

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1534 of 2012

[Ms. Gulnarv..... Muhammad Yousuf Barakzai & others]

Dates of Hearing : 04.11.2021 & 26.11.2021

Plaintiff : Plaintiff in person.

Defendants : Mr. Usman Tufail Shaikh, Advocate for defendant No.1.

Nemo for defendant No. 3 & 4 & defendant No. 2, 5 & 6 are *ex parte*.

JUDGMENT

Zulfiqar Ahmad Khan, J:-The present action at law is filed in respect of an Immovable Property bearing Bungalow No.17/1 Creek Lane No.5 measuring 500 sq. yds., Phase VII situated at Defence Housing Authority Karachi (suit property), seeking declaration, cancellation of documents, possession and permanent injunction against creating any third party interests.

2. Quintessentially, the facts of the case as emerged from the plaint are that the plaintiff solemnized marriage with defendant No.1 on 29.04.1984 whilst she was running a Beauty Salon. It is averred by the plaintiff that she belonged to a well to do family and out of her own savings, she purchased an expensive apartment in Askari IV, Karachi, however, with the passage of time, at the request of defendant No.1 she sold out the said apartment in order to assist the defendant No.1 to share fifty percent amount in purchasing the suit property. Plaintiff knowing that the defendant No.1 is her husband got prepared pay order in the name of defendant No.1 for onward investment in the suit property but the defendant No.1 in order to

subvert the suit property, and to deprive the plaintiff from the suit property got transferred the suit property entirely in his own name rather transferring half of the same in the name of plaintiff keeping her as joint owner. Plaintiff further asserts in the plaint that defendant No.1 broke the marriage bond and pronounced divorce to plaintiff on 27.12.2011, whereafter the plaintiff started living in Islamabad and when she returned to Karachi to visit the suit property, the watchman did not let her enter into the suit property, hence the plaintiff reached the doorstep of this Court beseeching and entreating as follows:-

- i). Declaration that the plaintiff and defendant No.1 were/are real owners to the extent of 50:50 shareholding and the Defendant No.1 was only co-owner and co-sharer to the extent of 50% and ostensible owner (Benamdar) of remaining 50% share and the name of Defendant No.1 to the extent of 50% be cancelled and its ownership/title substituted in the name of plaintiff and defendant No.1 in the documents/records of the defendant No.2 to 5 and the conveyance deed dated 30.11.23004 is invalid, ab initio, null and void and has no legal effect liable to be cancelled/delivered up.
- ii). To restore the possession of 50% of the suit property to the plaintiff.
- iii). Permanent injunction restraining the defendant No.1 from claiming and absolute ownership, rights and exercising such rights directly or indirectly in any manner whatsoever in the One Unit Bungalow bearing No.17/1 Creek Lane No.5 measuring 500 sq. yds., Phase VII situated at Defence Housing Authority Karachi, and further restraining the Defendant No.1 from transferring, alienating, selling, disposing, mortgaging, encumbrancing, let or lease of the suit property or part thereof to any person from parting possession of the suit property or part thereof to any person other

than the plaintiff directly or indirectly in any manner whatsoever.

- iv). Cost of the suit be borne by the defendant No.1
- v). To award any other relief or reliefs of this Honourable Court may deem fit and property under the circumstances of the case.

3. The summons and notices were issued to the defendants by orders of this court whereafter, defendant No.1, 3 & 4 contested the matter and filed their written statement, however, defendant No.2 & 5 were repeatedly served and having exhausted all modes of service, the defendant No. 2 & 5 were declared ex parte vide order dated 05.03.2018.

4. It is worth mentioning here that the lis in hand was filed on 10.11.2012 and on the said date of hearing, the defendant No.1 was restrained from selling or creating any third party interest in the suit property, whereas, learned representative of the defendant No.1 on 18.08.2018 introduced on record that the suit property was sold out and the said buyer is now in arena as defendant No.6 who even failed to contest the matter despite proper service upon her including publication in daily newspaper "Express" dated 30.08.2019.

