

THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Adnan Iqbal Chaudhry

Suit No. 2581 of 2014

[Mohsin Ahmad versus Nasreen Irfan and 05 others]

Plaintiff : Mohsin Ahmad through Mr. Muhammad Imtiaz Lari, Advocate.
Defendants 1-5 : Nemo.
Defendant 6 : Agha Asad Abbas Khan through Mr. Khaleeq Ahmed, Advocate.

Suit No. 717 of 2010

[Agha Asad Abbas Khan versus Mst. Nasreen]

Plaintiff : Agha Asad Abbas Khan through Mr. Khaleeq Ahmed.
Defendants : None for Defendant No.1.
Mohsin Ahmad through Mr. Muhammad Imtiaz Lari, Advocate.
Dates of hearing : 12-11-2020 & 10-03-2021
Date of decision : 01-07-2021.

ORDER

Adnan Iqbal Chaudhry J. - The underlying facts are common and therefore the listed applications in both suits are being decided together.

2. The property in dispute is House No. 28-B, 4th East Street, Phase-I, DHA, Karachi, which vested in Syed Ahmed Irfan who passed away on 13-11-1998 (hereinafter 'the Deceased').

3. On 10-05-2010, Agha Asad Abbas (hereinafter 'Asad') filed Suit No. 717/2010 making the following prayer in respect of the suit house:

"A- It may be declared that the plaintiff is lawful owner of the property bearing No: 28-B, 4th East Street, Phase I, DHA, Karachi.

B- *The defendant may be directed to hand over the peaceful vacant possession of the Bungalow bearing No: 28-B, 4th Street, DHA, Karachi to the plaintiff."*

The sole defendant was Nasreen Irfan (hereinafter 'Nasreen'), the daughter of the Deceased. It was Asad's case that the suit house had been mortgaged to him by the Deceased, a close friend, by an unregistered mortgage deed dated 12-03-1996 and by delivering the original title documents thereof to secure a private loan. Per the mortgage deed, if the Deceased does not pay the mortgage money or redeem the property in 14 years, Asad "*shall be lawfully entitled to claim the ownership of the mortgaged property*". It was pleaded that since the Deceased, and then his widow, could not settle the mortgage debt during their lifetime, hence the suit against the surviving daughter of the Deceased, Nasreen. Within a few days, the suit was compromised. Pursuant to the compromise application, Nasreen conceded to the suit, and on receiving consideration agreed to deliver possession of the suit house to Asad. A compromise decree was accordingly passed in Suit No. 717/2010 on 27-05-2010.

4. On 22-12-2014, Mohsin Ahmed (hereinafter 'Mohsin') emerged as the son of the Deceased and filed Suit No. 2581/2014 against his two sisters, including Nasreen, for administration of the suit house. He pleaded that he resided in the USA and was being denied his share in the suit house by Nasreen who was in occupation thereof. By an interim order, the defendants of Suit No. 2581/2014 were restrained from creating third-party interest in the suit house. On 20-03-2015, Asad intervened in Suit No. 2581/2014 with an application for joinder, contending that he was in possession of the suit house pursuant to the compromise decree in Suit No. 717/2010. He was eventually added as a defendant to Suit No. 2581/2014 by order dated 03-12-2018, and filed written statement on 24-10-2019.

5. On discovering the compromise decree in Suit No. 717/2010, Mohsin filed J.M. No. 1/2016 under section 12(2) CPC for setting aside the same on the ground of fraud and misrepresentation for

concealing the other legal heirs of the Deceased who had also inherited the suit house. It was observed by the Court that when Asad had pleaded that he and the Deceased were close friends for many years, it was apparent that he knew that there were other children/legal heirs of the Deceased apart from Nasreen. Therefore, by order dated 05-10-2017, J.M. No. 1/2016 was allowed, the compromise decree passed in Suit No. 717/2010 was set-aside, Suit No. 717/2010 was reopened and Asad was directed “..... to implead all the legal heirs of the deceased Syed Ahmed Irfan in Suit No.717/2010 and file amended plaint within fifteen days”.

