IN THE HIGH COURT OF SINDH AT KARACHI

HCA NO.99 of 2007

JUDGMENT / OPINION

Date of hearing: 04.10.2007 :

Appellants: Mst. Tahira Parveen and three others through Mr.S. Ansar Hussain, Advocate :

Respondent: Mst. Saba Jamil and four others through Mr. Yawar Jaruqui, Advocate :

N O T E

This matter was heard by a Division Bench comprising of my learned brother Muhammad Athar Saeed, J. (as his lordship then was) and my self and by a short order dated 04.10.2007 the same was dismissed in open Court and the short order was signed. Thereafter, I have recorded the reasons but before signing the same my learned brother Muhammad Athar Saeed, J. (as his lordship then was) ceased to be a Judge of this Court.

Rule 3 of Chapter 4-H of Volume V of the High Court Rules & Order deals with such situation and provides as under:-

> "Opinion recorded before delivery of judgment: Where an appeal has been heard by a Bench of the Court, the written opinions of the Judges who heard the appeal, but have ceased to be attached to the Court before delivery of judgment, shall, unless delivered by another Judge of the Bench which heard the appeal, be deemed to be minutes merely and not judgments."

Earlier the same situation was dealt by two separate learned Division Benches of this Court. In the reported case of GHULAM HUSSAIN VS. THE STATE (PLD 1981 Karachi 711) it was held as under:-

> ". . . Although both the Judges of a Division Bench may have concurred in the decision and the short order, it is conceivable that the reasons for the conclusion reached may be different. In that case, if one of the Judges of the Division has ceased to be available, as in the instant case, the reasons given by the Judge who still continues to adorn the High Court, would not really be the reasons of the Bench in support of the conclusions reached or the short orders passed by it, but would be, in effect, the individual opinion of that learned Judge. However, such a written opinion would be of assistance to the Supreme Court, in case an appeal against the decision of a Division Bench is preferred to it."

In the reported case of OFFICE REFERENCE DATED 28.4.1981 (PLD 1982 Karachi 250) a learned Division Bench of this Court has held as under:-

". . . The cases in which short orders have been recorded and signed by the concerned Judges, these cases stand disposed of as these orders are fully operative in law. In the last-mentioned cases the Judges who have ceased to hold office cannot record reasons, but in cases in which one of the Members of the Bench was a Judge who is still available, he may be requested to record his reasons in support of the decision which will, however, serve as minutes of his individual opinion for use as deemed fir by the Supreme Court in case appeals are filed against such orders."

The matter was also placed before the Hon'ble Chief Justice by Reference dated 04.02.2008 who had allowed the undersigned to deliver the judgment.

Following the above pronouncements and permission of the Hon'ble Chief Justice I am recording the following reasons/opinion in support of short order already announced and signed by both the members of the bench.

NADEEM AZHAR SIDDIQI, J : By filing of this appeal the appellants have challenged the judgment dated 27.3.2007 and decree dated 24.4.2007 passed by learned Single Judge in Suit No.334 of 2001 by which the suit for partition and administration filed by the respondents was decreed.

The facts necessary for disposal of the appeal are that late Wilayat Hussain (hereinafter referred as deceased owner) the grandfather of Appellants No.2 to 4 and Respondents No.2 to 4 and father-in-law of Appellant No.1 and Respondent No.1 died on 26.1.1993 leaving behind his wife Mst. Sultana Wilayat and two sons namely Dr. Muhammad Ather Kamal Faruqui and Anwar Kamal Faruqui as his legal heirs. Dr.Ather died on 27.1.1996 at Saudi Arabia and Anwar died on 26.1.1997. Mst. Sultana died during pendency of the suit. At the time of his death the property bearing No.B-63, Block 13-D1, Gulshan-e-Iqbal, Karachi, (hereinafter referred to as the property) stand in the name of deceased owner. The respondents filed suit for administration and partition of property left by the deceased owner. The appellants filed written-statement and claim that deceased owner was the ostensible owner and real owner was Anwar. It was further pleaded that property was purchased by the deceased owner for consideration of Rs.4,05,000/- out of which deceased owner contributed a sum of Rs.2,00,000/- and remaining amount of Rs.2,05,000/- was contributed by Anwar and the incomplete structure was completed from the funds of Anwar. It was further pleaded that during his life-time the deceased owner has relinquished his right in the property in favour of his son Anwar, the predecessor-in-interest of appellants.

On 22.4.2007 preliminary decree was passed and parties were directed to appear before the Nazir for enquiry as contemplated under Order 20 Rule 13 CPC. On 1.7.2007 instead of Nazir, Official Assignee was appointed as receiver to comply the order dated 22.4.2002.

The learned counsel for the appellants submits that the suit was not maintainable as the facts were disputed and the parties to the suit have conflict interest. He further submits that no issue with regard to the ostensible ownership was framed by the learned Single Judge and the application moved by the appellants for framing of the issue was dismissed on 24.3.2005. He further submits that the appellants by cogent evidence has proved that the deceased owner was ostensible owner and during his life time relinquished his right in the property in favour of his son Anwar which was ignored. He further submits that the suit is not maintainable for the reason that in a suit for administration and partition unity of title and unity of possession must exist between the parties which is lacking. He referred to the evidence and has stressed upon the affidavit-in-evidence of Mst. Sultana widow of deceased owner and letters of deceased owner.

