

IN THE HIGH COURT OF SINDH, KARACHI

SUIT NO. 2418 OF 2014

Muhammad Raza Shah Nawaz Khan & others.

Versus

Nasir Khan & others.

Plaintiffs : Ms.Nazia Rashid, Advocate.

Defendants. : Khawaja Naveed Ahmed, Advocate.

Date of Hg; : 14.2.2018

ORDER

ADNAN IQBAL CHAUDHRY.-J This is a suit for administration and partition of House No.76-C, Block-2, P.E.C.H.S., Karachi, measuring 400 square yards (hereinafter 'the Suit Property'), comprising of a ground-plus-one construction. The plaintiffs have moved *inter alia* CMA No.16367/2014 under Order XXXIX Rules 1 & 2 CPC for restraining the defendants from creating any third party interest in the Suit Property.

The undisputed facts of the case are that the Suit Property was owned by Muhammad Raees Khan (hereinafter 'the Deceased') who passed away on 28.3.2013. Two out of his four sons, namely Muhammad Amir Khan and Muhammad Naseer Khan, had pre-deceased him. Muhammad Amir Khan died issueless in the year 2011 after divorcing his wife, while Muhammad Naseer Khan died on 1.1.2000 leaving behind the plaintiffs as his legal heirs. The defendants in the suit are the surviving sons of the Deceased.

It is the plaintiffs' case that as legal heirs of the pre-deceased son of the Deceased, they have inherited shares in the Suit Property in accordance with Muhammadan Law,

which shares are being denied to them by the defendants; that title documents of the Suit Property are with the defendants and they apprehend that the defendants will sell the Suit Property to deprive the plaintiffs; hence this suit for partition of the Suit Property, and for an injunction restraining the defendants from creating third party interest in the Suit Property and from delivering its possession to any third party. On CMA No.16367/2014 (the injunction application), an interim order was passed as prayed on 9-12-2014. On the other hand, it is case of the defendants (a) that the first floor and roof of the Suit Property was not the property of the Deceased at the time of his demise as he had gifted the same to the defendant No.1 during his lifetime, which gift was registered vide a Declaration of Gift dated 16.03.2011 and the Suit Property was mutated accordingly – in other words, only a part of the Suit Property vested in the Deceased at the time of his demise; (b) that the plaintiffs being legal heirs of a pre-deceased son do not inherit from the Deceased under Muhammadan Law and thus are not entitled to any share in any part of the Suit Property; (c) that they (the defendants) are in occupation/residence of the Suit Property and the plaintiffs' apprehension of its sale is misconceived; and (d) that in any case, in lieu of their inheritance, the plaintiffs had received compensation from the Deceased during his lifetime – in other words, that the plaintiffs had renounced their right to inherit from the Deceased in lieu of compensation. A copy of the registered Declaration of Gift dated 16.03.2011 is annexed to the written statement.

In rebuttal, the plaintiffs' counsel submitted that the plaintiffs were not aware of the aforesaid Declaration of Gift dated 16.03.2011 until written statement was filed in the suit; and that the documents on record demonstrate that the alleged compensation was infact the share of late Muhammad Naseer Khan in the sale proceeds of agricultural land that had nothing to do with the Suit Property. However, during hearing, on being confronted by the fact that the plaintiffs have since not challenged the duly registered Declaration of

Gift dated 16.03.2011, the plaintiffs' counsel dropped her claim to that part of the Suit Property that stands gifted to the defendant No.1 and also filed a statement in writing to that effect. Consequently, the question of the plaintiffs entitlement is now confined to that part of the Suit Property that is not the subject matter of the Declaration of Gift dated 16.03.2011.

Since part of the Suit Property admittedly vested in the Deceased at the time of his demise, the plaintiffs 1 and 2 as grandsons of the Deceased would inherit in it to the extent of the share of their pre-deceased father (Muhammad Naseer Khan) on the basis of section 4 of the Muslim Family Laws Ordinance 1961. However, the plaintiff No.3 as widow of Muhammad Naseer Khan stands excluded from the purview of section 4 of the said Ordinance. Barrister Khawaja Naveed Ahmed for the defendants contended that section 4 of the Muslim Family Laws Ordinance 1961 had been declared to be repugnant to the injunctions of Islam by the Federal Shariat Court in the case of *Allah Rakha v. Federation of Pakistan* (PLD 2000 FSC 1), but he was candid in conceding that by virtue of the proviso to Article 203D(2) of the Constitution of the Islamic Republic of Pakistan 1973, section 4 of the Muslim Family Laws Ordinance 1961 continues to hold the field pending appeal of the Federal Shariat Court's decision to the Shariat Appellate Bench of the Supreme Court of Pakistan. For said legal position, the case of *Mahmood Shah v. Syed Khalid Hussain Shah* (2015 SCMR 869) is authority.

As regards the defendants' contention that the plaintiffs 1 and 2 had received compensation from the Deceased during his lifetime in lieu of their expected inheritance/share in that part of the Suit Property which vested in the Deceased and had thus renounced their right to inherit in it (which is denied by the plaintiffs), even assuming that to be true, such understanding/agreement between the Deceased and the plaintiffs 1 and 2 being a transfer of *spes succession* (ie., a chance of an heir-apparent succeeding to an estate), is not recognized under Muhammadan Law. Para 54 of

Muhammadan Law by Mulla and its illustration, the latter being a complete answer to the defendants' contention, read:

“54. Transfer of spes successions: Renunciation of chance of succession. - The chance of an heir-apparent succeeding to an estate cannot be the subject of a valid transfer or release.

Illustration

A has a son B and a daughter C. A pays Rs.1000 to C and obtains from her a writing whereby in consideration of Rs.1000 received by her from A, she renounces her right to inherit A's property. A then dies, and C sues B for her share (one-third) of the property left by A. B sets up in defence the release passed by C to her father. The release is no defence to the suit, and C is entitled to her share of the inheritance, as the transfer by her was a transfer merely of a *spes successions*, and as such, inoperative. But C is bound to bring into account the amount received by her from her father. [(1906 31 Bom. 165; (1908) 32 Bom. 172, 174-175]

The rule of Muhammadan Law embodied in Para 54 *supra* is similar to the one codified in section 6(a) of the Transfer of Property Act 1882, which reads:

“6. What may be transferred.- Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.”

In view of the provisions reproduced above, even assuming for the sake of argument that the plaintiffs 1 and 2 had received compensation for renouncing/releasing their expected inheritance in the Suit Property, the fact of the matter would still be that such renouncement/release was not a transfer of property and cannot be given any legal effect. It can at best give rise to a claim/action to account for the compensation so received, which claim/action, in my view, would not afford the defendants a defence against administration of the Suit Property.

The Suit Property is joint property, and to allow for any third party interest or possession in any part thereof would only frustrate its beneficial sale as a whole, which sale may well be a consequence of this suit. In any case, the defendants have stated in their written statement that do not intend to create any third party interest in the Suit Property. Thus, not only do the plaintiffs have a prima facie case for the grant of an injunction, the balance of convenience is clearly in their favor. Therefore, in view of what has been discussed above, the defendants are restrained from creating any third party interest in any part of the Suit Property and from parting with possession with any part thereof. To come up for considering a preliminary decree or otherwise. CMA No. 16367/2014 stands allowed in the above terms.

JUDGE

Karachi
Dated. _____