

## IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Muhammad Shafi Siddiqui

Mr. Justice Omar Sial

### High Court Appeal No. 418 of 2017

**Tazeen Manzoor & others** ..... Appellants

vs.

**Mansoor Akbar & others** ..... Respondents

<><><><>

### High Court Appeal No. 429 of 2017

**Raza Ahmed** ..... Appellant

vs.

**Mansoor Akbar & others** ..... Respondents

<><><><>

### High Court Appeal No. 438 of 2017

**Mansoor Akbar** ..... Appellant

vs.

**Raza Ahmed & others** ..... Respondents

<><><><>

Mr. Abbadul Hasnain, Advocate for appellant in HCA No.438/2017 and for respondent No.1 in HCA Nos.418 & 429 of 2017.

Ms. Kinza Raza in person on behalf of appellant in HCA No.429/2017 and for respondent No.1 in HCA No.438/2017 and for respondent No.2 in HCA No.418/2017.

Mr. Sandeep Molani, A.A.G. Sindh.

Date of hearing: 26.02.2024

Date of short order: 26.02.2024

Date of reasons: 14.03.2024

### JUDGMENT

**OMAR SIAL, J:** Suit No. 668 of 2013 was filed by Mansoor Akbar (Appellant in HCA 438) for declaration, partition, injunction & appointment of receiver. Defendants Raza Ahmed, Ms. Tazeen Manzoor and Ms. Shireen Sultan are

legal heirs of Manzoor Ahmed owner of Property Unit No. 29, Street FT-2, Old NJ/127, Frere Town, Karachi. He during his life time executed a registered declaration of confirmation of oral gift in favour of Mst. Zubaida (wife), Tazeen (daughter) and Shireen (daughter). Subsequently Zubaida died. Mansoor Akber entered into agreement for purchase of share of Raza Ahmed in respect of share derived by him from his mother (Zubaida) and paid sale consideration. Till 17.05.2013 plaintiff enjoyed equal status in all respect in the demised property as the joint owner of undivided property and thereafter such status was refused.

2. During trial Raza Ahmed filed written statement followed by CMA No. 15385 of 2014 for amendment in written statement which was dismissed and CMA No. 8772 of 2017 for site inspection was allowed by the learned Single Judge through impugned order dated 10.10.2017.

3. Tazeen Manzoor, Shireen Sultan and Zulfiqar Ali (Defendants 2 to 4 in suit) have jointly filed HCA No.418/2017 with prayer to set aside the impugned order passed on CMA No. 15385/2014.

4. Raza Ahmed (Defendant No.1) filed HCA 429/2017 with prayer to set aside the impugned order, allow CMA No. 15385/2014 for amendment in WS.

5. Mansoor Akbar (Plaintiff) filed HCA No. 438 of 2017 with prayer to set aside the last paragraph of impugned order and issue direction decide CMA No. 12783/2014 along with CMA No. 15385/2014.

6. We have heard the learned counsels and perused the record. Our observations and findings are as follows.

7. Raza's counsel at trial, argued that the initial written statement had been filed due to misrepresentation and fraud. Learned counsel in appeal was unable to divulge clearly what the fraud and misrepresentation was and who had committed it. At the end of the day, it was Raza Ahmed himself who had sworn and verified the pleading and filed it himself. Surely, he would have been aware that numerous allegedly important details had been excluded from its content. It seems that the entire blame for the fiasco was put on the former counsel who appeared for Raza.

