

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI  
J. M. No. 07 OF 2018

Date	Order with signature of Judge
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Syeda Maryam

APPLICANT

VERSUS

Rabia Bibi & others

RESPONDENTS

Mr. Shafiq Ahmed, Advocate for the Applicant  
Mr. Adil Shamsi, Respondent No.4 in person

**ADNAN IQBAL CHAUDHRY J. -**

By a short order dated 10-4-2018, this J.M. was allowed as follows:

“For reasons to be recorded later, J.M. No.07 of 2018 is allowed. Consequently, any auction proceedings being taken with regards to 2 ½ marlas of the Applicant’s house mentioned in the prayer clause of J.M. No.07/2018 should be stopped.”

Reasons for the above short order follow.

1. By this J.M. under section 12(2) CPC the Applicant has challenged the judgment and decree dated 13-02-2015 passed in Suit No.1251/2008 insofar as it decreed a property claimed by the Applicant. Suit No.1251/2008 for administration of the estate of late Syed Safdar Hussain Shah Shamsi (hereinafter ‘the Deceased’) was filed by the widow of the Deceased and the children of the Deceased through the said widow (respondents 1 to 4 herein), against the other children of the Deceased through his first marriage (the Applicant and the Respondents 5 to 11 herein). The Applicant, as daughter of the Deceased was arrayed as defendant No.5 in the said Suit.

2. Per the plaint of Suit No.1251/2008, the Deceased had passed away on 25-6-2007. The properties said to be left behind by the Deceased were listed in paragraphs 3(a) to 3(e) of the plaint, which comprised of 5 immovable properties. The immovable properties mentioned in paragraphs 3(a) to 3(d) of the plaint were situated at Karachi, hereinafter ‘the Karachi Properties’; while the

immovable property mentioned in paragraph 3(e) of the plaint was situated at Multan, being House constructed on land measuring 7 marlas, the land bearing khata No.305, khatafi No.471, situated at Moza Tarf Mubarak, behind Meharban Colony, Tehsil and District Multan, hereinafter referred to as “the Multan Plot”. It is the Multan Plot that is germane to these proceedings.

3. Per paragraph 5 of the plaint, a civil suit with regards to the Multan Plot was pending before the Senior Civil Judge Multan, and this paragraph explicitly excluded the Multan Plot from the purview of Suit No.1251/2008 and confined the Suit to the Karachi Properties. The prayer clause of Suit No.1251/2008 too was with regards to the Karachi Properties only. On 10-10-2009 a written statement was filed by the defendant No.2 (Respondent No.6 herein) for himself and as Attorney of the other defendants. While such written statement admitted that the Multan Plot was the property of the Deceased, it categorically stated that it was so only to the extent of 4 ½ marlas and not 7 marlas as alleged by the plaintiffs (see paragraph 8 of the written statement). No document was filed with the plaint nor with the written statement to show the title of the Deceased to any part of the Multan Plot.

4. The affidavit-in-evidence of the plaintiff No.1 (the Respondent No.1 herein) stated that the civil suit before the Senior Civil Judge Multan with regards to the Multan Plot, filed by the defendants 2 and 3 (the Respondents 6 and 7 herein), was dismissed under Order XVII Rule 3 CPC for want of evidence. The date of its dismissal was mentioned by the defendant No.2 on cross-examination as 13-02-2012. The affidavit-in-evidence of the defendant No.2 (Respondent No.6 herein) again clarified that the Multan Plot that belonged to the Deceased measured only 4 ½ marlas and not 7 marlas as alleged by the plaintiffs.

5. That paragraphs 4 and 8 of the judgment dated 13-2-2015 passed in Suit No.1251/2008 show that the Multan Plot (of 7 marlas) was treated as subject matter of the suit, being one for administration, on the basis of an admission made by the defendant No.2 (Respondent No.6 herein) that the same was also the property of the Deceased. Though while passing judgment, the

Court decreed the suit “.....in terms of the prayer clause (a).....”, which prayer clause did not include the Multan Plot, it was also decreed that “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”, and the Nazir of this Court was appointed Administrator of the properties of the Deceased, including the Multan Plot of 7 marlas, to sell the same and to distribute its proceeds amongst the legal heirs. It may be recalled that paragraph 3(e) of the plaint of Suit No.1251/2008 was with regards to the Multan Plot. Thus in decreeing Suit No.1251/2008, the Multan Plot was described in the manner set-out in paragraph 3(e) of the plaint, i.e. 7 marlas as opposed to 4 ½ marlas.

