

**IN THE HIGH COURT OF SINDH AT KARACHI**

**SUIT NO.435/2019**

Plaintiff : Arif Siddik Adam.

Defendants : Siddiki Fund Trust and others.

**APPEARANCE:**

Ms. Mahreen Ibrahim advocate for plaintiff.

M/s. Abdul Sattar Pirzada and Mamoon Choudhri, advocates for defendants No.1 to 3.

Mr. Ghulam Shabbir Shaikh advocate for Board of Revenue.

Ms. Saba Siddiqui advocate for SBCA.

Mr. Sheharyar Qazi, Additional A. G.

Date of hearing : 22<sup>nd</sup> November and 1<sup>st</sup> December, 2021.

Date of short order : 1<sup>st</sup> December, 2021.

**ORDER**

**SALAHUDDIN PANHWAR, J.** By the dint of this order, I decide injunction application (CMA No.3564/2019), filed by the plaintiff wherein praying therein that:

*“To permanently restrain defendants No. 1 to 5, their agents, representatives, attorneys or any person(s) acting on their behalf from creating third party interest in respect of Plot Nos.50/3, 50/2/1, 50/2/2, 50/2/3 and 50/2/5 which were amalgamated and renumbered and measured as residential open plot Nos.50/3/1 measuring 5558.5 square yards and 50/2/2 measuring 5558.5 square yards, total measuring 11117 square yards, situated at Garden East Quarters, Karachi, restraining defendant No.6 to approve the building plan in respect of above plot.”*

2. Precisely relevant facts, as set out in the plaint, are that grandfather of plaintiff Haji Adam created fund in the year 1939 and established *Waqf-ul-Aulad* under the name “**Siddiqui Fund Trust**” having different properties situated in India; thereafter he migrated to Pakistan and established *Waqf-ul-Aulad* in continuity of earlier trust

deed, in the year 1957; thereafter he passed away on 24.10.1957; that the trust properties cannot be alienated or divided in view of trust deed however defendant No.2 transferred his property in favour of defendant No.3, his son, therefore it is prayed that plaintiff shall be joined as trustee after death of plaintiff's father as he was one of the trustees of defendant No.1.

3. Whereas defendants No.1 to 3 have filed written statement contending therein that trusts created in Kathiawar, India, are not applicable in respect of defendant No.1; that terms referred in the deed are not precluded or limit, restrain a trustee from selling or alienating the subject matter properties. Besides, it is seriously emphasized that the plaintiff executed power of attorney and transferred the subject matter property in favour of defendant No.3 with that mandate in registered power of attorney, thereafter conveyance deed was partly executed in respect of subject matter property on 16.02.2015 with the Registrar, Jamshed Town; accordingly respective share of each beneficiary including that of plaintiff were distributed, received by plaintiff on 17.12.2014. It is further contended that unanimously trustees rendered to transfer the subject matter property in favour of defendant No.3 and that is not distributed hence they are barred to take a U-turn under the law of estoppel.

4. Learned counsel for plaintiff while agitating her pleadings, contends that trust also reflects orphanage center to be established hence they shall be considered as created under the Religious/Pious/Charitable purpose including benefits to legal heirs. She referred section 193 of the Muhammadan Law as well as section 203 and 204; also she relied upon 2003 CLC 771 and 2014 MLD 1269.

5. In contra, Mr. Pirzada contends that clauses of trust are contingent in nature and not in nature of trust deed cannot be termed as charitable. He has relied upon AIR 1952 Allahabad 127. Further he contends that trust deed as referred by the plaintiff cannot be termed as trust property; that he has also emphasized over legal notices issued by the plaintiff on the plea that both legal notices are contradictory; plaintiff has failed to challenge the power of attorney therefore suit is also barred under the law and same may be dismissed in its inception; he has referred article 122 and 91 of the Limitation Act while arguing that plaintiff's father died in 2000 but present suit is filed in 2019 as well admittedly transfer of property was transferred in 2014 and limitation was only 3 years therefore suit is barred by law. Learned counsel for defendants No.1 and 3 has relied upon 2014 CLC 1299 (Sindh), 2013 PLC (CS) 768, 2010 MLD 1267 (Karachi), 2007 CLC 339 (Karachi), 2017 YLR 1039, 2013 YLR 2243, 2010 YLR 2790, PLD 2003 Karachi 222, AIR 1963 Punjab 104, 2003 MLD 1095, 1993 SCMR 462 and 2007 CLC 339.

