

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. Nil (– 819) of 2021

(Syed Ghulam Sarwar Shah V/S Federation of Pakistan & others)

Date	Order with signature of Judge
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- For orders as to maintainability of Suit :
- For orders on office objection :
- For orders on CMA No.5638/2021 (Stay) :
- For orders on CMA No.5639/2021 (Receiver) :

Plaintiff : Syed Ghulam Sarwar Shah,
through Mr. Muhammad Ali Shaikh, advocate.

Date of hearing : 08.04.2021.

ORDER

NADEEM AKHTAR, J. – The plaintiff has filed this Suit for declaration, cancellation of documents, mutation in the record of rights, mesne profits and permanent injunction with the following prayer :

“ (a) *That, this Honourable Court may be pleased to declare that the plaintiff is a legal, lawful and an exclusive owner of the plot bearing House No.43/Z-1 Block-6 PECH Karachi.*

(b) *That, this Honourable Court may be pleased to declare that the occupation of the defendant No.12 & 13 on the plaintiff's plot (the suit property) as illegal, void, abinitio, unlawful and without lawful justification based on fraud.*

(c) *That, this Honourable Court may be pleased to declare the forged, void, fraudulent sale deeds dated 27.11.1968 and mutation in 1985 and the sub-division in 2017 regarding the suit property bearing House No.43/Z-1 Block-6 PECH Karachi as null, void, abinitio and same may be declared as cancelled.*

(d) *That this Honourable Court may be pleased to restrain the defendants No.12 & 13 to another subsequent sale of the suit property.*

(e) *That, this Honourable Court may be pleased to restrain the defendants from raising any kind of construction in the suit property bearing House No.43/Z-1 Block-6 PECH Karachi through themselves, their servants, employees, legal heir, contractors, worker, agents or agency in any manner.*

(f) *That this Honourable Court may be pleased to direct the defendants No.12 & 13 to pay the mesne profits at the rate of PKR 100,000/- per month since December 1968 till handing over the possession of suit property i.e. House No.43/Z-1 Block-6 PECH Karachi to plaintiff.*

(g) *Any other relief(s) which this Honourable Court deems fit and proper may kindly be awarded to the plaintiff.”*

2. On 26.03.2021, the following order was passed :

“ In paragraphs 4 and 5 of the plaint, it is claimed by the plaintiff that the suit property was purchased by his father Syed Ghulam Rasool Shah from the original lessee Abdus Saeed Baig through a registered sale deed dated 24.09.1968 ; and, in paragraph 9 of the plaint he has claimed that the suit property was gifted to him by his father through an oral gift. In paragraphs 7 and 12 of the plaint, he has alleged that the suit property was illegally transferred / mutated in their names by defendants 12 and 13 on the basis of a sale deed executed and registered in their favour on 29.11.1968 (page 49). He has also alleged in paragraph 12 of the plaint that the said defendants committed fraud in the year 1968 when they got the above sale deed registered in their favour. In view of the above, he has prayed, inter alia, that he may be declared as the exclusive owner of the suit property and the registered sale deed dated 29.11.1968 executed in favour of defendants 12 and 13 be cancelled.

Record shows that the plaintiff has not filed copy of the registered sale deed dated 24.09.1968 allegedly executed and registered in favour of his late father Syed Ghulam Rasool Shah, nor has he filed any document to show that the suit property was gifted to him by his late father during his lifetime. He has also not impleaded other legal heirs of his late father. Moreover, the details of the fraud allegedly committed by defendants 12 and 13 have also not been specifically pleaded or disclosed in the plaint as required under Rule 4 of Order VI CPC. In view of the above, prima facie, the Suit appears to be miserably barred by limitation. The Suit also appears to be barred under Section 42 of the Specific Relief Act, 1877, Rule 4 of Order VI CPC and for non-joinder of necessary parties. Learned counsel for the plaintiff has been heard at some length, however, he requests for time to prepare the brief. He is put on notice to satisfy the Court on the next date of hearing regarding maintainability of this Suit in view of the above. At his request, adjourned to 08.04.2021 at 11:00 a.m. for his further submissions.”