8. We have gone through the amendments sought by Raza Ahmed to the original written statement. A bird's eye view of the amendments sought is as follows:

<p><b><i>That the contents of para 11 of the plaint are partly admitted to the extent of the fact that Plaintiff approached the Plaintiff to buy the share of the answering Defendant and the execution of the agreement in this respect</i></b></p>	<p>That the contents of para 11 <b><u>of the plaint are absolutely false, baseless hence not admitted and vehemently denied.</u></b> It is submitted that Defendant No.1 and Plaintiff are follower of one Mian Mohammad Ismail and Defendant No.1 is keeping high respect for him who used to attend his followers at Khando Got h Block B North Nazimabad, Karachi before whom Defendant No.1 disclosed his disputes with his sisters pending in Suit No. 354/2013 in this Hon'ble Court, Mian Muhammad Ismail introduced the Defendant No.1 with Plaintiff and advised the Defendant No.1 to hand over all his affairs in respect of Suit No. 354/2013 to Plaintiff therefore, Defendant No.1 on trusting upon the Plaintiff appointed him as his attorney in Suit No. 354/2013.</p> <p>The Defendant No.1 also executed a Power of Attorney in favour of Plaintiff, which was prepared by the Plaintiff who obtained photocopy of CNIC of the Defendant No.1. The Plaintiff used to call the Defendant No.1 in Hon'ble High Court of Sindh for filing applications and affidavits in his suit No. 354/2013. The Defendant No.1 on believing upon the Plaintiff used to sign applications and affidavits whenever called him by the Plaintiff for filing in suit No. 354/2013.</p> <p>...</p> <p><b><u>That alleged sale agreement dated 10.07.2012 is an agreement which has been fabricated and manipulated by the Plaintiff by playing deception and fraud and by representing the said document as a Power of Attorney for using the same in suit no. 354/2013 for pursuing the said suit on behalf of the Defendant No.1 and Defendant No.1 on believing upon the Plaintiff, put his signature on the said sale agreement on believing that he is putting his signature on power of attorney, as such by playing deception, fraud and inducement Plaintiff obtained signature of Defendant No.1 on sale agreement dated 10.07.2012 which document is based on fraud, misrepresentation, concealment of facts, inducement and deception, which has no legal effect and consequences and liable to be cancelled.</u></b></p>
<p>The content of para 12 of the plaint are admitted as the answering Defendant acknowledges the execution of agreement and settlement of the sale consideration for his share derived from his mother in the property unit No. 29 street No. FT 2 Old NJ/127 Frere Town Karachi</p>	<p>The contents of para 12 and 13 are absolutely false, baseless and vexatious, hence, not admitted and vehemently denied. It is submitted that Defendant No.1 never executed the alleged sale agreement dated 10.07.2012, therefore, no question of fixation of Rs. 40.00 Million is arise, however, the Defendant No. 1 was surprised to know about all the above referred fraudulent acts of the Plaintiff from this suit because Defendant No.1 has no share, right and entitlement in the said plot because the said plot was gifted by his (late) father to his (late) mother and his two sisters who entered into an agreement/MOU dated 11.05.2011 with Mr. Zulfikhar Ali and has sold out the said plot to him for Rs. 190,000,000/-...and paid Rs. 450,00,000/- to claimant Dr. Naveed ul Haq by an</p>

