

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A.No.154/2017
Shahnaz Parveen and another
Versus

Javed Yaqoob and others

Date of Hearing: 02.10.2019
Appellants by: Malik Babar Hameed, Advocate
Respondents by: Ms. Shahina Shahad ud Din Advocate for respondent No.1
Raja Shujahat Ali, Advocate for respondent No.2

MIANGUL HASSAN AURANGZEB, J:- Through the instant regular first appeal, the appellants, Shahnaz Parveen and Misbah Parveen, impugn the consolidated judgment and decree dated 12.09.2017 passed by the Court of the learned Senior Civil Judge, Islamabad, whereby (i) suit for declaration and permanent injunction filed by respondent No.1 (Javed Yaqoob) was decreed, and (ii) suit for possession through partition and recovery of rent filed by respondent No.1 was partially decreed.

2. The facts essential for the disposal of the instant appeal are that Muhammad Yaqoob, who had served as a Section Officer in the Establishment Division, had applied on 30.07.1971 for membership in the Federal Government Employees Cooperative Housing Society ("F.G.E.C.H.S."). It is not disputed that Muhammad Yaqoob's application for membership had been allowed. Before Muhammad Yaqoob could be allotted a plot in F.G.E.C.H.S., he died on 20.05.1973. In his application form, Muhammad Yaqoob had named his second wife, Mst. Imtiaz Yaqoob, as his nominee. In the year 1976, Mst. Imtiaz Yaqoob had applied to F.G.E.C.H.S. for allotment of a residential plot on the basis of her late husband's membership. Vide letter dated 14.04.1979, plot No.175, measuring 45x80 feet, G-10/1, Islamabad ("the suit plot") was allotted to her. On 25.09.1982, possession of the suit plot was delivered to Mst. Imtiaz Yaqoob, whereafter a house was constructed on the suit plot.

3. Respondent No.1 (Javed Yaqoob) is Muhammad Yaqoob's son from his first wife who has passed away. The appellants (Mst. Shahnaz Parveen and Mst. Misbah Parveen) are Muhammad Yaqoob's daughters whereas respondent No.2 (Mst. Imtiaz Parveen also referred to as Mst. Imtiaz Yaqoob) is Muhammad Yaqoob's second wife and respondent No.3 (Tahir Yaqoob) is his son. The appellants and respondent No.3 are Muhammad Yaqoob's children from his second wife.

4. On 02.10.2006, respondent No.1 filed a suit for declaration and permanent injunction against his half-brother and sisters and stepmother before the Court of the learned Senior Civil Judge, Islamabad. In the said suit, respondent No.1 prayed for a declaration to the effect that he is entitled to his share in the suit plot as inheritance from his father, Muhammad Yaqoob.

5. The appellants and respondents No.2 and 3 contested the said suit by filing their written statements. The position taken by the said parties was that after Muhammad Yaqoob's demise, the suit plot was allotted on 14.04.1979 to Mst. Imtiaz Yaqoob who had paid all the costs and allied charges for it. It was also pleaded that the Capital Development Authority ("C.D.A.") had executed registered deed No.5725, dated 22.12.1985, with respect to the suit plot in Mst. Imtiaz Yaqoob's favour.

6. The written statement filed by F.G.E.C.H.S. shows that on 30.07.1971, Muhammad Yaqoob had applied for membership in F.G.E.C.H.S. and later on respondent No.2 who was Muhammad Yaqoob's nominee applied on 01.01.1976 for the allotment of a residential plot in the said society. It was also pleaded that the suit plot was allotted to respondent No.2 as Muhammad Yaqoob's nominee.

7. On 26.07.2010, respondent No.1 filed a suit for possession through partition and recovery of rent against the same parties who had been arrayed as defendants in the earlier suit. In the subsequent suit, respondent No.1 had prayed for a decree for possession of his share through partition of the suit plot. Furthermore, respondent No.1 had prayed for his share in the

rental amount of Rs.80,000/- per month for a period of five years before the institution of the suit to be awarded to him.

8. The appellants and respondents No.2 and 3 contested the said suit by filing their written statements. The position taken by the said parties in their written statements was consistent with their pleadings in the written statements to the earlier suit.

