

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1251 of 2008

Plaintiffs : Mst. Rabia Bibi, Hina Shamsi, Sana Shamsi
and Master Adil Shamsi through Mr. Mehar
Khan, Advocate

Defendants : Syed Ahmad Shah Shamsi and 7 others
through Mr. Zulfiqar Ali Langah, Advocate

Date of Hearing : 02.12.2014

JUDGMENT

NAZAR AKBAR, J. The plaintiffs through the instant suit have sought declaration, administration, cancellation of documents, partition, rendition of accounts, mesne profit and permanent injunction.

2. Briefly stated the facts of this case are that after pronouncing divorce upon defendants' mother, Syed Safdar Hussain Shah, father of the defendants, contracted second marriage with plaintiff No.1, a blind lady, on 07.08.1988 and from their wedlock plaintiffs Nos.2 to 4 were borne. The mother of the defendants had also contracted second marriage with one Khizar and she is living with him. The said Syed Safdar Hussain Shah expired on 25.06.2007 at Multan, leaving behind his widow, plaintiff No.1, plaintiffs Nos.2 to 4 and the defendants as legal heirs and the following immovable properties:

- (i) Ground plus three storey residendial/commercial building, measuring approximately 8132 square ft. consisting of four shops at ground floor and a godown at first floor and the defendants are also residing at upper floor, constructed on Plot bearing E & T Property Rating No.AK-13B-38-4-1, situated at the crossing of Street

No.3 and Masjid Road, Behar Colony, Lyari Town, Karachi South.

- (ii) Ground plus single storey residential/commercial building, measuring approximately 3820 square feet consisting of 12 shop-s, built on Plot bearing E & T property rating No.M-II-E-898, situated at Punjabi Chowk, Lyari, Karachi West.
- (iii) Industrial Sheds and Godowns, measuring approximately 1200 square yards, built up on Plot bearing E & T rating No.M-II-E-194, situated at Block 'B', Lane No.52, Urdu Bazar Road, Sher Shah, Karachi West.
- (iv) Two Industrial Sheds, measuring more than 400 square yards, built up on Plot bearing No.E & T Property Rating No.M-II-E-173-A-2, Lane No.58, Block 'B', Muhammadi Road, Sher Shah, Karachi West.
- (v) One constructed residential House bearing Khata No.305, Khatafi No.471, measuring seven marlas, situated at Mozza Tarf Mubarak, behind Mehrban Colony, Tehsil and District Multan, Punjab.

3. Defendants Nos.2 and 3 filed a Civil Suit before the learned Senior Civil Judge Multan for distribution of only one property mentioned at serial No.(v) above, which has been dismissed on 13.02.2012 pending the present suit. It is averred in the plaint that there are more than 25 tenants in the suit properties and the defendants Nos.1 to 3 are collecting rent from the tenants and depriving the rest of the legal heirs of their right of inheritance in the estate of the deceased. Therefore, plaintiffs No.1 approached all the tenants through her brother that the suit properties are jointly owned by the plaintiffs and the defendants by way of inheritance, as such, they have to deposit the rent in the concerned Court of law but under the influence of the defendants Nos.1 to 3, they continue to pay rent to the said defendants. It is alleged that property mentioned at serial No.(iv) above belongs to deceased Syed Safdar Hussain Shah Shamsi

but defendant No.2 got the same mutated in his name unauthorizedly and unlawfully. Plaintiff through this suit has prayed for the following relief(s):-

