

Judgement Sheet

IN THE HIGH COURT OF SINDH, KARACHI

Suit No.1324 of 2008

BEFORE:**Mr. Justice Arshad Hussain Khan.***Muhammad Shafique & Two Others v. Muhammad Rafique*

Plaintiff	Muhammad Shafique & Two Others Through Mr. Afaq A. Saeed Advocate.
Defendant	Muhammad Rafique Through Mr. Mr. Shahnawaz M. Sahito, Advocate.
Date of Hg:	18.10.2017.

JUDGMENT

ARSHAD HUSSAIN KHAN, J.- The present suit was filed by the Plaintiffs against the Defendant for Partition with the following prayers :

- a) To appoint the Nazir of this Court as Receiver of the suit property and direct him to partition the suit property, if possible, and in other case / alternate.

The suit property may be sold out by way of action and sale proceeds of the same may be distributed among all the co-owners equally.

- b) Any other relief(s) which this Honourable Court may deem just, fit and proper in the circumstances of the case.

2. Brief facts leading to the filing of the present suit as stated in the Plaint are that the Plaintiffs and the Defendant are real brothers and sons of [late] Lal Muhammad Malik, residing in the property bearing House No.R-2, ad-measuring 125 Sq.Yds. Sector 11-B, North Karachi (hereinafter referred to "suit property"). It is stated that the Plaintiffs and the Defendant are co-owners of the suit property by virtue of mutation bearing No.KDA/LAND/GUL/92/149 dated 19.01.1992, issued by the KDA. All the Plaintiffs are married

and have their children and the total residents of the suit property are 27 in number. It is also stated that due to large number of the occupants, now it is impossible for them to live together peacefully in such a small house. The Plaintiffs in this regard have approached the Defendant in order to sell the house and distribute the receipts amongst the co-owners of the suit property, however, the Defendant did not pay any heed to their request. It is also stated that the Plaintiffs and the Defendant are living independently in the suit property for so many years and have their own independent business and source of income. It is further stated that when the Defendant failed to accede to the request of the Plaintiffs, the dispute was taken up with the Young Malik Ittehad Welfare Society (Registered), Karachi, for an amicable settlement in an arbitration proceedings. However, again, due to adamant attitude of the Defendant the amicable settlement could not reach amongst the parties. However, the Arbitrator has determined that the ownership of the suit property belongs to the Plaintiffs and the Defendant jointly. Where after, the Plaintiffs have again approached the Musalahiti Anjuman Council (Kalyana), New Karachi Town, Karachi, in order to have some sort of settlement of the suit property but no settlement could take place, again due to adamant attitude of the Defendants, who was not ready to settle the dispute amicably. Thereafter, the Plaintiffs sent a legal notice dated 06.09.2008, however, no reply was received from the Defendant resulting which the Plaintiffs filed the present suit.

3. Upon notice of the present suit the Defendant filed his written statement wherein it has been stated that the suit property was mutated in the name of the Plaintiffs on account of insisting of real uncle of the Defendant, whereas, the Plaintiffs are neither co-owners nor have any share in the property. It has also been stated that the Defendant had purchased the suit property in the year 1985 against a consideration of Rs.2,10,000/- only, out of which Rs.1,60,000/- was paid in cash whereas Rs.50,000/- was paid through loan obtained from the HBFC. While Rs.40,000/- were obtained by selling the plot of the father of the Plaintiffs and the Defendants. It is also stated that at the time of purchase of the suit property, the Plaintiffs were minors whereas the Defendant was of 20 years of the age. It has also

been stated that all utility bills are being issued in the name of the Defendant and it is the Defendant who has maintained the Plaintiffs and settled their independent business by investing his huge money. It is also stated that the present suit was filed with mala fide intention and ulterior motives and with the intention to usurp the property of the Defendant by ejecting him from the shop situated in the suit property.

4. From the record, it reveals that on 25.11.2013, this Court in order to ascertain whether the suit property is divisible or not, appointed the official assignee to inspect the site and furnish his report in this regard. In pursuance of the said order, the official assignee inspected the site and furnished his Report bearing Reference Number 01/2013 dated 11.12.2013, which is on the record. Relevant portion whereof is reproduced as under :-

“2. That official assignee deputed Mr. Shah Muhammad Junejo, Superintendent of his office, who along with Mr. Muhammad Shafique (Plaintiff No.1) reached at House No.R-2, Sector 11-B, North Karachi on 07.12.2013 at 12.00 noon pointed by the said Plaintiff. Muhammad Sohail, Plaintiff No.2 was present there. It is submitted that three Plaintiffs and one Defendant who are brothers interse and parties in this suit are residing in the above mentioned house with their families. The house in question is constructed on plot of 120 sq. yds. which in the present condition is indivisible.”

