

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 614 of 2008.

Plaintiff:- Muhammad Amin S/o Hakeem
Muhammad Yamin
since deceased through his Legal Heirs.
(1) Zaibhunnisa W/o Muhammad Amin,
(2) Muhammad Mohsin S/o Muhammad Amin
(3) Muhammad Meraj S/o Muhammad Amin

through Mr. Sajid Latif,
Advocate for the Plaintiffs.

Defendants:- (1) Mst: Shamim Begum @ Lala
D/o Late Hakeem Muhammad Yamin,
(2) Muhammad Islam,
(3) Irfan.

None present for the Defendants

Date of hearing 11.01.2017

J U D G M E N T

ADNAN-UL-KARIM MEMON, J. The Plaintiff Muhammad Amin son of (late) Hakeem Muhammad Yamin (since deceased) filed the present suit for recovery of possession and mesne profits against Defendants seeking following relief(s):-

- A. Direct the Defendants to vacate the respective portions of the premises constructed on Plot No.R-1032, Block-14, Federal B. Area, Scheme No.16- Karachi admeasuring 120 Sq. Yards and handover the possession of the same to the Plaintiff.
- B. Grant mesnej profit at the rate of Rs.15,000/- against Defendant No.1 for three years from filing of this Suit, which total comes to Rs.540,000/- and against Defendants No.2 and 3 at the same rate i.e. Rs.15,000/- for having been in occupation of the property i.e. Plot No.R-1032, Block-14, Federal B. Area, Scheme No.16- Karachi admeasuring 120 Sq. Yards from January 2007 till filing of the suit i.e. Rs.225,000/- each and Rs.20,000/- per month each as future mesne profits till handing over the possession.
- C. Grant Rs.25,00,000/- towards wear and tear of the Suit House jointly and severally against the Defendants for not properly maintaining the suit property i.e. Plot No.R-1032, Block-14, Federal B. Area, Scheme No.16- Karachi admeasuring 120 Sq. Yards.

D. Cost and other relief, which this Hon'ble Court may deem fit and proper.”

2. Notices of this suit were issued to the defendants but they did not turn up in this Court and vide order dated 07.09.2009 they were declared ex-parte. During the course of proceedings the Plaintiff passed away and his legal heirs were directed to be brought on record, the same was done on 14.11.2009. The legal heirs of the Plaintiff contested the suit against the defendants as the Plaintiffs No.1, 2 and 3. Since none has appeared on behalf of the defendants as such this Court vide order dated 28.3.2011 fixed the matter for final arguments. Plaintiff No.2 namely Muhammad Mohsin, in compliance of the order has filed affidavit in ex parte proof alongwith Special Powers of Attorney executed by Legal Heirs No.1 and 3. He has attempted to establish his case that the Suit Property was leased out in favour of his father Muhammad Amin on 14.5.1975 by the Administrative Officer-II, Lands & Estate Department, K.D.A. and in support of his case he produced the photocopies of Indenture of Lease registered in his name, approved building plan of Suit Property and letter dated 03.01.1976 issued by Architect (Control) KMC Building Control Department. None is present on behalf of the Defendants. I have heard the learned counsel for the Plaintiffs.

3. Learned counsel for the Plaintiffs has argued the matter that the deceased Muhammad Amin was the original owner of the Suit Property together with triple storey building admeasuring 120 square yards by way of registered Lease Deed duly registered before the Sub-Registrar T-Division-III, Karachi on 13.8.1975. Per learned counsel, the construction on the plot was raised by the deceased Muhammad Amin with his own means being employed in Siemens (Pvt) Limited which was approved by the then competent authority vide letter dated 03.01.1976. Learned counsel for the plaintiff has further contended that the Defendant No.1 is

