

# IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal 173 of 2018

Present: **Muhammad Ali Mazhar** and **Agha Faisal, JJ.**

Mst. Suriya Iqbal Chishti and Another  
vs.  
Mst. Rubina Majidullah and Others

For the Appellants                      Mr. Aftab Ali Bhangwar, Advocate  
For the Respondent No.1              Khawaja Shamsul Islam, Advocate  
For the Respondent No.2              Mr. Jafar Raza, Advocate  
Dates of Hearing:                      18.10.2018 & 30.10.2018  
Date of Announcement:              24.12.2018

## JUDGMENT

**Agha Faisal, J:** The crux of this judgment is the determination whether it was lawful, just and proper for a preliminary decree, in terms of Order XX Rule 18(2) CPC (“**CPC Provision**”), to be rendered in a suit for declaration, cancellation of documents, mandatory injunction and damages.

2. Mr. Aftab Ali Bhangwar Advocate set forth the case of the appellants and his arguments are encapsulated and presented herein below:

- i) It is submitted that Suit 195 of 2013 (“**Suit**”) was preferred by (Late) Mrs. Suriya Iqbal Chishti (“**Original Plaintiff**”), being wife of appellant No.1 and the mother of appellant No.2, respondent No.1 and respondent No.2 herein. The said Suit challenged a Gift Deed dated 21.12.2012 (“**Gift**”

**Deed**") admittedly executed in respect of property No.3/B-1, Zamzama Street, Clifton Karachi ("**Property**") in favour of the respondent No.1. In the said Suit, the only private defendant was the present respondent No.1 and none of the legal heirs of the Original Plaintiff were parties therein. The Original Plaintiff passed away during pendency of the Suit and her legal heirs, including the present appellants and the present respondent No.2, were impleaded as parties to the Suit.

- ii) It was demonstrated that during the pendency of the Suit a preliminary decree dated 27.04.2018 was delivered therein ("**Impugned Order**") and the operative part thereof is reproduced herein below:

"In the circumstances, let a preliminary decree be passed in terms of Order XX Rule 18(2) CPC by appointing the Nazir as Administrator in respect of the property in question with the mandate to carry out the sale of the property firstly through private sale amongst the parties, if so desired, and if not, then through open auction subject to rules, where-after, the share to the extent of defendant No.1, as per sharia be paid, and remaining share of other legal heirs be invested in some government profit bearing instrument until further orders.

Nazir's Fee is tentatively fixed as per rules which shall be payable by all the parties to the extent of their respective shares. Such amount is to be paid out from the sale proceeds subsequently. However, publication charges and other costs are to be paid in advance by all according to their share.

Office is directed to prepare preliminary decree under Order XX rule 18(2) CPC in the above terms. In view of above order, all listed applications stand disposed of."

- iii) Per learned counsel, the Impugned Order was prima facie, in contradiction to the very provision of the law under which

it was purported to have been rendered as the proceedings in the Suit were neither in nature of a suit for administration nor a suit for partition.

- iv) It was further contended that the Impugned Order, inter alia, would amount to a dissipation of the subject matter of the Suit and hence could not be permitted to perpetuate in good conscience. Therefore, the present appeal was preferred and it was prayed that the Impugned Order be set aside.

3. Mr. Khawaja Shamsul Islam, learned counsel for respondent No.1 controverted the arguments advanced on behalf of the appellants and supported the Impugned Order. Per learned counsel it was apparent from the pleadings that execution of the Gift Deed was admitted by the original plaintiff in the Suit, however, cancellation of the same was sought subsequently on other grounds stated in the relevant pleadings. It was demonstrated from the record that the Gift Deed was witnessed by husband of the deceased, who is present appellant No.1. It was further argued that no legal heir of the Original Plaintiff was originally party to the Suit and neither of them had ever challenged the Gift Deed, executed in favour of respondent No.1. The learned counsel categorically submitted that the Suit was never sought to be converted to an administration suit because of the objection of the present respondent No.1, as respondent No.1 remains the owner of the Property by virtue of the Gift Deed, which remains operative and in the field. A specific question was put to the learned counsel as to whether a preliminary decree, in the nature passed vide the Impugned Order, could be delivered in a suit for, inter alia, cancellation of documents. In response thereto it was categorically stated by the learned counsel that

the rights of the respondent could not be sacrificed at the altar of the technicalities.