5. The Defendant No.1 contested the matter by filing its stance in the shape of written statement and raised objections that the suit is hit by latches and barred by limitation as the plaintiff approached this court after a delay of eight (08) years, therefore, the lis is hopelessly time barred and it is the considered opinion of the Court that the prescriptions of limitation are not mere technicalities and disregard thereof would render entire law of limitation redundant.

Defendant No.1 denied the assertion of the plaintiff to have contributed 50% amount in purchasing of the suit property. It is introduced on record by the defendant No.1 that the apartment situated in Askari IV, was purchased by the defendant No.1 and the contracting documents was also executed and signed by the defendant No.1. He further stated that he mostly remains out of station and at the time of executing the power of attorney of the said apartment, the defendant No.1 was in Quetta and the power of attorney of the Askari IV apartment was executed in the name of the plaintiff at the request of defendant No.1 and the said apartment was also sold out upon the directions of the defendant No.1 by the plaintiff. The whole assertion of the defendant No.1 is that the plaintiff never contributed any amount in purchasing the suit property as well as she was never gifted anything moveable or immovable by her father or family. Lastly, the defendant No.1, prayed for dismissal of the lis in hand filed by the plaintiff.

6. The defendant No.3 in its written statement introduced on record that the suit property was originally allotted to one Naeem ul Haq who later on sold out the same to the defendant No.1 and now, according to their record of rights, the defendant No.1 is owner of the suit property, whereas, defendant No.4 in its written notion introduced on record that they are alien to the proceedings in hand.

7. The record insinuates that on 20.01.2020 issues were framed and matter was referred to the learned Commissioner for recording of evidence. The issues settled by this court are as under:-

“1. Whether the suit is hopelessly time barred?

2. Whether the plaintiff has any right, title or interest in the suit property?
3. Whether the plaintiff is ostensible owner of the suit property to the extent of 50% share? If not what is its effect?
4. Whether the suit property has been rightfully sold by defendant No.1? if not what is its effect?
5. What should the decree be?"

8. Plaintiff in person introduced on record her grievances at great length. Concisely, she submitted that she belongs to a well-to-do family and runs a beauty salon; being a working lady, she purchased an apartment in Askari IV out of her own saving and earnings which she was earning from the said salon; so as to make a better future of her children she invested a 50% amount at the behest of defendant No.1 in purchasing the suit property but the defendant No.1 had surreptitiously transferred the suit property solely in his own name rather making the plaintiff as co-owner; that owing to the unavoidable circumstances, the defendant No.1 broke the marriage and divorced her due to which the plaintiff was not only deprived from the suit property as well as the money which she invested therein; that the plaintiff was maltreated as well as harassed by the defendant No.1; while summing up her arguments, she prayed that the conveyance deed executed in the name of the defendant No.1 be cancelled and directions be issued to the defendant No. 2 to 4 to enter her name as co-owner of the suit property and decree the suit as prayed.

9. In contra, Mr. Usman Tufail Shaikh, Advocate entered appearance on behalf of defendant No.1 divided his arguments in four limbs. His first limb of argument is that the plaintiff should have

filed the suit in 2004 when the suit property was mutated in the name of the defendant No.1 but she approached this court in the year 2012, therefore, the lis in hand is hopelessly time barred and it is the considered opinion of the Court that the prescriptions of limitation are not mere technicalities and disregard thereof would render entire law of limitation redundant, therefore, the suit be dismissed on this score alone. The second limb of arguments of learned counsel is that defendant No.1 purchased an apartment in Askari IV and the contracting documents in purchasing the said apartment are between the owner and the defendant No.1 side by side the sale consideration was also paid by the defendant No.1. The other limb of the argument is that the defendant No.1 usually remains out of station and at the time of transferring the said apartment, the defendant No.1 was in Quetta, therefore, he got transferred the Askari IV apartment in the name of the plaintiff and at his instructions, the said apartment was also sold out. The last limb of argument is that the suit property had been sold out prior to filing of the lis in hand and these proceedings are filed only to harass and humiliate the defendant No.1 to which the defendant No.1 reserves his right to initiate proceedings against the plaintiff. While concluding his prime submissions, he prayed for dismissal of the suit.

