

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1640 of 2010

[Mst. Zubaida Khatoon v. Muhammad Iqbal and others]

Date of hearing : 18.09.2019, 07.10.2019 and 10.10.2019.

Date of Decision : 18.10.2019.

Plaintiff : Mst. Zubaida Khatoon, through Mr. Muhammad Arif Sheikh, Advocate.

Defendant No.1 : Muhammad Iqbal, through Ms Alizeh, Advocate.

Defendant No.2 : Abdul Qadir, through Mr. Muhammad Sadiq Hidayatullah, Advocate.

Defendant No.3 : Shaukat Ali, through M/s. Mustafa Safvi and Syed Ahmed Hussain, Advocate.

ORDER

Muhammad Faisal Kamal Alam, J: - By this order, I intend to dispose of two applications being C. M. A. Nos.11395 and 4658 of 2018. Application (C.M.A. No.4658 of 2018), under Section 151 of C.P.C. is preferred by Defendant No.3 seeking relief, *inter alia*, that in fact it was the said Defendant No.3, who purchased half of the share of Defendant No.1 (brother) in the House No.13, Block 7 and 8, A. Yamni Road, Jinnah Cooperative Housing Society, Karachi (the “**Subject Property**”) along with Defendant No.2. The second application is C.M.A. No.11395 of 2018, filed by Defendant No.2, praying that Nazir may execute Sale Deed in respect of entire share of Defendant No.1 purchased by Defendant No.2 in the above Subject Property.

2. M/s. Mustafa Safvi and Syed Ahmed Hussain, Advocates for Defendant No.3, has submitted that the record produced with the

application *ex facie* shows that out of twenty six Pay Orders, thirteen are prepared by Defendant No.3 (Shaukat Ali) as the thirteen Pay Orders clearly mention the name of purchaser as “Shaukat Traders”, which is a proprietorship concern of Defendant No.3. It is further submitted that Defendant No.3 having reposed his trust in his real brother – Defendant No.2, got defrauded by the latter as it was the said Defendant No.2, who was attending Court hearings, while keeping the Defendant No.3 in dark. It is further contended that by misrepresentation, order dated 22.11.2017 was obtained through which the learned Nazir of this Court handed over the possession of the portion under occupation of Defendant No.1 to Defendant No.2 only, being the purported purchaser of share of Defendant No.1, which in fact is incorrect and the share was purchased by both Defendants No.2 and 3.

3. Mr. Muhammad Sadiq Hidayatullah, Advocate representing Defendant No.2, has controverted above arguments by referring orders dated 23.10.2017, 22.11.2017 and 01.03.2018, to fortify his arguments that it was only Defendant No.2, who is mentioned in these orders as purchaser of the share of Defendant No.1 in the Suit Property. In the order dated 23.10.2017, it is observed that Defendant No.2 has submitted all the twenty six Pay Orders as sale price of the share of Defendant No.1, *whereas*, on the next date of hearing, it has been observed that Defendant No.1 has received his share and Defendant No.2 is mentioned as purchaser. With regard to contention of learned counsel for Defendant No.3, that out of twenty six Pay Orders, thirteen are in the name of the above proprietorship concern of Defendant No.3, learned counsel has referred to paragraph-8 of the Counter Affidavit to the application of Defendant No.3, that the latter (Defendant No.3) being elder brother of Defendant No.2, has given him loan for purchase of the share of Defendant No.1 in the Suit Property. It is further

contended that Defendant No.2 has specifically denied the assertion of Defendant No.3, about the jointly purchasing the share of Defendant No.1. Learned counsel for Defendant No.2 has referred to the order dated 16.10.2018, in which the counsel for Defendant No.3, who was representing him at the relevant time, clearly stated that she did not intend to file Rejoinder to the Counter Affidavit of Defendant No.2. Learned counsel for Defendant No.2 on this aspect of the case has relied upon the two judgments reported in (i) **P L D 1996 Karachi page-365** [*Abdul Latif v. Muhammad Yousuf and two others*] and **P L D 2003 Karachi page-691** [*Jehan Khan v. Province of Sindh and others*].

