is hereby stated by the defendant No.3 that the said defendant No.3 holding Sub-General power of attorney executed by defendant No.2 which is already filed with the written statement as annexure “F”.

Statement on behalf of defendant No.4

It is hereby stated that the counter affidavit filed by the defendant No.3 in reply to the injunction application, the same be adopted/treated on behalf of the present defendant No.4 accordingly.

16. As it could be seen from the foregoing replies filed by the defendants are utterly evasive and completely vague which as per PLD 2017 SC 265 amount to admission as the claims of the plaintiff are not specifically controverted. In the case of 2011 PLD SC 119 the apex Court has held that evasive denial is no denial, rather an admission.

17. Merits for the grant of injunction in a suit for declaration are provided in the Apex Court's judgment reported as 2002 SCMR 1196. The ratio of the judgment is whether in such cases, (1) the plaintiff has made a claim to the suit land; and (2) whether the plaintiff has abandoned his claim over the years.

18. In the case at hand the plaintiff's entitlement to the subject property has been established by two Courts (Civil Suit No.2064 of 1968 upheld by Appeal No.55 of 1973) as being the surviving legal heir of late Ibrahim, and since the death of his father in 1968, he has been pursuing his claim to the suit property at all possible forums, thus both the ingredients of the above referred Apex Court's judgment have been satisfied. He nonetheless is also on good pedestal with regards requirement of order XXXIX Rule 1 & 2 CPC for having a *prima facie* title, balance of convenience and would suffer irreparable losses if the instant application is refused and the suit property is allowed to change hands.

19. In the circumstances at hand, where this Court had already granted interim relief to the plaintiff and where Courts are competent to grant injunctions to foster the cause of justice, this application was allowed on 12.09.2018 through my short order. These are the reasons thereof.

Judge