

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 779 of 2012

Date	Order with signature of Judge
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Mr. Muhammad Ishrat Ghazali, advocate for the plaintiff.

Mr. Shabbir Ahmed Shaikh, advocate for defendant No.1.

Mr. Tanvir Ahmed, advocate for defendants 4 and 5.

Mr. Ziauddin Junejo, AAG for Board of Revenue.

Dates of hearing :08.09.2015, 01.10.2015 and 25.04.2016.

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ORDER

NADEEM AKHTAR, J. – This Suit has been filed by the plaintiff against the defendants for declaration, permanent injunction, cancellation of documents, rendition of accounts and mesne profits. On 08.09.2015 when this matter was listed for hearing of miscellaneous applications, learned counsel for the plaintiff was put on notice to satisfy the Court on the next date as to how this Suit is maintainable and why the plaint should not be rejected under the principle of *res judicata*. This direction was given in view of Suit No.1360/2011 (new Suit No.45/2002) filed by the present plaintiff against the present defendant No.1 under the Summary Chapter of CPC, which has been mentioned by her in paragraph 9 of the plaint of the instant Suit and copy whereof has been filed by her along with the plaint ; and, in the said paragraph 9 she has also pleaded that the dispute between her and defendant No.1 was referred to arbitration.

2. The case of the plaintiff, as averred in the plaint, is that she is the real daughter and one of the legal heirs of late Shaikh Zamiruddin Ahmed ('the deceased'), in whose favour 16-00 acres of land in Na-Class No.308, Deh Joreji, Taluka Karachi East ('the suit property'), was leased in the year 1974-1975 for a period of ten years for poultry farming ; defendant No.1, being the real son, is also the legal heir of the deceased ; after the demise of the deceased, the suit property was transferred on 02.09.1981 in the name of his seven legal heirs, including the plaintiff and defendant No.1; by virtue of such transfer, plaintiff became the owner of 2-00 acres out of 16-00 acres ; vide order dated 20.05.1992 and entry dated 20.10.1992, the lease of the suit property in favour of all the seven legal heirs was extended for a further period of thirty years commencing from 1983-1984 ; vide order dated 27.09.1992 passed by

the D.C. Karachi East, the shares of four legal heirs / daughters, including the plaintiff, were transferred in favour of defendant No.1 ; this transfer was managed by defendant No.1 without the consent or knowledge of the said legal heirs and by committing fraud upon them ; vide order dated 27.09.1992 passed by the D.C. Malir, the lease of the suit property was converted into that of 99 years in favour of defendant No.1 ; the plaintiff filed an appeal under Section 161 of the Land Revenue Act, 1967, against the order of transfer of shares of four legal heirs / sisters in favour of defendant No.1, which was allowed vide order dated 14.07.2008, and accordingly the entry in the name of defendant No.1 was cancelled and the entry in the names of all seven legal heirs was restored ; against the above order, defendant No.1 filed C.P. No.D-871/2009 before this Court without impleading the plaintiff, however, she was impleaded therein upon her application ; on 08.04.2011, the said petition was withdrawn by defendant No.1, and as such the above order attained finality ; and, through the impugned order dated 01.11.2011 passed by the Secretary Land Utilization Department, Government of Sindh, the lease of the entire 16-00 acres of the suit property has been regularized in favour of defendant No.1 subject to payment of differential amount by him.

3. In view of the above averments and allegations, the plaintiff has prayed for declarations that she is the lawful owner of the suit property to the extent of 2-00 acres, the impugned order dated 01.11.2011 is malafide and illegal, and the agreement dated 30.06.2008 in respect of the suit property between defendant No.1 and defendants 4 and 5 is a fabricated document having no legal effect. She has further prayed that all entries, transactions, documents, orders and any superstructure built in pursuance of the impugned order, be cancelled ; 2-00 acres of land out of the suit property belonging to her be handed over to her after partitioning the suit property ; and, defendant No.1 be directed to pay mesne profits and compensation to her to the tune of Rs.26,000,000.00 and also to render accounts since 1992. Consequential relief of injunction and appointment of receiver has also been sought by the plaintiff.