4. Mr. Jafar Raza, learned counsel for respondent No.2, also argued in favour of the Impugned Order and stated that the demand for the preliminary decree was initiated by respondent No.1 and not respondent No.2. Learned counsel submitted that even though the Suit was not a suit for administration, however, after the death of the Original Plaintiff it was proper that the Suit be treated as one for administration by fiction of law. It was stated by the learned counsel that CPC Provision applies to suits for partition and that the Suit in question herein, being for cancellation of documents, was admittedly not a suit of such nature.

5. We have heard arguments of the respective learned counsel and have also reviewed the record available before us. The primary question for this Court to determine is as to whether preliminary decree in the manner prescribed vide the Impugned Order, could be delivered in the facts and circumstances of the Suit.

6. It may be expedient to initiate the deliberation in such regard by adverting to the CPC Provision, which stipulates as follows:

“18. Decree in suit for partition of property or separate possession of a share therein.—where the court passes a decree for the partition of property or for the separate possession of a share therein, then ---

(1) If and in so far as the decree relates to an estate assessed to the payment of revenue to the government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazette subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54.

(2) If and in so far as such decree relates to any other immovable property or to movable property, the Court may, if partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring

the rights of the several parties interested in the property and giving such further directions as may be required.”

7. The definition of decree, preliminary and final, is contained in Section 2(2) CPC and it is recognized in the judgment of this Court in the case of *Aijaz Haroon vs. Inam Durrani* reported as *PLD 1989 Karachi 304* that the specific provisions for preliminary decrees are delineated in Order XX Rules 12 to 16 and 18 and Order XXXIV Rules 2 to 5 and 7 to 8 CPC. The CPC Provision, relied upon in the Impugned Order, pertains to suits for partition and requirements for such a suit were prescribed, *inter alia*, in the judgment of *Wajihunnisa vs. Bankebihari Singh* reported as *AIR 1930 Patna 177*, as relied upon in the Lahore High Court judgment of *Syed Mohsin Raza Bukhari & Others vs. Syed Azra Zenab Bukhari* reported as *1993 CLC 31* (“**Mohsin Raza**”), in the following terms:

“It is well settled that the necessary conditions for a suit for partition are: first, that there must be unity of title; and, secondly, there must be unity of possession.”

8. *Mohsin Raza* observes that unity of title and possession must exist between the parties impleaded in a suit for partition qua the property sought to be partitioned. If anyone impleaded in the suit claims a paramount title in the property then the same would defeat the unity of title, hence, such a plea would fall outside the scope of a partition suit. The judgment then goes on to make a distinction that when a party claims title paramount to the adversaries then the suit ought to be one for declaration and title or cancellation of deed instead. In the present facts and circumstances the respondent No. 1 claims the Property as her own, to the exclusion of all others, hence, the Suit was that for declaration, cancellation of documents, mandatory injunction and

damages and admittedly not for partition, therefore, the invocation of the CPC Provision by the learned Single Judge appears to be erroneous.

9. It was contended by the learned counsel for the respondents that post the demise of the Original Plaintiff the legal heirs thereof were impleaded in the Suit and hence the Suit could be treated as a suit for administration, by fiction of law, and thereby giving rise to the permissibility of a preliminary decree. With utmost respect, we do hereby express our inability to sustain the said argument as the Suit is primarily for cancellation of a Gift Deed with respect to the Property where claims of the respondent No. 1 are in conflict with those of the present appellants. A specific query was addressed to the learned counsel for the respondent No. 1, during the course of the hearing, if the said respondent was ready to forego her claim to the Property and settle for her share therein as a legatee in the estate of the Original Plaintiff. The said query was replied to the in the negative. Even otherwise there was nothing on the record to allude to any consideration having been meted out in the Suit to convert it into a suit for administration. A learned Division Bench of this Court in the case of *Saifullah Khan & Others vs. Mst. Afshan & Others* reported as *PLD 2017 Sindh 324* has observed that preliminary decrees in suits for administration may be rendered in respect of assets which are in the name of the deceased and it is apparent that at the time of the demise of the Original Plaintiff the Property stood conveyed to the respondent No. 1.

10. It is also within our contemplation that the Suit is in respect of the Property to which the claim of the respondent No. 1 is adverse to that of the remaining legal heirs of the Original Plaintiff. Regardless of whether the Suit is allowed or dismissed, if the Impugned Order were to be

sustained then the Property, subject matter of the Suit, would cease to exist in its present form prior to the determination of the Suit.

11. Therefore, in view of the reasoning and rationale contained herein, and with utmost respect to the learned Single Judge, we are of the considered view that the Impugned Order is not sustainable, hence, the same is hereby set aside. The present appeal is hereby allowed in terms herein.

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