

Order Sheet
IN THE HIGH COURT OF SINDH AT KARACHI
Suit No. 1710 of 2015

Date	Order with Signature of Judge
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Syed Shafaat Ali
since deceased, through his legal heirs

PLAINTIFFS

VERSUS

Syed Feroz Ali

DEFENDANT

Dates of hearing: 22.02.2018 and 26.02.2018

Ms. Seema Waseem, Advocate for the plaintiffs
Mr. Muhammad Mushafay, Advocate for the defendant

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ADNAN IQBAL CHAUDHRY J. –

1. The suit had been filed by Syed Shafaat Ali (now deceased) on 10.09.2015 essentially for cancellation of a registered document standing in the name of his son, the defendant. The case of the original plaintiff was that from the sale proceeds of his previous property, he purchased a house comprising of a ground-plus-one structure built on two adjoining plots i.e. Plot No.R-164 and Plot No.R-165, Ali Muhammad Goth, Block-6, KDA Scheme No.24, Gulshan-e-Iqbal, Karachi, together measuring 240 square yards (hereinafter the 'Said House'); that conveyance deeds of both the said plots were registered the same day, but while conveyance deed of Plot No.R-164 was registered in the plaintiff's name as vendee, his son (the defendant) duped the plaintiff by getting the conveyance deed of the other Plot No.R-165 registered in his (the defendant's) own name, who then moved to the first floor of the Said House, with the plaintiff on the ground floor thereof; hence prayers *inter alia* for cancellation of the conveyance deed of Plot No.R-165 and for possession of Plot No.R-165 from the defendant. It was the case of the plaintiff that after his wife had passed away (and before his second marriage to Nazira Shafaat), the defendant who used to look after the plaintiff's affairs, had gained his trust and was instrumental in negotiating and formalizing the purchase of the Said House, which trust he betrayed by defrauding the plaintiff as aforesaid.

2. Both counsels stated that the Said House is constructed such that it covers both Plot No.R-164 and Plot No.R-165 and is incapable of subdivision between the two plots, but to identify occupation of the Said House, both sides refer to the ground floor of the Said House as Plot No.R-164 in which the original plaintiff resided, and the first floor of the Said House as Plot No.R-165 in which the defendant resides. The original plaintiff married again in the year 2014 with one Nazira Shafaat. He filed this suit on 10-9-2015. He passed away on 17.03.2016 and his other legal heirs, including his widow, Nazira Shafaat, were brought on record as plaintiffs vide order dated 29.08.2017. A written statement by the defendant was filed on 13-4-2017, after the demise of the original plaintiff, in which he denied that he committed any fraud, and he asserted that Plot No.R-165 had been purchased by him from his own funds. Earlier, the defendant had filed Suit No.1441/2015 before the Senior Civil Judge Karachi East against his father (the original plaintiff herein) and Nazira Shafaat (the defendant's step-mother) claiming that his father was only a *benamidar* for him as regards Plot No.R-164. Per counsels, such suit was returned under Order VII Rule 10 CPC; it was then presented before this Court, but was then withdrawn by the defendant herein.

3. Right after the demise of the original plaintiff, his widow (Nazira Shafaat, the present plaintiff No.1) filed a criminal complaint under the Illegal Dispossession Act, 2005, claiming that she resided with her husband (the original plaintiff herein) in the ground floor of the Said House, and alleged that on 20-3-2016 when she came back from the *Imam Bargah* from the soym of her husband, she was denied re-entry into the Said House by the defendant (her step-son); hence her illegal dispossession. Her complaint under the Illegal Dispossession Act, 2005 was dismissed by the Additional District Judge on 25-4-2016 on the ground (a) that admittedly, the defendant resided in the Said House, thus it was not a case of *qabza*, to which the said Act was restricted; and (b) that the dispute was of a civil nature. In Criminal Revision No.69/2016 while the High Court set-aside the finding on ground (a), the finding on ground (b), that the dispute was of a civil nature where a civil suit was pending, was maintained and the said Criminal Revision was also dismissed vide order dated 13.06.2017. In these circumstances, on 23-9-2017, Nazira Shafaat moved CMA No.13141/2017 and CMA No.13142/2017 in this suit; the first one praying for restoration of possession of the ground floor of the Said House (referred to as Plot No.R-164); and the second one praying that the defendant be restrained

from creating third-party interest in the first floor of the Said House (referred to as Plot No.R-165), and from misusing and selling any of the movables lying at the ground floor of the Said House. It is the said CMA's that are subject matter of this order. Vide order dated 4-10-2017, this Court appointed the Nazir as commissioner to inspect the Said House so as to ascertain *inter alia* the dispossession of Nazira Shafaat from the ground floor thereof and to make an inventory. To that end, the Nazir submitted two inspection reports dated 27-10-2017 and 22-11-2017 which were taken on record. None filed any objection thereto.