Aunty of Plaintiffs No.2 and 3 and real sister of Muhammad Amin. The Defendant No.1 was unmarried and living in the Suit Property along with her father with their implied consent. The father of Muhammad Amin passed away on 02.02.2005 whereafter the Defendant No.1 usurped the legacy left over by their father namely Hakeem Muhammad Yamin, which consisted of valuables in the shape of gold, diamonds, silvers worth more than Rs.10.00 Millions and besides that valuable securities in the shape of certificates drawn from various banks/WAPDA Bearers Certificates and the deposit in the bank account maintained in the NBP, Naseerabad Branch, Federal-B Area, Karachi as the Defendant No.1 failed to fairly distribute the legacy left over after the sad demise of Hakeem Muhammad Yamin as such a Civil Suit No.538 of 2006 for administration of the properties of the deceased was filed, which is reported to be pending adjudication before the Court of law. Learned counsel has further submitted that the Defendant No.1 was asked to vacate the Suit Property and offer was given by the sisters of Muhammad Amin, the legal heirs in the Administration Suit, to accommodate and adjust her so that she may remain in the family atmosphere but she remained adamant and on her asking to vacate the suit premises had shown adamancy. Not only that she illegally occupied the Suit Property but for the last about one year the remaining portion of the Suit Property was let out to Defendants No.2 and 3, who are in illegal occupation being without consent of the Plaintiffs. Learned counsel further argued that since the Defendant No.1 did not vacate the Suit Property in the month of February 2005, after the death of their father she made her liable to pay mesne profits at the rate of Rs.500/- per day (Rs.15,000/- per month) within three years prior to filing of this suit which comes to Rs.540,000/- and so also since the Defendants No.2 and 3 have been in occupation of the Suit Property without the express permission of the

Plaintiffs as such they have also made themselves liable to be ejected from the Suit Property and to pay to the Plaintiffs the mesne profits for the use of the suit property at the rate of Rs.500/- each per day for the possession/occupation of the suit property in their respective use and occupation w.e.f. January, 2007 i.e. Rs.15,000/- per month each which comes to Rs.225,000/- each till filing of the suit and onward at the rate of Rs.700/- per day. Learned counsel for the Plaintiffs next argued that defendants did not properly maintain the Suit Property and thus an amount of Rs.25,00,000/- is required towards wear and tear of the suit property which requires repair and thus the defendants are liable to pay jointly and severally the said amount. Learned counsel has next contended that Muhammad Amin during his lifetime requested the defendants to hand over the vacant possession of the Suit Property and pay the mesne profits at the rate of Rs.540,000/- and Rs.225,000/- each from Defendant No.1, 2 and 3 respectively and so also Rs.25,00,000/- towards repair of the same but the Defendants did not pay any heed. The counsel for the Plaintiffs has drawn attention of this Court that during proceedings of this matter the father of the Plaintiffs No.2 and 3 tried his level best to get the vacant possession of the Suit Property, but failed and was compelled to file the instant suit and summons were duly served upon the defendants through bailiff as well as through registered A/D and thereafter through publication on 18.8.2009 but they did not turn up and this Court vide order dated 07.9.2009 ordered to proceed against the defendants ex-parte and in this regard the Plaintiff No.2 filed affidavit-in-exparte proof alongwith title documents of the suit property before this Court. The learned counsel for the Plaintiffs has prayed for judgment and decree against the defendants for recovery of possession and mesne profit with cost.

