

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1724 of 2009

[Mst. Zaibunisa & others v. Iqbal Ahmad and others]

Date of hearings : 17.01.2019 and 28.01.2019.

Date of Decision : 28.01.2019.

Plaintiffs : Mst. Zaibunisa and 6 others, through
M/s. Adnan Ahmed and Bilawal Channa,
Advocates.

Defendants : Nemo.

Case law relied upon by Plaintiffs' Counsel

1. 1992 S C M R page-917
[*Tanveer Jamshed and another v. Raja Ghulam Haider*]
2. 2001 S C M R page-1
[*Hafiz Brothers (Pvt.) Ltd. and others v. Messrs Paksitan Industrial Credit and Investment Corporation Ltd.*]
3. 2013 S C M R page-464
[*Muhammad Yar (Deceased) through L.Rs. and others v. Muhammad Amin (Deceased) through L.Rs. and others*]
4. P L D 2007 Lahore page-180
[*Ch. Muhammad Tufail Khan alias Tufaul Muhammad through Legal Representative v. Zari Taraqiati Bank Limited through Branch Manager*]
5. P L D 1976 Supreme Court page-37
[*Ali Muhammad v. Hussain Bakhsh and others*] – Ali Muhammad Case.
6. P L D 1976 Supreme Court page-208
[*Khuda Bakhsh v. Khushi Muhammad and 3 others*] – Khuda Bakhsh case.
7. 2007 S C M R page-729
[*Rehmatullah and others v. Saleh Khan and others*]
8. 2007 S C M R page-1835
[*Executive District Officer (Education), Rawalpindi v. Muhammad Younas*]

Case law relied upon by Defendants' Counsel

Other precedents

1. 2010 S C M R page-978
[*Abdul Rehman and others v. Ghulam Muhammad through L.Rs. and others*]
2. P L D 1964 Supreme Court page-329
[*Muhammad Akbar Shah v. Muhammad Yusuf Shah and others*]
3. S B L R 2017 Sindh page-105
[*Mansoor Ashraf v. Province of Sindh & others*] – Ashraf Case.
4. 2012 C L D page-6
[*Abdul Majeed Khan v. Tawseen Abdul Haleem and others*] – Abdul Majeed Case.

- Law under discussion:**
1. The Limitation Act, 1908 (“**Limitation Law**”).
 2. The Specific Relief Act, 1877 [“**SRA**”]
 3. Civil Procedure Code, 1908 (“**CPC**”)
 4. Qanun-e-Shahadat Order, 1984 (Evidence Act, 1872); “**Evidence Law**”.

JUDGMENT

Muhammad Faisal Kamal Alam, J: - The present suit has been filed by the Plaintiffs, *inter alia*, for cancellation of sale deed dated 21.05.2009. The plaint contains the following prayer clauses_

- (a) *It be declared and adjudged that the purported sale deed dated 21st May, 2009 in respect of property bearing No.C-95 Block-10, Scheme No.16, F.B. Area, Karachi ad-measuring 700 square yards, bearing Registered No.1448, Book No.1 dated 21.05.2009 of Sub-Registrar Gulberg Town Karachi, and bearing M.F. Roll No.U-38811/5889 of Photo-Registrar Karachi dated 13.06.2009, is a forged and fabricated document and is a nullity in the eye of law, and, as such, it is liable to be cancelled and delivered up.*
- (b) *It be declared that the Plaintiffs are in lawful possession of their respective properties on Sub-divided plots No.C-95 (396.66 square yards) and C-95/1 (303.3 square yards) in Block No.10, KDA Scheme No.16, F.B. Area, Karachi, as the owners thereof, and Defendant No.1 has no rights, title or power to disturb their peaceful possession of the said properties, or any of them, and / or to do any act, deed or thing prejudicial to the rights, title and*

interests of the Plaintiffs in respect of the said properties, directly or indirectly.