6. At the outset, the legal principles for deciding the injunction application (s) need to be reiterated *first*. Legally, there is no denial to well established position, so iterated in case of *PURI TERMINAL LTD. versus GOVERNMENT OF PAKISTAN* 2004 SCMR 1092 that:-

*“21. No doubt an injunction is a form of equitable relief and is to be issued in aid of equity and justice, but not to add injustice. For grant of such relief, it is mandatory to establish that in order to obtain an interim injunction, the applicant has not only to establish that he has a prima facie case, but he has also to show that the balance of convenience is on his side and that he would suffer irreparable injury / loss unless he is protected during the pendency of suit.”*

The above legal position leaves nothing ambiguous that all required ingredients i.e **prima facie case; balance of convenience & irreparable loss** must be shown to be co-existing. The said position as well said ingredients are reaffirmed and defined in the case of Feroz Ali Gaba v. Fishermen's Cooperative Society Ltd. & 2 others 2015 CLC 493 as:-

“8. Before going any further on merits of the instant application (s), it would be just, proper and necessary to mention that an injunction is not to be granted where the party, claiming injunction, fails in establishing co-existence of all three required ingredients for grant of injunction which are ‘prima facie case, balance of inconvenience and irreparable loss / injury’. It is always necessary to give due meaning and weight to each ingredient because each is not simply a word but a circumstance showing existence of some fact to a prudent mind. It is not the claimed rights, convenience of a party or investment and even an apprehension of some loss or injury but what shall make one entitled for grant of injunction is:-

- (i) **Prima facie case is existence of legal right** which should appear to a prudent mind with a probability of success at the end of the day;
- (ii) **Balance of inconvenience is existence of circumstance (s)** through which the plaintiff establishes that his inconvenience shall be greater than that of opposite party if injunction is not granted;
- (iii) **Irreparable loss / injury** do not refer to a damage or loss which can be ascertained or compensated but to such an injury which cannot be adequately compensated.

It should always be kept in mind that plaintiff has to establish co-existence of all said ingredients through pleading, document (s) attached therewith and affidavit, so sworn in support of the injunction application. Through discretionary powers, including Under Order XXXIX Rules 1 and 2 C.P.C. the Court is bound to protect legal rights, their infringements, malafide exercise of jurisdiction by an authority but such discretion should always to be used in aid of justice, equity and fair play but not in aid of a prima facie illegality or improper relief.

Having reaffirmed the above legal position, now it is the time to examine the case of the plaintiff whether plaintiff satisfies co-existence of all required ingredients for grant of injunction or *otherwise?*.

7. *Prima facie*, the plaintiff has taken different plea (s) so as to establish the **Trust** but what the plaintiff does not dispute is the execution of '**General Power of Attorney**' (Annexure-A/4 of plaint) with plea that same was executed to save plot Nos.50/3/1 and 50/3/2 area 11117 Sq.yards from encroachment as well from land grabbers. The perusal of the General Power of Attorney shows purpose thereof as:-

“.... due to unavoidable circumstances the parties of the first part are unable to utilize the said plots and **as such they have agreed to transfer the said plots to one of the decedents of one of the Trustees of this Trust hereinafter referred to as the said property.**

The said power of attorney further shows:

“To possess manage and look after the above said property, to pay the CDGK, KDA(WING), KMC, Builders, dues and other relevant charges, **to execute and admit execution of any Deed including Lease Deed, Sub-Lease, Sale Deed, Mortgage Deed.....**

“To demolish any existing structure on the said property and to rebuild whole or part of the same for the purposes of letting it hire or otherwise in accordance with approved.....

To sell, mortgage, charge, encumber and to convey or transfer the said property by way of Gift (whether registered or Hiba Bilwa Ewas as the case may be) or otherwise dispose off in manner whatsoever with or without building and structure thereon at such time in such manner for such consideration and to such person as my said Attorney may in his / her sole, absolute and unfettered

discretion may deem, proper, desirable and for the purpose aforesaid to execute the necessary Deed of .....

8. The above conditions of undisputed Power of Attorney, *prima facie*, show that it was purposefully executed by all including the present plaintiff whereby the attorney was given specific and categorical powers and authorities to make transfer of subject matter, therefore, legally the plaintiff can't take an exception to his own acts which he *himself* agreed, particularly when no declaration or cancellation of such document is sought in the relief (s). Thus, it is quite *safe* to conclude the plaintiff does not have a *prima facie case* nor balance of convenience in his favour for grant of injunction because the possession stood delivered to the defendant No.3 who, *even*, has processed further for construction.

On the other hand, the sale has been in consequence to such power of attorney which, *too*, is claimed against valuable consideration therefore, *prima facie case*, flows in favour of the defendant.

9. Further, the defendants claimed to have shared / distributed shares among the **Principals**, including the present plaintiff, therefore, the right of the plaintiff to claim such share, if not received, was / is alive. Thus, it is quite safe to say that the ground of **irreparable loss** is also not flowing in favour of the present plaintiff. Not only this, but *prima facie* the sale was / is in favour of the defendant no.3 who does qualify within meaning of **male descendent** hence even plea that trust was

established for the benefit of **male descendants** is of no help for the plaintiff.

10. The above discussion makes it quite obvious that the plaintiff has failed to make out a case for grant of injunction in his favour hence application for grant of injunction, *prima facie*, fails. Accordingly, the same (CMA No.3564/2019) is hereby dismissed.

**J U D G E**

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