10. Heard the arguments and considered the evidence.

11. **Issue No.1.** Since, defendant No.1 has raised a basic objection of limitation, which goes to the root of the case, hence, it should be decided first. A close scrutiny of plaint it unfurls that the plaintiff introduced on record that the defendant No.1 broke the marital knot

on 27.12.2011 whereafter she requested time and again to the defendant No.1 to give her share as she paid a 50% amount in purchasing the suit property but the defendant No.1 kept the plaintiff on hollow hopes, neither refunded back the 50% share to the plaintiff nor mutated the suit property in her name being co-owner of the suit property, therefore, she has filed this lis for cancellation of the alleged Conveyance Deed in the year 2012. For the purposes of cancellation of document, three years of limitation is provided under Article 91 of the Limitation Act, 1908. The plaintiff could maintain the suit for declaration of her legal status and could also maintain a suit for cancellation of a document under such declaration. The legal position, being so, shall stand clear from a reference to Section 39 of the Specific Relief Act, 1877 which reads as:--

“39. When cancellation may be ordered: Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it an order it to be delivered up and cancelled.”

12. It is gleaned from the appraisal of the foregoing that “any person” can seek cancellation of a written instrument as 'void or voidable' only if remaining of such document outstanding may cause one a serious injury. Furthermore, issue of limitation is a mixed question of fact and law, particularly in the present lis and in other cases as well, where this question of law (of Limitation) is dependent on the determination of other issue(s), then, in my considered view, a plaintiff should not be non-suited, unless, either there is incriminating evidence against a plaintiff that her claim is a time barred one, or, this issue could be decided on the basis of undisputed

record. Furthermore, right to fair trial as enunciated vide Article 10-A of the Constitution, 1973 is right of every citizen. In our Constitution, right to fair trial is a fundamental right. This constitutional reassurance envisaged and envisioned both procedural standards that courts must uphold in order to protect peoples' personal liberty and a range of liberty interests that statutes and regulations must not infringe. On insertion of this fundamental right in our Constitution, we ought to analyze and survey the laws and the rules/ regulations framed thereunder to comprehend whether this indispensable right is accessible or deprived of? In case of stringency and rigidity in affording this right, it is the function rather a responsibility of court to protect this right so that no injustice and unfairness should be done to anybody, therefore, in view of the above dictum, to give a fair right of audience and proper disposal of the issues, it is necessary to address to issue one after another. Mindful to the nitty-gritties of the case, I feel no reluctance to hold that this suit is well within time and not time barred, therefore, the **issue No.1 is answered in negation.**

13. In my considerate view, the Issue Nos. 2 & 3 are inextricably linked, based upon similar evidence and record, therefore, it would be advantageous to discuss the same simultaneously, in the same breath.

14. So to strengthen and validate her grievances, the plaintiff amid her examination-in-chief produced the material documents and to substantiate her testimony produced one witness. The documents produced by the plaintiff are in following sequence:-

Copy of allotment letter dated 06.04.1999 as Exh. X-5/1
Copy of pay order as Exh. X-5/2
Copy of Bank's memo as Exh. X-5/3
Copy of letter to D.G. Housing as Exh. X-5/4.
Copy of agreement to sell dated 03.12.2004 as Exh. X-5/5
Copy of receipt as Exh X-5/6
Copy of pay order dated 30.11.2004 as Exh. X-5/7
Copy of conveyance deed dated 30.11.2004 as Exh. X-5/8
Copy of conveyance deed dated 15.11.2012 as Exh. X-5/9
Copy of application to registration authority for the purchase of property as Exh. X-5/10.
Copy of application under Section 22-A & 22-B Cr.P.C as Exh. X-5/11.
Copy of complaint to SHO P.S. Gizri as Exh. X-5/12.
Copy of order dated 31.01.2013 passed in Cr. Misc. Appl. No. 118/2013 as Exh. X-5/13.
Copy of application dated 04.07.2012 addressed to Hon'ble Chief Justice as Exh. X-5/14.
Copy of reply from Hon'ble Supreme Court dated 08.09.2012 as Exh. X-5/15.
Copy of letter to Director Human Right Cell dated 17.08.2012 as Exh. X-5/16.
Copy of letter dated 15.08.2012 addressed to Inspector General of Police as Exh. X-5/17
Copy of letter dated 09.08.2012 addressed to Additional Inspector General of Police as Exh. X-5/18
Cop of letter dated 08.08.2012 addressed to Deputy Inspector General of Police as Exh. X-5/19.
Copy of police report dated 05.08.2012 as Exh. X-5/20
Copy of statement by Gulnar Memon recorded with police as Exh. X-5/21.