- (A) To declare that the plaintiffs are joint owners of the following suit properties by inheritance and order for the partition of the following constructed suit properties according to the respective shares of the plaintiffs by metes and bounds for their specific possession as per the provisions of Partition Act, 1893:-
- (i) Ground plus three storey residential/commercial building, measuring approximately 8132 square ft. consisting of four shops at ground floor and a godown at first floor and the defendants are also residing at upper floor, constructed on Plot bearing E & T Property Rating No.AK-13B-38-4-1, situated at the crossing of Street No.3 and Masjid Road, Behar Colony, Lyari Town, Karachi South.
 - (ii) Ground plus single storey residential/commercial building, measuring approximately 3820 square feet consisting of 12 shops, built on Plot bearing E & T property rating No.M-II-E-898, situated at Punjabi Chowk, Lyari, Karachi West.
 - (iii) Industrial Sheds and Godowns, measuring approximately 1200 square yards, built up on Plot bearing E & T rating No.M-II-E-194, situated at Block 'B', Lane No.52, Urdu Bazar Road, Sher Shah, Karachi West; and
 - (iv) Two Industrial Sheds, measuring more than 400 square yards, built up on Plot bearing No.E & T Property Rating No.M-II-E-173-A-2, Lane No.58, Block 'B', Muhammadi Road, Sher Shah, Karachi West.

Alternatively, if it be not possible, to divide above immovable suit properties then the same be sold through Public Auction and their sale proceeds be distributed amongst the parties to the suit through Nazir of this Court according to their respective shares under the Islamic Law, per strip value whereof (based on approximate value of suit properties at Rs.2,50,00,000/- (Rupees Two Crore and Fifty Lacs).

- (B) To order and administer of all accounts against the defendants Nos.1 to 3 in respect of the suit properties with enquiries and directives of this Court to adjudge and appropriate respective shares of the plaintiffs and other legal heirs/joint owners with full rendition of accounts of all incomes, benefits and profits so derived by the said defendants respectively and also distribute under the decree of the Court.
- (C) To direct the defendants Nos.1 to 3 jointly or severally to pay a sum of Rs.3,25,000/- (Rupees three lacs and twenty five thousand) being mesne profits to the plaintiffs so far earned by the defendants Nos.1 to 3 jointly or severally from the suit properties.
- (D) To appoint any person or persons as this Court may deem fit and proper to be the Receiver who receives the rent and benefits from all the tenants of the suit properties during the pendency of this suit with all powers and authority under the provisions of Order 40 Rule 1 CPC and with such other powers as may be determined by this Court.
- (E) To cancel the instrument (Annexure P/20) which is in the name of defendant No.2 regarding suit property at serial No.(iv) above.
- (F) Permanently restrain the defendants Nos.1 to 3, their legal representatives, men, relatives, agents, well-wishers, functionaries, heirs, subordinates, attorneys or any person or persons, acting under defendants Nos.1 to 8 and/or on their behalf from selling, mortgaging, disposing off, transferring, letting out the above suit properties and/or from creating their own or any third party interest in respect of suit properties in any manner whatsoever and also restrain the defendants Nos.1 to 8 from receiving/collecting the rent/incomes/profits from the tenants till the disposal of the case.
- (G) Cost of the suit may also be awarded.

4. The suit was filed on 01.09.2008 and after service of summons on 10.10.2009 the Defendants filed their written statement wherein they raised preliminary objections and denied the contents of the plaint. In the written statement, in addition to the plaintiffs and the defendants, another set of legal heirs has been shown, i.e., (1) Nargis Bano, (2) Syed Sikandar Shah (3) Feroz Shah and (4) Noor Jahan Bibi, being wife, sons and daughter, respectively of Syed Safdar Ali Shah as allegedly the deceased had three wives. The defendants claimed that the properties mentioned at Serial No.(i) and (ii) above had been gifted to defendants by the deceased during his lifetime. The property at serial No.(iii) above is claimed to have been given by the deceased through general power of attorney to defendant No.2, who continues to take care of and supervise the said property in all respects. The property at serial No.(iv) above is claimed to be the property of defendant No.2 and not that of the deceased. It has been claimed in the written statement that property at serial No.(v) above belongs to the deceased where the plaintiffs are presently residing, the same is also to be treated as the suit property. It has further been claimed in written statement that defendant No.2 had been bearing all monthly expenses of the plaintiffs continuously and also paying Rs.8000/- per month to plaintiff No.1 and also to the rest of the plaintiffs separately but the same was stopped when the brother of plaintiff No.1 registered false FIRs bearing Nos.24 and 201 of 2008 at Karachi against the defendants, who mala fide intends to usurp the property of plaintiff No.1, who is a blind lady, and that of her minor children, plaintiffs Nos.2 to 4. It is admitted in the written statement

that the defendants never intended to deprive the plaintiffs of their legal and lawful right in the estate left by the deceased.