6. Suit No. 717/2010 was fixed in Court by the office on 03-11-2017 soliciting further orders inasmuch as Asad did not comply with the aforesaid direction dated 05-10-2017 to file amended plaint within fifteen days. None appeared before the Court on that date and the suit was adjourned with the observation that it may be dismissed for non-prosecution if compliance is not made by the next date. The suit was again fixed in Court for further orders on 02-04-2018 as the required compliance had not been made; thus Suit No. 717/2010 was dismissed with the following order:

“None present. The order dated 05.10.2017 passed in J.M. No.01/2016, copy of which is on record, shows that after grant of application under Section 12(2) CPC, the plaintiff had been directed to file amended plaint within 15 days after impleading all the legal heirs of the deceased Syed Ahmed Irfan. The order sheet shows that such order has not been complied with till date. In the circumstances, and in view of the order dated 03.11.2017, the instant suit is dismissed for non-prosecution”.

CMA No.12209/2020 in Suit No. 717/2010

7. CMA No. 12209/2020 in Suit No. 717/2010 is an application under section 151 CPC by Asad (Plaintiff) for re-calling the order dated 02-04-2018 whereby said suit was dismissed for non-prosecution. The ground taken in the application is that he was unwell and therefore could not contact his counsel for compliance of the aforesaid direction; that due to his illness, he could not appear before

the Court on the day it was dismissed; and that the dismissal of the suit on 02-04-2018 came to his knowledge much later. The application for restoration of the suit moved on 07-11-2020 is after more than 2 ½ years of dismissal of the suit. Mr. Khaleeq Ahmed, learned counsel for Asad, submitted that limitation was governed by Article 181 of the Limitation Act, which prescribes a period of three years, and hence the application was within time. He further submitted that the suit could not have been dismissed for non-prosecution when it was not fixed 'for hearing', as so held in *Muhammad Tariq v. Hasin Jehan* (1993 SCMR 1949). On the other hand, Mr. Mazhar Imtiaz Lari, learned counsel for Mohsin, submitted that the suit had been dismissed for non-compliance, not for non-appearance, and therefore it did not matter that it was not fixed 'for hearing'; that the record reflects that the Plaintiff had knowledge of the date of dismissal; that the application was hopelessly time-barred, and was an attempt to hold on to unlawful possession of the suit house.

8. Heard the learned counsel and perused the record.

9. To recap, the compromise decree passed in Suit No. 717/2010 was set-aside under section 12(2) CPC by order dated 05-10-2017 passed in J.M. No. 1/2016, and Suit No. 717/2010 was re-opened with the direction to Asad "to implead all the legal heirs of the deceased Syed Ahmed Irfan in Suit No. 717/2010 and file amended plaint within fifteen days". No appeal was filed against said order, nor was compliance made of the direction given thereby.

The order dated 02-04-2018 passed in Suit No. 717/2010 manifests that the suit was dismissed, not for non-appearance of the plaintiff, but for non-compliance of the direction to implead other legal heirs of the Deceased and to file an amended plaint within fifteen days. It is apparent that said direction was given to ensure not only that the other legal heirs of the Deceased who were co-owners of the suit house, are made parties to the suit, but also that summons to them are positively issued right after 15 days. That latter requirement was the essence of the direction and the amended plaint was only the

means to that end. The consequence of not processing summons within the given time is that the plaint can be struck off as set-out in Rule 128 of the Sindh Chief Court Rules (O.S.) as under:

“128. Time for payment of process fee and consequence of non-payment.- Process fees for the issue of summons, notice or other process and costs of advertisements shall be paid to the Nazir within seven days from the order directing such summons, notice, process or advertisement to issue or within such further time as may be allowed by an order in writing of the Registrar, (O.S.). In default of such payment, the plaint or application shall be struck off by the Registrar (O.S.), who shall make an endorsement to that effect on the plaint or application and sign it. The plaintiff or applicant or his advocate presenting the plaint or application is expected to ascertain and shall be presumed to know the date of the order directing the issue of the process or advertisement.”

In my view, in circumstances where it had already been held that Suit No. 717/2010 could not be determined without joining and summoning the other co-owners of the suit house, there was no difference between dismissing the suit for non-prosecution and striking off the plaint when the required compliance had not been made.¹

10. Mr. Khaleeq Ahmed, learned counsel for Asad had submitted that the suit could not have been dismissed when it was not fixed ‘for hearing’. Again, that argument would have been worthwhile had the suit been dismissed for non-appearance under Rules 3 or 8 of Order IX CPC, which provisions envisage a suit called on ‘for hearing’² before it can be dismissed for non-appearance. But that is not the case here. For obvious reasons, the words ‘for hearing’ do not appear in Rule 128 of the Sindh Chief Court Rules (O.S.), or for that matter in Rule 2 of Order IX CPC. The case of *Muhammad Tariq v. Hasin Jehan* (1993 SCMR 1949) cited by learned counsel, does not help him. In that case the underlying suit was fixed for hearing of the injunction application when it was dismissed citing Rule 8 of Order IX CPC, and

¹ Note that under Order IX Rule 2 CPC, failure to pay process fee also entails a dismissal of the suit.

