

THE HIGH COURT OF SINDH, KARACHI

Suit No. 728 of 2024

[Imran Abbas Khan v. Malik Muhammad Afzal Khan & others]

Plaintiff : Imran Abbas Khan through M/s. Haider Raza Arain and Abdul Wajid Wyne, Advocates.

Defendants 1 & 2 : Malik Muhammad Afzal Khan and Malik Akram Khan through Mr. Muhammad Ali Lakhani, Advocate.

Defendant No. 3 : Nemo.

Defendants 4 to 10 : Shair Ali & 06 others through Syed Hassan M. Abidi, Advocate.

Defendant No. 11 : Imran Afzal through Mr. Muhammad Rehman Ghous, Advocate.

Defendants 12 to 15 : The Station House Officer & 03 others through Ms. Deeba Ali Jaffri, Assistant Attorney General, Sindh.

Dates of hearing : 13-01-2025

Date of decision : 13-01-2025

ORDER

Adnan Iqbal Chaudhry J. - The case of the Plaintiff appears to be that the subject property was privately partitioned between the Defendants 1 to 3; that the Plaintiff purchased the portion/share of the Defendant No.3 by a registered sale deed dated 12.09.2023 and is in physical possession thereof; that the suit was filed when the Defendants 1 and 2 tried to dispossess the Plaintiff from said portion. The Defendants 1 and 2 dispute the sale deed relied upon by the Plaintiff and contend that the Defendant No.3 had transferred his portion/share in the suit property to the Defendant No.1 by an earlier sale deed. By CMA No. 10190/2024, the Defendants 1 and 2 pray for rejection of the plaint under Order VII Rule 11 CPC.

2. Heard learned counsel and perused the plaint.

3. Learned counsel for the Defendants 1 and 2 submits that the sale deed allegedly executed by the Defendant No.3 in favor of the Plaintiff was in respect of a dwelling house belonging to an undivided family; that the Plaintiff is not part of such family; consequently, the sale deed was prohibited by the proviso to section 44 of the Transfer of Property Act, 1882 read with section 4 of the Partition Act, 1893; and therefore, a suit based on an unlawful transaction is barred by law.

4. Firstly, the question whether the portion transferred by the Defendant No.3 to the Plaintiff was a 'dwelling house belonging to an undivided family', is a question of fact yet to be ascertained. Secondly, a bare perusal of the cited provisions show that the proviso to section 44 of the Transfer of Property Act does not prohibit a transfer by a co-owner of undivided property, rather it restricts the delivery of joint possession to the transferee, who may then invoke section 4 of the Partition Act for separate possession. Both the cited provisions have been accordingly interpreted by a Division Bench of this Court in the case of *Nafeesa Siddiqui v. Danish Rafique* (2019 CLC 1739). Again, it has yet to be seen whether the Plaintiff's possession is contrary to the proviso to section 44 of the Transfer of Property Act, 1882.

5. For the foregoing reasons, the suit is not barred by law. CMA No. 10190/2024 is therefore dismissed.

JUDGE

Karachi
Dated: 13-01-2025