

# THE HIGH COURT OF SINDH KARACHI

Suit No. 1532 of 2015

[Mrs. Umahani Fikree & another versus Tewfiq Fikree]

Plaintiffs : Mrs. Umahani Fikree and another through M/s. Muhammad Safdar and Roheela Nazar, Advocates.

Defendant : Tewfiq Fikree through M/s. Moin Azhar Siddiqui and Ali Ahmed Turabi, Advocates.

Dates of hearing : 24-08-2021 & 06-09-2021

Date of Decision : 14-01-2022

## ORDER

Adnan Iqbal Chaudhry J. - This order is to decide CMA No. 5373/2018, an application under Order VII Rule 11 CPC for rejection of the plaint.

2. The property subject matter of the suit is Plot No. 58-A, measuring 324 square yards, Shahnawaz Bhutto Road, Soldier Bazar, Karachi, with a building thereon (suit property), standing in the name of late Umahani Fikree & Hafsa Fikree, through whom the Plaintiffs have inherited the same. The Defendant is the nephew of the Umahani & Hafsa and the cousin of the Plaintiffs. The Plaintiffs have sued the Defendant for possession of the second floor and one room of the third floor of the suit property in his possession and for mesne profits.

3. Per the Plaintiffs, the suit property had been purchased by their late grandfather, Ebrahim Fikree, as a benamidar for his daughters, Umahani & Hafsa; that by a deed dated 25.11.1974, Ebrahim Fikree relinquished the suit property in favor of Umahani & Hafsa, which was then mutated to their names in 1985; that in 1984, Ebrahim Fikree, Umahani & Hafsa, the grandfather and aunts of the Defendant, had allowed him to live temporarily in a portion of the

suit property until he could find a job, but later on he refused to vacate the same.

4. The Defendant prays for rejection of the plaint on the ground that a previous Suit No. 293/1986 (renumbered as Suit No. 1397/1996) by Umahani & Hafsa for the same relief had been dismissed for non-prosecution, so also an application for its restoration, and therefore this second suit by their successors on the same cause of action is barred by Order II Rule 2 CPC.

5. Heard the learned counsel.

6. The facts leading to this suit, also pleaded in the plaint, appear to be as follows:

(i) In 1986, Ebrahim Fikree and Umahani filed Suit No. 293/1986 in the High Court against the Defendant for exclusive possession of the suit property and for mesne profits. On behalf of Ebrahim Fikree, the suit was filed through an Attorney. In his written statement in Suit No. 293/1986, the Defendant pleaded that since his grandfather, Ebrahim Fikree, was suffering from senile dementia since 1982, he could not have authorized the suit; that the relinquishment deed dated 25.11.1974 produced by the plaintiffs in respect of the suit property had been fabricated after 1982; that it was Ebrahim Fikree who was actual owner of the suit property and who had let a premises therein to the Defendant at a token/nominal rent; that he was never asked by Ebrahim Fikree to vacate the same; and that the suit was barred by the provisions of Sindh Rented Premises Ordinance, 1979.

(ii) Some time in 1989, Ebrahim Fikree passed away. Those of his legal heirs who were not already party to Suit No. 293/1986 were impleaded as co-plaintiffs, including Hafsa. In 1996, the suit was transferred from the High Court to the District Court on change in pecuniary jurisdiction, where it was renumbered as Suit No. 1397/1996. By order dated 24-11-1998, the III-Senior

Civil Judge, Karachi East dismissed the suit for non-prosecution.

- (iii) An application for restoring Suit No. 1397/1996 under Order IX Rule 4 CPC was made by the plaintiffs of said suit, included Umahani & Hafsa, along with an application for condoning the delay. However, by order dated 15-02-2002, the Senior Civil Judge was not inclined to condone the delay and dismissed the restoration application as time-barred. Such order was maintained in Civil Revision No. 21/2002 by the I-Additional District Judge, Karachi East by order dated 17-04-2004, and then by the High Court in C.P. No. 545/2004 by order dated 13-09-2006.
- (iv) In Suit No. 1397/1996, since the Defendant had taken the stance that he was tenant of the suit property, Umahani and legal heirs of Hafsa filed Rent Case No. 523/2006 for ejecting the Defendant from the suit property on the ground of default and personal need. In the rent case, the Defendant contended that the suit property vested in Ebrahim Fikree, his grandfather; that the relinquishment deed and mutation of the suit property in favor of Umahani & Hafsa were fraudulent; that after the demise of Ebrahim Fikree, the Defendant's possession of the suit property was that of a co-owner as the son of the pre-deceased son of Ebrahim Fikree; and that for cancelling the mutation entry standing in favor of Umahani & Hafsa and for partition of the suit property, the Defendant had also filed Suit No. 163/2007.
- (v) The above Rent Case No. 523/2006 was dismissed by judgment dated 30-05-2009 while observing that the question raised to the title of the suit property could best be resolved by a civil court. Against that, Umahani and the legal heirs of Hafsa preferred FRA No. 152/2009, which too was dismissed by judgment