	<p>Agreement dated 17.08.2011 and Defendant No.1 is signatory in both the agreement as such no question is arise to execute the alleged sale agreement by the Defendant No.1 in favour of Plaintiff, therefore, the alleged sale agreement dated 10.07.2012 is a void document having no legal effect and consequences.</p> <p>That in the light of agreement/MOU dated 21.09.2012 which was executed after the death of Defendant No.1 mother in which share of the Defendant No.1 to the extent of 16.66% share from 33.33% share of his (late) mother was admitted and Defendant No.1 was allotted and Defendant No.1 was allowed to receive his such share from the Builder as such alleged sale agreement dated 10.07.2012 is a void document having no legal effect and consequences...</p>
<p>That the execution of the agreement dated 10<sup>th</sup> July 2012 appended as Annexure H is admitted and the answering Defendant acknowledges the execution of the same which bears his signature and thumb impression hence contents of para 13 are not denied.</p>	<p>That para 6 of the written statement may kindly be deleted/omitted.</p>
<p>That the answering Defendant also acknowledges the receipt of Rs. 5 Million as stated in para 14 of the plaint.</p> <p>That the contents of para 15,16 and 17 are not subjected to any comments.</p>	<p>That the contents of para 14,15,16 and 17 of the plaint are false, baseless hence not admitted and vehemently denied. It is submitted that sisters of Defendant No.1 handed over copy of this suit to the Defendant No.1 and also informed him about the execution of alleged sale agreement dated 10.07.2012 by him in favour of Plaintiff and receiving of amount of Rs. 96,70,000/- through following cheques...</p> <p>7-B. That neither Defendant No.1 executed sale agreement dated 10.07.2012 in respect of the said plot in favour of Plaintiff nor received Rs. 50,00,000/- on 10.07.2012 through a receipt dated 10.07.2012 and amount of Rs. 10,00,000/- as mentioned in Cheque No. 97909718 amounting to Rs. 38,30,000/- and Cheque No. 97909722 amounting to Rs. 140,00,000/- total Rs. 260,00,000/-...</p>
<p>That the contents of para 19 and 20 of the plaint are tainted with malafide as no fraud has been committed with the Plaintiff and the subject matter of Annexure H is still free from all sorts of claim liabilities and charges etc and Plaintiff is put to strict proof of the same.</p>	<p>That the contents of para 19 and 20 of the written statement are false, baseless, hence, not admitted and vehemently denied. It is respectfully submitted that Defendant No.1 never executed the alleged sale agreement dated 10.07.2012 which is a fraudulent document based on fraud, inducement of the Plaintiff, the Defendant No.1 for the sake of convenience and to avoid repetition submits that the contents of paragraph No. 4,4-A,4-B,4-C,5,5-A,5-B,5-C,5-D,5-E of this Written statement may kindly be treated as reply of Paragraph No. 19 and 20 of the plaint.</p>
<p>That the contents of para 21 of the plaint are also tainted with malafides and the present suit has been filed by Plaintiff just to</p>	<p>That the contents of para 21 of the plaint are false, baseless hence not admitted and vehemently denied. It is respectfully submitted that as Defendant No.1 never entered into any deal in respect of said plot or his share involved in the construction going on upon the said Plot of Paradise Residency and never</p>

cause harassment.	executed alleged agreement of sale dated 10.07.2012, therefore, Plaintiff cannot enjoy any status in the said property and Plaintiff cannot claim joint ownership in the said project because the Defendant No.1 does not possess any right, title, interest in respect of said plot, therefore, he cannot convey any right, interest and title to the Plaintiff, the alleged sale agreement dated 10.07.2012 is a fundamental document having been fabricated by the Plaintiff by misrepresenting the said document as a Power of Attorney for using the same in Suit No. 454/2013 filed by the Defendant No.1 against his sisters in this Hon'ble Court.
That the contents of para 23,24 and 25 of the plaint are tainted with malafides are not subjected to any comments and Plaintiff is put to strict proof of the same as the present suit has simply been filed to pressurize the answering Defendant and his family members.	That contents of para 23,24,25,26,27,28,29,30,31,32,33, 34,35, 36 of the plaint are false, baseless bundle of lies, hence not admitted and vehemently denied. It is respectfully submitted that for the sake of convenience and to avoid repetition the Paragraph No. 4,4-A,4-B,4-C,5, 5-A, 5-B,5-C,5-D,5-E,7, 7-A,7-B,7-C,7-D, 7-E, 7-F,7-G,7-H of this written statement may kindly be treated as reply of aforesaid para of the plaint.
The contents of para 29 are admitted strictly in accordance with Annexure H executed by the answering Defendant which is agreement dated 10 <sup>th</sup> July 2012 and the present suit has been filed by Plaintiff with malafide intention to harass me and my family.	That para 14, 15, 16,17,18,19,20,21 of the written statement may kindly be deleted/omitted.
That the contents of para 37 are denied as framed as no cause of action accrued to Plaintiff and the suit is filed by Plaintiff with malafides intention before completion of project.	That the contents of para 37 of the plaint are false, baseless hence not admitted and vehemently denied. No cause of action accrued to the Plaintiff to file this case against the Defendant which is based on fraudulent document, which Plaintiff got executed from the Defendant No.1 by misrepresenting that he is obtaining Defendant No.1 signature of a Power of Attorney but in fact, he obtained the signature of the Defendant No.1 on the alleged sale agreement which was never executed by the Defendant No.1 and a serious fraud has been committed by the Plaintiff with the Defendant No.1 the whole suit is based on malafide, fraud and lies of the Plaintiff, therefore, the suit is causeless and it may kindly be dismissed with compensatory cost to the Defendant No.1.

