

THE HIGH COURT OF SINDH, KARACHI

Suit No. 172 of 2019

[Furqan and others versus Mst. Roshan Ara and others]

Plaintiffs	:	Furqan and 02 others through Syed Muhammad Haider, Advocate.
Defendants 1-4	:	Mst. Roshan Ara and 03 others through Ms. Saman Rafat Imtiaz, Advocate.
Defendants 5-7	:	Mst. Kulsoom Bai and 02 others through Ms. Kausar Amin, Advocate.
Defendants 8-9	:	Nemo.
Defendants 10-11	:	Through Mr. K.A. Vaswani, Assistant Advocate General Sindh.
Interveners	:	Shaikh Irshad Ali and another through Mr. Munir-ur-Rehman, Advocate.
Intervener	:	Mst. Rabia through Mr. M. Danish Raza, Advocate.
Dates of hearing	:	03-02-2020 & 03-03-2020
Date of order	:	09-06-2020

ORDER

Adnan Iqbal Chaudhry J. - This order decides CMA No. 5988/2019 by the Defendants 1 to 4 under Order VII Rule 11 CPC seeking rejection of the plaint.

2. The Plaintiffs are legal heirs of Abdul Razzak son of Haji Yousuf. Haji Yousuf and Haji Suleman, both deceased, were brothers and were in business together. The Defendants 1 to 4 are the daughters and surviving legal heirs of Haji Suleman. The Defendants 5 to 7 are daughters of Haji Yousuf and sisters of Abdul Razzak.

3. Abdul Razzak and his sisters (children of Haji Yousuf) had filed Suit No. 1054/1999 before this Court against the legal heirs of Haji Suleman (Defendants 1 to 4 herein). The subject matter of the suit

were immovable properties at Karachi said to be the joint properties of Haji Yousuf and Haji Suleman. It was the case of Abdul Razzak and his sisters that after the demise of their father, Haji Yousuf, their uncle, Haji Suleman took over the joint business and joint properties of the two brothers and lead Abdul Razzak and his sisters to believe that they would get the share of their late father in due course; and that after the demise of Haji Suleman in 1999, his legal heirs denied Abdul Razzak and his sisters their share, and that is when they discovered a registered Deed of Partition dated 21-03-1983 alleged to have been executed by Abdul Razzak transferring to Haji Suleman some of the joint properties. It was the case of Abdul Razzak that he had not executed the Deed of Partition and his signature thereon was forged. Hence, by Suit No. 1054/1999 Abdul Razzak and his sisters prayed for cancellation of the Deed of Partition dated 21-03-1983 and for administration not only of Haji Yousuf's share in the joint properties, but also that of Haji Suleman's who was survived by females only, and thus Abdul Razzak and his sisters contended that they inherit also from their uncle Haji Suleman.

4. Suit No. 1054/1999 was at the stage of final arguments when it was dismissed for non-prosecution on 14-11-2008. No attempt was made for its restoration. The plaintiff No.1 of that suit, Abdul Razaak, is said to have passed away much later, on 16-02-2016.

5. The sisters of Abdul Razzak (Defendants 5 to 7 herein), who were co-plaintiff's of Suit No. 1054/1999, filed a fresh Suit No. 1267/2017 before this Court against the legal heirs of Haji Suleman (Defendants 1 to 4 herein). The Court observed that the cause of action of the fresh Suit No. 1267/2017 was the same as that of the earlier Suit No. 1054/1999 which had been dismissed for non-prosecution, and thus the remedy available was by way of an application for restoration of the previous suit as a fresh suit was barred by Order IX Rule 9 CPC. Accordingly, the plaint of Suit No. 1267/2017 was rejected vide order dated 13-10-2017. Though that order was appealed by the plaintiffs of Suit No. 1267/2017 (sisters of

Abdul Razzak) vide HCA No. 437/2017, the appeal was withdrawn on 27-02-2019 and thereafter they also did not make any application for restoration of the previous Suit No. 1054/1999.

6. The instant Suit No. 172/2019 is now by the legal heirs of Abdul Razzak, making the same averments in respect of the same properties and seeking the same relief as their predecessor did in Suit No. 1054/1999 viz., cancellation of the Deed of Partition dated 21-03-1983 allegedly executed by Abdul Razzak, and for administration of the properties jointly held by Haji Yousuf and Haji Suleman. The Plaintiffs contend that they were minors when Suit No. 1054/1999 was dismissed for non-prosecution; that they came to know of the said dismissal only when they received notice of HCA No. 437/2017; and that the cause of action for this suit arose on 16-02-2016 when their predecessor Abdul Razaak passed away. Certain Intervenors, namely Sheikh Irshad, Sanober Begum, Mst Rabia and Muhammad Shafi have moved applications under Order I rule 10 CPC to join the suit as a defendants claiming that they are subsequent purchasers of the some of the properties involved in the suit.

7. Heard the learned counsel and perused the plaint.

8. Ms. Saman Imtiaz, learned counsel for the Defendants 1 to 4 submitted that when Abdul Razzak had abandoned Suit No. 1054/1999 and had not made any attempt for its restoration during his lifetime, his death does not give his legal heirs a fresh cause of action, and their remedy at best is to apply for restoration of Suit No. 1059/1999 as a fresh suit on the same cause of action is barred by Order IX Rule 9 CPC. She also relied on the plaint-rejection order of Suit No. 1267/2017. She submitted that even if the plaint survived, the relief for cancellation of the Partition Deed dated 21-03-1983 was hopelessly time-barred.