² As to the meaning of the words ‘for hearing’ appearing in Rules 3 and 8 of Order IX CPC, see *Abdul Latif v. Aqeel Ahmed* (2006 SCMR 789).

therefore it was held by the Supreme Court that at best the injunction application could have been dismissed and not the suit.

11. Adverting now to the limitation of the restoration application. Though Suit No. 717/2010 was dismissed as far back as 02-04-2018, the application for its restoration was moved on 07-11-2020. The reason for the delay cited in the application is that Asad (the plaintiff) was unwell and came to know of the dismissal of the suit much later. The ground taken is *ex facie* frivolous. Firstly, the medical record filed with the application does not show that Asad was in any way incapacitated. In fact, most of the medical record does not even relate to the relevant period. Secondly, the dismissal of Suit No. 717/2010 was categorically pleaded by Mohsin in his receiver application dated 14-09-2018 filed in Suit No. 2581/2014, to which Asad had filed counter-affidavit on 24-10-2019, and which was sworn by him in person before the affidavit branch of this Court despite is alleged illness. Therefore, clearly, Asad had prior knowledge of the dismissal of his Suit No. 717/2010.

12. Nonetheless, Asad has not sought condonation of delay in making the restoration application as it is submitted on his behalf that the restoration application is within the limitation of 3 years prescribed by Article 181 of the Limitation Act. While learned counsel did not support such submission with any case-law, it has been held by a learned Division Bench of this Court in *Sabzal v. Bingo* (1989 CLC 656), and also observed by the Supreme Court in *Honda Atlas Cars (Pakistan) Ltd. v. Honda Sarhad (Pvt.) Ltd.* (2005 SCMR 609), and *Mian Muhammad Asif v. Fahad* (2009 SCMR 1030), that limitation for an application for restoration of a suit dismissed for non-prosecution, is not governed by Article 181, but by Article 163 of the Limitation Act, 1908 which reads as under:

Description of application	Period of limitation	Time from which period begins to run
163.— By a plaintiff, for an order to set aside a dismissal for default	Thirty days	The date of the dismissal

of appearance or for failure to pay costs of service of process or to furnish security for costs.		
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13. In view of the foregoing, CMA No. 12209/2020 viz., the application for restoration of Suit No. 717/2010, is dismissed as time-barred by 2 years and 6 months or so.

CMA No.17431/2014; CMA No. 12929/2018; and CMA No. 12213/2020 in Suit No. 2581/2014:

14. By CMA No. 12213/2020 in Suit No. 2581/2014, Asad (Defendant No.6), prays for rejection of the amended plaint on the ground that the same is filed without permission of the Court. The application is misconceived. The permission to file amended plaint was granted by order dated 03-12-2018. Therefore, **CMA No. 12213/2020 is dismissed in limine.**

15. By CMA No.17431/2014, Mohsin (the Plaintiff) prays to restrain the Defendants 1, 3 to 5 from creating any third-party interest in the suit house pending suit. By CMA No. 12929/2018 under Order XL Rule 1 CPC, Mohsin (the Plaintiff) prays for appointing the Nazir as receiver of the suit house. Mr. Mazhar Imtiaz Lari, learned counsel for Mohsin, submitted that after the compromise decree in Suit No. 717/2010 had been set-aside as having been obtained by fraud and misrepresentation, Asad was a mere trespasser on the suit house, and hence the Nazir be appointed receiver to take over its possession for its administration. On the other hand, Mr. Khaleeq Ahmed, learned counsel for Asad, submitted that he had been put in possession of the suit house by Nasreen, who had held out to be the sole heir of the Deceased, and who had taken valuable consideration for delivering possession of the suit house.

16. That the suit house vested in the Deceased at the time he passed away, and that it's title still stands in the name of the Deceased, is an undisputed fact. Therefore, to determine the receiver application, or for that matter the passing of a preliminary decree

under Order XX Rule 13 CPC as this is a suit for administration, I proceed to examine *prima facie* Asad's claim to the suit house, and whether he has a case for retaining its possession.