4. I have heard the learned counsel for the Plaintiffs and perused the material available on record.

5. From perusal of pleadings and evidence of Muhammad Mohsin, who is also duly constituted attorney of other legal heirs i.e. Plaintiffs No.1 and 3, by virtue of a Special Powers of Attorney. The title documents of the Suit Property are duly registered in the name of Muhammad Amin (Plaintiff/since deceased), it is now an undisputed fact that so far as to the title documents of the Suit Property in favour of the Plaintiffs are concerned, it is also an admitted fact that the Defendant No.1 is the real sister of the deceased Muhammad Amin and in this regard the Plaintiffs have asserted that Suit Property belonged to them and not to the Defendant No.1 and the Defendant No.1 has illegally and unlawfully given the suit property on rent to the Defendants No.2 and 3 without lawful justification. I have also perused the pleadings of the Plaintiffs and gone through the order dated 14.03.2011 and statement dated 11.08.2010 of Plaintiff No.2, which shows that the Defendant No.1 has shifted to some other place after vacating the premises subject matter of the present Suit. The same is lying vacant and locked since 2008. I have also gone through the Application being (CMA No.2187/2011) filed under Order XXVI Rule 9 read with Section 151 CPC for appointment of the Commissioner to make investigation whether the Defendant No.1 Mst. Shamim Begum alias Lala daughter of Hakeem Muhammad Yameen residing at House No.R-1032, Block-14, F. B. Area, Karachi is alive or dead or she has left the premises, which is lying vacant and locked. This Court vide order dated 14.03.2011, dismissed the said application as not pressed. So far as the next point with respect to the factum whether the Defendant No.1 Mst. Shamim Begum alias Lala daughter of Hakeem Muhammad Yameen is alive or dead is

concerned, this Court vide order dated 28.03.2011 made observation that:-

“several efforts made by the legal heirs of the Plaintiff no evidence has come on record that the Defendant No.1 has expired. However, it is clear from the affidavits filed by the legal heirs of the Plaintiff that the Defendant No.1 has shifted from the present address. Office is directed to place the matter for final arguments.”

6. I have also gone through the evidence of the Plaintiff No.2 (Muhammad Mohsin), who in support of his case, has produced affidavit-in-ex-parte proof, as Ex.PW5-1/1, he also produced Special Powers of Attorney of Muhammad Mairaj and Mst. Zaibunnisah, executed in his favour as Ex.PW5-1/2 and PW-5-1/3. He also produced photocopy of the letter dated 14.05.1975 issued to Muhammad Amin (Plaintiff/since deceased) by the Administrative Officer-II, Lands and Estates Department, KDA as Ex.PW5-1/4 (original seen and returned). He also produced photocopy of Indenture of Lease dated 12.08.1975, in the name of Muhammad Amin son of Muhammad Yameen (father of Plaintiff No.2 and 3) as Ex.PW5-1/5 (original seen and returned). He also produced photocopy of approved building plan of Plot No.1032, Block No.14, F. B. Area, Karachi as Ex.PW5-1/6 (original seen and returned) and he produced a photocopy of the letter dated 03.01.1976 issued to Muhammad Amin by Architect (Control) KMC Building, Control Department, as Ex.PW5-1/7.

7. It is now well settled principle of law that even in absence of the defendants, this Court has to see the legal character of the Plaintiffs and what evidence as proof they have brought before this Court to substantiate their claim with regard to the recovery of possession of the Suit Property and mesne profit.

8. It is an admitted fact that the title documents of the suit property are duly registered in the name of Muhammad Amin (Plaintiff / since deceased) and as such I confine myself to the extent of the prayer of the Plaintiffs for recovery of possession and mesne profit.

9. It appears from the record that title documents issued in favour of Muhammad Amin (Plaintiff / since Deceased) and other related documents brought on record by PW/1 (Muhammad Mohsin), show that he is owner of the suit property, and the presumption of its genuineness is also existed in terms of Article 75 of the Qanun-e-Shahadat Order 1984, therefore, the Suit is decreed in terms of Prayer Clause (A). Insofar as grant of Prayer Clause (B) to (D) are concerned, it is well settled principle of law that the burden is always held to be on the Plaintiff(s) to prove the amount of mesne profit. This is the recognized practice and in the present proceedings, the Plaintiff(s) have not produced any cogent evidence to substantiate their claims with regard to mesne profit and other prayers, viz. Prayer Clauses (B) to (D) of the Plaint, which cannot be allowed under the peculiar circumstances of the present case. Consequently, the instant Suit is hereby decreed only to the extent of Prayer Clause (A). Office is directed to prepare Decree accordingly.

JUDGE