9. Out of the divergent pleadings of the contesting parties in the said suits, the learned Civil Court framed the following consolidated issues on 30.10.2015:-

- “1. Whether the plaintiff is entitled to the decree for declaration to the effect that he is entitled for the share in plot No.175, G-10/1, Islamabad as legal heir of the actual allottee Muhammad Yaqoob deceased? OPP*
- 2. If issue No.1 is proved, then whether the plaintiff is entitled to the decree for permanent injunction as prayed for? OPP*
- 3. Whether the plaintiff has not come to the court with clean hands? OPD in suit No.762 of 2010*
- 4. Whether the plaintiff has no cause of action to file this suit? OPD in suit No.762 of 2010*
- 5. Whether the suit is hopelessly time barred according to Limitation Act? OPD in suit No.762 of 2010*
- 6. Whether the suit is bad for mis-joinder of necessary parties? OPD in suit No.762 of 2010*
- 7. Whether the plaintiff has concealed material facts from this court? OPD in suit No.762 of 2010*
- 8. Whether the defendant No.1 is lawful owner of the suit plot/house who paid the complete cost of the plot and allied charges and constructed a house on the suit plot? OPD in suit No.762 of 2010*
- 9. Whether plaintiff of suit No.544 is entitled for decree of possession through partition and recovery of rent as prayed for? OPP in suit No.544 of 2010*
- 10. Whether the suit is bad for mis-joinder and non-joinder of necessary parties? OPP in suit No.544 of 2010*
- 11. Relief.”*

10. Respondent No.1 appeared as PW-1 and recorded his examination-in-chief on 26.07.2016. On 28.11.2016 and 29.11.2016, respondent No.1 was cross-examined.

11. Since the appellants and respondents No.2 and 3 did not produce evidence despite having been afforded several opportunities, the learned Civil Court, vide order dated 13.02.2017, closed their right of defence. The appeal against the said order was allowed by the learned Appellate Court subject to the payment of costs of Rs.5,000/-. Since the said parties neither

produced their evidence nor paid the costs, their right to produce evidence was closed once again, vide order dated 22.05.2017.

12. As mentioned above, vide consolidated judgment and decree dated 12.09.2017, respondent No.1's suit for declaration, etc. was decreed whereas the suit for possession etc. was partially decreed. The said consolidated judgment and decree has been assailed by the appellants in the instant regular first appeal.

13. Learned counsel for the appellants, after narrating the facts leading to the filing of the instant appeal, submitted that although Muhammad Yaqoob had been granted membership in F.G.E.C.H.S., the suit plot had not been allotted to him during his lifetime; that Muhammad Yaqoob had named Mst. Imtiaz Yaqoob as his nominee; that had the suit plot been allotted to Muhammad Yaqoob and had he paid for the suit plot in his lifetime, then the mere fact that Mst. Imtiaz Yaqoob had been named as his nominee would have resulted in respondent No.1 inheriting his share in the suit plot; that since Mst. Imtiaz Yaqoob had paid for the suit plot and also for the construction of the house thereon, respondent No.1 could not claim any share in the suit plot; that since the suit plot was not allotted to Muhammad Yaqoob, it could not have formed part of his estate; that mere membership in F.G.E.C.H.S. cannot be subjected to devolution or inheritance; that respondent No.1 did not contribute any amount for the purchase of the suit plot or construction thereon; that respondent No.1's pleadings in his suits are inconsistent; that appellant No.1 resided in Canada and came to know about the impugned judgment and decree when she returned to Pakistan; that even on the basis of the material on the record, respondent No.1's suits could not have been decreed; and that the impugned judgment and decree is not in accordance with the law and facts of the case. Learned counsel for the appellants prayed for the appeal to be allowed and for the impugned consolidated judgment and decree to be set-aside.

14. On the other hand, learned counsel for respondent No.1 submitted that the suit plot constituted a part of Muhammad Yaqoob's estate, and accordingly respondent No.1 was entitled to inherit his share in the suit plot; that had respondent No.1's father

not become a member of F.G.E.C.H.S., the question of the allotment of the suit plot in favour of Mst. Imtiaz Yaqoob would not have arisen; that the mere fact that respondent No.1's father had named Mst. Imtiaz Yaqoob as his nominee would not entitle her to solely inherit the suit plot; that since the allotment of the suit plot in favour of Mst. Imtiaz Yaqoob had been made on the basis of Muhammad Yaqoob's membership in F.G.E.C.H.S., for all intents and purposes, the suit plot is to be considered as part of Muhammad Yaqoob's estate; that Mst. Imtiaz Yaqoob had unlawfully deprived respondent No.1 of his inheritance rights; and that the consolidated judgment and decree passed by the learned Civil Court does not suffer from any legal infirmity. Learned counsel for respondent No.1 prayed for the appeal to be dismissed.

