

ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Date	Order with signature of Judge
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Suit No. 1485 of 2015.

For hearing of CMA Nos:

1. 15536/15.
2. 16897/15.
3. 1052/16.
4. 14163/15.
5. 13263/15.
6. 11545/15.
7. 14164/15.

Suit No. 1103 of 2015.

For hearing of CMA Nos:

- 1- 15919/15 (U/o VII rule 11 CPC).
- 2- 9869/15. (U/O. 39 rule 1 & 2)

19.4.2016.

Mr. Muhammad Sajjad Abbasi, Advocate for Plaintiffs in both suits.

Mr. Naeem Suleman, Advocate for Defendant No.1 in both suits.

Mr. Azhar Faridi, Advocate for Defendant No.4 in Suit No.1485 of 2015.

By the dint of this order I intend to dispose of CMA Nos. 15919 of 2015 and 15536 of 2015, under Order VII Rule 11 of the Code of Civil Procedure (the Code) filed by the defendant No. 1 in captioned suits.

2. Through suit No. 1485 of 2015, plaintiffs have prayed that:

- A- To declare that the defendant No.1 and 4 fraudulently transferred the suit Property Bearing No.85-E, Block-2, PECHS, Karachi in their names with collusion of the defendant No.2 and 3.
- B- To cancel the transfer order/letter issued by the defendant No.2 and 4 in respect of the suit property bearing No.85-E, Block-2, PECHS, Karachi in the name and favour of the defendant No. 1 and 4.
- C- To permanent restrain the defendants their servants, agents, attorney, employees, officers and anyone else

acting themselves and/or acting on their behalf from demolishing/ transferring/sell/transfer and/creating third parties interest in respect of the property bearing No.85-E, Block-2, P.E.C.H.S, Karachi.

- D- To direct the defendants to pay Rs.50,000,000/- as a damages to the plaintiffs with interest as prescribed by the state bank of the Pakistan till finalization of the decretal amount.
- E- Any other remedy/relief as deem and fit and necessary in the above circumstances in the favour of the plaintiffs.
- F- Cost of the suit.

Whereas in Suit No.1103 of 2015, plaintiffs have prayed that:-

- A- To direct the defendant No.1 to hand over physical possession of the Property Bearing No.85-E, Block-2, PECHS, Karachi to the plaintiffs with house articles as annexure "B".
- B- To permanent restrain the defendant No.1 his servant, agents, attorneys and anyone else acting his behalf from disposing of/sell/transfer the possession/creating third parties interest in respect of the property bearing No.85-E, Block-2, P.E.C.H.S, Karachi.
- C- To direct the defendant No.1 to pay mense profit at the rate of Rs.50,000/- per month from the date 20th June, 2015 till date of realization of the decretal amount.
- D- To direct the defendant No.1 to pay Rs.40,000,000/- as a damages to the plaintiffs with interest as prescribed by the state bank of the Pakistan till finalization of the decretal amount.
- E- Any other remedies as deem and fit in the above circumstances in the favour of the plaintiffs.
- F- Cost of the suit.

2. Precisely, facts are that plaintiffs are grandson and granddaughter of Muhammad Ali Gurdezi and had claimed that in 1965 the Plot bearing No.85-E, Block-2, P.E.C.H.S. Karachi (Admeasuring 400 Square Yards) was allotted to their grandfather and he was having only one son i.e. Syed Iftikhar Ahmed who contracted two marriages and from

his first wife i.e. Mst. Shehnaz Akhtar both the plaintiffs were born, whereas, second wife Mst. Akhtar Jabeen was issueless; plaintiffs are seeking possession and have challenged that defendant Nos. 1 and 4 fraudulently transferred the suit property in their name with collusion of defendants No. 2 and 3.

3. At the outset, learned counsel for the defendants, inter alia, argued that grandfather of the plaintiffs gifted suit property in favour of Mst. Akhtar Jabeen in the year 1986, subsequently that lady died in 2011 and Mst. Jabeen and her husband were residing in that premises whereas, mother of the plaintiffs was divorced and they were not residing there; Syed Iftihar-ul-Hasan died in the year 2008 and in 2005 Mst. Akhtar Jabeen sold out subject matter property in favour of defendant No.1 Zafar Ahmed, subsequently Zafar Ahmed transferred this house to Defendant No.4 Mst. Shahida Shams wife of Shamsuddin. Per learned counsel, plaintiffs have not filed both the suits for declaration of their title as right of inheritance; during whole life Syed Iftikhar-ul-Hasan did not challenge the gift deed which was executed in favour of Mst. Akhtar Jabeen as well both plaintiffs are not seeking cancellation of that gift deed which is a registered document. It is further contended that gift deed executed in 1986 is an old document, hence, presumption of genuineness cannot be challenged attached with that deed; plaintiffs were having intimation in 2011 and in spite of that plaintiffs failed to challenge that transfer and both plaintiffs are barred under Section 91 of Limitation Act. In support of his contentions he has relied on 2012 SCMR 338, SBLR 2008 SC 186, 2002 SCMR 1330, 4 2013 PSC 439, SBLR 2012 Sindh 742, 2007 YLR 2215, 2000 YLR 1385, 2005 SCMR 1660 and KLR 2012 Civil Cases 10.

4. Learned counsel for the plaintiffs while referring both the gift deed and sublease as well sketch has given much emphasis that there is difference in signature of their grandfather, as except gift deed signature of late Muhammad Ali Gurdezi is in English whereas gift deed shows signature in Urdu. On this count, learned counsel for defendants has shown copy of CNIC which shows signature of the Muhammad Ali Gurdezi in Urdu. He also refers transfer letter as well page 61, counter affidavit and order passed on contempt application while raising plea that defendants demolished that house illegally.