5. Out of the pleadings on 19.05.2014, this Court framed the following issues :-

1. Whether the suit of the plaintiff for partition is maintainable ?
2. Whether the plaintiffs and defendant are lawful and bonafide co-owner / shareholders in the suit property bearing House No.R-2, situated at Sector No.11-B, North Karachi Township, Karachi, left by their deceased father ?
3. What should the decree be ?

6. Thereafter, the Commissioner was appointed for recording of evidence, who after recording evidence submitted his Report on 16.06.2015. The relevant portion of the said Report is reproduced as follows :-

Exh.P Affidavit in evidence filed by Muhammad Shafique. He produced documents annexed with affidavit in evidence as 1,2,3,4, A,B, B-1, C & D.

Exh.P/1 Examination in chief recorded on 25th April, 2015

Exh.P/2 Affidavit in evidence of Plaintiff witness Malik Imamuddin.

Exh.P/3 Examination in Chief recorded on 25.4.2015

Affidavit in evidence filed by Muhammad Shafiq Plaintiff was dropped on 23.5.2015 by counsel Mr. Afaq A. Saeed.

Notice issued to Defendant on 16.4.2015 for 25.4.2015.

Notice issued on 9.5.2015, 23.5.2015 & 6.6.2015 returned undelivered as defendant as not available on above date as reported by postman.

Defendant Advocate Mr. Shah Nawaz, notice issued at 115 Frere Market Karachi returned undelivered by postman as reported office is closed since long.

Cross marked Nil on 23rd May 2015.

Notice was issued to Defendant for 6.6.2015 on the address of Defendant. Also mentioned on postal envelope that it should be delivered to Defendant or any family member present at his residence. The postman returned undelivered with his report that defendant or his family members refused to accept notice from him though he visited several times at the address mentioned in the envelope.

Karachi
Dated
16 June,
2015.

Sd/-
(Feroz Ali K. Allana)
Commissioner / Advocate"

7. From the aforementioned Commissioner's report, it reveals that in support of their stance in the instant case, the Plaintiffs have produced three witnesses namely; Muhammad Shafiq Exh.P who produced documents as 1,2,3,4, A,B, B-1, C & D and Malik Imamuddin as Exh.P/2. Whereas, the Defendant has chosen to remain absent despite various notices and did not come in the witness box to substantiate his stance in the case, so much so the witnesses of the plaintiffs were not cross-examined.

8. Learned counsel for the plaintiffs during the course of arguments besides reiterating the contents of the plaint and the affidavit-in-evidence of the plaintiffs has urged that since the sufficient documentary evidence are available on record, which according to him the defendant neither denied nor cross-examined the witness, therefore, the stance of the plaintiffs has gone un-rebutted. He further urged that the Plaintiffs have filed Mutation

Order/ Letter of Mutation bearing No.KDA/LAND/GUL/92/149 dated 19.01.1992, issued by the KDA, which amply demonstrates the joint ownership of the Plaintiffs as well as defendant vis-à-vis the suit property. He further urged that the defendant never disputed the genuineness of said Mutation Order/letter, however, his stance in the written statement was that the names of the plaintiffs were inserted in the mutation letter upon the insistence of his uncle. Learned counsel further urged that the uncle of the plaintiffs and defendant came into the witness box, however, the said witness was not cross-examined by the defendant. Not only this, the defendant neither put himself for evidence nor any witness was examined on his behalf to substantiate the stance taken by him in the written statement. Furthermore, the documents produced by the plaintiffs in the case clearly substantiate the case of the plaintiff and hence the plaintiffs are entitled for decree as prayed.

9. I have given due consideration to the arguments advanced by the learned counsel for the plaintiffs, minutely perused the material/evidence available on record and the applicable laws. My findings on the issues are as under:-

ISSUES NO.1 The issue of maintainability of present suit, though raised by the defendant, however, it is neither mentioned in the written statement nor argued on behalf of the defendant that as to how this suit is not maintainable. From the record, it reveals that the claim of the plaintiffs in the present suit that they are co-owners of the suit property along with the defendant, is based on the mutation order bearing No.KDA/LAND/GUL/92/149 dated 19.01.1992, issued by the KDA in respect of the suit property. The said mutation order, which is not disputed by the defendant, has clearly mentioned the names of the plaintiffs and the defendant as co-owners of the un-divided suit property and since the defendant did not accede to the request of the plaintiffs to dispose of the suit property and to disburse the sale proceeds amongst the owners of the suit property, which resulted in filing of the present case. In the circumstances, the plaintiffs, being co-owners and in possession of the un-divided suit property is within their right to file the present suit. Accordingly, this issue is answered in affirmative as the suit is maintainable.

