

IN THE HIGH COURT OF SINDH AT KARACHI.

H.C.A. No. D- 109 of 2016.

(Mrs. Andaleeb Kamran versus Mrs. Noreen Mughal & others)

Present:

Mr. Justice Syed Hassan Azhar Rizvi J.

Mr. Justice Adnan Iqbal Chaudhry J.

Appellant Mrs. Andaleeb Kamran  
Through Mr. Anwar M. Siddiqi, Advocate

Respondent No.1 Mrs. Noreen Mughal  
Through Mr. Zohaib Sarki, Advocate

Respondent No.3 Mrs. Seema Tariq Khan  
Through Mian Ashfaq Ahmed, Advocate

Respondent No.4 Najmal Sehar Soomro,  
Through Mr. Mansoor-ul-Arfin, Advocate

Respondent No.7 Mrs. Sana Rafiq  
Through Mr. Syed Salim Ahmed, Advocate

Respondents No.2,5&6 Nemo.

Date of hearing: 22.11.2018.

**J U D G M E N T.**

**Adnan Iqbal Chaudhry J.** - This appeal is from an order dated 15.03.2016, passed by a learned Single Judge of this Court in Suit No.369/2012, a suit for Administration, whereby the Appellant has been directed to deposit rent collected by her since 13-09-2012 from the tenant of a property that is subject matter of the suit, and whereby the Rent Controller seized of the Rent Case filed by the Appellant against the tenant of the said property, was directed to maintain status quo.

2. The Appellant and the Respondents are siblings and parties to Suit No.369/2012 (Said Suit) which is filed by the Respondents 1 to 3 (plaintiffs) for the Administration of the estate of their late father

(Jamil Ahmed Soomro), late mother (Salma Soomro), and late grandfather (Muhammad Hassan Soomro).

3. This appeal is concerned with only one of the many properties that are subject matter of the Said Suit, viz. bungalow No.13/M, Block-6, PECHS, Karachi, measuring 700 sq. yards (the Said Property), which is listed at clause (k) of paragraph-3 of the plaint as the property left behind by the deceased mother (Salma Soomro) who had passed away on 05.08.2001 prior to the deceased father, who passed away on 31.03.2012. It is alleged in the plaint that after the demise of the deceased father, the eldest son (Respondent No.4/defendant No.1), took possession inter-alia of the original title documents of immovable properties left behind by the deceased and refused to distribute the estate amongst all legal heirs.

According to the written statement of the Respondent No.4, filed on 08.05.2012, after their deceased mother passed away, the Said Property was mutated to the names of her children (the parties) and their husband who was then alive (the deceased father of the parties). Per the Respondent No.4, the original title documents of the immovable properties of the deceased had taken by him only for the purposes of safe custody.

4. Along-side the written statement of the Respondent No.4, three of his siblings, which included the Appellant, also filed a written statement on 08-05-2012 adopting the written statement of the Respondent No.4. Such written statement was signed by the Appellant herself and filed through the common counsel of the Appellant, the Respondent No.4 and two other siblings.

5. On 13.09.2012, the following order was passed in the Said Suit with the consent of counsel for both sides:

“In paragraph 3 of the plaint, several properties are mentioned which were owned by the deceased father. During the course of arguments, both the learned counsel raised some objections vice versa to some properties but they agreed that few properties are undisputed at this stage which may be sold out by the Nazir of this

Court. The properties mentioned in paragraph 3 of the plaint at Sr. No. (a), (j) and (k) are undisputed. Nazir is directed to get the tentative valuation of these properties and submit the report before the next date. Nazir's fee shall be Rs.25000/- tentatively which will be paid by all the legal heirs proportionate to their shares.

..... The defendant No.1 has also admitted that the title deeds of the properties left by his deceased mother and deceased father are also in his possession. Learned counsel for the defendant No.1 submits that these documents will also be deposited in original with the Nazir of this Court, which will be retained by the Nazir in his safe custody till further orders."

In the aforesaid order, the reference to property in paragraph 3(k) of the plaint is a reference to the Said Property, which, per the counsel representing the Appellant at that time, was undisputed between the parties.