4. Arguments heard and record perused.

5. When the matter was reserved for orders, on that day Syed Ahmed Hussain, Associate of Mr. Mustafa Safvi, Advocate for Defendant No.3, produced a correspondence from Habib Metropolitan Bank Ltd. addressed to the Nazir of this Court, in which the Bank has confirmed that the thirteen Pay Orders amounting to Rs.6,500,000/- were issued from account of “Shaukat Traders”. As per the learned counsel for Defendant No.3, this further confirms that Defendant No.3 is the owner of 50% share of Defendant No.1 in the Subject Property.

6. Share of Defendant No.1 in the Suit Property comes to Rupees Thirteen Million. The Pay Orders appended with the Nazir Report and subsequent Statement filed by Defendant No.3 shows that out of twenty six Pay Orders, thirteen bear the name of “Shaukat Traders”, which is the business concern of Defendant No.3. *Prima facie*, contention of Defendant No.3 appears to be correct, but, the said assertion was denied by way of Counter Affidavit, as mentioned in preceding paragraphs, to which non-filing of Rejoinder, is fatal. The two reported decisions relied upon by

learned counsel for Defendant No.2, in particular, later one (Jehan Khan case) is a decision handed down by learned Division Bench of this Court and has a binding force and rule laid therein is applicable to the present dispute. Consequently, this controversy at this stage cannot be decided unless evidence is led on this aspect also. But, at the same time subsequent application of Defendant No.2 for execution of Sale Deed in view of the above discussion can also not be accepted at this stage, unless this factual controversy is decided about purchasing of share of Defendant No.1 is concerned. Thus, both applications are disposed of by directing the parties to maintain *status quo* in respect of share of Defendant No.1 in the Subject Property.

7. Since the matter was also fixed for evidence, therefore, considering that the present suit is for distribution of inheritance amongst legal heirs, Mr. Dilawar Hussain, Advocate is appointed as Commissioner to record evidence, in order to expedite the matter. Learned Commissioner will have all the powers in this regard while recording the evidence, *inter alia*, including the following_

- (i). Affidavit-in-Evidence of the witnesses will be filed directly before the learned Commissioner.
- (ii). Two months' time is granted to the Commissioner for completing the assignment.
- (iii). Fee of the Commissioner is fixed at Rs.20,000/- (*Rupees Twenty Thousand Only*) per witness, which shall be borne by the party, who is producing the witness for examination.
- (iv). The Commissioner will also be empowered to impose cost and close the side of a delinquent party, who is trying to delay the proceeding.
- (v). Learned Commissioner will also be empowered to call for the record from any other concerned Government Department(s) as well as from the concerned Branch of this Court and Nazir, but after adhering to the Rules including Order XVI of the Civil Procedure Code.
- (vi). If any record is called from the Government department then costs of the same (*if any*) will be shared in equal proportion by Plaintiff and the Defendants; and the record can only be

produced through a duly authorized representative of the Government Department and not otherwise.

(vii). While recording evidence relevant Rules including Rules 251 to 255 of Sindh Chief Court Rules (SCCR) of the original side will be adhered to.

8. On 16.02.2015, Issues were framed, in which the following Issues will be added_

A. Whether the share of Defendant No.1 was purchased solely by Defendant No.2 or jointly by Defendant No.3?

B. Whether the Defendant No.2 took loan of Rs.6,500,000/- from Defendant No.3 and the Pay Orders mentioning "Shaukat Traders" were in fact loan advanced to Defendant No.2? If yes, what would be its effect?

9. Now the following will be the Issues, on which evidence is to be led_

1. Whether the Plaintiff is entitled for the administration of the following properties?

i. House/building situated on Plot No.13, Block 7 & 8, A, Yamni Road, Jinnah Cooperative Housing Society Ltd. Karachi, measuring 705 Square Yards.

ii. Shop/property No. M.R 7/3, II-B-381, situated at Bombay Bazar, Karachi.

2. Whether the Plaintiff is entitled for the decree as prayed for?

2(A) Whether the share of Defendant No.1 was purchased solely by Defendant No.2 or jointly by Defendant No.3?

2(B) Whether the Defendant No.2 took loan of Rs.6,500,000/- from Defendant No.3 and the Pay Orders mentioning "Shaukat Traders" were in fact loan advanced to Defendant No.2? If yes, what would be its effect?

3. What should the decree be?

10. Office is directed to issue intimation to the learned Commissioner to commence the proceeding.

Judge