4. On CMA No.13141/2017 it was contended by Ms. Seema Waseem, Advocate for Nazira Shafaat, that she resided with her husband (the original plaintiff) in the ground floor of the Said House (referred to as Plot No.R-164); that on 20-3-2016, when she came back from the *Imam Bargah* from the *soyem* of her husband, she was denied entry to the Said House by the defendant (her step-son), where after she was given shelter by one of the other plaintiffs; that the defendant wants to usurp the entire Said House even though he could not assert any title to the ground floor (Plot No.R-164) of the Said House which vested in the original plaintiff and has now devolved on all his legal heirs including his widow, Nazira Shafaat; that the valuables, documents, personal effects etc. of the original plaintiff and that of Nazira Shafaat were lying at the ground floor of the Said House, which per learned counsel, was demonstrated by the Nazir's Inspection Reports; and that Nazira Shafaat was entitled to an injunction putting her back in possession of the ground floor of the Said House. As regards CMA No.13142/2017, it was contended by Ms. Seema Waseem Advocate that given the events that have transpired, it is likely that the defendant will create third-party rights in the first floor (Plot No.R-165) of the Said House to deprive the plaintiffs; and that since the defendant is now in exclusive possession of the Said House, it is likely that he will remove, sell or misuse the movables lying in the ground floor (Plot No.R-164) of the Said House.

5. While opposing CMA No.13141/2017 and CMA No.13142/2017, Mr. Mushafay, Advocate for the defendant, first took me through copies of other proceedings on the record to contend that the original plaintiff and the present plaintiffs were in the habit of lodging frivolous cases. On CMA No.13141/2017 he contended that after the dismissal of Criminal Revision No. No.69/2016, Nazira Shafaat can no longer agitate the matter of her dispossession before this Court; that though the defendant did not deny

the entitlement of his siblings to inherit from the original plaintiff in the ground floor (Plot No.R-164) of the Said House, his step-mother Nazira Shafaat, being a widow was only entitled to 1/8th of the sale proceeds of the structure on Plot No.R-164 and not to any part of the land underlying Plot No.R-164, for which he relied upon a *fatwa*. As regards CMA No.13142/2017, he submitted that the defendant being the exclusive registered owner of Plot No.R-165, the plaintiffs cannot claim any right thereto.

6. On noticing that the suit remained essentially one for cancellation of the conveyance deed of Plot No.R-165 and for the consequential relief of possession of the first floor (Plot R-165) of the Said House, nothing relating to the ground floor (Plot No.R-164) of the Said House, and that the alleged dispossession of Nazira Shafaat that arose subsequently gave her an independent and separate cause of action, I queried the learned counsel for the plaintiffs whether the relief of restoration of possession of the ground floor (Plot No.R-164) of the Said House sought under CMA No.13141/2017 was beyond the scope of the suit ? and why did Nazira Shafaat not invoke section 9 of the Specific Relief Act, 1877 ? In reply she submitted that changed circumstances could always be taken notice of by the Court and the relief can be moulded accordingly so as to shorten litigation. For such proposition she relied on 5 cases, the leading one being the case of *Amina Begum v. Meher Ghulam Dastagir* (PLD 1978 SC 220).

7. Coming first to the legal objection raised by Mr. Mushafay Advocate for the defendant, that after the dismissal of Criminal Revision No.69/2016, Nazira Shafaat could not re-agitate her dispossession by way of civil proceedings, the same is misconceived. It will be seen that the criminal complaint by Nazira Shafaat under the Illegal Dispossession Act, 2015, and her Criminal Revision No.69/2016 arising therefrom had not been dismissed on merits, but on the ground that the matter was a civil dispute – in other words, that she should approach a civil court for redress. Consequently, Nazira Shafaat is entitled to invoke civil remedies available to her against her alleged unlawful dispossession.

