

HIGH COURT OF SINDH AT KARACHI

Suit No.1740 of 2010

Present:
Mr. Justice Nazar Akbar

Plaintiff: Muhammad Ali Abbas through Mr. Munir-ur-Rehman, Advocate.

Defendant Syed Hassan Raza Rizvi through Mr. Abadul Hasnain, Advocate

Date of Hearing 09.12.2013

ORDER

Nazar Akbar, J. – Through this Order I intend to decide the issue of maintainability of plaintiff's suit for administration of the properties of his maternal grandfather namely late Dr. Syed Muhammad Ahsan Rizvi who died on 20.05.1991. The plaintiff has filed this suit on 11.11.2010, impleading his real maternal uncle Syed Hassan Raza Rizvi and his own father Mr. Muhammad Anwar as defendant Nos.1 & 2 respectively. The plaintiff has sought the following relief:-

- (i). That an account may be taken of moveable and immovable property left by (late) Dr. S. M. Ahsan and the same may be administered under the decree of this Honourable Court.
- (ii). Restrain the defendant from creating any third party interest in any whatsoever nature.
- (iii). Be pleased to grant any relief/reliefs which this Honourable Court deems fit in the circumstances of this case.
- (iv). Costs of this Suit.

2. The plaintiff is son of defendant No.2 and despite having the same address as that of the plaintiff himself neither the plaintiff got notice/summons even issued for service on the defendant No.2, nor he himself has come forward to support the case of the plaintiff, therefore, by order dated 06.09.2012 on account of nonpayment of cost of

summons for service, the plaint was struck off against the defendant No.2 under Rule 128 of the Sindh Chief Court Rules. The Plaintiff has not filed any application to set aside the order of striking off Plaint against the Defendant No.2, the father of the Plaintiff himself. Therefore, the suit is now only between the plaintiff and his maternal uncle, the Defendant No.1.

3. The Defendant No.1 on 15.09.2011 filed a comprehensive written statement as well as an application under Section 3 of the Limitation Act, 1908 read with Order VII Rule 11 CPC (CMA No.9273/2011) challenging the very maintainability of the Suit. The plaintiff till date has not filed any counter affidavit to the said application. However, after one and half year on 08.03.2013 to avoid the consequences of the said application, the plaintiff preferred an application for amendment of the pleadings under Order VI Rule 17 read with Section 151 CPC (CMA No.2522/2013). The defendant No.1 on 14.09.2013 has filed counter affidavit to the application for amendment of plaint and brought on record certain undisputed documents, which include

(i) Succession petitions bearing SMA No.123/1994, filed on 12.05.1994 after the death of Dr. Syed Muhammad Ahsan Rizvi;

(ii) a suit No.440/1994 for partition of estate of deceased Dr. Hyderi Begum, wife of Dr. Syed Muhammad Ashan Rizvi, and grandmother of Plaintiff; and

(iii) a Succession petition bearing SMA No.09/2008 filed by the plaintiff himself on 19.12.2007 after the death of his mother.

The plaintiff on 26.09.2013 in his rejoinder affidavit to the said counter affidavit admitted the judicial record as correct.

4. Since the very maintainability of the suit was challenged by the sole Defendant through CMA No.9273/2010 under Order VII Rule 11 CPC, this Court by order dated 18.09.2013 directed the plaintiff to file

proposed amended plaint, pending the application for amendment of the plaint, so as to examine the same on the point of maintainability of even amended plaint.

5. The perusal of the amended plaint shows that in addition to the prayer in original suit as reproduced in Paragraph-1 above the plaintiff has only added the following prayer in the plaint after incorporating para 7-A in the memo of plaint:

“3-A. Declare that the Declaration of Gift dated 26.08.1985, Will dated 27.04.1988 and mutation letter issued by defendant No.3 are liable to be cancelled and direct the defendant No.1 to deliver the documents in Court i.e. Declaration of Gift dated 26.08.1985, Will dated 27.4.1988, and mutation/transfer letter No.KDA/L&D/ND/92/380 dated 04.07.1992 issued by KDA for cancellation.”

For convenience, para 7-A of amended plaint is also reproduced below:-

“7-A. That the plaintiff respectfully dispute the existence of Declaration of Gift dated 25-8-1985 and will dated: 27-04-1988, and submits that these two documents are forged and bogus and mutation letter issued by K.D.A on basis of Declaration of Gift obtained without follow law & prescribed procedure are liable to be cancelled.”

