

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 403 of 2014

Mrs. Ismat Ashraf ----- Plaintiff

Versus

Salateen Trust & others ----- Defendants

- 1) **For hearing of CMA No. 4197/2014.**
- 2) **For hearing of CMA No. 3246/2014.**
- 3) **For hearing of CMA No. 3247/2014.**
- 4) **For hearing of CMA No. 3248/2014.**
- 5) **For hearing of CMA No. 3249/2014.**
- 6) **For hearing of CMA No. 4196/2014.**
- 7) **For orders on CMA No. 15923/2014.**

Date of hearing: 08.03.2017.

Date of order: 03.04.2017.

Plaintiff : **Through Mr. Khawaja Shamsul Islam along with Mr. Imran Taj Advocates.**

Defendants: **Through Mr. Ravi R. Pinjani along with Mr. S. Maqbool Shah Advocates.**

ORDER

Muhammad Junaid Ghaffar, J. Through application at Serial No.1 (CMA No. 4197/2014) the Defendants seeks rejection of the plaint in this Suit under Order VII Rule 11 CPC on the ground so stated in the application.

2. Learned Counsel for the Defendants has submitted that this is a Suit against a Charitable Trust and in view of the fact that the Plaintiffs have come to this Court seeking personal benefits; therefore, in terms of Section 92 CPC the Suit is barred, hence, the plaint is liable to be rejected. Per learned Counsel in terms of Section 92 CPC and as interpreted by a Division Bench of this Court in the case reported as *Khawaja Muhammad Ali & 6 others V. Sir Jehangir Kothari Trust through Trustees and 16 others (PLD 2013 Sindh 592)* there should not be any private interest of the parties and therefore, the Suit is incompetent. He has further submitted that after an objection was

raised the Plaintiff sought an amendment in the prayer clause whereby, prayer clause (a) was omitted; however, such permission was granted by this Court without prejudice to the objections so raised on behalf of the Defendants and therefore, even after omission of prayer clause (a), the objection can be sustained. Learned Counsel has read out various Paragraphs of the plaint including Para No. 12, 17 and 18 and has contended that they all relate to private interest in the Trust and therefore, the Suit is incompetent under Section 92 CPC. Learned Counsel has also raised an objection regarding the power of attorney of the Plaintiffs inasmuch as according to the learned Counsel the same is defective and does not authorize the attorney to file instant Suit. Therefore, per learned Counsel even on this ground the Suit is incompetent. Learned Counsel has also referred to the various provisions of the Trust Deed and has contended that the Trust property no more vests in deceased Azeem Sultan from whom the Plaintiffs allegedly derive any interest in the Trust. In support of his contention he has relied upon *Messrs M. A. Majeed Khan V. Karachi Water & Sewerage Board and another (PLD 2002 Karachi 315)*, *Arif Majeed Malik and others V. Board of Governors Karachi, Grammar School (2004 CLC 1029)*, *Messrs Muhammad Ismail through Managing Partner and 6 others V. Messrs Sir Jahangir Kothari Trust through Trustees and 16 others (2011 CLC 1847)*, *Fakir Shah and others V. Mehtab Shah Pir Bukhari Masjid Committee and others (PLD 1989 SC 283)*, *Swami Parmatmanand Saraswati and another V. Ramji Tripathi and another (AIR 1974 SC 2141)* and *Ejaz Inayat v. Rt. Rev. Dr. A.J.Malik (PLD 2009 Lahore 57)*.

3. Conversely on the other hand, Learned Counsel for the Plaintiffs has referred to order dated 17.1.2014 passed in Suit No.1643/2013 and has contended that through this order the Plaintiffs were required to forgo their claim to the extent of the Trust from the aforesaid Suit, and thereafter have filed an independent Suit. Learned Counsel has also referred to permission dated 12.3.2014 granted by the office of the Advocate General Sindh and has contended that all requirements as provided in Section 92 CPC have been fulfilled. Learned Counsel has also referred to J.M. No. 1/2014 filed by the Defendants and has submitted that through the said J.M. the Defendants have themselves come to this Court for seeking guidance regarding managing the Trust and the prayer in this Suit is more or less similar to the prayer in the J.M., therefore, listed application is misconceived. Per learned Counsel the Plaintiff do not claim any personal interest in the trust, whereas, more than two Plaintiffs have come before this Court, therefore, even otherwise, the conditions stipulated in Section 92 CPC are more than fulfilled; hence, the objection of the Defendants is not appropriate. Regarding the power of attorney learned Counsel has contended that such objection is too hyper technical, whereas, even subsequently, the Plaintiffs have further ratified through correspondence and have affirmed the competency of their attorney in filing and pursuing these proceedings. Per learned Counsel even the Defendants who have filed J.M. have done so through