15. We have heard the contentions of the learned counsel for the contesting parties, and have perused the record with their able assistance. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 11 above and need not be recapitulated.

16. As mentioned above, since the appellants, respondent No.2 and respondent No.3 (who were the private defendants in the two suits instituted by respondent No.1) had not assailed the order dated 22.05.2017 passed by the learned Civil Court, whereby their right to produce evidence was closed, there is no evidence on the record from the said parties. Only respondent No.1's evidence is on the record.

17. Since the essential facts in the case at hand are not in dispute, the vital question that needs to be answered is whether respondent No.1 could claim a share in the suit plot on the ground that it was allotted to respondent No.2 / Mst. Imtiaz Yaqoob by virtue of being named as a nominee by her late husband, Muhammad Yaqoob. This question has to be answered bearing in mind that there is no documentary evidence on the record to prove that respondent No.1 contributed any amount for the allotment of the suit plot.

18. In paragraph 2 of the suit for declaration etc., respondent No.1 has admitted *inter-alia* that the suit plot had been allotted after Muhammad Yaqoob's demise. However, in paragraph 4 of the said suit, it has been pleaded that respondent No.1 had recently come to know that the suit plot had been allotted to his father, but had been transferred to respondent No.2 "*fraudulently, with malafide and in connivance with F.G.E.C.H.S.*" The pleadings in respondent No.1's suit for declaration etc. show that he was under the impression that the suit plot had been allotted to his father.

19. In the second suit instituted by respondent No.1, it was *inter-alia* pleaded that Muhammad Yaqoob was given membership in F.G.E.C.H.S., but he had died before the allotment of the suit plot. It was also pleaded that after Muhammad Yaqoob's demise, respondent No.2, being his nominee, applied for the allotment of a plot, and consequently, the suit plot was allotted to her, vide allotment letter dated 14.04.1979.

20. There are material contradictions in the two suits filed by respondent No.1. In the first suit (suit for declaration etc.) respondent No.1 pleaded that the suit plot was allotted to his father and was fraudulently transferred to respondent No.2 whereas in the second suit (suit for possession etc.) he pleaded that after his father's demise, the suit plot was allotted to respondent No.2 as his father's nominee.

21. Respondent No.1 appeared as PW.1 and in his examination-in-chief, deposed *inter-alia* that after his father's demise in the year 1973, he was employed as an Assistant in the Establishment Division on the basis of his father's employment in the said Division; that the suit plot was transferred to his stepmother/respondent No.2 on the basis of her nomination in his father's application form submitted to F.G.E.C.H.S.; that payment for the suit plot was made from respondent No.1's salary; that the suit plot was "allotted" to respondent No.1's father on the basis of him being a government employee; and that respondent No.2 was not a government employee and could not have been allotted the suit plot.

22. In his cross-examination, respondent No.1 deposed that by virtue of being a government employee, he has been allotted a plot in Jinnah Garden by F.G.E.C.H.S.; that respondent No.1 has paid for the suit plot, but its possession had not been handed over to him; that in the year 1979, the suit plot was allotted to respondent No.2 through collusion between C.D.A. and F.G.E.C.H.S.; that the suit for the declaration etc. was instituted by respondent No.1, 27 years after the allotment of the suit plot in respondent No.2's favour; that the house constructed on the suit plot had been given to one Shamsuddin on rent for Rs.46,000/- per month; that respondent No.1 had paid the installments for the suit plot; that respondent No.1 cannot produce the receipt for the payment of the installments for the suit plot; that respondent No.1 is not in possession of the allotment letter regarding the suit plot in favour of his father; and that respondent No.1 has not seen the allotment letter in favour of his father.