6. In April 2013, the Appellant engaged a fresh counsel and filed a second written statement in the Said Suit contending that the Said Property had in fact been gifted to the Appellant during the lifetime of the deceased father; that the title documents of the Said Property were kept with the deceased father, but after he passed away, the said documents taken by the Respondent No.4; that the Appellant's ownership of the Said Property was demonstrated by a tenancy agreement dated 20.07.2006 whereby she had let the Said Property to Universal Track (Pvt.) Ltd., which tenancy was subject matter of Rent Case No.159/2013; and that her Income Tax returns also reflected the Said Property as hers.

7. In September 2013, the Appellant moved CMA No.10313/2013 under Order VI Rule 17 CPC praying that her subsequent written statement be accepted as her amended written statement. It was averred by the Appellant that in adopting the written statement of the Respondent No.4 there was an oversight, and therefore the factum of the gift of the Said Property was not mentioned in her previous written statement. The amendment application is of course being contested by the Respondent No.4.

8. On 13.11.2014, when the Said Suit came up for hearing of miscellaneous applications, including the amendment application, the Court passed a Preliminary Decree under Order XX Rule 13 CPC and appointed the Official Assignee as Administrator of the estate of 'Jamil Ahmed Soomro', the deceased father of the parties. The Preliminary Decree recites inter alia that :

“(v). That the Commissioner shall be at liberty to call for the purpose of determination any witness, which is called by the parties, at their will. However, the evidence shall only be recorded on the basis of existing pleadings of the parties.”

9. Against the order dated 13.09.2012, which had recorded that the Said Property was undisputed between the parties, the Appellant preferred a Review application in December 2014 being CMA No.17045/2014 alleging that she had been duped by Respondent No.4 into signing the adopting written statement; and that the order dated 13.09.2012, insofar as it recorded no objection on her behalf in respect of the Said Property, was obtained by misrepresentation and fraud.

10. Learned counsel for the Appellant submitted that since the Appellant was claiming gift of the Said Property vide her amendment application and Review application, the impugned order requiring the Appellant to deposit the rent collected by her of the Said Property could not have been passed without first deciding the question of ownership of the Said Property. Learned counsel submitted that the documents evidencing the gift of the Said Property by the deceased mother to the Appellant had been taken away by the Respondent No.4 and therefore the Appellant was not in a position to produce the same. Insofar as the impugned order had directed the Rent Controller to maintain status quo with regards to the Rent Case filed by the Appellant against the tenant of the Said Property, learned counsel submitted that such an order was beyond the jurisdiction of a civil court.

On the other hand, learned counsel for the Respondents denied that the Said Property was ever gifted to the Appellant. Their common submission was that the creation of a tenancy in the Said Property was no evidence of its exclusive title. They drew our attention to an annexure to the counter-affidavit of the Respondent No.4 to this appeal, which is a copy of an application made to the PECHS (Society) by all legal heirs of the deceased mother, including the Appellant and their deceased father (who was alive at the time), requesting mutation of the Said Property to all of them, and submitted that such application was sufficient to establish that the Appellant's claim of gift of the Said Property was an after-thought made to usurp the share of the other legal heirs in the Said Property.

11. After hearing learned counsel for the Appellant it is apparent that his case is not against the Preliminary Decree that has been passed in the Said Suit, but his case is essentially that since the Appellant was duped into signing a written statement that did not plead the gift of the Said Property, she will be deprived of an opportunity to prove that before the Administrator in proceedings pursuant to the Preliminary Decree, inasmuch as clause (v) of the Preliminary Decree states that "..... the evidence shall only be recorded on the basis of existing pleadings of the parties".

12. A perusal of the discussion above of the facts of the case will show that the Appellant's claim that the Said Property had been gifted to her, hardly inspires any confidence. In adopting the written statement of the Respondent No.4 on 08-05-2012, the Appellant had accepted that the Said Property had vested in the deceased mother of the parties at the time she passed away. It was in April 2013, when the Appellant filed a second written statement (though not accepted as yet as an amended written statement) to contend for the first time that the Said Property had been gifted to her during the lifetime of the deceased father. In the Review application filed by her in 2014 she stated that the Said Property had been gifted to her during the lifetime of her deceased mother and deceased father. No