4. On the point of maintainability of the Suit, Mr. Ishrat Ghazali, learned counsel for the plaintiff, contended that the illegal title of defendant No.1 was cancelled vide order passed on 14.07.2008 in the appeal filed by the plaintiff under Section 161 of the Land Revenue Act, 1967, which order attained finality long ago. He further contended that as a result of such cancellation, the joint ownership of all the legal heirs, including the plaintiff, stood restored. He argued that due to this reason alone, the plaintiff has the legal character and right in terms of Section 42 of the Specific Relief Act, 1877, to seek the declarations sought in this Suit. Regarding the arbitration between the parties, he contended

that the same were not arbitration proceedings in *stricto sensu*, but was a family settlement which never materialized as the cheques issued in pursuance thereof by defendant No.1 were dishonoured due to which the plaintiff had to file a Suit against him under the Summary Chapter of CPC. He argued that due to this reason, the principle of *res judicata* will not apply to the facts and circumstances pleaded in the plaint.

5. On the contrary, Mr. Shabbir Ahmed Shaikh, learned counsel for defendant No.1, contended that the shares of the other legal heirs, including that of the plaintiff, were purchased by defendant No.1 for valuable consideration and the plaintiff executed a receipt in respect of her share. He further contended that after receiving consideration in lieu of their shares, the legal heirs, including the plaintiff, filed an application before the competent authority seeking transfer of the suit property in favour of defendant No.1. He submitted that the fact that the Suit filed by the plaintiff under the Summary Chapter was dismissed for non-prosecution and she did not seek its restoration or file an appeal, shows that she had received the agreed consideration against her share in the suit property. He further submitted that the arbitration proceedings and the award of the arbitrator are binding upon the plaintiff, and she cannot be allowed to approbate and reprobate, especially in view of the contents of the plaint filed by her under the Summary Chapter and the affidavit sworn by the arbitrator. It was urged that in view of the award in arbitration proceedings, which was not challenged by the plaintiff, this Suit is clearly hit by the principle of *res judicata*. In support of this submission, he relied upon (1) Muhammad Akbar V/S Muhammad Tariq and 6 others, **2014 YLR 2218**, (2) Port Services Company Ltd. V/S Port Services (Pvt.) Ltd., through Chief Executive and others, **2006 CLC 303**, and (3) Messrs Hasan Ali Rice Export Co. through Sole Proprietor V/S Flame Maritime Limited and another, **2004 CLD 334**.

6. Mr. Tanvir Ahmed, learned counsel for defendants 4 and 5, adopted the arguments advanced by the learned counsel for defendant No.1.

7. I have heard the learned counsel for the parties at length and have also examined the material available on record. It is clear from the pleadings and contentions of the plaintiff and defendant No.1 that there is a factual controversy with regard to the arbitration proceedings and the events subsequent thereto. The questions whether there was a private settlement between the parties or the matter was resolved through arbitration and whether the parties complied with the settlement / award or the dispute is still alive, cannot be decided without evidence. The order dated 14.07.2008 passed in the appeal filed by the plaintiff under Section 161 of the Land Revenue Act, 1967,

whereby the entry in the name of defendant No.1 was cancelled and the entry in the names of all seven legal heirs was restored, was passed after the purported settlement / award. Therefore, the effect of the said order on the ownership claimed by both the parties will have to be examined. It is my considered view that the principle of *res judicata* cannot be applied to the instant case unless defendant No.1 successfully proves that arbitration proceedings did take place and the issues raised and the reliefs sought in the instant Suit were conclusively decided in such arbitration proceedings. The plaintiff cannot be non-suited at this stage in the absence of the above. Needless to say that defendant No.1 will have all the opportunity at the time of evidence to prove that the plaintiff is not entitled to the relief prayed for.

8. In my humble opinion, apart from the above the other issues raised by the parties in their pleadings and the allegations and counter allegations made by them against each other clearly indicate that they are at variance on questions of fact which cannot be resolved without allowing them to adduce evidence in support of their respective claims. Therefore, I am of the view that the plaint cannot be rejected in these circumstances without affording opportunity to the parties to adduce evidence and without providing them chance of hearing. This view expressed by me is supported by (1) Q.B.E. Insurance (International) Ltd. V/S Jaffar Flour and Oil Mills Ltd. and others, 2008 SCMR 1037, (2) Mst. Karim Bibi and others V/S Zubair and others, 1993 SCMR 2039, (3) Muhammad Younis Arvi V/S Muhammad Aslam and 16 others, 2012 CLC 1445 (Supreme Court AJ&K) and (4) Muhammad Afzal V/S Muhammad Manzoor and 40 others, 2013 YLR 85 (Supreme Court AJ&K).

9. In view of the above, the plaint cannot be rejected on the ground discussed hereinabove. Since the question of maintainability of the Suit arose during the hearing of miscellaneous applications, office is directed not to treat this case as a part-heard matter and to list it for hearing according to roster.

J U D G E