6. In the light of above pleadings from either side, the obvious question is that once a succession petition and a suit for administration in respect of estates of deceased grandparents were filed in the lifetime of his mother, then how a grandson can file another suit for administration of estate of his grandfather after 16 years of earlier litigation amongst the legal heir.

7. I have heard the learned counsel for the plaintiff and the sole defendant since the plaint has been struck of against the Defendant No.2. I have also carefully examined the record. My findings are as follows.

8. Mr. Munir-ur-Rehman counsel for the plaintiff has contended that the earlier suit for administration was dismissed for non-prosecution and the same was not filed by the present plaintiff, therefore, the same is not adversely affecting the present suit. He has further contended that there is no limitation for filing suit for administration. He has further contended that since his client came to know about the Gift and WILL only on going through written statement in the present suit therefore he amended the plaint and included prayer for declaration and cancellation of Gift and WILL. The limitation for the relief of declaration and cancellation of Gift deed and WILL should start from the date of knowledge. He has relied on case reported in PLD 2001 Karachi 83 **MUHAMMAD ZAHID through Legal Heirs ..Vs.. Mst. GHAZALA ZAKIR and 7 others** to claim that transfer of title of immovable property by his grandfather even in his lifetime can also be challenged in a suit for administration.

9. Mr. Abbad-ul-Hussain, advocate for the Defendant No.1 in rebuttal has contended that even after amendment of the Plaint, the suit is not maintainable on the ground that the properties of the deceased Dr. Syed Muhammad Ahsan Rizvi, shown in the Schedule of the properties from item 'B' to 'L' had already been settled through the WILL of deceased which was annexed to the Succession Petition No.123/1994 filed in respect of the estate of deceased Dr. Syed Muhammad Ahsan Rizvi and the property mentioned as item No.'A' to schedule bearing Plot No.1-A-1/13 Nazimabad Karachi was gifted by the deceased in his lifetime on 06.08.1985 to the Defendant and even it has been mutated in the name of Defendant No.1 in the record of KDA vide Transfer Mutation Order dated 04.07.1992. To rebut the contention of the Plaintiff that he came to know about the Will and Gift through written statement filed on 15.9.2011, the counsel for the defendant No.1 has referred to the

Succession Miscellaneous Application filed by the Plaintiff himself on the sad demise of his mother bearing SMA No.09/2008 in which in Paragraph-1 the Plaintiff has referred to SMA No.123/1994, therefore, he had knowledge of the Will and the factum of gift since 1994 since it was specifically mentioned in para-4 of the memo of Succession Petition. He contended that Plaintiff's knowledge about the Will and the Gift dates back to 01.08.1994 when his mother died or at least to 15.04.1995 when the Plaintiff and his father, the Defendant No.2 herein, filed written statement in Suit No.440/1994 for partition wherein they mentioned the same schedule of properties which has been reproduced in para-5 of present suit. Therefore, now after 16 years of filing of the said written statement in suit No.440/1994 for partition he cannot claim that he did not know much about the said properties. Regarding contention of the Plaintiff that he was minor in the year 1995, learned counsel for the Defendants has contended that the Plaintiff's date of birth is 22.02.1979 and, therefore, limitation for seeking relief of declaration and cancellation of Gift and WILL started on attaining the age of majority in the year 1997 and maximum three years period from 1997 expired on 22.02.2000 whereas the Suit for partition and particularly the amended Plaint has been filed on 19.09.2013 after 13 years of the cause of action, if any, accrued to the Plaintiff and as such even on amendment suit is also time barred from the date of attaining the age of majority by the Plaintiff.

10. The first contention of the plaintiff that after 16 years of dismissal of the earlier suit for partition, the present suit is maintainable only because the earlier suit for administration was filed by the defendant No.1 and not by the plaintiff and defendant No.2 herein is misconceived. The plaintiff and defendant No.2 in earlier suit No.440/1994 for partition themselves had raised the issue of partition of the estate of deceased

Dr.Syed Muhammad Ahsan Rizvi. In their written statement they prayed for partition of the estate of plaintiff's grandfather in the following terms:-

- (a) directing partition of the properties disclosed in the Schedule hereto, as inherited jointly by the plaintiff and the original defendant (the predecessor of these defendants) from their father Dr. Syed Muhammad Ahsan Rizvi in the ratio of 2:1 respectively, alternatively to be sold in public auction and the proceeds thereof to be divided according to the share of each party.
- (b) directing the suit property to be partitioned between the parties in equal share.