- (c) *The Hon'ble Court may be pleased to adjudge the said sale deed (P/12) as void instrument, and be further pleased to order that it be delivered up and cancelled, with such further direction as this Hon'ble Court may deem just and proper.*
- (d) *Defendant No.1, his servants, agents, and all persons claiming through or under him, be restrained from acting, in any way or manner, on the said disputed sale deed (annexure P/12) and doing any act or deed prejudicial to the rights and title of the plaintiffs in respect of suit property in their lawful possession (C-95 & C-95/1).*
- (e) *Defendant No.2 be restrained from effecting any Mutation or transfer in their records of the suit-property, on the basis of the disputed sale deed (annexure P/12).*
- (f) *Defendant No.3 be directed that no sale deed or any other instrument pertaining to property bearing No.C-95 situated in Block No.10, KDA Scheme No.16, F.B. Area, Karachi, including any Power of Attorney, be registered, or entertained for registration till further order of this Hon'ble Court.*
- (g) *Decree in sum of Rupees one crore against Defendant No.1 including the amount of Rupees three lacs and fifty thousand as Special Damages.*
- (h) *Any other, further or additional relief, which this Hon'ble Court may deem just and proper, be granted to the Plaintiffs.*
- (i) *The cost of the suit be awarded to the Plaintiffs.*

2. Summons and notices were issued to the Defendants, but despite service, Defendant No.1, who is the contesting party, never appeared, whereas, Defendant No.3 (concerned Sub-Registrar) also did not participate in the proceeding. Defendant No.2 – Karachi Metropolitan Corporation (“KMC”) has filed its Written Statement. Vide order dated 11.10.2010, the said Defendants No.1 and 3 were directed to be proceeded *ex parte*.

3. The present claim of the Plaintiffs is in respect of a built up house property bearing No.C-95, Block No.10, measuring 700 Square Yards, K.D.A. Scheme No.16, F. B. Area, Karachi (“**Suit Property**”), which they had purchased through registered sale deeds executed by the legal heirs of the erstwhile owner and the original Lessee [Late] Shireen Akhtar Khan. Plaintiffs have challenged that a subsequent Sale Deed dated 21.05.2009 (Annexure O/1) was obtained by Defendant No.1 through fraud. The said Sale Deed is purportedly a registered instrument bearing registration No.M.F. Roll No.U 38811 / 5889 dated 13.06.2009. This instrument for the sake of reference be referred to the “**Impugned Instrument**”. It is also an undisputed factual aspect of the case that subsequently the erstwhile owners got the Suit Property bifurcated/sub-divided into two plots bearing **No.C-95 and C-95/1**, comprising of area 396.66 Square Yards and 303.33 Square Yards, respectively. In this regard, the defunct City District Government Karachi (CDGK)/earlier Defendant No.2 has issued a subdivision order, which has been exhibited as **P/6** (page-221 of the Evidence File). Later, through the two sale deeds, the property in question was sold to the present Plaintiffs. For the purpose of present decision, even after subdivision, this property can be referred to as the ‘**Suit Property**’.

4. On a specific query, Mr. Adnan Ahmed, learned counsel for the Plaintiffs, has pointed out that since Defendant No.2-KMC does not contest the claim of the Plaintiffs in its Written Statement, therefore, due to some *bona fide* omission, the Issues could not be framed and Plaintiffs straightaway led the evidence. Consequently, following issues are framed_

1. Whether the present suit as framed is maintainable?

2. Whether the Plaintiffs are owners of the Suit Property and the Impugned sale Deed dated 13.06.2009 was obtained fraudulently and is thus void ab initio and liable to be cancelled?

3. *Whether the Plaintiffs are entitled for damages as claimed? If so, to what extent?*

4. *What should the decree be?*

5. The Issue-wise finding is mentioned herein under:

Issue No.1 _____ Affirmative.

Issue No.2 _____ As under.

Issue No.3 _____ As under.

Issue No.4 _____ Suit decreed.

Discussion / Reasons of the Issues.