6. By order dated 24-8-2016 passed in Suit No.1251/2008 after it had been decreed, it was observed that given the self-executing nature of the decree, a separate Execution Application need not be filed to implement the decree. Thus by a subsequent order dated 18-12-2017 the Karachi Properties and the Multan Plot were ordered to be auctioned through the Senior Civil Judge Multan. On 28-12-2017 the Senior Civil Judge Multan directed its Nazir to take possession of the Multan Plot. Pursuant thereto, the Nazir of the Senior Civil Judge Multan attached 4 marlas 15 yards of the Multan Plot. However, on noticing that the decree was for the sale of the entire 7 marlas of the Multan Plot, the Senior Civil Judge Multan, vide order dated 22-1-2018, directed its Nazir to attach the entire Multan Plot measuring 7 marlas for auction. Per the Applicant of this J.M., that is when she discovered that the decree in Suit No.1251/2008 had been passed also against her house on 2 marlas and 15 yards of the Multan Plot. Thereafter the Applicant moved an application to the Senior Civil Judge Multan on 29-1-2018 for stopping the auction of her house on 2 marlas 15 yards of the Multan Plot, which application was dismissed by the Senior Civil Judge Multan essentially on the ground that it cannot go behind the decree; hence this JM by the Applicant on 6-2-2018.

7. It is the case of the Applicant that while the Deceased had purchased the Multan Plot measuring 7 marlas in the year 1987, he had in the year 1992 gifted 2 marlas 15 yards out of 7 marlas to

the Applicant; that there are 2 houses built on the Multan Plot, one house was built by the Applicant on her property, i.e., 2 marlas 15 yards, and the other house was built on 4 ½ marlas that was the property of the Deceased and which was in possession of the plaintiffs of Suit No.1251/2008 (the Respondents 1 to 4 herein). The J.M. is supported by the following:

- (i) the report of the *patwari* (page 141) that the Deceased had purchased the Multan Plot vide a registered deed dated 17-9-1987 (page 151); that the Deceased had gifted 2 marlas 15 yards to the Applicant vide a registered deed dated 19-2-1992 (back side of page 143), whereafter the Deceased was left with 4 marlas 15 yards which was mutated to the names of his legal heirs after his demise;
- (ii) registered gift deed dated 19-2-1992 executed by the Deceased gifting 2 marlas 15 yards to the Applicant out of the Multan Plot of 7 marlas (page 143); and
- (iii) extract of the mutation in the record of rights in the name of the Applicant showing her as owner of 2 marlas 15 yards of the Multan Plot (page 157).

8. Learned counsel for the Applicant contented that though the Multan Plot was never subject matter of the plaintiff's claim in Suit No.1251/2008, it was treated as subject matter of the suit not on the basis of any documentary evidence, but on the basis of an admission made by the defendant No.2 (Respondent No.6 herein) that the same was also the property of the Deceased, but that such admission was only to the extent of 4 ½ marlas of the Multan Plot. Thus the remaining part of 2 marlas 15 yards of the Multan Plot was never subject matter of the suit and to that extent the judgment and decree are without jurisdiction. He submitted that the Applicant only became aware that the judgment and decree adversely effected her when her house on 2 marlas 15 yards of the Multan Plot was attached by the Nazir of the Senior Civil Judge Multan. Learned counsel for the Applicant submitted that the description of the Multan Plot in para 3(e) of the plaint as being 7 marlas as opposed to 4 marlas 15 yards was a fraud and misrepresentation by the plaintiffs (the Respondents 1 to 4 herein) who have all along been residing at the Multan Plot in their house on 4 marlas 15 yards knowing fully well that the adjacent house

on 2 marlas 15 yards of the Multan Plot where the Applicant has been residing all along, is the Applicant's property.