3. Addressing the question of maintainability of the present Suit in view of the above observations, it was contended by learned counsel that despite his best efforts the plaintiff has not been able to locate the sale deed allegedly executed in respect of the suit property in favour of his late father Syed Ghulam Rasool Shah (**‘the deceased’**). Regarding the alleged gift of the suit property by the deceased in favour of the plaintiff, he stated that since the said gift was oral the plaintiff does not have any proof or record thereof. He conceded that in addition to the plaintiff, there are several other surviving legal heirs of the deceased viz. his children. He, however, insisted that the said other legal heirs are not necessary parties to the present Suit as the plaintiff is now the sole and absolute owner of the suit property which was gifted in his favour by the deceased during his lifetime. He submitted that the Suit is not barred by limitation as the cause of action for filing the same accrued to the plaintiff for the

first time in the year 2019–2020 when he came to know about the illegal and fraudulent transfer and mutation of the suit property in favour of defendants 12 and 13, and as such the period of limitation for filing the Suit should be reckoned therefrom. In support of his last submission, he relied upon *National Bank of Pakistan through Attorney / Officer / Original Operation Chief V/S Jalib Saeed, PLD 2007 Quetta 1*, and *Abdul Haleem V/S Messrs Gulshan-e-Faisal Coop. Housing Society Ltd. through Secretary and 5 others, 2016 YLR 1557*.

4. I have heard learned counsel for the plaintiff at considerable length on the question of maintainability of the instant Suit and have also examined the material available on record. It is the case of the plaintiff, as stated by him in paragraphs 4, 5 and 9 of the plaint, that the suit property was purchased by the deceased from the original lessee Abdus Saeed Baig through a registered sale deed dated 24.09.1968, which was subsequently gifted to him by the deceased through an oral gift the date whereof has not been disclosed by him in the plaint. He has alleged in paragraphs 7, 10 and 12 of the plaint that the suit property was illegally transferred / mutated by defendants 12 and 13 in their names in the year 1985 on the basis of a sale deed executed and registered in their favour on 29.11.1968 (**'impugned sale deed'**). He has further alleged in paragraph 12 of the plaint that the said defendants committed fraud in the year 1968 when they got the impugned sale deed registered in their favour which fraud came to his knowledge in the year 2019–2020. He has also alleged in paragraph 10 of the plaint that the suit property was illegally sub-divided in the year 2017, and defendants 12 and 13 tried to sell the same in the year 2019–2020. In paragraph 12 of the plaint, the plaintiff has alleged that the said defendants are in illegal possession of the suit property. He has claimed in paragraph 15 of the plaint that the cause of action for filing this Suit accrued to him for the first time in the year 2019–2020 when he came to know about the impugned sale and transfer of the suit property in favour of defendants 12 and 13. The title of the plaint shows that defendants 12 and 13, who are the main defendants in this Suit, have passed away and they have been sued through their respective legal heirs.

5. The question of limitation involved in the instant Suit, being the fundamental one, shall be taken up and decided first as before exercising jurisdiction in a case, the Court must ensure that the case was instituted within time, and if it is found that the case is barred by limitation then it becomes the duty of the Court to dismiss the same. It is an admitted position that the impugned sale deed executed and registered in favour of defendants 12 and 13 is in the field since 29.11.1968 ; the fraud was allegedly committed by the said defendants in the year 1968 ; the suit property was transferred / mutated in the

names of the said defendants in the year 1985 on the basis of the impugned sale deed, which transfer / mutation is still intact ; the said defendants were in possession of the suit property and now it appears that their legal heirs are in possession thereof as the plaintiff has alleged their possession ; the deceased during his lifetime, and/or the plaintiff after the demise of the deceased, never claimed or asserted any right, title and/or interest in respect of the suit property nor did they challenge the impugned sale deed ; and, the impugned sale deed, which is a registered document, has been challenged by the plaintiff for the first time through the instant Suit instituted on 22.03.2021 i.e. after more than fifty two (52) years of execution and registration thereof.