23. Respondent No.1's evidence that the suit plot was allotted to respondent No.2 on the basis of her nomination in Muhammad Yaqoob's application form also contradicts his pleadings in the suit for declaration etc., that the suit plot was allotted to Muhammad Yaqoob and was fraudulently transferred to respondent No.2. It must be remembered that the declaration claimed under Section 42 of the Specific Relief Act, 1877 lies entirely within the judicial discretion of the Court and is to be exercised with caution according to the exigencies of a particular case. A party cannot, as of right, claim such a declaration, because such relief is more in the nature of an equitable relief than a legal remedy. Litigants with inequitable conduct ought not to be granted equitable reliefs such as declaration and injunctions. In the case of Muhammad Rafique Vs. Liaqat Ali (2006 YLR 2689), the Hon'ble Mr. Justice Sair Ali (as he then was) had the occasion to hold that plaintiffs who contradict their pleadings through their evidence deprive themselves of the equitable relief of declaration. Having adopted contradictory positions, respondent No.1 could not have approached the Court for seeking the discretionary and equitable relief of declaration.

24. In paragraph 6 of the suit for possession etc., respondent No.1 admits that respondent No.2 was Muhammad Yaqoob's nominee and on this basis, she was allotted the suit plot. In his examination-in-chief, respondent No.1 has deposed *inter-alia* that the suit plot was allotted to respondent No.2 on account of being Muhammad Yaqoob's nominee. It is well settled that the nomination of any person by an allottee of a plot of land or an account holder by itself does not make the nominee the sole beneficiary or the owner of such land or account after the demise of the original allottee or account holder. The estate of the original allottee or the account holder devolves on all his legal heirs in accordance with the injunctions of Islam regardless of any particular person nominated by him. Such a nominee remains accountable to all the legal heirs of the deceased for the devolution of the deceased's estate in accordance with the injunctions of Islam. In holding so, we place reliance on the following case law:-

- (i) In the case of Muhammad Bakhsh Vs. Mst. Ghulam Fatima (2007 SCMR 1227), it was held that nomination of a person by the late allottee of a cooperative forming society would not, by itself, deprive his legal heirs to inherit the estate of the deceased. Furthermore, it was held that allottee's interests and rights in the land allotted to him by the society stood to devolve upon his legal heirs under Muslim Personal Law of inheritance notwithstanding anything contained in the bye-laws of the society.
- (ii) In the case of Mst. Ameeran Khatoon Vs. Mst. Shamim Akthar (2005 SCMR 512), the petitioner's case was that on account of being the deceased's mother as well as his nominee, she was exclusively entitled to the amount of benevolent fund and group insurance. It was held by the Hon'ble Supreme Court since the deceased was not entitled to the benevolent fund and group insurance during his lifetime, such amounts would be deemed to be owned by him upon his death

and devolved upon his legal heirs being his “*tarka*”. Accordingly, it was held that the petitioner would not be entitled to exclusively claim these amounts except to the extent of her entitlement as per *shariah* along with other legal heirs of the deceased.

- (iii) In the case of Amtul Habib Vs. Musarrat Parveen (PLD 1974 SC 185), it was held at Page 191, as follows:

“Apart from this, it appears to us that, unless a nomination can amount to a valid gift inter vivos, it cannot pass title to the nominee in respect of immovable property, nor can the making of a nomination give the right to the nominator at his own choice to change the law of succession which would otherwise be applicable in the case of his death. Obviously, the nomination cannot operate as a valid gift under the Muhammadan Law because, such a gift, in order to confer title on the donee, must be accompanied by delivery of possession of the property gifted. In the case of plots allotted to Muhammad Yakub, there could be no delivery of possession at the time the nomination was made for, at that time, no plot had been allotted to him.”

- (iv) In the case of Kamal Afzal Farooqui Vs. Begum Shahzada Farooqui (1989 CLC 110), it was held that a nominee of the deceased could not claim to be the absolute owner of the deceased’s immovable property to the exclusion of all other legal heirs of the deceased.
- (v) In the case of Muhammad Sohail Anjum Khan Vs. Abdul Rasheed Khan (2003 MLD 1095), it was held that the position of a nominee is merely that of a trustee of the owner of the property and he could not become the owner of the property after the demise of the original owner. Furthermore, it was held that such a nominee remains accountable to the legal heirs of the original owner for all the benefits derived out of the property. Since the author of the said judgment, the Hon'ble Mr. Justice Mushir Alam, rose to grace the Hon'ble Supreme Court, the ratio in the said judgment deserves respect and reverence.