5. The Court on 20.03.2012 from the pleading of the parties framed the following issues:-

- i) Whether suit is bad for non-joinder of necessary parties?
- ii) Whether any valid and legal gift was made by deceased Syed Safdar Hussain Shah to defendants No.1 to 3 and 5 and such gift deeds are genuine documents or defendants fraudulently fabricated such gift deed to deprive the plaintiffs?
- iii) Whether defendant No.2 fraudulently got mutated one of the suit property viz. shown in para No.3 (d) in his name from the name of deceased to deprive the plaintiff which is too, to be inherited?
- iv) Whether plaintiffs are entitled for the relief as claimed?
- v) What should the decree be?

6. Evidence of the parties was recorded through the Commissioner for recording of evidence. Plaintiff No.1 Mst. Rabia Bibi filed her affidavit in evidence and she was cross examined by the counsel for defendants. Defendant No.2, Syed Mehmood Shah Shamsi, appeared as witness on behalf of defendants had filed affidavit in evidence. He was cross examined by the counsel for the plaintiffs. Both the counsel closed their respective side for evidence after examining one witness each and the report of Commissioner alongwith evidence was placed on record. I have heard learned counsel for the parties and perused the record. My issue-wise findings are as follows:-

7. ISSUE No.1. This issue was raised by the defendants in the written statement when they alleged that the deceased Syed Safdar Hussain Shah besides the plaintiffs and the defendants were also survive by one more wife namely Mst. Nergis Bano and two sons Syed Sikandar Shah, Feroz Shah and one daughter Noor Jehan Bibi. However, except an assertion in the written statement, nothing was placed on record to establish that the said Mst. Nergis Bano and her children will also legal heir of the deceased to establish the suit was bad for non-joinder of the parties. Therefore, the burden of proof of this issue was on defendants not only because it was raised by the defendants but also because the plaintiff has categorically denied that there was another wife Mst. Nergis Bano and her offspring as legal heirs of the deceased Syed Safdar Hussain Shah who died on 25.06.2007. In the evidence, the defendants admitted that he has not produced even National Identity Card of Mst. Nergis Bano or its copy. He claimed that Mst. Nergis Bano and the other childrens are residing abroad but he did not produced even copy of the passports or even Nikahnama of the deceased with said Mst. Nergis Bano and contrary to his claim in the written statement his admissions are as follows:-

“It is correct that I have not field any CNIC of Mst. Nergis Bano which shows that she is also widow of deceased Syed Safdar Hussain Shah. It is correct that I have not filed any copy of Passport of Mst. Nergis Bano and also copy of Nikahnama with the affidavit-in-evidence. Voluntarily says that the above documents were filed with the written statement. I am not aware whether these documents were filed with the written statement. It is correct that I have not filed any documents of the children of Nergis Bano with my affidavit-in-evidence, namely Syed Sikandar Shah, Feroz Shah and Noor Jehan Bibi. I cannot show these documents.”

In view of the above admissions of the defendants in the cross examination, he has failed to prove his averments of the written statement regarding the non-joinder of necessary parties. The issue No.1, therefore, is answered in negative.

8. ISSUE No.2 and 3. The burden of these issue was also on the defendants being beneficiary of the alleged gift deeds of the property bearing three Story House on Plot No.5/1, Survey No.AK-13-B-3S-41, Masjid Road, Behar Colony, Karachi and the property bearing Ground Plus single Story residential/commercial building, measuring approximately 3820 sq. feet consisting of 12 shops, built on Plot bearing E & T property rating No.M-II-E-898, situated at Punjabi Chowk, Lyari, Karachi West, mentioned in para 3(a) and 3(b) of the plaint. In the written statement, the defendants have claimed to have registered gift deed in respect of the said properties, however, neither the original not even copy of gift deed was filed by the defendants with the written statement nor with the affidavit in evidence. In the cross examination, defendant No.2 admitted that all the five properties mentioned in para 3(a) to (e) were in the name of deceased. However, mutation of the property mentioned in para 3(d) of the plaint stand in his named. Relevant cross examination is reproduced below:-

