

## IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 1342 of 2007

**PRESENT:****Mr. Justice Arshad Hussain Khan.***Muhammad Shafi vs. Syed Chan Pir Shah and Others*

Plaintiff: Muhammad Shafi

Defendants: Syed Chan Pir Shah &amp; others

Date of  
hearing: 23.10.2017**JUDGMENT**

**ARSHAD HUSSAIN KHAN, J.** This suit was filed by the plaintiff against the defendants for declaration, permanent injunction, cancellation of forged documents, possession, damages and for the recovery of mesne profit with the following prayers:-

- i) This Hon'ble Court may be pleased to direct the defendants to deposit the rent before the Nazir of this Hon'ble Court till the disposal of the suit and passed order to restrain the defendants 2 to 5 not paid the rent to the defendant No.1.
- a) For declaration that the alleged sale agreement dated 19.01.2006, receipt of the payment of the amount of sale consideration amount to Rs.410,000/- to the plaintiff by the defendant No.1, in respect of the suit property and the alleged affidavit of plaintiff dated 13.12.2006 are illegal, un-lawful, null & void nor signed by the plaintiff as the alleged signatures of the plaintiff thereon are forged, fabricated and as such the defendant No.1 has no any power, legal authority to use the same in any manner of whatsoever nature, the same be got declared forged fabricated, null & void.
- b) For declaration that the defendant No.1 has no power, authority to demand, received, collect any amount from other defendants, in respect of the tenements, in their possession, occupants.
- c) To cancel the alleged sale agreement dated 19.01.2006, alleged receipt of payment of an amount of Rs.410,000/- to the plaintiff by the defendant No.1 on account of total amount of sale consideration in respect of Plot of land bearing No.A-180 of Mujahid

colony, situated in Nazimabad No.4 Karachi along with the entire construction standing there on given to the defendant No.1 by the plaintiff in respect of the suit property being null & void, forged, fabricated. This Hon'ble Court may further direct to the defendant No.1 to surrender the original of the same before this Hon'ble Court for its cancellation.

- d) Permanent injunction restraining the defendant No.1, his agents, servants, nominees, employees, friends, relatives, workers, labourers, tenants from posing themselves as owner of Plot of land bearing No.A-180 of Mujahid colony, Nazimabad No.4, building standing thereon, from collecting, receiving, demanding the rent in respect whereof from the tenants, let-out the same to any other person, making any attempt, given any threat for and to sale, transfer the same or any part whereof illegally, unauthorizedly, without due course of law.
- e) For possession: Directing the defendants, their agents, servants, nominees, employees, associates, to deliver the physical possession of the building standing on Plot No.A-180 of Mujahid colony, Nazimabad No.4, Karachi to the plaintiff above named.
- f) To pay the compensation and mesne profit of Rs.51,45,848/= for future at the said rate by increasing the same 5% for each subsequent one year in respect of the portions of the building standing on Plot No.A-180 of Mujahid colony, Nazimabad No.4, Karachi w.e.f. the month of December, 2006 as well as.
- g) To pay the electricity, suit gas, water conservancy charges to the concerned departments directly, failing wherein the said amount along with the amount of mesne profit may please be got recovered from the defendants, along with the penalties etc., with the interest at the rate of Rs.18% per annum w.e.f. the date of the institution of the above suit till the realization of the whole amount of the same.
- h) Cost of the suit.
- i) Any other relief or relieves as this Hon'ble Court may deem think fit and proper in view of the circumstances of the case.