ISSUE NO.1:

6. Even though none of the Defendants participated in the evidence proceeding, the matter proceeded practically *ex parte*, because Defendant No.2-KMC has supported the stance of the Plaintiffs, yet the Court has to apply its independent judicial mind with regard to the nature of proceeding and reliefs claimed. This is a suit for Declaration and Cancellation of Impugned Instrument so also Damages, therefore, it is to be seen as to whether the claim was brought within time under the Limitation Law or not. Article 91 of the Limitation Law mentions the limitation period as three years, for seeking cancellation of an instrument, whereas, the Declaration of the nature would be covered by Article 120, which provides a period of six years for bringing an action at law.

7. Learned counsel for the Plaintiffs has submitted that though the Impugned Instrument appears to have been registered on 13.06.2009, the present suit was instituted on 04.12.2009 when the Plaintiffs came to know about the Impugned Instrument in the second week of November 2009, when the Photostat copy of the Impugned Instrument was obtained, because estate agents approached the Plaintiffs and sought information about

disposal of the suit property. He has referred to paragraphs-12, 13 and 18 {in respect of cause of action} of his pleadings and paragraph-11 of the Affidavit-in-Evidence. He has further submitted that even otherwise, the present suit is within time as it has been filed within few months of the acquiring of knowledge about the Impugned Instrument.

8. The submission of the Plaintiffs' counsel, if evaluated in the light of the record, has substance, because the Impugned Instrument bears a registration date as 3.06.2009, whereas, the present *lis* was filed on 4-12-2009, that is, after six months; thus, the reliefs claimed are within the limitation period, as mentioned in the forgoing paragraphs. Accordingly, Issue No.1 is answered in the Affirmative.

ISSUE NO.2:

9. The Plaintiffs' witness – P.W.-1 (Muhammad Idrees son of Muhammada Zakria), who himself is Plaintiff No.3 and one of the co-owners, has filed number of documents in the evidence. Firstly, he has produced in his evidence the original Indenture of Lease executed between the Karachi Development Authority {as the principal owner/Lessor}, which in the intervening period became part of the defunct City District Government Karachi/the former Defendant No.2 and the above named Mst. Shireen Akhter, which is available at page-271. He has then relied upon the mutation order in favour of the present Plaintiffs, which were produced in the evidence as Exhibits P/8 and P/10; dated 8.2.2005 and 5.4.2005, respectively. As stated above that since the Suit Property was earlier bifurcated / subdivided into the two plots, therefore, the subdivision permission / order is exhibited as P/6 (dated 23.12.2004).

10. Learned counsel for the Plaintiffs has also relied upon the second set of evidence with regard to the vesting of Suit Property in the present Plaintiffs and their predecessor-in-interest. It is pleaded and testified by the

above witness (on behalf of the Plaintiffs) that since the above named lady/original lessee Mst. Shereen Akhter Khan was unmarried, therefore, after her death she was survived by her near relatives. Learned Advocate has referred to the Death Certificate of the above named lady, which has been exhibited as P/2, which shows that the deceased lady passed away on 11.12.1999. He has then referred to the Deed of Relinquishment (**Exhibit P/3**) in support of his arguments that surviving heirs / legal heirs of the above deceased lady relinquished their respective shares in favour of three heirs/persons; namely, (1). Fatima Khatoon Khan (2). Aftab Ahmad Khan and (3). Azad Ahmad Khan. This **Relinquishment Deed is a registered document** bearing M.F. Roll NO.U – 4006 / 1640 dated 24.01.2004. Learned counsel for the Plaintiffs has then referred to the Sale Deeds dated 03.01.2005 and 10.03.2005 (**Exhibits P/7 and P/9**), respectively, between the above named persons / legal heirs of the deceased lady and the present Plaintiffs. Whereafter mutation was accordingly done as discussed herein above.

11. It is vehemently argued that Plaintiffs are in possession of the Suit Property since then, which fact is also evident from the above referred registered Sale Deeds itself, that after receiving the entire sale consideration, the possession of the Suit Property was handed over to the present Plaintiffs. These sale deeds (in original) in favour of Plaintiffs, are admittedly registered public documents/instruments as envisaged in the Article 85 of the Evidence Law and thus presumption of genuineness as mentioned in the Chapter V of the Evidence Law is attached to all these documents.

