

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. NO. D-7030/2016

Present: Munib Akhtar & Yousuf Ali Sayeed, JJ

Petitioner : Shabbir Ahmed, through Ms. Naila Kausar, Advocate.

Respondent No.2 : Mst. Gul Bano, in person.

Date of hearing
& Short Order : 09-02-2017.

JUDGMENT

YOUSUF ALI SAYEED, J.- Vide a short Order dictated in open Court on culmination of the hearing, this Petition was dismissed for detailed reasons to be recorded later, which are as set out herein below.

2. In terms of this Constitutional Petition, the correctness of an Order dated 21.12.2016 passed in Civil Revision No.57/2016 by the learned IIIrd Additional District Judge, Karachi, Central (the “**Impugned Order**”) has been assailed.
3. The main contesting parties are the Petitioner and the Respondent No.2, namely one Mst. Gul Bano, and the issue in dispute between them is essentially the degree of relative consanguinity between the Petitioner and one Mst. Mongi Bai, who is admittedly their common progenitor.
4. At the time of her demise, Mongi Bai is said to have been the owner of an immovable property, bearing Flat No. D-79, Karimabad, Ismailia Multi-Purpose Co-operative Housing Society, F. B. Area, Karachi. Apparently this property was subsequently demolished and reconstructed by the Society and then renumbered as Flat No.D-14, Karimabad, Ismailia Multi Purpose Co-operative Housing Society Ltd, F. B. Area, Karachi (the “**Ancestral Property**”), which we are told still stands in her name.

5. Whilst the Respondent No.2 is admittedly the daughter of the late Rehmat Khano Lakhani, who was the daughter of Mongi Bai, having been so described in the Petition, a correct ascertainment of the Petitioner's relationship with Mongi Bai is said to be determinative of the shares of these contesting parties in the Ancestral Property, as per the applicable rules of intestate succession.

6. The Petitioner contends that he is the son of Rehmat Khano Lakhani and thus the sibling of the Respondent No.2, hence they share a collaterally consanguineous relationship to Mongi Bai. He contends that on this basis, as the male heir, he is entitled to a 66.66% share in the Ancestral Property in relation to the 33.33% share of the Respondent No.2.

7. The Respondent No.2, appearing in person, denies this assertion/relationship, and contends that the Petitioner is her nephew and thus is a level below her in lineal consanguinity to Mongi Bai.

8. Briefly stated, the course of past litigation between the contesting parties relating to the Ancestral Property, as relevant for the purpose of the present dispute, is as follow:
 - (a) The Respondent No.2 had filed Civil Appeal No.39/2012 in the Court of learned IVth Additional District Judge, Karachi, Central, assailing the dismissal of a Civil Suit that had been filed by her.

 - (b) The said Civil Appeal was allowed vide Judgment dated 13.05.2014, whereby the Petitioner and Respondent No.2 were adjudicated to be the heirs of Mongi Bai and it was directed that the Ancestral Property be mutated in their names.

- (c) The Petitioner filed Execution Application No.10/2014 on 08.07.2014 before the learned 1st Senior Civil Judge, Karachi, Central, and it appears that being aggrieved by certain orders of the executing court apparently determining his share, the Petitioner filed an Application under S.151 CPC within the framework of the execution proceedings. This was dismissed on 25.11.2016.
- (d) The Petitioner then filed the aforementioned Civil Revision, which culminated in dismissal in terms of the Impugned Order.
9. Thus, in terms of the present proceedings the Petitioner has, *inter alia*, sought recall of the Impugned Order and what amounts to a declaration as to his and the Respondent No.2's respective shares in the Ancestral Property as per the basis espoused by him, as well directions to the concerned Cooperative Society to mutate the Ancestral Property in his favour accordingly.
10. Learned counsel for the Petitioner has contended that, the words "there is a dispute between the nephew and aunt over the property of the deceased Mongi Bai" appearing in the Judgment dated 13.05.2014 do not constitute a finding on this point by the learned IVth Additional District Judge, Karachi Central as to the relationship *inter se* the Petitioner and Mongi Bai, and that the executing court as well as the learned IIIrd Additional District Judge, Karachi (Central) have misconstrued these words and failed to appreciate that, being brother and sister, the shares of the Petitioner and Respondent No.2 in the Ancestral Property are to the extent of 66.66% and 33.33% respectively. Building on this contention, whilst responding to our query as to whether a second appeal was filed against this Judgment, learned counsel has conceded that no such appeal was filed and has argued, rather ingenuously, that this is not of importance as the Petitioner is not assailing any finding in the Judgment dated 13.05.2014 and is merely seeking the correct interpretation and implementation thereof.

11. Having examined the Judgment dated 13.05.2014, we are unable to accept the basic premise of the Petitioner's argument, in as much as the learned IVth Additional District Judge, Karachi Central appears, on the face of the record, to have proceeded with due application of mind on the basis of the evidence as referred, and has quite evidently held the relationship *inter se* the Petitioner and the Respondent No.2 to be that of aunt and nephew. *Prima facie*, there is nothing to suggest that the learned Judge fell into error in so ruling, and, if at all, this finding ought to have properly been assailed vide a second appeal. Admittedly, this remedy was never availed.

12. A perusal of the Order made on 25.11.2016 in respect of the Application of the Petitioner under S.151 CPC within the execution proceedings shows that whilst interpreting these words accordingly, the learned 1st Senior Civil Judge, Karachi (Central) has quite correctly held that it is not within the province of the executing court to go beyond the judgment and decree passed in the Civil Appeal. This has been affirmed, quite properly in our opinion, in terms of the Impugned Order, wherein the learned IIIrd Additional District Judge, Karachi (Central) has recorded a finding that the executing court has rightly allowed both the Petitioner and the Respondent No.2 a 50% share in the Ancestral Property and that the order dated 25.11.2016 does not require any interference.

13. As such, we are of the opinion that there is no apparent material irregularity in the Impugned Order, and accordingly no interference by this Court in exercise of its writ jurisdiction under Article 199 is warranted under the given circumstances.

14. In view of foregoing discussion this Petition is found to be devoid of merit and hence is dismissed. There will be no order as to costs.

JUDGE

JUDGE

Karachi
Dated _____