2. Brief facts leading to filing of this suit as averred in the plaint are that the plaintiff is the absolute and lawful owner of plot of land measuring 100 sq. yds., bearing No.A-180, situated at Mujahid colony, Nazimabad No.4, Karachi along with the shops, houses constructed thereon, (to be referred to as suit property). It is also averred that the suit property is a constructed house of Ground + 1<sup>st</sup> Floor; on the ground floor there are two shops on the front side

whereas on the backside two residential portions are constructed and on the first floor two residential portions are constructed. The plaintiff had rented out one shop on ground floor to defendant No.1 at the rate of Rs.1,500/- per month and the other shops were rented out to other tenants. On 08.10.2005 an earthquake hit Azad Kashmir, due to which, the plaintiff along with his family members had to go to Azad Kashmir after handing over the physical possession of ground floor's residential portion as well as first floor of the suit property to his nephew namely, Mohammad Niaz Abbas. In the month of November, 2006 defendant No.1, forcibly took over the possession of the suit property by dispossessing said Mohammad Niaz Abbasi. Defendant No.1, after taking the illegal possession of the suit property, rented out the portions of the suit property to the other, that is, defendants No.2 to 5 and started receiving amount of Rs.13,200/- per month from them towards the rental. The plaintiff, after coming to know about such illegal and unlawful act of defendant No.1, came back to Karachi and filed Criminal case bearing No.123 of 2007 against the defendants No.2 to 5 under the provisions of Section 3 of the Illegal Dispossession Act, 2005 in the Court of Sessions Judge, Karachi Central but the said case was dismissed on 21.05.2007. The plaintiff also filed Rent Case No.312/2007 against defendant No.1 for his eviction from the Shop No.F-24 situated at suit property. Upon notice of the said rent case defendant No.1 filed its reply in the said rent case, wherein it was claimed that he purchased the suit property from the plaintiff as per sale agreement dated 19.01.2006 on payment of sale consideration of Rs.4,10,000/-. The plaintiff upon coming to know the alleged claim of defendant No.1 in respect of the suit property, filed present suit and stated therein that plaintiff has neither sold out the suit property to defendant No.1 nor any part thereof nor had taken any amount from the defendant No.1 in respect of the suit property. The alleged sale agreement dated 19.01.2006, receipt of the alleged payment of Rs.4,10,000/= dated 19.01.2006 and the alleged affidavit dated 13.12.2006 have never been executed by the plaintiff and all are forge and fabricated documents. The plaintiff also claimed mesne profit of at 18% of the amount and Rs.50,00,000/- as damages in respect of mental and physical torture.

3. From perusal of the record, it appears that the defendants despite directions and having opportunities failed to file written statement resultantly they were declared ex-parte on 16.11.2007, the said order, for the sake of ready reference is reproduced as under:

“Interim order was passed on CMA 7033/2007 on 16.8.2007. The same is confirmed. CMA 7033/2007 is disposed of.

Nazir`s reference dated 27.8.2007 has been perused. No objections have been filed from either side to the report. The report is taken on record. Statement dated 13.11.2007, filed on behalf of the plaintiff, is taken on record.

By order dated 07.11.2007 the defendants were directed to file written statement within one week from the date of the order and also be present in person along with their advocate today at 11.00 a.m. in Court. Today is Friday. It is 11.28 a.m. a.m. They are called absent.

From the facts of the case, it appears that defendants are land-grabbers and members of land mafia. They have avoided to appear in Court in spite of directions. They have failed to file written statement in spite of directions given by this Court within stipulated time. The case of the plaintiff appears to be genuine.

I have heard the plaintiff in person at length, who is an old man, aged about 70 years. Let the case proceeds Ex Parte against the defendants as the defendants in spite of directions have failed to file written statement. The plaintiff is directed to file affidavit-in-ex parte proof within seven days and case may be placed in Court for Ex Parte orders on the next date of hearing.

Adjourned to 03.12.2007.”

Thereafter, the plaintiff filed affidavit in ex-parte proof and subsequently cross-examined by the counsel for defendant No.1.