9. The respondent No.4, arguing the matter in person, supported the judgment and decree passed in Suit No.1251/2008. He contended that notwithstanding the absence of 2 marlas 15 yards of the Multan Plot from the subject matter of the suit, the last paragraph of the judgment had annulled all instruments adverse to the Deceased's title, including the one claimed by the Applicant. However, he conceded that the registered instrument of gift relied upon by the Applicant was never part of the record of the Suit nor was it challenged.

10. Admittedly, the Multan Plot, which was not subject matter of the plaintiff's claim in Suit No.1251/2008, was treated as subject matter of the suit on the basis of an admission made by the defendant No.2 (Respondent No.6 herein) that the same was also the property of the Deceased. However, such admission was only to the extent of 4 ½ marlas of the Multan Plot and it had been specifically denied by the defendants that the Multan Plot that vested in the Deceased on his demise was 7 marlas. No issue was framed with regards to the 2 marlas 15 yards of the Multan Plot; admittedly, no evidence was lead by the plaintiff to show that the Multan Plot that vested in the Deceased on his demise was in excess of 4 marlas 15 yards; and admittedly, the documents relied upon by the Applicant for her title to 2 marlas 15 yards of the Multan Plot, that are said to have been annulled by the judgment, were also not subject matter of the suit. Infact, 2 marlas 15 yards of the Multan Plot was a separate property. Thus if a judgment on the admission of the defendants had to follow, it could only have been for the admitted 4 marlas 15 yards of the Multan Plot. In other words, the remaining part of 2 marlas 15 yards of the Multan Plot and the Applicant's entitlement thereto was never subject matter of the suit.

11. In the case of *Rehmat Ali v. Additional District Judge Multan* (1999 SCMR 900), while discussing the scope of section 12(2) CPC, it was held by the Honourable Supreme Court that "*The jurisdiction of Court has reference to (i) subject matter, (ii) territorial extent, (iii)*

*pecuniary value of the claim involved, (iv) nature of dispute, and (v) amenability of the parties to the process of the Court. The jurisdictional defect may arise with reference to absence of any of the afore-noted defects or there may be legal bar itself by a statute or something else having the force of law. On account of exercise of any jurisdictional defect, the judgment can be said to have been passed “without lawful authority” and illegally and can be set aside on the ground of want of jurisdiction.”* In the case of *Mian Munir Ahmed v. United Bank Ltd.* (PLD 1998 Kar 278) a Division Bench of this Court held that a decree against a guarantor passed in excess of the amount guaranteed would be in excess of jurisdiction and amenable to challenge under section 12 (2) CPC for ‘want of jurisdiction’.

12. In view of the foregoing, having concluded that 2 marlas 15 yards of the Multan Plot and the Applicant’s entitlement thereto having never been subject matter of the Suit No.1251/2008, and relying on the cases of *Rehmat Ali* and *Mian Munir Ahmed* supra, I set aside of the judgment and decree dated 13-02-2016 passed in the said Suit on the ground of ‘want of jurisdiction’ under section 12(2) CPC, insofar as it deals with 2 marlas 15 yards of the Multan Plot and the Applicant’s entitlement thereto. In this view of the matter, the grounds of fraud and misrepresentation urged by the Applicant need not be addressed. Since the Applicant has not assailed the judgment and decree for want of territorial jurisdiction under section 16 CPC with regards to the Multan Plot, I refrain from expressing any opinion on that and do not reopen the suit. Consequently, the decree passed in Suit No.1251/2008 for 4 marlas 15 yards of the Multan Plot and the Karachi Properties remains intact and the words “*properties mentioned in paragraph 3(a) to (e)...*” appearing in the last paragraph of the decree are substituted by the words “*properties mentioned in paragraph 3(a) to (d) and the property mentioned in paragraph 3(e) to the extent of 4 marlas 15 yards.....*”.

The above are the reasons for the short order dated 10-4-2018.

J U D G E

Dated: 24-04-2018