It is immaterial for the Plaintiff that earlier suit for partition filed by the defendant No.1 was dismissed for non-prosecution, the fact remains that the plaintiff and defendant No.2 were party to that suit and they had raised the issue of partition in Suit No.440/1994 for partition of the same properties mentioned in para-5 of plaint but did not pursue the same. The Plaintiff herein alongwith his father, the Defendant No.2 should have continued to prosecute the Suit No.440/1994 even if the Defendant No.1 had abandoned of the said suit for partition. The perusal of the Plaint and admitted written statement of Suit No.440/1994 read with admission of Plaintiff in Paragraph-6 of the Plaint that property was subsequently sold jointly by consent and the share of the present Plaintiff was settled leads to inescapable conclusion that by all means the succession opened on the death of Mst. Hyderi Begum and Dr. Syed Muhammad Ahsan Rizvi stand closed. The claim of the plaintiff is identical as it was in earlier Suit No.440/1994. On the face of it, this is a second suit on the same cause of action and the subject matter is also one and the same which was in the earlier suit. Therefore, on disposal of suit No.440/1994 for partition by a compromise outside the Court or even by default, the Plaintiff's claim in the earlier suit reproduced in para-10 above stand relinquished by him or dismissed in default. In

either case the Plaintiff's fresh suit on the same cause of action is hit by the provisions of both Order II Rule 2 CPC and Order IX Rule 9 CPC. In forming this opinion, I find strength from the judgment of Hon'ble Supreme Court reported in 1987 SCMR 527 **AZIZ AHMAD and others ..VS.. Mst. Hajran BIBI and another** Relevant para-4 from the authority is reproduced below:-

4. It is then contended on behalf of the appellants that before the suit at Bahawalpur was dismissed the suit at Faisalabad had already been instituted; that being so, rule 9 of Order IX was not in terms applicable as this rule only prevented a Plaintiff from instituting a fresh suit but had no effect on a suit which had already been filed. The contention in so far as the construction of rule 9 is concerned is correct but that does not mean that the second suit is not barred and can be tried on merit. There is well established principle that no one is to be twice vexed for the same cause of action. Reference in this context is invited to a Division Bench Judgment of the Lahore High Court in Amir Din Shahab Din v. Shiv Dev Singh AIR 1947 Lah. 102 where the maintainability of the second suit brought before the dismissal in default of the first suit was considered and it was held that the second suit was hit by the above-mentioned principle and it was also liable to be dismissed on the ground that its institution and trial amounted to the abuse of the process of the Court.

11. The Plaintiff's second contention that there is no limitation for filing of a Suit for administration, in the facts of the present case, is not relevant. He was required to seek restoration of the Suit No.440/1994 in which he had raised substantial claim for partition of estate of deceased Dr. Syed Muhammad Ahsan by way of inheritance but he has allowed it to be dismissed in default instead of prosecuting his claim in the said Suit for administration. It is settled law that in a suit for partition / administration a decree under Order XX Rule 13 CPC read with Order XX Rule 18 CPC has some distinct feature. In a Suit for partition every co-sharer is in the category of the Plaintiffs as held by this Court in 1981

CLC 409 **MST. KHATOON AND 3 OTHERS ..VS.. SIDDIQ MUHAMMAD**

AND ANOTHER and even in an earlier authority reported in PLD 1967

Dacca 809 **MD. BAZLUR RAHMAN ..VS.. SYED ALI PRAMANIK.**

Therefore, on disposal of suit No.440/1994 for partition between the same parties, this being second suit for partition the ground that no limitation is prescribed for filing of the suit for administration is not available to the Plaintiff. The limitation had estopped once the first suit for partition of estate of deceased had been filed in 1994 and the Plaintiff and Defendant No.2 entered appearance as well as raised their own claim of inheritance. However, he could have filed an application for restoration of earlier suit within prescribed time in terms of Order IX Rule 9 CPC. The issues of inheritance cannot be raised again and again with a gap of 16 years or so between the same parties without giving a plausible explanation of reopening of the issue which was abandoned in 1994. There is no concept of second Suit for partition of estate of the deceased either. Nor there can be second Succession Miscellaneous Application under Section 372 of the Succession Act, 1925. In this context PLD 2004 Lahore 311 **YASEEN QURESHI ..vs.. TARIQ QURESHI** may be referred.