5. Before diving into the merits, it is significant to mention that while deciding an application under Order VII rule 11 of the Code courts are *normally* required to examine the contents of plaint *only* but development of the law, *which* is a living *organ*, has allowed the Courts to competently take into consideration the undisputed *documents & facts* because a mere concealment shall not operate to keep matter hanging in name of 'only averments of plaint to be considered'. At this point, I would refer to the case, reported as 2007 SCMR 741, wherein it held that:

'It is pertinent to mention here that in view of the Order VII rule 11 CPC it is the duty of the Court to reject the plaint if, one a perusal thereto, it appears that the suit is incompetent, the parties to the suit are at liberty to draw courts' attention to the same by way of an application. The Court can, and, in most cases hear counsel on the pint involved in the application meaning thereby that court is not only empowered but under obligation to reject the plaint, even without any application from a party, if the same is hit by any of the clauses mentioned under rule 11 of Order VII CPC.

(Underlining is supplied for emphasis)

6. A *bare* perusal of the plaint makes it clear that '**grandfather of the plaintiffs gifted suit property in favour of Mst. Akhtar Jabeen in the year 1986'** ; present plaintiffs are not claiming any right, title and interest

under 'Mst. Akthar Jabeen' . Worth to add that no suit can sustain unless the plaintiff *first* prima facie shows his *legal character* while seeking any 'declaration', 'cancellation of a document' or even 'enforcement of a document' . Absence of such *legal character* and *status* shall, without any hesitation, should bring such *lis* to an end through course of Order VII r 11 The Code.

7. Resuming the discussion, I would say that the gift was within prohibitory degree and on *death* of donor, as in the instant case the position is, nothing short of a decree of the Court can affect the validity of a gift. (Section 167 of Muhammadan law). The present plaintiffs have filed *two* suits with reference to one and same '**subject matter**' yet not challenged the gift hence *legal* presumption would be nothing but that the plaintiffs have relinquished the same. Thus, the plaintiff, within meaning of Order 2 r II of the Code, "*shall not*", *afterwards sue* in respect of the omitted or relinquished claim hence in absence of such relinquished claim both suits of the plaintiffs are not maintainable within meaning of Order VII rule 11(d) of the Code. A reference in this regard may be made to a case, reported as PLD 2011 Karachi 550 wherein it is held that:

".....to which it may be observed that clause 1 of Rule 2 of Order II, CPC provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. It is, therefore, left to the discretion of the plaintiff how he, "frame" is suit and choose jurisdiction, according to his suiting, if law permits. However, once the plaintiff has opted, then by virtue of clause 2 of Rule 2 of Order II CPC he, "shall not", afterwards sue in respect of the omitted or relinquished claim. Since the plaintiff omitted and or relinquished to raise the claim of damages in Suit No.913 of 2010 he could have not raised the prayer of damages in this suit. Therefore, by virtue of clause 'd' of Rule 11 of Order VII CPC this suit was barred by law and could have not been instituted and / or entertained at all."

8. Further, it is also strange that the present plaintiffs have not sought declaration regarding their own *legal status* hence the suit of the plaintiffs is also not sustainable within meaning of Section 42 of Specific Relief Act, 1877 which reads as:-

42. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

9. In addition to above position, it is also not a disputed position that the present plaintiffs claim under 'Syed Iftikhar-ul-Hassan' and not under 'Mst. Akhtar Jabeen'. Syed Iftikhar-ul-Hassan, the *father of plaintiffs*, never challenged the gift, made by his father in favour of Mst. Akhtar Jabeen, hence present plaintiffs, claiming under such person (*Syed Iftikhar ul Hassan*) legally cannot seek any relief by *first* not getting the gift declared *otherwise*. Further, it is also not the case of the plaintiffs that their father had no knowledge and notice of the gift by his father (*grand father of present plaintiffs*) hence silence of their father (Syed Iftikhar-ul-Hassan) brings a *full* stop and present plaintiffs in *independent* capacity cannot bring a suit causing any effect upon such gift. It is also a matter of record that said Mst. Akhtar Jabeen sold out the subject matter whose such title, *in absence of declaration of gift in her favour*, was / is not open to an exception by present plaintiffs within capacity of grand children of original owner *even*. The case law, relied by learned counsel for the defendant, is relevant to situation i.e Abdul Haq and another v. Mst.

Surrya Begum and other [2002 SCMR 1330], wherein the Hon'ble apex Court has observed as under:

“11. Atta Muhammad was deprived of right to inherit the property as a consequence of mutation in dispute but he did not challenge the same during his lifetime. The petitioners claimed the property through Atta Muhammad as his heirs who filed the suit as late in 1979 about nine years after the sanction of mutation which had already been given effect to in the record of rights. **The petitioners, therefore, had no locus standi to challenge the mutation independently, for Atta Muhammad through whom they claimed inheritance himself had not challenged the same during his lifetime.**”

(Underlining is supplied for emphasis)

10. In law the absence of legal character of the plaintiffs is sufficient for rejection of plaint but I may also add here that the plaintiffs even remained silent for considerable period despite attaining the age of majority much *earlier* and even admittedly have not been in possession of the subject matter nor claimed to have been dispossessed shortly, therefore, their status as *grandchildren* of original donor is not sufficient to keep an *otherwise* barred suit.

11. In view of above discussions, I am of the clear and *firm* view that the plaintiffs have failed to establish their *independent* legal character to file the instant suits which *even* otherwise is barred under the law in *present form* hence both the plaintiffs are hereby rejected under Order VII rule 11 (d) of the Code of Civil Procedure. In consequence thereof all other pending applications stands dismissed.

JUDGE

Sajid