8. As to the merits of CMA No.13141/2017, apart from stating that the present version of Nazira Shafaat as to manner in which she was dispossessed, varies from the one she made in her complaint to the Police, Mr. Mushafay, Advocate for the defendant, did not make any

submission to rebut the contention that Nazira Shafaat had been residing at the ground floor of the Said House along with the original plaintiff, nor did he categorically deny the allegation that on 20-3-2016 the defendant had prevented Nazira Shafaat from entering the ground floor of the Said House. The counter-affidavit too of the defendant to CMA No.13141/2017 is completely silent on this aspect. The inventory prepared by the Nazir of the articles he found at the ground floor of the Said House includes ladies wear, ladies accessories, ladies jewelry, cosmetics such other personal effects. All of that would go to suggest and Nazira Shafaat had been residing at the ground floor of the Said House. Having said that, the right that is being asserted by Nazira Shafaat via CMA No.13141/2017 i.e. one for restoration of possession to the ground floor (Plot No.R-164) of the Said House after allegedly being dispossessed from it illegally, is her independent right – i.e. independent of the original plaintiff's right; and a cause of action for asserting the said right, is completely different from the cause of action and the relief claimed in this suit which is essentially one for cancellation of the conveyance deed of Plot No.R-165 (as distinct from Plot No.R-164). It is to be noted that the right so asserted by Nazira Shafaat is also separate and distinct from her right, if any, to possession of the ground floor (Plot No.R-164) of the Said House on the basis of inheriting a share therein.

9. The present plaintiffs, including Nazira Shafaat, were impleaded in this suit under Order XXII Rule 3 C.P.C. the relevant part of which reads:

“3. Procedure in case of death of one of several plaintiffs or of sole plaintiff. (1) Where a sole plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.”

Thus, it was on the basis that the original plaintiff's “right to sue” had survived to her that Nazira Shafaat became a plaintiff in this suit. Consequently, in this suit she can only pursue those rights for which the original plaintiff had sued, unless of course the plaint is capable of and is allowed to be amended to assert her own rights. For the proposition that where a party is joined in the suit under Order XXII Rule 3 C.P.C. (on the death of the original party) it is the original party's rights and liabilities which are to be considered and not those of the legal representatives impleaded in place of the deceased party, reliance can be placed on the cases of *Sharif Khan v. Abdur Rahman* (2000 CLC 4); *Muhammad Iqbal v.*

Ghulam Ali Shah (PLD 1975 Lah 1205); *Sardar Ally v. Abdul Ghani* (PLD 1987 Kar 58); and *Abdul Sattar v. Ibrahim* (PLD 1992 Kar 323).

10. As regards the reliance placed by Ms. Seema Waseem Advocate on the case of *Amina Begum v. Meher Ghulam Dastagir* (PLD 1978 SC 220) to contend that this Court is vested with discretionary powers to mould the relief so as to shorten litigation, while there can be no cavil with that, it will be seen that even *Amina Begum's* case holds that such discretion is to be exercised by the Court judiciously. In the circumstances of this case, where section 9 of the Specific Relief Act, 1877 being the remedy prescribed for relief against unlawful dispossession, was not invoked within time, nor has any suit been filed for partition/administration of the ground floor (Plot R-164) of the Said House, to allow Nazira Shafaat possession of the same in this suit, that too on a CMA, would in fact be injudicious, especially in circumstances where the ground floor (Plot R-164) of the Said House stands devolved on all legal heirs of the original plaintiff including the defendant.

11. In view of the foregoing, CMA No.13141/2017 is dismissed with the observations:

- (i) without prejudice to their rights in this suit, all legal heirs of the original the plaintiff, including Nazira Shafaat, are at liberty to file separate proceedings for partition/administration of the ground floor (Plot No.R-164) of the Said House;
- (ii) without prejudice to her rights in this suit, Nazira Shafaat is at liberty to institute separate proceedings for possession of any movables claimed by her in her own right that was or is lying at the ground floor (Plot No.R-164) of the Said House.

12. As regards CMA No.13142/2017, for reasons discussed in para 8 above; and for the reason that the Said House is not capable of partition between Plot No.R-164 and Plot No.R-165 and may well end-up in sale as a whole in partition/administration proceedings, I conclude that the plaintiffs have a *prima facie* case and the balance of convenience is in their favor for the grant of an injunction. In any case, in para 10 of his written statement the defendant has acknowledged that he does not intend to sell Plot No.R-165. Therefore, CMA No.13142/2017 is allowed in the following terms:

- (i) the defendant is restrained from creating any third-party interest in the first floor (Plot No.R-165) of the Said House;

- (ii) the defendant is restrained from using, removing and selling any movable that finds mention in the Nazir's Reports dated 27-10-2017 and 22-11-2017 as lying at the ground floor (Plot No.R-164) of the Said House.

J U D G E

Dated : 26/03/2018