15. Learned counsel for the defendant No.1 amid examination-in-chief of plaintiff before the learned Commissioner raised objection in respect of production of Photostat copy of the documents produced by the plaintiff. It is settled principle that a party/aggrieved person

having grievance against another person/party ought to produce original documents before the court to strengthen its claim. Tendering a document in evidence is wholly distinct rule, it concerns with mode of proving document itself. Existence and probative value of such document is different matter and involves assessment to be made by Court of a fact it seeks to establish. For Court to look into document for deciding its probative or evidentiary value, it is necessary to tender the document legally first. When defence objects to tendering i.e. mode of proof of a document in evidence, it is duty of Court to decide it immediately and not defer it. When objection is not on existence or execution of document itself but on the contents, its evidentiary value, the fact it seeks to convey and there is a chance that primary or secondary evidence may be led to prove its contents, production of such document in evidence cannot be denied. When a photostat document is taken on record, subject to its admissibility and later no steps are taken to prove contents of document by leading primary or secondary evidence, such document cannot be taken into consideration for determining its evidentiary value. Merely by tendering a document in evidence, it gets no evidentiary value unless its contents are proved in terms of Art. 79 of Qanun-e-Shahadat, 1984. When a piece of evidence/document sought to be tendered is admittedly inadmissible, irrespective of mode of proof of such document, production of such document in evidence has to be denied. To hold or to view that a given piece of evidence is inadmissible, (its contents cannot be accepted or admitted to have probative value even if it is taken on record) has to involve presence of predetermination of such fact. Furthermore, production of a

Photostate document annexing the same with plaint by the plaintiff and later on was not proved through secondary evidence, then production of Photostate document alongwith plaint as well as in evidence would deserve to be kept out of consideration.

16. On the other hand, defendant No.1 in order to strengthen his claim, produced comprehensive documents as compared to plaintiff in the following sequence:-

Copy of allotment letter dated 06.04.1999 as Exh. D-7/2.

Certified copy of NOC for sale from legal heirs as Exh. D-7/3

Certified copy of handing over and taking over of possession certificates as Exh. D-7/4 & D-7/5.

Certified copy of agreement of sale as Exh. D-7/6.

Certified copy of receipt of amount of Rs.20,80,000/- as Exh. D-7/7.

Certified copy of affidavit of Mr. Zafar Iqabal as Exh. D-7/8.

Certified copy of application for transfer as Exh. D-7/9.

Certified copy of possession letter as Exh. D-7/10.

Copy of conveyance deed dated 30.11.2004 as Exh. D-7/11.

Original affidavit of plaintiff as Exh. D-7/12.

17. Under section 42 of the Specific Relief Act, any person entitled to any legal character or to any right as to another property may institute a suit against any person denying or interested to deny his title to such character or right. The object of this section is to perpetuate and strength the testimony regarding the title of the plaintiff and to secure possession of the property to a wrong party. A person can seek the aid of the court to dispel the cloud in case a cloud is cast upon his title or legal character. On the plain language of the section 42 it does not appear to be any justification for assuming that a suit for declaration as to status claimed by the

plaintiff cannot be maintained. A man's legal character is generally taken as the same thing as a man's status. The words "right to as to any property" are to be understood in a wider sense than "right to property" and the words "interested to deny" denotes that the defendant is interested in denying the right of the plaintiff or his legal character. The denial of the right constitute a cause of action to maintain an action under this Section. A relief of declaration being a discretionary relief can be granted in the case where substantial injury is established and in absence of denial of right no relief of declaration can be granted. In the case of Major General Shanta Shansher Jung Bahadur Rana v. Kemani Brother Private Ltd. reported in AIR 1959 Bombay 201, it was held that section 42 provides that 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. This section therefore applies when a person is entitled to any legal character or to any right as to any property. The phrase "legal character" occurs in two statutes viz., in section 42 of the Specific Relief Act and in section 41 of the Indian Evidence Act (Article 55 of Qanun-e-Shahadat Order, 1984) but that phrase has not been defined in either of the said two Acts. Section 42 provides for a declaration being made in respect of a legal character and a right as to any property. These two categories viz., legal character and a right as to any property, have been separately mentioned and would therefore prima facie appear to be distinct, separate and exclusive. Section 42 provides for making a declaratory decree i.e., making a decree declaring a man's rights which would mean legal rights and it would therefore appear that