Law to the said effect has also been laid down in the cases of Malik Safdar Ali Khan Vs. Public at Large (2004 SCMR 1219), Mst. Manzoor Ahmed Vs. Salaman Bibi (1998 SCMR 388), Fazal Shah Vs. Muhammad Din (1990 SCMR 868), Dr. Safdar Hussain Vs. Flt. Lt. Nadia Latif (2014 YLR 1553), and Muhammad Aslam Shah Vs. Province of the Punjab (2012 MLD 1768).

25. Having gone through the precedent case law, we have noted that in the said cases, the dispute was with respect to either an existing immovable property or an account owned by the deceased. The distinguishing feature in the case at hand is that the suit plot had not been allotted to Muhammad Yaqoob during his lifetime. He was only a member of F.G.E.C.H.S. at the time of his death. There was no tangible and immovable property in F.G.E.C.H.S. owned by Muhammad Yaqoob at the time of his death. It was after his death that his wife/respondent No.2 applied for the allotment of a plot on the basis of being Muhammad Yaqoob's nominee. Therefore, the property (i.e. the suit plot) came into existence when it was allotted to respondent No.2 and when she paid for it.

26. There is nothing on record to show that the suit plot was allotted to Muhammad Yaqoob during his lifetime. Mark-D is the allotment letter dated 14.04.1979 regarding the suit plot issued by C.D.A. in favour of respondent No.2. The said allotment letter is stated to have been issued on respondent No.2's request. As per the said allotment letter, the total price of the suit plot was stated to be Rs.16,800/-, out of which Rs.5,040/- was stated to have been already paid. The remaining amount was to be paid in installments. Since the said allotment letter is addressed to respondent No.2 and since it is stated therein that *"you have already paid Rs.5,040/- and the balance shall have to be paid by you within the specified period"*, it would be safe to hold that the said amount was indeed paid by respondent No.2 and not by respondent No.1. Had respondent No.2 not paid the said amount, the suit plot would not have been allotted. Ever since 1979, the allotment of the suit plot has remained in respondent No.2's name.

27. Although respondent No.1 claims to have paid for the allotment of the suit plot and for raising construction thereon, but he has not produced a single document to prove that. If respondent No.1's stance that he paid for the suit plot is to be accepted, then he must have known about the allotment letter being in respondent No.2's favour when the same was issued. He must also have been aware of the schedule for the payment of installments in the said letter and made payments according to such schedule issued in 1979. The question that crops up in the mind that if he was aware as to the issuance of the allotment letter in respondent No.2's favour, why is it that he waited from 1979 to 2006 (i.e. 27 years) to institute the suit for declaration etc? It is not respondent No.1's case that he is the real owner of the suit plot whereas respondent No.2 is the ostensible owner. In the two suits instituted by respondent No.1, he has not challenged the issuance of the allotment letter in favour of respondent No.2. It is not his case that the allotment letter should have been issued to all of Muhammad Yaqoob's legal heirs.

28. In the suit for possession etc., it has also been pleaded that after the completion of the house on the suit plot, the appellants and respondents No.2 and 3 started living in it and did not allow respondent No.1 to enter or to live in the house. This denial of respondent No.1's right, if at all he had any, constituted a cause of action for the institution of a suit against respondent No.2 and her children. However, respondent No.1 did not plead the date on which he was refused such entry. Be that as it may, in the year 1987, a legal notice was sent on respondent No.1's behalf to the C.D.A. requesting for the suit plot to be jointly allotted in favour of himself, the appellants, and respondents No.2 and 3. Since in the said legal notice, respondent No.1's right to own a share in the suit plot was asserted, it would be safe to hold that in the year 1987 (if not in the year 1979), he certainly had knowledge about the allotment letter issued in favour of respondent No.2. In spite of this, he decided to remain mum for almost two decades before filing the suit for declaration etc. This conduct also disentitles respondent No.2 from the equitable relief of declaration.

According to the maxim *vigilantibus non dormientibus jura subveniunt*, the laws help the vigilant, not the sleepers.

29. Since there is nothing on record to show that respondent No.1 had paid for the allotment of the suit plot or construction thereon; and since the suit plot had not been allotted to respondent No.1's father during his lifetime, we hold that in the year 1973 when respondent No.1's father died, there was no immovable property in existence which could have been inherited by respondent No.1. Consequently, the instant appeal is allowed; and the consolidated judgment and decree dated 12.09.2017 is set-aside. There shall be no order as to costs.

(CHIEF JUSTICE)

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2019

(CHIEF JUSTICE)

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*

Uploaded By: Engr. Umer Rasheed Dar