4. The record also shows that defendant No.1 after passing the exparte order though had filed written statement along with application for condonation, however, the said application was dismissed by this Court, vide order 11.2.2008. The written statement though was not taken on record however it has been stated therein that the suit is not maintainable and the claim of the plaintiffs is false and the same is based on the utility bills, which have no legal value and the plaintiff on the basis of said bills cannot claim ownership of the suit property. Further stated that the plaintiff has neither inducted his nephew nor any other relatives while leaving for Azad Kashmir and therefore the question of their alleged dispossession from the

suit property does not arise. The true fact is that the plaintiff had sold out the suit property in the year 2006 to defendant No.1 and after payment of entire sale consideration and getting possession has become sole and absolute owner of the suit property. It is also stated in the written statement that at the time when the plaintiff entered into said sale transaction of the suit property with defendant No.1 there was only one constructed shop of 12x12 feet in the suit property whereas other shops were constructed lateron by defendant No.1 and lastly stated that no cause of action arose to the plaintiff to file the instant suit which is liable to be dismissed.

5. The record also reveals that the evidence of defendant No.1 was also recorded, the said evidence for the sake of ready reference is reproduced as under:-

“To Court

I am defendant No.1 in this case and as such well conversant with the facts of this case. Plaintiff is not my relative. On 19.01.2006 my father was not well. He had sent for Muhammad Shafi, the plaintiff, at our house and in presence of my mother and my uncle, Syed Nazeer Shah and myself had paid Rs.410,000/- for sale of house No.A-180, Mujahid colony, Nazimabad No.4, Karachi. I am owner of the house since that date. The plaintiff has filed false case against me and others. The defendant No.2,3,4 and 5 are my tenants and related to me. After purchase of this house I was raising wall to which my uncle Syed Habib Shah has objected and fight had taken place between myself and my uncle. My uncle had instigated the plaintiff to file cases against me. Plaintiff filed application before the Nazim and also at 90. Thereafter I had a case in the City Court for harassment. I do not know how many cases the plaintiff has filed against me. Plaintiff had got firing done at me and I had received injuries. I also lodged FIR against the plaintiff in firing.

**CROSS EXAMINATION TO MR. SYED MUKHTAR HUSSAIN SHIRAZI ADVOCATE FOR THE PLAINTIFF**

It is correct that except my family members nobody was present when alleged payment was made to the plaintiff. It was on 19.01.2006 that payment was made. There was no written sale agreement between me and the plaintiff. It is correct that the electricity and suit gas bills are still in the name of the plaintiff and I have not paid the same. Voluntarily states that due to my poor financial condition I could not pay the bills. However, I will pay the bills very soon. It is incorrect to suggest that I am deposing falsely.

TO COURT

Rs.410,000/- which was paid by me to the plaintiff was collected by me from different people and money saved by my

mother at home and the total Rs.410,000/- was paid in case at home. The plaintiff had kept the entire money in his pocket.”

6. On 23.10.2017, this matter was taken up when neither on behalf of plaintiff nor the defendants` side appeared. Since this is an old matter pertaining to the year 2007, therefore, keeping in view the orders dated 22.12.2016 and 03.04.2017 respectively, passed by this Court in the matter, the judgment was reserved in this case.

7. Though the record of the case does not show that this Court framed/settled issues in the matter, yet, in order to decide the present case on the pleading, I frame the following issues:

1. Whether the suit is not maintainable?
2. Whether the plaintiff is entitled to any relief from the defendants? if so, to what extent ?
3. What should the decree be?

8. I have minutely perused the material/evidence available on the record and the applicable laws. My findings on the issues are as under:-

Issue No.1: Since, there can be no denial to the legally established principle of law that legal character is mandatory requirement for one to maintain a civil suit and in absence thereof a suit shall not be maintainable. Section 42 of the Specific Relief Act, 1877 deals with the suit for declaration. For convenience, Section 42 of the said Act, is reproduced as under:--

**"42. Discretion of Court as to declaration of status or right.**

Any person entitled to any legal character or to right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.

**Bar to such declaration.** Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief that mere declaration of the title omits to do so."