both the said categories mentioned in section 42 are species of the same genus viz., "legal rights", "legal character" however, does not appear to be phrase common to jurisprudence nor does it appear to have been used in statutes, except in section 42 of the Specific Relief Act and section 41 of the Indian Evidence Act (Article 55 of Qanun-e-Shahadat Order, 1984). In at least three judgments reported in I.L.R. 39 Mad 80 = AIR 1915, Mad. 584, AIR 1955 Mad b. 111 and AIR 1940 Cal 225, "legal character" has been taken to mean "legal status" a phrase known to jurisprudence. When the legislature used the phrase "legal character" in the said two sections, it is legitimate to assume that the legislature was using the same in respect of some known legal concept and the context in section 42 of the Specific Relief Act indicates that what was intended to be meant by "legal character" was "legal status".

18. No doubt the provisions of section 42 are not exhaustive and all-encompassing of virtues and ambiances in which declaration is to be given. Sometimes in the peculiar and distinctive circumstances of the case court may grant the declaration even not covered by section 42 of the Specific Relief Act where in case general provision of law gives declaration sought. Legal character as used in section 42 is equivalent to legal status and legal status is a legal right when it involves a peculiarity of the personality arising from anything unconnected with the nature of the act itself which the person of inherence can enforce against the person of incidence. Salmond pointed out in his book on Jurisprudence, rights of four distinct kinds: (1) rights (in the strict sense); (2), liberties; (3) powers; and (4) immunities. The word 'right' is used in a wider sense in section 42 of

the Specific Relief Act. The distinction between the expression 'right as to any property' and the expression 'right to any property' is not very important.

19. It is sine qua non as to whether the plaintiff in facts and circumstances of the case should or should not grant declaration. Looking into down-to-earth and pragmatic perseverance in this forward-looking advance era, one should not stick to the rigidities and complexities or acid test of legal character but it needs some more generous comprehension to meet up all exigencies. Lord Cottonham said, in Taylor v. Salmon:

“It is the duty of a court of equity to adapt its practice and course of proceedings, as far as possible, to the existing state of society and to apply its jurisdiction to all those new cases, which from the progress daily made in the affairs of men, must continually arise and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy”.

(1838) 4 Myln and Cr 134. (C M Row. Law of Injunctions, Eighth Edition.)

20. The dictum laid down in the case of Arif Majeed Malik and others v. Board of Governors, Karachi Grammar School (**2004 CLC 1029**) unequivocally held that wherever there is a right there must be a remedy to enforce it. Persuaded courts not to remain bound within the technicalities of section 42 of Specific Relief Act. The reason for the divergence of judicial opinion is that when Specific Relief Act, 1877 was enacted concept of rights which could be enforced through courts was largely confined to status as understood in feudal social context or rights pertaining to property in laissez-faire economy.

21. In the United States, both in the Federal and Uniform laws, the word 'right' alone is used, so that a party may obtain a declaration as to any legal rights which, of course, mean justiciable rights. **Ref: Cf. Ashwender v. Teinessee Valley Authority, 297 U.S. 288 at p. 325: L, Ed. 688 at p. 699.** In keeping with Cf. 62 Harvard Law Review at pp. 875-76. (**Ref: Anand & Iyer's, Commentary on Specific Relief Act. 11th Edition. Page 927**), the word 'right' has been interpreted to include 'liability' also, so that actions have been entertained against the Government and other public bodies to determine their liability, duty or power. Right also includes immunity, e.g. that a statute is not applicable to the plaintiff. Since the word 'right' is not confined to proprietary right, the courts have had no difficulty in making a declaration as to contractual right or a right to practice a profession or the like.