document evidencing the alleged gift has been produced before us. On the other hand, the copy of the application dated 26-01-2003 made by the legal heirs of the deceased mother to the PECHS requesting for the mutation of the Said Property to the names of all her legal heirs of the deceased mother, supports the case of the Respondents that the Said Property vested in the deceased mother at the time she passed away. That application for mutation was signed by all legal heirs of the deceased mother including the Appellant, and that much has not been denied by the Appellant in her rejoinder. The copy of the mutation application bears the acknowledging receipt of the PECHS and the attestation of the Chief Administrative Officer of the PECHS, *albeit* the record before us does not show whether that application had subsequently been processed by the PECHS to eventually mutate the Said Property. Be that as it may, the question whether the Appellant should be permitted to lead evidence before the Administrator to prove the alleged gift, is a matter that has yet to be addressed in the Said Suit as the amendment application of the Appellant is still pending. For the present we are not convinced with the argument of learned counsel for the Appellant that the pendency of Appellant's amendment application and Review application in the Said Suit claiming a gift of the Said Property is by itself a ground to set aside the impugned order.

13. However, we cannot help but notice that the Preliminary Decree, that formed the basis for requiring the Appellant to deposit the rent collected by her of the Said Property, that Preliminary Decree is only for administering the estate of the deceased father, 'Jamil Ahmed Soomro'. It does not expressly include the estate of the deceased mother, 'Salma Soomro', from whom the Respondents claim to have inherited the Said Property, nor does it mention the estate of the deceased grandfather 'Muhammad Hassan Soomro'. Whether that was an accidental omission in the Preliminary Decree, or whether a Preliminary Decree for the estate of the other deceased

(deceased mother and grandfather) was intentionally postponed, that is a matter to be addressed in the Said Suit, but till such time it is, the Preliminary Decree extends only for the estate of the deceased father, 'Jamil Ahmed Soomro'.

14. As per the case of the Respondents, and as per the mutation application made to the PECHS (discussed *supra*), the deceased father of the parties was only a co-sharer in the Said Property to the extent of a share inherited by him from his late wife (the deceased mother of the parties). Therefore, keeping in mind the scope of the Preliminary Decree passed in the Said Suit (*supra*), that decree could have at best been a basis to require the Appellant to account for the deceased father's share in the rent collected, in which the Appellant too would have a share. As regards the share in the rent inherited by the Respondents from their deceased mother, while an injunction may follow to restrain the Appellant from collecting further rent of the Said Property, a direction to deposit the rent already collected required that first an account be taken of that rent, inasmuch as the Appellant too had a share in that, which exercise would be taken after the passing of a preliminary decree for the estate of the deceased mother. In other words, a mandatory injunction to deposit the 'entire' rent without first determining the Appellant's share in such rent, and without considering whether the Appellant could well seek an adjustment of the such rent from the proceeds of the properties likely to be sold, was, in our view a premature order which cannot be sustained for the present.

15. Adverting now to the second part of the impugned order which is as follows:

"It further appears that the rent case which has been filed by defendant No.4 is without disclosure of the proceedings pending before this Court for administration of the properties of the deceased, and specially orders dated 13.09.2012, as well passing of a preliminary decree. In the circumstances, the VIIIth Rent Controller, Karachi South who has seized with the rent matter is directed to maintain status-quo in respect of rent proceedings arising out of Rent Case No.159/2013 till further orders.....".

It appears that in ordering as above, the learned Single Judge was of the view that the filing of the Rent Case for ejection of the tenant after the institution of the Said Suit was an attempt by the Appellant to take possession of a property that was under administration, *albeit* the Preliminary Decree dated 13.11.2014 was passed after the institution of the Rent Case. But even assuming that to the case, the fact of the matter remained that the Appellant was, in the very least, a co-owner of the Said Property, and in such capacity she was competent to institute ejection proceedings against the tenant without impleading the other co-owners of the Said Property as parties to the Rent Case [see the case of *Abdul Ghani v. Abrar Hussain* (1999 SCMR 348)].

In any case, section 56(b) of the Specific Relief Act, 1877 states that “An injunction cannot be granted to stay proceedings in a Court not subordinate to that from which the injunction is sought”. The High Court of Sindh at Karachi while exercising original jurisdiction to entertain civil suits, is not a Court to which the Rent Controller is subordinate. Therefore no injunction could have issued to stay the proceedings of Rent Case No. 159/2013 pending before the VIIIth Rent Controller, Karachi South.

16. In view of the foregoing reasons, and with the foregoing observations, we allow this appeal and set-aside the impugned order dated 15.03.2016 passed in Suit No.369/2012.

**J U D G E**

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Karachi  
Dated: 14-03-2019