attorney which is also defective and therefore, they cannot raise such an objection. He has further contended that the Plaintiffs are even agreeable to the grant of prayer in J.M. for administration of the Trust and therefore, the application is misconceived and is liable to be dismissed. In support he has relied upon *Ms. Anita Ghulam Ali & 2 others V. Abdul Rehman and 4 others (PLD 1972 Karachi 649)*, *Zahid Farooq and another V. Anjuman Jamia Masjid and 4 others (1995 SCMR 1584)*, *Shaikh Mushtaq Ali Advocate V. Shafqat Ali Khan and another (1987 CLC 753)* and *Kathiawar Cooperative Housing Society Ltd. V. Macca Masjid Trust and others (2009 SCMR 574)*.

4. I have heard both the learned Counsel and perused the record. First, I would like to deal with the objection regarding power of attorney. On perusal of the power of attorney as well as the subsequent emails of the Plaintiffs placed on record, I do not see any reason to discard the power of attorney and to hold that the Suit is incompetent. It is of utmost importance to observe that while construing these types of power of attorneys, the Court is not required to take a strict view, but should construe them liberally, to meet the ends of justice. It is to be noted that while interpreting the contents of a power of attorney, the acts done by the attorney in furtherance to the main purpose for which the power of attorney has been issued, and which are for the benefit of the principal, the same may be protected and may be considered as valid irrespective of the fact that such authority or power was not specifically mentioned in the power of Attorney. If the acts performed by the attorney are detrimental or against the interest of principal, then the same has to be strictly constructed and in such exceptional cases exercise of such power by the attorney will not be considered as valid. Reference in this regard can be made to a judgment of the Hon'ble Supreme Court in the case of *Qadir Bakhsh & 10 others Vs. Kh. Nizam-ud-din Khan & 4 others*, reported in *2001 SCMR 1091*, wherein it was contended by one of the parties that since the power of attorney was only to manage the immovable properties, and, therefore, the attorney was not competent to file suit or prefer appeal there against, as the power of attorney is to be construed strictly, whereas, the authority in question is to be found within the four corners of the instrument; either in express terms or by necessary implication. Such objection was repelled by the Hon'ble Supreme Court while interpreting the contents of the power of attorney and it was observed that the power of attorney vests full rights in the agent to perform the specified acts and to vest in him all the present and future property rights and interest of the principal including filing of suit or appeal in respect of the said property. The relevant portion of the judgment is reproduced as under:

“19. The underlined portion of the impugned power of attorney is in essence of the operative part and a bare reading thereof would show that the authority conferred on the attorney in the underlined portion of the power of attorney was much higher and extensive rather than the filing of the suit or of the appeal. Generally, in interpreting the power of attorney, it is ignored that it

has two aspects: (i) the power to do something on behalf of the principal which is generally beneficial to him and (ii) the power to exercise the discretion depriving the principal of his right to his assets, properties etc. The part of the power of attorney which tends to accretion of the right to the proprieties and assets to the principal may not be interpreted in stringent terms for instance to file a suit or appeal as has been clearly laid down in the power of attorney in the instant case authorizing the attorney to file suit/action either civil or criminal or to defend them if filed against the principal and to peruse it from the lower Court to the High Court. In the instant case the attorney has been authorized even to sell, bequeath the immovable property of the pre-emptors. Such a right tends to deprive the principal of his valuable rights in the immovable property. If the attorney has been given that much power there is no earthly reason as to why he should be deemed to be deprived of the power to file suit or appeal on behalf of his principal”.

In view of hereinabove discussion and peculiar facts and circumstances of this case, the objection in respect of power of attorney as being incompetent or deficient is hereby repelled.

5. Section 92 CPC envisages a situation when a Suit is filed to obtain a decree for any one or more of the relief(s) enumerated in clauses (a) to (h) of sub-section (1) of Section 92 *ibid*. Such a Suit can either be filed by the Advocate General or two or more persons having an interest in the Trust with the consent in writing of the Advocate General. Here, in this matter the only objection which has been raised is that since the Plaintiffs are seeking a personal interest in Trust, therefore, the Suit is not maintainable. There is no objection regarding the permission of the Advocate General and so also in relation to the relief(s) enumerated in Section 92 CPC. Though a feeble attempt has been made by the learned Counsel for Defendants that even such permission does not cure his objection, however, I am of the view that at this stage of the proceedings this cannot be sustained so as to reject the plaint. On the basis of the averments and the record placed by the Plaintiffs including the permission of Advocate General, I am not satisfied that the plaint can be rejected summarily in this matter. In the earlier Suit No.1643/2013, while passing order dated 17.1.2014, the Court had specifically observed that the relief being claimed against the Trust has to be separated, and thereafter instant Suit has been filed. The operative part reads as under;