22. Reverting to the merits of the issues under discussion, in order to impeach the credit of the plaintiff, learned counsel for defendant No.1 exercise his all professional abilities to shake the confidence of the plaintiff during cross-examination. Plaintiff was put to the text of a lengthy cross-examination upon her testimony and she admitted various suggestion of the learned counsel for the defendant No.1 and the defendants failed to shatter the version of the plaintiff. The pertinent excerpt of the cross-examination of the plaintiff is pen down hereunder:-

“It is correct that I had purchased Askari flat on the basis of power of attorney as during those days the authorities were not allowing to sell the property directly.

It is incorrect that I have not produced any receipt for the flat along with my affidavit in evidence. I see article X-5/2 (pay order) and say that it was executed on my behalf. Vol. says that at that time my brother in law namely Agha Saeed @ Jehangir, accompanied me to the Bank.

I was working in Garrison Academy School, Quetta, upto the year 2000. I was fetching salary from Garrison Academy School in form of cash cheque of Askari Bank.

I had obtained loan from NIB Bank, I.I. Chundrigar Road for once. I mortgaged my Askari flat with the Bank against such loan.

I was doing school job since my marriage as my husband never used to give me monthly maintenance.

It is correct to say that I was not in possession of original title documents. Vol. says that during the married life, the documents were kept in almirah. However, thereafter, they did not allow me to enter the house. As I stated that I was not in possession of the title documents, still I submitted those along with my pleadings/affidavit in evidence as I had obtained certified copies from the office of sub-registrar which are marked as Ex-5/2 & Ex-5/3.

It is correct that according to Ex-5/9 Mrs. Uzma had returned my security amount in respect of Noori's Beauty Studio. I was running Noori's Beauty Studio since 2002.

Vol. says that my ex-husband had admitted to give me Bungalow and car. It is correct that in the ending paragraph of Ex-5/5, I had demanded these two things i.e. Bungalow and car Starvac. It is correct that I had not demanded anything else except house and car. I see article X-5/20, X-5/20/1, X-5/21 & X-5/21/1 and confirm that I had demanded these two things i.e. house and car.

I had stated that my ex-husband was nominated/culprit in the Shershah Bridge case and he was suspended, but Govt. of Sindh had again sent him to Islamabad by promoting him.

Agha Saeed helped me to get the pay order prepared by accompanying me to the Bank, as he was doing the business of Estate as his side business.”

23. It is gleaned from the appraisal of the foregoing that plaintiff was able to show that she shared 50% sale consideration towards purchasing the suit property. In sequel to the above discussion, deliberation and rationale, the Issues No. 2 & 3 are answered in affirmation and in favour of plaintiff.

24. Issue No.4 relates to the selling out of the suit property by the defendant No.1 where the plaintiff alleged that the suit property was sold out during pendency of the suit while vide order dated 10.11.2012, defendant No.1 was restrained from selling and/or creating a third party interest in the suit property. Learned counsel for the defendant No.1 in this respect contended that the suit property has been sold out to the defendant No.6. The act of the defendant No.1 is clearly barred by Section 52 of the Transfer of Property Act, 1882 (“Act, 1882”). At this juncture, it would be material to reproduced Section 52 of the Act, 1882 which stipulates as follows:-

“52. Transfer of property pending suit relating thereto.- During the pendency in any Court having authority in Pakistan or established beyond the limits of Pakistan by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.”

25. There are a plethora of precedents of Apex Court dilating upon the issue of *lis pendence* that the property in view of bar under Section 52 of the Act, 1882 cannot be sold out, alienated transferred/allotted during pendency of proceedings. During course

of arguments, a query was raised as to what will be the effective date of passing of order i.e. date of passing of order or the date when the said order was served on the concerned party. To answer the said query, I may say that order of injunction takes effect from the time it is passed.

25. In view of the above rationale, this court is left with no option but to hold that the suit property has been wrongfully sold by the defendant No.1, therefore, the **issue No.4 is answered in negation.**

26. So far as issue No.5 is concerned, sanguine to the set of circumstances and ramification as well as connotation of statues, the suit of the plaintiff is allowed as prayed.

JUDGE

Karachi
Dated:01.07.2022