6. In order to justify the institution of the Suit after more than 52 years, an extremely vague and ambiguous statement has been made by the plaintiff in paragraph 12 of the plaint that the alleged fraud came to his knowledge in the year 2019–2020. He has not bothered to disclose the exact or even an approximate date of such knowledge or to explain why the title of defendants 12 and 13 and the impugned sale deed executed and registered in their favour were not challenged by him during the last 52 years, particularly during the lifetime of the said defendants who are now deceased. Due to this reason, heavy burden was initially and solely on the plaintiff to show that, *prima facie*, the Suit was within time in view of the date of knowledge of the impugned sale and transfer of the suit property ; and, such burden could have been discharged by him only by specifically pleading the facts relating to the date on which and the circumstances in which such knowledge was acquired by him. It may be noted that the impugned sale deed was executed and registered in favour of defendants 12 and 13 admittedly in the year 1968 and the suit property was transferred / mutated in their favour admittedly in the year 1985, whereafter all the bills and receipts in respect of property tax must have been issued and paid in the name of the said defendants who were/are admittedly in possession of the suit property since long. Therefore, the plaintiff was also required to explain why the deceased, and then he himself, did not come to know up till 2019–2020 about the impugned sale, transfer and mutation of the suit property in favour of defendants 12 and 13 because this aspect is directly linked with the alleged date of knowledge. Despite such heavy burden, the plaint is completely silent with regard to the above essential dates and facts to justify the alleged first accrual of the cause of action in the year 2019–2020 or that the Suit is within time. In the absence of the specific date of knowledge of the alleged fraud and the justification by the plaintiff for keeping mum for more than 52 years, it cannot be assumed that the fraud allegedly committed in the year 1968 actually came to his knowledge after more than 51 years in the year 2019–2020. From the above it is clear that the plaintiff has not been able to establish that the

cause of action for filing this Suit accrued to him for the first time in the year 2019–2020, and thus the Suit is miserably barred by limitation.

7. In addition to the above, it is well-settled that if fraud is alleged in a Suit for declaration, it is the duty of the plaintiff, as mandated by Order VI Rule 4 CPC, to plead specifically the particulars of fraud and the circumstances in which the fraud was committed ; where charges of fraud are intended to be made, full particulars thereof ought to be given in the pleadings, either as originally framed or as amended for that purpose ; in pleadings general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice ; and, Order VI Rule 4 CPC provides that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary, full particulars with dates and items shall be stated in the pleadings. The above view is fortified by Mst. Sahib Noor V/S Haji Ahmad, 1988 SCMR 1703, and Jubilee General Insurance Co. Ltd., Karachi V/S Ravi Steel Company, Lahore, PLD 2020 SC 324. Despite the fact that the plaintiff has rested his entire case solely on the fraud allegedly committed by defendants 12 and 13, he has not disclosed / pleaded in the plaint the essential dates, particulars and facts relating thereto. Therefore, the Suit is also barred under Order VI Rule 4 CPC, the provisions whereof are mandatory in nature because of the word “*shall*” used therein.