Be that as it may, one question that has arisen in my mind is as to how these two matters, which appear to be distinct and separate subject matters, can be clubbed together in one suit. When this query was raised, learned Counsel for the plaintiff stated, in my view quite properly, that insofar as the allegations with regard to the trust were concerned, that would form the subject matter of a separate suit, if any, to be filed. Accordingly, insofar as this order is concerned and any subsequent order that may be made in this suit, it is clarified that such order shall not in any manner whatsoever affect or relate to the trust or

the trust finds as stated or shown in the plaint, whereby by way of any bank accounts in the name of the trust or any other moveable property that may lie with or vest in the trustees or may otherwise be in their possession or control. The plaintiffs, if entitled to do so, will have to pursue their claims with regard to such funds and property by way of separate proceedings. It is also clarified that this observation is entirely without prejudice to the case of any person who is impleaded as a defendant in any such suit, and that suit will be considered on its own merits. The specific reason why a clarification is being made is that the plaint contains a number of paragraphs in which a large number of moveable and immovable properties have been mentioned and listed, and it is sometimes not immediately clear whether a particular property is that of the trust, or is averred to form part of the estate of the aforementioned deceased. It may therefore be that the interim order being made today, or as may be made subsequently, may inadvertently affect the trust, the defendant No. 8. It is clarified that any interim order made in this suit, unless specifically and expressly so stated by the Court, does not extend or apply to the trust or any property or bank account of the trust. The order made today and any subsequent orders must therefore, be read subject to this clarification.

On this basis the Plaintiffs have forgone prayer clause (a) regarding the Trust in question and therefore, even otherwise, and without prejudice, even if this Suit is treated as a Suit out of the ambit of Section 92 CPC, then again on an application under Order 7 Rule 11 CPC, in a declaratory Suit plaint cannot be rejected on this ground alone. The Plaintiffs were Trustees at one point of time when their deceased father Azeem Sultan was alive and had formed the Trust as a settlor. Their case is that during his illness the Defendants No.2 to 6 maneuvered the Trust Deed by making his forged signatures and have thrown out the Plaintiffs from the management of the Trust, whereas, funds of the trust are not being used in respect of the aims and objects laid down by the settlor. Their further claim is that they have also syphoned of funds and have taken over the management of the Trust, and therefore, they are seeking relief through this Suit.

6. Perusal of section 92 CPC further reflects that it does not impose a general embargo on filing of a Suit in a Civil Court but only directs that Suits of the nature mentioned in Sub-section (1) shall not be instituted in a Civil Court except in conformity with the provisions set out thereto, and the main purpose of this Section is to give protection to public trusts of a Charitable or Religious nature from being subjected to harassment through fictitious litigation; but in no manner it can be construed so as to give the Trust and Trustees a free ride regarding management of the Trust. Legislation never intends so, nor is done to protect the wrongdoers, if any. There are serious allegations against the trustees in this matter, who are brothers and sisters inter-se, and therefore, if the plaintiffs are denied their right of remedy on this hyper-technical objection and are restrained or debarred from leading evidence in the matter, by

rejecting the plaint, I am afraid this will not serve the cause of justice, in any manner. Moreover, the defendants have also filed a J.M. by themselves, seeking guidance from this Court regarding affairs of the Trust, therefore, even otherwise rejection of plaint will not serve the Trust, nor will it be helpful in management of the Trust in a transparent manner, and will also deprive the beneficiaries from purposeful distribution of donations, if any. In their J.M. filed under Section 7 of the Charitable & Religious Trust Act, 1920, the defendants have sought opinion to the effect *that upon the demise of the Settlor Trustee, what would be the composition of the Trust and how it has to be proceeded; opinion as to whether upon resignation of one of the Trustees* (Rubina Ali Khan-Proforma defendant No.7), *how it has to be filled; opinion / declaration that the Trust is a Charitable purpose Trust and not a Wakf-ul-Aulad under the Islamic Law; directions to all Trustees to furnish details of all cheques drawn on any Trust Account; and direction to Respondent No.3* (Plaintiff No.3), *who is a Trustee to refrain from raising any claim adverse to the interest of the Trust.* After an overall perusal of the prayer made in the J.M. and instant Suit, I am really surprised as to why the defendants are seeking rejection of plaint in this Suit. Here in this case there are serious allegations against the Trust and its Trustees regarding mismanagement as well as removal of Trustees, appointment of a Trustee(s), directing accounts and inquiries, settling a scheme; which all are mentioned under section 92 CPC, hence if this matter is treated as a Suit under section 92 *ibid*, then necessary conditions have been fulfilled, including permission by the Advocate General. Whereas, the defendants have also come to this Court regarding various issues about the Trust including a declaration that the Trust is Charitable Trust and not a Wakf-ul-Aulad, which apparently but indirectly is the claim of the plaintiffs in this Suit.