9. On the other hand, Syed Muhammad Haider, learned counsel for the Plaintiffs submitted that the bar to a fresh suit in Order IX Rule 9 CPC is not attracted, firstly because the previous Suit No. 1054/1999

was not filed by the present Plaintiffs; and secondly because the instant suit is on a recurring cause of action. As regards the objection of time-bar to the prayer for cancellation of the Deed of Partition, learned counsel submitted that the suit was essentially one for administration which was not barred by any period of limitation.

10. As already observed above, apart from the effect of the demise of Abdul Razzak which is adverted to *infra*, the cause of action of the instant suit and the relief sought herein is the same as in the previous Suit No. 1054/1999 that had been filed by Abdul Razaak, the father and husband of the Plaintiffs. It is also not disputed that the previous suit was dismissed for default under Order IX Rule 8 CPC as only the counsel for the defendants 1 to 5, 7 and 8 of that suit appeared before the Court on the day it was dismissed¹. The Defendants 1 to 4 herein, who are the contesting parties, were amongst those defendants. The effect of, and the remedy against dismissal of a suit under Order IX Rule 8 CPC is provided by Order IX Rule 9 CPC as follows:

“Decree against plaintiff by default bars fresh suit.- (1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this Rule unless notice of the application has been served on the opposite-party.

(3) The provisions of section 5 of the Limitation Act, 1908 (IX of 1980), shall apply to applications under sub-rule (1).”

11. Mr. Haider’s argument that the bar to a fresh suit in Order IX Rule 9 CPC is not attracted to the legal heirs of the plaintiff of the previous suit is answered by the case of *Suraj Ratan Thirani v. The Azamabad Tea Co.* (AIR 1965 SC 295), relied upon by Ms. Saman Imtiaz, wherein it was held by the Supreme Court of India that “The ban imposed by Order IX Rule 9 CPC does not create merely a

¹ Verified from the record of Suit No. 1054/1999.

personal bar or estoppel against the particular plaintiff suing on the same cause of action and does not leave the matter at large for those claiming under him. The word 'plaintiff' in the Rule includes his assigns and legal representatives".

12. Mr. Haider's other argument was that the instant suit is a 'recurring cause of action' to which the bar contained in Order IX Rule 9 CPC does not apply. In that regard, learned counsel had relied upon *Muhammad Habibullah Siddiqui v. Habib Jafferli* (1993 MLD 1050) and the *Shahnaz alia Jahan Ara v. Syed Ahtisham Ali Shah* (2015 CLC 672). However, none of those cases are of help. In the first case, the suit was for redemption of mortgage, which is a right not extinguished except under section 60 of the Transfer of Property Act, 1882²; and in the second case a fresh suit on the same cause of action was found maintainable as the dismissal of the previous suit was under Order IX Rule 3 CPC and not under Order IX Rule 8 CPC.

13. In my view, the instant suit cannot be said to be a 'recurring cause of action'. 'Recurring' or successive wrongs are those which occur periodically, each wrong giving rise to a distinct and separate cause of action³. In the instant suit, the alleged wrongful act is the forgery committed by Haji Suleman of Abdul Razzak's signature on the Deed of Partition, and the denial by Haji Suleman's legal heirs (the Defendants 1 to 4) that any of the subject properties continued to vest in Haji Yousuf. Those were the very wrongful acts alleged by Abdul Razzak in Suit No. 1054/1999. Thus, by this fresh suit the Plaintiffs only seek to further the cause of action of their predecessor and no fresh or independent cause of action has accrued to them. As already discussed above, the death of Abdul Razzak does not give the Plaintiffs a fresh cause of action.

14. Learned counsel for the Plaintiffs had submitted that the suit was essentially one for administration which was not barred by any period of limitation, though he did concede that as regards the

² *Sultan Ali v. Khushi Muhammad* (PLD 1983 SC 243).

³ *Union of India v. Tarsem Singh*, (2008) 8 SCC 648.

properties subject matter of the Deed of Partition the relief for administration was dependant on the success of cancellation. On the other hand, learned counsel for the Defendants 1 to 4 had contended that no part of this suit or the previous suit can be said to be for administration as none of the subject properties were shown to be standing in the name of Haji Yousuf or Haji Suleman at the time of the said suits. Be that as it may, I am not inclined to give an opinion whether any part of this suit is, and by implication, the previous suit also was one for administration lest the case of any party be prejudiced in the event the Plaintiffs move for restoration of the previous suit. But assuming that this were a suit for administration, and while it is correct that limitation does not come in the way of a suit for administration⁴, that, to my mind, is not an answer to the bar contained in Order IX Rule 9 CPC. It would be absurd to suggest that an issue of inheritance can be raised repeatedly between the same parties or their legal representatives without a fresh cause of action, especially when it appears from the record of Suit No. 1054/1999 that some evidence had been recorded in that suit. In fact, if the Plaintiffs demonstrate that the previous suit was one for administration, then the argument that no limitation runs against such suit may better serve the Plaintiffs in moving for the restoration of the previous Suit No. 1054/1999.

15. In conclusion, the Plaintiffs cannot escape the bar to a fresh suit contained in Order IX Rule 9 CPC, and their remedy, also provided under the same Rule, is to move for restoration of their predecessor's Suit No. 1054/1999, which application will be considered on its own facts. Consequently, CMA No. 5988/2019 succeeds and the plaint is rejected under Order VII Rule 11 CPC. All other applications become infructuous.

JUDGE

Karachi

Dated: 09-06-2020

⁴ *Juma Khan v. Bibi Zenaba* (PLD 2002 SC 823) and *Muhammad Iqbal v. Allah Bachaya* (2005 SCMR 1447) cited by learned counsel for the Plaintiffs.