8. It is also an admitted position that the plaintiff has not filed copy of the registered sale deed dated 24.09.1968 allegedly executed and registered in favour of the deceased, nor has he filed any document to show that the suit property was gifted to him by his late father during his lifetime. Even the date of the alleged gift in his favour has not been disclosed by him in the plaint. If the suit property was purchased by the deceased through a registered instrument as claimed by the plaintiff and such registered instrument was/is not traceable as stated on his behalf, he could have very easily obtained a Search Certificate in respect of the suit property from the Sub-Registrar concerned, which would have reflected the entire history and relevant details of all the instruments registered in respect thereof. However, he has chosen not to do so. He has also not filed any proof of the mutation of the suit property by the competent authorities viz. the Ministry of Housing and Works, Government of Pakistan, and the PECH Society Karachi, either in the name of the deceased on the basis of the alleged registered sale deed or in his own name on the basis of the alleged gift by the deceased. If the above vital

documents and record were not available with him or were not in his possession, he was duty-bound (i) to mention the same in the '*list of documents relied upon*' and such list was to be annexed to the plaint, as required under Order VII Rule 14(2) CPC ; and, (ii) to disclose the particulars of such person(s) or authority(ies) in whose possession or power the said documents and record were, as required under Order VII Rule 15 CPC. It may be noted that the provisions of Rules 14(2) and 15 *ibid* are mandatory in nature because of the word "*shall*" used therein. However, the plaintiff has failed to comply with any of the above mandatory provisions. In the absence of any title document in respect of the suit property in favour of the plaintiff and/or the deceased, the plaintiff cannot be deemed to have any legal character and/or right in respect of the suit property in terms of Section 42 of the Specific Relief Act, 1877. Thus, the Suit is also barred under Section 42 *ibid*.

9. Admittedly, there are several other surviving legal heirs of the deceased viz. his children, who are real siblings of the plaintiff. The said legal heirs have not been impleaded in this Suit by the plaintiff on the pretext that they are not necessary parties as now he is the sole and absolute owner of the suit property by virtue of the alleged oral gift pronounced in his favour by the deceased during his lifetime. The above contention cannot be accepted for the reason that the alleged gift was admittedly oral and as such there is nothing available on record, or even with the plaintiff, to substantiate his claim vis-à-vis the gift ; and, even transfer / mutation of the suit property was never effected by him with the competent authority, which was possible even on the basis of the alleged oral gift by personal appearance of the deceased / donor and the plaintiff / done before the competent authority. Therefore, till the time the alleged oral gift was proven by the plaintiff or admitted by other legal heirs, all the other legal heirs of the deceased were necessary parties to this Suit, which cannot proceed in their absence. In view of the above, the Suit is bad for non-joinder of necessary parties.

10. Before parting with this case, I cannot resist myself from discussing another important and crucial aspect of this case. Perusal of the impugned sale deed dated 24.09.1968 executed and registered in favour of defendants 12 and 13 shows that the same was executed in their favour by the original lessee / vendor viz. Abdus Saeed Baig. It is important to note that the impugned sale deed was not executed by the vendees / defendants 12 and 13 themselves, but was executed on their behalf by none other than the deceased, and the pay order mentioned therein was also handed over to the vendor by the deceased on behalf of the said defendants / vendees. In addition to the above, the deceased had also signed the impugned sale deed as a witness. It is not

mentioned in the impugned sale deed that the deceased had acted as the attorney of the said defendants. Be that as it may, the above important facts completely belie the entire claim of the plaintiff as they clearly show that the deceased, being the signatory as well as a witness, was fully aware of the execution and registration of the impugned sale deed in favour of defendants 12 and 13, who were his real brothers.

11. As a result of the above discussion, it is hereby held that the instant Suit is barred by limitation, and also under Section 42 of the Specific Relief Act, 1877, and Order VI Rule 4 CPC, and is bad for non-joinder of necessary parties. Accordingly, the Suit is liable to be dismissed with costs.

12. Foregoing are the reasons of the short order announced by me on 08.04.2021 whereby this Suit and the listed applications were dismissed with costs of Rs.100,000.00 (Rupees one hundred thousand only). The amount of costs shall be deposited by the plaintiff with the Nazir of this Court within thirty (30) days, which amount shall be transferred / deposited forthwith by the Nazir in the bank account of Edhi Foundation.

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