7. The objection that the plaintiffs have a private interest in the Trust or not, is not a question which can be decided on the mere reading of pleadings and necessarily requires leading evidence to that effect. In my view merely for the fact that defendants aver that according to them it is the private interest which is being pressed upon by the plaintiffs, and the plaint be rejected, cannot be accepted by the Court at this stage of the proceedings and can only be decided once the parties lead evidence to that effect. Moreover, it is also to be noted that there may be a case that ultimately the Suit at the trial is dismissed as not maintainable, but on the same issue it is not necessary that the plaint may also be rejected under Order 7 Rule 11 C.P.C. The Hon'ble Supreme Court very recently in the case of *Al-Meezan Investment Management Company Ltd & Others V. WAPDA First Sukuk Company Limited, Lahore, etc* (**PLD 2017 SC 1**) has observed that *...Suffice it to say that the question of whether a suit is maintainable or not is moot with respect to whether or not a plaint is to be rejected as being barred by law. Both are a different species altogether and it may well be that a plaint is not rejected in terms of Order 7 Rule 11 CPC but*

the suit is dismissed eventually as not maintainable for a possible host of reasons. In the circumstances, I am of the view that the defendants may well be within their right to have an issue framed regarding maintainability of Suit as above, but cannot seek rejection of plaint on this ground.

8. Notwithstanding the aforesaid observation, even otherwise I am of the view that the bar (if any, as contended by the defendants) under section 92 CPC is not attracted in this case as the prayer which is being sought does not *stricto-sensu* makes it a Suit seeking such relief. In the case of *Bishwanath and another v Sri Thakur Radha Ballabhji and others* (**AIR 1967 SC 1044**) in more or less similar circumstances, the Hon'ble Supreme Court of India has been pleased to observe as under;

7. It is settled law that to invoke section 92 of the Code of Civil Procedure, 3 conditions have to be satisfied, namely, (i) the trust is created for public purposes of a charitable or religious nature; (ii) there was a breach of trust or a direction of Court is necessary in the administration of such a trust; and (iii) the relief claimed is one or other of the reliefs enumerated therein. If any of the 3 conditions is not satisfied, the suit falls outside the scope of the said section. A suit by an idol for a declaration of its title to property and for possession of the same from the defendant, who is in possession thereof under a void alienation, is not one of the reliefs found in section 92 of the Code of Civil Procedure. That a suit for declaration that a property belongs to a trust is held to fall outside the scope of section 92 of the Code of Civil Procedure by the Privy Council in *Abdul Rahim v. Barkat Ali* 55 Ind.App. 96: (AIR 1928 PC 16), and by this Court in *Mahant Pragdasji Guru Bhagwandasji v. Patel Ishwarlalbhaji Narsibhai* 1952 SCR 513: (AIR 1952 SC 143), on the ground that a relief for declaration is not one of the reliefs enumerated in section 92 of the Code of Civil Procedure. So too, for the same reason a suit for a declaration that certain properties belong to a trust and for possession thereof from the alienee has also been held to be not covered by the provisions of section 92 of the Code of Civil Procedure: See *Mukhda Mannudas Bairagi v. Chagan Kisan Bhawasar* ILR (1957) Bom 809: (AIR 1959 Bom 491). Other decisions have reached the same result on a different ground, namely, that such a suit is one for the enforcement of a private right. It was held that a suit by an idol as a juristic person against persons who interfered unlawfully with the property of the idol was a suit for enforcement of its private right and was, therefore, not a suit to which section 92 of the Code of Civil Procedure applied: see *Darshan Lal v. Shibji Maharaj Birajman* I.L.R. [1922] 45 All. 215: (AIR 1923 All 120) and *Madhaurao Anandrao Raste v. Shri Omkareshvar Ghat* [1928] 31 Bom LR 192: (AIR 1929 Bom 153). The present suit is filed by the idol for possession of its property from the person who is in illegal possession thereof and, therefore, it is a suit by the idol to enforce its private right. The suit also is for a declaration of the plaintiff's title and for possession thereof and is, therefore, not a suit for one of the reliefs mentioned in section 92 of the Code of Civil Procedure. In either view, this is a suit outside the purview of section 92 of the said Code and, therefore, the said section is not a bar to its maintainability.

9. In view of the above discussion and the peculiar facts and circumstances of this case I am of the view that the objection so raised cannot be sustained and the plaint cannot be rejected. Accordingly the application bearing CMA No.4197/2014 filed under Order 7 Rule 11 CPC is hereby dismissed. However, the defendants may raise such objection at the time of settlement of issues regarding maintainability of the Suit.

Dated: 03.04.2017

J U D G E

ARSHAD/