

**IN THE HIGH COURT OF SINDH,  
AT KARACHI**

**Present:**

Irfan Saadat Khan and  
Yousuf Ali Sayeed, JJ

**High Court Appeal No. 334 of 2019**

Appellant : Mehdi Hussain & others,  
through, Advocate.

Respondents : Nemo.

Date of hearing : 06.11.2020

**JUDGMENT**

**YOUSUF ALI SAYEED, J** - This Appeal emanates from Suit No.2007 of 2017 (the “**Suit**”) pending on the Original Side, and impugns the propriety an Order made therein a learned Single Judge of this Court on 17.09.2019 the “**Impugned Order**”), whereby an Application under Order VII Rule 11 CPC, bearing CMA No.4164/2019 (the “**Underlying Application**”), filed by the Appellant/Defendant No.1 was dismissed.

2. The Suit was filed by the Respondent/Plaintiff espousing a claim to a share in an immovable property bearing No.C-9, measuring 300 Square Yards, situated in Rizvia Cooperative Housing Society, Karachi (the “**Subject Property**”), which, as per the case set up through the plaint, was said to have been allotted by the aforementioned Society to their late father and then devolved unto his legal heirs, finally coming to vest jointly in the Respondent/Plaintiff and one of his siblings, namely late Mehdi Hussain, who had been admitted as the Regular Member of the Society following their father’s demise, and whose own heirs were in turn accordingly arrayed as the Defendants, with a prayer being made seeking a declaration as to the Respondents professed entitlement, coupled with an order for partition, or in the alternative, sale of the Subject Property, as well as rendition of accounts and payment of *mesne profits*.

3. The Plaintiff was met by the Underlying Application, seeking rejection of the plaint on the ground that the Subject Property belonged exclusively to Mehdi Hussain and stood solely in his name, hence the prospect of partition did not arise; that the Suit was barred by Order 2, Rule 2 CPC as well as Sections 42, 55 and 56(k) of the Specific Relief Act; that no cause of action had accrued in favour of the Respondent; and that he had come to the Court with unclean hands, with the mala fide intent and ulterior motive of harassing/pressuring the Appellants.
  
4. After hearing counsel in the matter, the learned Single Judge was pleased to dismiss the Underlying Application vide the Impugned Order, which reflects that the case for rejection was essentially argued on the ground that the deceased father of the Appellants had been the sole owner of the Subject Property, with reliance being placed on copies of various documents emanating from the Society reflecting that position, and it being contended that the entire suit was therefore misconceived. Indeed, the submissions made by learned counsel for the Appellants while proceeding with the Appeal were also in the same vein - emphasising the sole ownership of Mehdi Hussain and assailing the merits of the Respondent's case.
  
5. A perusal of the Impugned Order reflects that while addressing the contention raised, the learned Single Judge *inter alia* observed that:

“Mr. Jawed Raza, Advocate, alongwith Mr. Danish Raza, learned counsel for the Plaintiff, has controverted the above line of arguments and has referred number of documents so also referred to the earlier order of 08.05.2019. Learned counsel has raised a serious dispute with regard to the documents appended with the listed application and has submitted that it is an admitted issue that the subject (suit) property was a joint property as also reflected in the earlier proceeding bearing Suit No.736 of 1985 (the **“Old Suit”**) filed by one of the deceased brothers, namely, Mazhar Hussain Pirzada against the brothers and sisters including present

Plaintiff Ghulam Hussain and Mehdi Hussain (deceased father of the present Defendants). He has referred to paragraphs-4 and 5 of the plaint of Old Suit, in which it is specifically pleaded that property in question was a joint property and the same stance is accepted by all the Defendants of the Old Suit including present Plaintiff and predecessor-in-interest of present Defendants in their joint Written Statement, which is available at page-43 of the case file, particularly, paragraphs-4 and 5 whereof. In paragraph-20 of the Written Statement of the Old Suit, it is stated that the subject property is impartitionable and since deceased brother/Mazhar Hussain Pirzada is a co-sharer of the subject property, thus either above Mazhar Hussain should sell his share or purchase of other co-sharers. A Preliminary Decree dated 18.11.1985, available at page-77 (of the Counter Affidavit) is also referred to by legal team of Plaintiff, in which it is clearly stated that subject property is a joint property belonging to all brothers and sisters including present Plaintiff and predecessor-in-interest of present Defendants. Finally, the earlier Suit was settled by making payment of Rs.3,90,000/- to the deceased brother (who instituted the Old Suit).”

6. In that backdrop, the learned Single was pleased to hold as follows:

“The arguments of Plaintiff’s counsel is based on the certified copies of undisputed judicial proceeding which obviously has a far better evidential value than the photocopy record of a Society; **secondly**, the documents relied upon by the Defendants’ counsel have been seriously disputed by the Plaintiff in his Counter Affidavit to the Application under consideration and taking guidance from the above cited case law of the Honourable Supreme Court (**Jewan and 7 others v. Federation of Pakistan**), same cannot be considered at this stage; **thirdly**, the prayer clause of the suit relates to an administration and partition of the subject property and it clearly states that Defendants are also entitled to their share as per the Islamic Law of Inheritance. It is also a matter of record that Defendants never contested the suit and were debarred from filing the Written Statement but at a later stage they filed an application under consideration with the plea mentioned hereinabove. **Fourthly**, the reported judgment (*supra*) relied upon by Defendant’s side is distinguishable from the present undisputed facts, discussed hereinabove, particularly, the earlier stance of the predecessor-in-interest/father of present Defendants in the aforementioned judicial proceeding. **Fifthly**, the present case is covered by another judgment handed down by learned Division Bench of this Court and reported in **PLD 2017 Sindh page-324 [Saifullah Khan and others v. Mst. Afshan and others]**; relevant paragraph whereof is reproduced herein under:-

“ 17. . . . .

(a). . . . .

(b). . . . .

**(c) when the determination of the aforesaid question involves a person who is a sharer in the estate, then the question comes within the scope of the administration suit, and this is so regardless of whether the sharer claims through or under the deceased (e.g., by way of a gift or sale from the latter) or in his own right;”**

7. On that basis, the learned Single Judge came to the view that the defence set up by the Defendants during arguments that the Respondent had also been paid his share would be determined when proceedings under the Preliminary Decree were undertaken, with it being directed that the same be drawn up and with the Official Assignee being appointed to undertake the proceeding in pursuance thereof and submit his Report in that regard.
8. Having considered the matter, we see no error or infirmity in the approach of the learned Single Judge, and counsel for the Appellant was unable to demonstrate to the contrary. Whatever the Appellants objections may be as to the effect of statements made in earlier proceedings vis-à-vis the Subject Property and the merits of the Respondent’s claim, the same apparently remain open to scrutiny and adjudication at the appropriate stage, following submission of the Official Assignee’s report.
9. As such, no case for interference stands made out. The Appeal fails and stands dismissed accordingly.

**JUDGE**

**JUDGE**

Karachi  
Dated \_\_\_\_\_