dated 15-01-2014. Thereafter, the legal heirs of Umahani & Hafsa proceeded to file the present Suit No. 1532/2015.

7. The dismissal of Suit No. 1397/1996 (old Suit No. 293/1986) was under Order IX Rule 3 CPC where neither party had appeared for hearing, thus attracting the provisions of Order IX Rule 4 CPC where under two remedies are provided; viz. the plaintiff may, subject to the law of limitation, bring a fresh suit, **or** he may make an application for setting aside the dismissal order. The plaintiffs of said suit, which included Umahani & Hafsa, opted the remedy of a restoration application, which did not succeed. Once that remedy was elected, then, by implication of the doctrine of election, the other remedy of a fresh suit came to be barred.<sup>1</sup> But then, having said that, the present suit has **not** been filed as a fresh suit under Order IX Rule 4 CPC.

8. The bundle of facts or the cause of action pleaded for bringing the present suit are narrated in para 6 above. To restate those facts, Suit No. 1397/1996 (old Suit No. 293/1986) was filed for exclusive possession of the suit property on the contending essentially that the Defendant was only a licensee thereof. The Defendant took the stance that he was a tenant of Ebrahim Fikree who was the real owner of the suit property. Since that previous suit was dismissed for non-prosecution, it did not come in the way of the rent case brought by Umahani and the legal heirs of Hafsa under the Sindh Rented Premises Ordinance, 1979. By that time, Ebrahim Fikree had passed away. Therefore, in the rent case the Defendant then took the stance that after the demise of Ebrahim Fikree, the Defendant was in possession of the suit property as a co-owner as the son of the pre-deceased son of Ebrahim Fikree. For such declaration, the Defendant also filed Suit No. 163/2007. Therefore, the rent case was dismissed by the Rent Controller by observing that such question to the title to the suit property could best be resolved by a civil court;

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<sup>1</sup> Reliance can be placed on the cases of *Trading Corporation of Pakistan v. Devan Sugar Mills Ltd.* (PLD 2018 SC 828); and *Daan Khan v. Assistant Collector* (2019 CLC 483).

and hence the present suit. In other words, the cause of action of the present suit was the change in circumstances in which the Defendant laid claim to the suit property as a co-owner thereof. Such cause of action had arisen to the Plaintiffs (or their predecessors) during the rent case and after the dismissal of the previous suit. Resultantly, the bar to a second suit contained in Order II Rule 2 CPC is not attracted, as it is settled law that such bar does not arise when the second suit is on a fresh cause of action.<sup>2</sup>

9. However, even though Order II Rule 2 CPC is not attracted, the matter does not end here. The 'cause of action' for a suit is one thing, whereas the relief sought on the basis of that cause of action is another. To submit that the present suit is maintainable, the Plaintiffs' themselves rely on the judgment in the rent case that the matter involved a question to the title of the suit property which could best be resolved by a civil court. Yet, in filing this suit for exclusive possession of the suit property, the Plaintiffs have not prayed for a declaration of their title to the same. It was incumbent on the Plaintiffs to seek a declaration of their title knowing that the Defendant disputed the same. It is been held by the Supreme Court in *Muhammad Aslam v. Ferozi* (PLD 2001 SC 213) and *Sultan Mahmood Shah v. Muhammad Din* (2005 SCMR 1872) that where title of the plaintiffs to the suit property was under question by the defendant, a suit for possession simpliciter without seeking declaration of title, is not maintainable.

10. Since this suit for possession cannot succeed without a declaration of the Plaintiffs' title to the suit property, the plaint is rejected under Order VII Rule 11 CPC with the observation that the Plaintiffs will have a fresh cause of action for exclusive possession of the suit property in the event Suit No. 163/2007 is decided against the Defendant.

**JUDGE**

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<sup>2</sup> *Abdul Hakim v. Saadullah Khan* (PLD 1970 SC 63).