“It is correct that the property No.AK_13B-38-41 stands in the name of deceased Syed Safdar Hussain Shah. It is also correct that the property No.M-II-E, 989 stands in the name of the deceased. It is also correct that the property No.M-II E-194 stands in the name of the deceased Syed Safdar Hussain Shah. It is incorrect that the property No.M-11 E-173-8-2 got

fraudulently mutated in my name. It is correct that I have not filed any documents how the above property mutant in my name with my affidavit-in-evidence. It is correct that I have not filed any documents in respect of gift allegedly made in our favour with my affidavit-in-evidence and not mentioned the name of the witness in the affidavit before whom the gift was made. It is correct that the suit property is in our possession after the death of my father.”

It is settled law that mutation of property is not prove of ownership of the property. There is no dispute about the fifth property of the deceased at Multan. The defendants have admitted that the plaintiffs were also the legal heirs of the deceased. In view of the evidence produced by the plaintiffs coupled with the failure of the defendants to collaborate the averment made in their written statement to defeat the plaintiffs’ claim of inheritance or reduce it by enlarging the list of legal heirs of the deceased. I hold that all the five properties are liable to be divided/ partitioned and/or sold so that the plaintiffs’ right of inheritance/share in the said properties may be handed over to them.

9. ISSUE No.4. In view of the above discussion, the plaintiffs’ entitlement to inheritance as per Shariah Law applicable in the case of the plaintiffs is established. The plaintiffs are also entitled to the share in the income from the various tenements’ right from the date of death of Syed Safdar Hussain Shah i.e. from **June 2007** till the properties are disposed of by public auction or otherwise and the shares of the plaintiffs are disbursed to them. Since the immovable properties are indivisible amongst the hostile legal heirs who are twelve in numbers, the Nazir of this Court should physically takeover all the suit properties and administrator them by collecting the rent from the different tenants as well as he should also take accounts

from the defendant No.2 from **June 2007** onwards, and disburse the respective charges of the plaintiffs and the defendants accordingly to the Mohammadan Law. The defendants from **15.10.2010** were required to deposit a sum of Rs.30,000/- in Court out of which Rs.10,000/- were to be paid to the plaintiffs. Pending the suit in term of order dated **04.10.2010** passed in High Court Appeal No.37/2010.

The relevant part of the order is reproduced below:-

“2.That from 15th day of October 2010 and before 15th day of every future month the Defendants/appellants will deposit Rs.30,000/- with the Nazir of this Court out of which Rs.10,000/- will be paid by the Nazir to the respondents in this appeal and Plaintiffs in the suit every month on applications being moved by them without any further order of this Court.

3.That in case such deposit is not made by 15th of the month, the learned Single Judge is directed not to proceed with the hearing of the application mentioned above. The learned Single Judge is also directed to dispose of these two application preferably within a period of six months.”

However, from now onward the plaintiff are entitle to their share from June 2007 and the Nazir after examining the tenants and taking accounts from the defendant shall adjust the amount payable to the plaintiffs either from the shares of the defendants on the sale of suit properties or the defendants themselves settle the accounts of plaintiffs shares in the income from their own resources through the Nazir.

10. ISSUE No.5. In view of the above findings on issues No.1 to 5, the plaintiffs suit is decreed in terms of the prayer clause (a) for sale of the immovable properties of deceased Syed Safdar Hussain Shah and Nazir of the Court is appointed as Administrator of the suit properties to sell the same and take accounts of the income from the

defendant No.2 and collect rent of various tenements and distribute the total assets of the deceased Syed Safdar Hussain Shah Shamsi according to the personal fiqah of the deceased. Any instrument or document registered in respect of any of the properties mentioned in paragraph 3(a) to (e) stands cancelled, revoked and declared unlawful against the rights of the legal heirs of the deceased. The cost of the suit and Nazir fee paid by the parties during the trial shall also be equally divided amongst the legal heirs proportionate to their respective shares.

Karachi
Dated:13.2.2015

J U D G E