The learned counsel for the appellants has relied upon the following reported cases:

1) SYED MOHSIN RAZA BUKHARI AND OTHERS VS. SYED AZRA ZENAB BUKHARI (1993 CLC 31)

2) MUHAMMAD YOUNUS QURESHI AND OTHERS VS. MRS. FEROZ QURESHI AND OTHERS (1982 CLC 976)

3) SYED MEHDI HUSSAIN SHAH VS. MST. SHADOO BIBI AND OTHERS (PLD 1962 SC 291)

Mr. Yawar Faruqui, learned counsel for the respondents, submits that at the time of death of deceased owner the property was stand in his name and the preliminary decree was rightly passed. He submits that alleged relinquishment was made by deceased owner on 26.8.1988; the deceased owner expired on 26.1.1993; Dr. Ather expired on 27.1.1996; Anwar expired on 26.1.1997; the suit was filed in 2001 and during that period no attempt was made by Anwar and thereafter the appellants to take steps for mutation of property in their favour, which fact alone is sufficient to disbelieve the version of the appellants. He further submits that affidavit-in-evidence of Mst. Sultana cannot be considered as she was not cross-examined. Regarding the other witness he submits that Riffat Iqbal is the real brother of Appellant No.1 and his deposition was not inspiring confidence and the other witness Abdul Latif Khalidi is closely related to Appellant No.1 and his evidence is contradictory with the evidence of Appellant No.1 and cannot be considered. Regarding the letters of the deceased owner he submits that from the letters it is not reflected that deceased Anwar has invested any amount for purchase or construction of property. He relied upon the following reported cases:-

1. MUHAMMAD SAJJAD HUSSAIN VS. MUHAMMAD ANWAR HUSSAIN (1991 SCMR 703)

2. ASGHAR ALI VS. MRS. ZOHRABI AND ANOTHER (NLR 1999 Civil 105)

There is no dispute that at the time of his death the property stands in the name of the deceased owner and till filing of the suit no efforts was made by the appellants and their predecessor for mutation of the property in their names. It is also not disputed that the deceased has purchased the property and the appellants admit that the deceased owner has invested Rs.2,00,000/- in the purchase of house. The burden to prove that Anwar contributed in the purchase of the property and that incomplete construction was completed from his funds was upon the appellants. The appellants have failed to produce any tangible evidence to prove that Anwar contributed in purchase and completion of property and deceased owner in his life time has relinquished his right in the property in favour of his son Anwar. The affidavit-in-evidence of the widow of deceased namely Mst. Sultana can not be considered as she did not appear for cross-examination and expired during the pendency of suit. The cross-examination of Abdul Latif Khalidi is not in consonance of his affidavit-in-evidence. In his cross-examination he has stated that Anwar paid the money to deceased owner in his presence. This fact was not pleaded in the affidavit-in-evidence and the witness has attempted to improve his evidence by giving details which are lacking in the affidavit-in-evidence. The evidence of the witness is also contradictory to the evidence of Appellant No.1 who in her affidavit-in-evidence has stated that Anwar contributed Rs.2,05,000/- towards purchase of house, whereas witness Khalidi in his cross-examination has stated that Anwar had paid Rs.2½ lac in his presence. The evidence of witness is not inspiring confidence and cannot be relied upon. The other witness was Riffat Iqbal who is the real brother of Appellant No.1. In his affidavit-in-evidence he has stated that deceased owner had relinquished his right in the property in favour of Anwar and had declared that his contribution in the said property was Rs.2,00,000/- and Anwar had spent Rs.7/8 lac. This witness in his cross-examination has pleaded ignorance in reply to material questions by saying "I do not remember". He also do not remember whether Anwar was present at the time of relinquishment by

deceased owner. The evidence of this witness is not inspiring confidence for the reason that he did not remember the material facts or not aware about the facts of the case and cannot be relied upon. The appellant No.1 has also filed her affidavit-in-evidence and was cross-examined. In his affidavit-in-evidence she repeated the contents of her written statement. The appellant No.1 has failed to prove that her late husband Anwar has contributed Rs.2,05,000/- for the purchase of incomplete house and has also spent Rs.5,25,000/- On account of completion of house. No document in this regard has been produced. The letters purportedly written by deceased owner does not speak about any contribution of Anwar. In the letters the deceased owner has only passed information to his son regarding the steps taken by him for completion of house and the amount incurred by him and the amount required for further construction/completion of house. The appellant has failed to prove that Anwar has contributed towards the purchase of house as well as spent considerable amount towards completion of house. The Respondent No.1 has filed her affidavit-in-evidence and stood the test of cross-examination and her evidence to the effect that property belongs to deceased owner has gone unrebutted and unshaken. It appears that the appellants for the sake of objection without any evidence and material placing on record have raised a plea that the deceased was not the owner of the property at the time of his death.