The proviso of Section 42 clearly imposes an embargo on grant of mere a decree for declaration if a plaintiff fails to pray for consequential relief in his plaint, which he is otherwise able to pray for. In other words, if a person files suit for declaration without praying for consequential relief he shall definitely face dismissal of his suit. Under the provisions of Section 42, declaration prayed for must relate to legal character, title or right as to any property and if one prays for mere declaration in his plaint but does not opt to pray for the consequential relief, the one which he was able to pray for, the prayed declaration shall not be granted and his suit must be failed.

9. From the perusal of the record, it appears that the plaintiff has filed the present suit for possession and cancellation of the documents and damages without seeking any declaration in respect of his ownership of the suit property. Under the provisions of Section 42 of the Specific Relief Act a person entitled to any legal character or to any right to property can institute a suit for declaratory relief in respect of his title to such legal character or right to property. The expression, legal character has been understood as synonymous with the expression status. Section 42 of the Specific Relief Act applies only to a case where a person files a suit claiming entitlement to any legal character or any right to property, which entitlement is denied by the defendants or in denying which the defendants are interested. It, cannot apply to a case where the plaintiffs do not allege their entitlement to any legal character or any right to property or its denial by the defendants. As a necessary corollary, it cannot apply to a case where only the entitlement to the legal character or the property of the defendant is denied by the plaintiff. Section 42 would be attracted to a case in which the plaintiff approaches the court for the safeguard of his right to legal character or property but where right to his own legal character or property is not involved, the suit is not maintainable. In the present suit, the plaintiff has not approached this Court for a declaration of his own right to property or his right to a legal character but has challenged the defendant pretension to a legal character and to right to property. Section 42 does not permit an

unrestricted right of instituting all kinds of declaratory suit at the will and pleasure of the parties, right is strictly limited. Suit for mere declaration aliunde is not permissible under the law, except in the circumstances mentioned in Section 42. Reliance is placed on the case of *ILYAS AHMED v. MUHAMMAD MUNIR and 10 others* (PLD 2012 Sindh 92).

10. In the present case the plaintiff in support of his claim of ownership in respect of the suit property did not file any title documents and instead his claim of ownership is based on the utility bills only. The utility connections do not confer any title on the person on whose premises it installed. The utilities usually provide to the occupants, who may or may not be the owner of the property. In this regard, reliance can be placed on the case reported as *MUHAMMAD ISMAIL v. MAQBOOL AHMAD and 8 others* (2001 CLC 252) wherein it has been observed that "The installation of electricity connection does not confer any right on the petitioner. Electricity is not provided to the owners only but any occupant can get the connection after fulfilling the formalities required by WAPDA".

In the circumstances, I am of the considered view that the plaintiff has no legal character to maintain the present suit inasmuch as no cause of action accrued to the plaintiff for filing the same. The suit is not maintainable being barred by Section 42, of the Specific Relief Act, 1877. Accordingly, this issue is answered in negative.

11. Issue No.2: In view of the findings of the above issue, the plaintiff has failed to establish his legal character in respect of the suit property thus he is not entitled to any of the relief claimed in the suit. As regards the possession of defendant No.1 in respect of the suit property is concerned, without touching the claims of the parties on merits, I am of the view that the same is illegal and unauthorized as according to defendant No.1 he has occupied the property by virtue of sale transaction entered into between him and the plaintiff. It is also settled law that nobody can transfer a better title, than that he himself possesses. When the plaintiff himself has



no right and title in the suit property, he could have not alienated the same to defendant No.1. In this respect reliance is placed on case of *ABDUL HAMEED through L.Rs. and others v. SHAMSUDDIN AND Others (PLD 2008 SC 140)*. This issue is answered accordingly.

12. Issue No.3: In view of the findings on the above issues, the suit is dismissed with no order as to cost.

JUDGE

Karachi

Dated: 31.10.2017

*jamil*