12. The last contention of the Plaintiff that he came to know about the Gift and WILL through written statement in present suit is not supported by his own averment in the plaint. Admittedly the schedule of the properties which has been reproduced by the plaintiff in schedule of properties in para 5 of both the original and amended plaint is one and the same which was attached to the written statement in suit No.440/1994. The perusal of para 6 of both the original and proposed amended plaint reveals that the plaintiff had knowledge of the record and proceedings of Suit No.440/1994, as he has specifically mentioned at the bottom of plaint that Plaintiffs relies on the originals of R&P of Suit

No.440/1994. Since he is relying on R&P of Suit No.440/1994, it cannot be accepted that since 1994 he was not aware of the existence of Gift and the WILL. In view of admitted record of Court proceedings of SMA No.123/1994, Suit No.440/1994 and his own SMA No.9/2008, since the Plaintiff has the knowledge of WILL and Gift through SMA No.123/1994 the relief of declaration of Gift and WILL as forge and bogus is time barred. In the peculiar facts of the present case the reliance on PLD 2011 Karachi 83 is misplaced. It is not relevant since the cause of action to challenge the factum of Gift and WILL is barred by law of limitation and no such issue of limitation was involved in the said authority. This right, if at all was available to him, the Plaintiff should have approached the Court within 3 years of attaining age of majority by the Plaintiff.

13. Yet another hurdle in the way of the Plaintiff to prosecute this Suit for partition of the estate of his grandfather is that he is not and he was not legal heir of the deceased Dr. Syed Muhammad Ahsan Rizvi as his mother was alive at the time of opening of succession. She has excluded him from the category of legal heir to claim share in the estate of the deceased Dr. Syed Muhammad Ahsan Rizvi. This aspect of the case seems to have been overlooked by both the Plaintiff himself and the Defendants No.1. This is fatal to these proceeding as no Suit for administration of the estate of properties can be filed by someone who was not amongst the legal heirs of the deceased at the time of opening of succession to claim anything by way of inheritance. This is basic principle of law of inheritance. On this score alone the suit by the grandson for administration of the estate of grandfather should be dismissed as the grandson is not entitled to claim inheritance in the estate of grandfather. The plaintiff in para 2 of the plaint himself has declared that he is legal heir of Mst.Parveen Zohra alongwith the defendant No.2. The record shows that the Defendant No.2 as natural

guardian of the Plaintiff was vigilantly looking after the plaintiff's interest in all the properties left by his mother at the time of her death, which included the properties inherited, if any, by her from the estate left behind by Dr. Syed Muhammad Ahsan Rizvi and Dr. Hyderi Begum, parents of deceased Mst. Parveen Zehra and maternal grandparents of the plaintiff. It is noteworthy, that mother of Plaintiff has died after the death of her both parents. Plaintiff is not claiming inheritance on the basis of son of pre-deceased daughter. Admittedly even a Succession Petition was granted by a competent Court on opening of the Succession on the demise of Dr. Syed Muhammad Ahsan Rizvi in the life time of mother of the Plaintiff, since the said Succession Petition No.123/1994 was disposed of on 26.06.1994 and his mother Mst. Parveen Zehra had died on 01.08.1994, therefore he cannot claim to inherit anything from the estate of the deceased Dr. Syed Muhammad Ahsan Rizvi. The very fact that the Plaintiff has willfully got the plaint struck off against his own father who has been impleaded as defendant No.2 confirms that through SMA No.123/1994 and Suit No.440/1994 for partition the issues of distribution of the estate by inheritance on the demise of grandparents of plaintiff already stand fully settled through the Court of law.

14. In view of the above discussion the application under Order VII Rule 11 CPC (CMA No.9273/2011) is allowed, the plaint is rejected and all pending application stand dismissed as infructuous.

Karachi
Dated:_____

JUDGE

Approved for reporting.

JUDGE