As far as the contention of Mr.S. Ansar Hussain is concerned, the appellants have to establish their title over the property by separate proceedings. The suit for administration was rightly filed and preliminary decree was accordingly passed as there was no dispute that the property stands in the name of deceased at the time of his death. In the reported case of SYED MOHSIN RAZA BUKHARI a learned Single Bench of Lahore High Court has held as under:-

> "The learned Judge in the case did not allow the suit for partition to be converted into a suit for title observing that if these persons have any rights in the disputed properties they will no doubt assert their rights in a properly instituted suit. It is, therefore, apparent that unity of title and unity of possession must exist between the parties impleaded in the suit for partition qua the property sought to be partitioned. If any one impleaded in the suit claims a paramount title in the property, obviously he is negating unity of title and as such the plea falls outside the scope of a partition suit. The reliance of the learned counsel on the general observations of the learned Judge of the Bombay High Court in the case of Mulji Narotam v. Hiralal Ramchandra (AIR 1992 Bom. 424) to the effect that "Court (in Bombay Presidency) should settle all disputes arising out of a partition suit in one litigation and should not leave the parties to have their rights determined piecemeal at different times by different suits and perhaps by different Courts" is not apt as no paramount title was set up in the said case. The plea taken in the case was of adverse possession of the properties. Such pleas undoubtedly, it is well-settled, have to be determined in a partition suit. "

The above case relates to partition of property alone and not administration of property. In the case of SYED MEHDI HUSSAIN SHAH Supra the Hon'ble Supreme Court has held as under:-

> ". . . In a suit for administration the relief to be granted is that the estate of the deceased is to be administered under the decree of the Court. This means that the Court will assume the functions of an administrator, it will realize the assets, will discharge the debts and legacies, will take an account of the income of the property and will distribute the assets amongst those entitled to it. "

In the reported case of MUHAMMAD YOUNUS QURESHI the learned Single Judge of this Court has held as under:-

> "The scope of Administration suit is limited. The question of title to a property claimed by any heir in his own independent right cannot be decided in these proceedings. The object of the suit is to determine the estate of the deceased at the time of his death. Reference can be made to PLD 1962 SC 291, PLD 1978 Lah. 391 and to an unreported order passed by Zafar Hussain Mirza, J. in Suit No.274/75. "

The purpose of a suit for administration and partition is to decide whether a property belongs to deceased or not and without deciding this it is not possible for the Court to administer and partition the property. The scope is limited. The question of title to a property claimed by any heir in his own independent right cannot be determined in these proceedings. The object was to determine the estate of the deceased at the time of his death. Admittedly at the time of death, the property stands in the name of deceased owner and the appellants have failed to prove that the same was relinquished in favour of Anwar by the deceased owner in his life-time. In the reported case of ASGHAR ALI Supra a learned Division Bench of this Court has held as under:-

> ". . . The appellant/defendant in written statement has admitted that property No.W.O. 7/34, Wadhumal Udhamal Quarters belonged to the deceased father of the parties while property No.W.O. 7/30, Essaji Ibrahimji Street belonged to the deceased Asmatullah Bai though the latter property was purchased by him from his own funds in the name of his deceased mother but both properties stood in the name of deceased parents of the parties at the time of their death. This being the admitted position, there was no need to held an inquiry or adduce any evidence, therefore, preliminary decree for administration of the said property of deceased was legally and rightly passed by the learned Single Judge. So far the claim of the appellant/defendant it could be investigated and determined subsequent to the preliminary decree as in terms of the preliminary decree the estate of deceased would be administered and Court would assume the function of administration of estate deceased thereby would realise all the assets, discharge the debts and legacies and would take accounts of income of the properties and would distribute the assets amongst those entitled to it. The preliminary decree for administration of assets of deceased cannot be withheld only on the assertion that one of the said properties was purchased by the appellant in the name of his deceased mother from his own funds, when the said property even stood in the name of his mother at the time of her death. "

Regarding the contention of Mr.S. Ansar Hussain that the affidavit-in-evidence of Mst. Sultana is protected under Article 46 of the Qanoon-e-Shahadat Ordinance, 1984, and can be considered without test of cross-examination appears to have no force. The article do not provide protection to the deposition made in the Court without cross-examination. Article 46 simply provides that statements written or verbal of relevant fact made by a person who is dead or who cannot be found or who has became incapable of giving evidence or whose attendance cannot be procured without any amount of delay or expenses which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts. Article 46 deals with the conditions mentioned in eight clauses. The non-appearance of witness after filing of the affidavit-in-evidence till her death is not covered by the eight conditions of Article 46.

The preliminary decree as well as the decree in the suit was properly passed by the learned Single Judge and the learned counsel for the appellants has failed to point out any defect in the same.

For the above reasons the appeal was dismissed vide order dated 4.10.2007 and the above are the reasons/opinion.

JUDGE

Karachi:
Dated:06.02.2008.

S.A