17. Admittedly, possession of the suit house was given to Asad by Nasreen (daughter of the Deceased) pursuant to the compromise decree dated 05-10-2017 passed in Suit No. 717/2010. Since that decree was set-aside as having been obtained by fraud and misrepresentation practiced by both parties to that suit, that decree cannot give Asad a ground to retain possession of the suit house. It is settled law that a person cannot take advantage of his own wrong. Mr. Khaleeq Ahmed Advocate had then contended that pursuant to the compromise decree, Asad had paid valuable consideration to Nasreen for the suit house. While Nasreen has not entered appearance to confirm such receipt, but even if that consideration is proved, that can at best be taken to be consideration for her share in the suit house, and till such time she executes a registered deed to transfer her share to Asad, the provision of section 44 of the Transfer of Property Act is also not triggered so as to enable him to claim that he is a transferee from a co-owner. Even if Asad were to subsequently become a transferee from Nasreen, he still cannot resist a suit brought by another co-owner for administration of the suit house.

18. This brings us to the last leg of Asad's contention, viz. that he became owner of the suit house by virtue of clause 5 of the alleged mortgage deed executed by the Deceased in his favor which stipulated that if the Deceased does not pay the mortgage money or redeem the mortgaged property in 14 years, he (Asad) "*shall be lawfully entitled to claim the ownership of the mortgaged property*". Though Asad's suit seeking a declaration to that end, has been dismissed for non-prosecution, he has taken the same plea in defence of Suit No. 2581/2014. But then, the right of a mortgagor to redeem his property, a right founded in equity, is also protected by statute in section 60 of the Transfer of Property Act, 1882, provided that such right is not extinguished by the act of parties or by decree of a Court.

It is for this reason it has been held by the superior courts time and again that any stipulation in a mortgage deed that the mortgagee would become owner or vendee of the property if the mortgage money is not paid, is a clog on the right/equity of redemption, repugnant to law and hence void.³ It has never been Asad's case that the alleged mortgage was a mortgage by conditional sale, or that he was delivered possession by the mortgagor, or that the mortgagor's right to redeem the property, now vesting in his legal heirs, has been extinguished. Therefore, even assuming that the Deceased had executed the alleged mortgage deed in favor of Asad, that does not entitle him to claim ownership or possession of the suit house. As mortgagee, he could at best have sued for sale of the mortgaged property to recover the mortgage money in terms of sections 67 and 68 of the Transfer of Property Act, 1882.

19. While it is for Asad to consider whether the aforesaid remedy is presently available to him, but on any view of the matter, be that at the instance of Asad as mortgagee or creditor of the Deceased, or at the instance of Mohsin as a legal heir of the Deceased, the suit house will have to be put up for sale. Whether Asad can then lay claim to any part of the sale proceeds on any of the premise discussed above, is a question that can be examined subsequently and before the disbursement of the sale proceeds.

20. The upshot of the above discussion is that Asad has no legal basis to retain possession of the suit house, nor any legal basis to oppose a preliminary decree for administration of the suit house belonging to the Deceased, to which there is otherwise also no impediment. Therefore, CMA No.17431/2014 and CMA No. 12929/2018 in Suit No. 2581/2014 are disposed of by passing a preliminary decree appointing the Nazir of this Court as

³ *Khushi Muhammad v. Muhammad Ashfaq* (PLD 2014 Lahore 26); *Muhammad Akhtar v. Siani* (2011 CLC 1218); *Muhammad Hassan Qureshi v. Muhammad Sharif* (2007 CLC 1438); *Moula Bakhsh v. Alfaz Hussain* (2006 YLR 956); *Abdul Lateef v. Ashique Ali* (PLD 2006 Karachi 404); and *Suleman v. Custodian Evacuee Property* (PLD 1971 Lahore 77).

Administrator of House No. 28-B, 4th East Street, Phase-I, DHA, Karachi, in the following terms:

- (i) The Nazir shall be and is hereby appointed the receiver of the suit house with all powers specified in Order XL Rule 1 CPC. Aga Asad Abbas and all persons claiming under him shall deliver up peaceful vacant possession of the suit house to the Nazir together with all title documents and other record relating thereto. If such possession is not delivered within 25 days, the Nazir will be free to obtain police aid.
- (ii) The other terms of the preliminary decree shall be as per clauses 3, 5, 7, 10(b), 10(c), 11 to 15 of Form No.17, Appendix D, Schedule I to the CPC.

The Additional Registrar shall take proceedings for fixing the suit for settlement of issues.

JUDGE

Karachi:
Dated: 01-07-2021