10. **ISSUE NO.2:** From the perusal of the record as well as the evidence produced by the Plaintiffs, it is clear that the suit property belongs to four(4) brothers i.e. the Plaintiffs 1,2 & 3 and Defendant. Though, the Defendant raised Objections in the Written Statement, however, he did not file any document in support his stance taken in the written statement nor produced the same in the evidence. In the circumstances, and in absence of any specific rebuttal from the side of the Defendant, it is apparent that the suit property belongs to four brothers i.e. the Plaintiffs and Defendant. Besides, the evidence produced by Plaintiff No.1 includes the decision of Arbitration conducted by the Young Malik Ittehad Welfare Society (Registered), Karachi, wherein it has been mentioned that the suit property belongs to the four (4) brothers viz. the Plaintiffs and the Defendant, such fact is also corroborated from the evidence of uncle of the Plaintiffs and the Defendant in his para-4 of his Affidavit-in-evidence. For the sake of ready reference, paras- 3 &4 of the same are reproduced herein below:-

“3. That I say that plaintiffs and defendants are also residing in the suit premises bearing House No.R-2, Sector 11-B, situated at North Karachi Township, Karachi Central and they are also co-owners of the suit property.

4. That I say that Plaintiffs and defendant sold out the property of their father Lal Muhammad Malik, and purchased the suit property and the said property also mutated in the record of right on their names and they jointly expended their earnings over the said house and constructed the first floor.”

Moreover, the witnesses of the plaintiffs have not been cross-examined by the defendant and it is well settled law that the testimony has not been subjected to cross-examination, the same shall be deemed to have been admitted. It is by now a settled principle of law that any deposition made in the examination-in-chief, if not subjected to cross-examination, shall be deemed to have been admitted. Reliance can be placed on *M/s. Akbar Brothers v. M Khalil Dar*(PLD 2007 Lahore 385).

Furthermore, it is also well-established principle of law that a written statement contains averments of a party, which are to be proved through cogent evidence. If a party does not produce any evidence to support the contents of its written statement, in absence

of any admission on the part of a plaintiff, the averments contained in the written statement cannot be treated as evidence. Reliance in this regard can be placed on the cases of *FEDERATION OF PAKISTAN through Secretary Ministry of Defence and another v. JAFFAR KHAN and others* (PLD 2010 Supreme Court 604) and *MUHAMMAD NOOR ALAM v. ZAIR HUSSAIN and 3 others* (1988 MLD 1122)

11. From the perusal of the material available on record and the evidence it is obvious that in the instant matter the plaintiffs' version are supported through their evidence while the defendant despite opportunities, neither cross-examined the plaintiffs' witnesses nor did he lead any evidence. The contentions /assertions and the evidence led by the plaintiffs are deemed to be admitted by the defendant. The general denials on the part of the defendant in his written statement is of no evidentiary value and in absence of any rebuttal to the plaintiff's version, the stance of the plaintiffs has gone un-rebutted and unchallenged. Furthermore, the plaintiffs in support of their claim of ownership over the suit property relied upon documents, genuineness whereof have not been disputed by the defendant, hence presumption of truth is attached to them, until and unless they are rebutted through strong and cogent evidence and the Defendant has failed to bring any such evidence on the record. Therefore, there is no reason, cause or justification to hold the said documents otherwise. Thus, I am of view that the plaintiffs have established their rights over the suit property and as such this issue is decided in favour of the Plaintiffs.

12. **ISSUE NO.3:** In terms of the findings on the above issues, I am of the opinion that the Plaintiffs have established their case, being co-owners of an un-divided suit property viz. House No.R-2, ad-measuring 125 sq.yds. Sector 11-B, North Karachi. Accordingly, this suit is decreed in the following term:-

The suit property may be sold out by way of public auction through the Nazir of this Court and the sale proceeds shall be distributed amongst the co-owners i.e. the Plaintiffs and the Defendant as per their legal share in equal proportion. However, the

Plaintiffs and the Defendant upon receiving the highest Bid by the Nazir shall have the right to match the Bid of the suit property preferably in case any of the parties intend to purchase the same. The Nazir is directed to do the needful in accordance with law. The publication and other charges including the Nazir's fee will be deducted from the proceeds and thereafter the remaining proceeds will be distributed amongst the parties as above.

JUDGE

Karachi;
Dated: 31 .10.2017

*Jamil***