9. Order VI, Rule 17 provides for two situations in which the Court can exercise its power for grant of an amendment to a pleading. The first vests in the Court the discretionary power to allow for all such amendments that it deems just. In the second situation, the Court has been mandated to grant permission for an amendment where the same is necessary for the purposes of determining the real questions in controversy. Reference may be made to **Ghulam Bibi v. Sarsa Khan (PLD 1985 SC 345)**.

10. A perusal of the original written statement with that of the amended version illustrates that the change being sought is not for the purposes of determining the real questions in controversy. In fact, admittedly, the change being sought to be made is premised on the plea of fraud. Even though fraud is not a specific ground for the grant of an Order VI, Rule 17 application, it can fall within the catch all phrase of 'just.' This discretion though has to be exercised in a structured manner against the touchstone of the law. In *Ghulam Haider v. Muhammad Ayub* (2001 SCMR 133), the Supreme Court has categorically held that no amendment shall be allowed that allows for the change of the complexion of the pleadings. More recently, in **Haji Sultan v. Mst. Shamim Akhter (2018 SCMR 82)**, the Supreme Court granted an Order VI, Rule 17 application because the alternate plea being raised was naturally arising from the facts of the case and could co-exist with the main plea. The test it stipulates is to draw a line of distinction between '*an alternative case*' and an '*inconsistent case*'. A case would not be deemed to be inconsistent if both the pleas being raised could have occurred simultaneously and in that case an amendment may be allowed. However, "*contradictory and mutually destructive pleas cannot be taken.*" Reference may be made to **Budho v. Ghulam Shah (PLD 1963 SC 553)**.

11. In the present case, the written statement that is on the record has acceded to the sale agreement dated 10.07.2012 and also admitted to receiving part of the sale consideration. However, in the proposed new written statement the agreement is being denied, as is the consideration and another theory is being proposed as to the execution and context of the sale agreement. Hence, the change(s) being sought to be allowed are a complete substitution of the original defence and make for an inconsistent case. Reliance is placed on **Syed Muhammad Ali v. Syed Dabir Ali (2016 SCMR 2164)**, in which in a similar situation it was held that mutually destructive pleas should not have been allowed to be made under Order VI, Rule 16.

12. The plea of fraud, though raised, is also not supported with any evidence and appears to be an afterthought on the part of the defence. In the proposed amendment of the written statement, it is pleaded that the Plaintiff misled the Defendant to file the sale agreement. The same ground is being raised in relation to the signing of the original written statement. However,

why the Defendant was misled into signing the written statement is absent from the record. It been urged that due to literacy issues the Defendant was unable to comprehend the contents of his written statement or was misled into signing the same. Even if true, Defendant's negligence in exercising due caution at the time of signing and swearing of his affidavit cannot be condoned and neither would the same be just. Specifically when doing so would greatly prejudice the case of the Plaintiff. In different pari materia contexts, negligence of a party has not been held to be a valid ground for the grant of relief under the law. Reliance is placed on **Muhammad Siddique v. Gul Nawaz (2021 SCMR 1840)**. Regardless, it is settled law that an amendment giving rise to contradictory and mutually destructive pleas cannot be granted. Accordingly, we find no reason to interfere in the Order dated 10.10.2017 which is correct in law.

13. Above are the reasons for dismissing the appeals through our short order dated 26.02.2024.

JUDGE

JUDGE