12. Since the above contention, pleadings of the Plaintiffs and the evidence led in support of the claim, have gone unchallenged, therefore, the arguments of the learned counsel for the Plaintiffs to the extent of sale

transaction in question and possession of the Plaintiffs vis-à-vis Suit Property stand proven.

13. The crucial point in this matter is the cancellation of the above Impugned Instrument. Learned counsel for the Plaintiffs has relied upon the case law mentioned in the opening paragraph of this Judgment. The crux of the reported decisions relied upon by the Plaintiffs is that if the foundation for a basic order is void and without lawful authority then the superstructure built upon it shall automatically fall; 2007 S C M R page-729 and 2007 S C M R page-1835. In reply to a query, learned counsel for the Plaintiffs has submitted that the Impugned Instrument apparently was executed through one Sheikh Muhammad Shuja, claiming to be the attorney of the deceased person-Late Shireen Akhtar (the original owner/lessee, as mentioned herein above) as well as through the Nazir of the District Court Central appointed by the learned Vth Senior Civil Judge, Karachi Central, in pursuance of a ‘Compromise decree’ passed in Civil Suit No.886 of 2007. This Impugned Instrument is *ex facie* speaks of illegality, because, the impugned Sale Deed dated 21-5-2009 is in respect of the entire suit property measuring 700 square yards, whereas, admittedly, the same was sub-divided on 23-12-2004 vide Sub-division Order, produced in the evidence as *Exhibit P/6*, which is an official document and its authenticity has never been challenge; according to which, the suit property has now got two numbers, viz. C-95 and C-95/1, having different measurements (as already mentioned herein above). *Secondly*, in the presence of already two registered sale deeds (*supra*) of a prior date, the impugned Sale deed/Instrument of subsequent date (of 21-5-2009) cannot be executed, that too of the undivided suit property, which itself is contrary to record. It is a proven fact that the **deceased lady died on 11.12.1999** (as discussed in the foregoing paragraph) and purported Civil Suit was filed

in the year 2007, that is, against a dead person; therefore, even the entire proceeding of the above mentioned Civil Suit No.886 of 2007 was based on *mala fide* and dishonesty and thus was illegal. In this regard, the submission of learned counsel for the Plaintiffs has substance; that an order without jurisdiction is nullity in law and it does not require to be set aside formally, *inter alia*, because in the eye of the law such type of order is nonexistent. The two reported judgments of the Honourable Supreme Court in the case of Ali Muhammad and Khuda Bakhsh (*ibid*) cited by the Plaintiffs' counsel, are relevant and the rule laid therein is attracted to the facts of the present case. Even though no witness has appeared on behalf of the official Defendant No.2-KMC, yet their acceptance of claim of the present Plaintiffs in their Written Statement cannot be ignored in these peculiar circumstances. More so, despite availing ample opportunities, none of the Defendants came forward to cross-examine the witness of the Plaintiff. The claim of Plaintiffs is based upon the registered instruments/documents and other official record, detail and description whereof are already stated in the preceding paragraphs.

Significantly, the vesting of suit property in favour of Plaintiffs has been proved through a series of documents, which corroborate and supplement each other and all of them are either official or registered documents. The registered relinquishment deed (*ibid*) through which the surviving legal heirs of the above deceased lady have relinquished and released their respective shares vis-à-vis the Suit Property in favour of the three of the legal heirs, who then signed / executed the subsequent sale deeds (Exhibit P/7 and P/9). In the intervening period the suit property was got sub-divided by the predecessor-in-interest of present Plaintiffs, as already discussed in the preceding paragraphs. The mutation orders (exhibits P/8 and P/10) are also evidence of ownerships, which at present stand in the names of present Plaintiffs. Presumption of genuineness as

contained in Articles 85 to 95 of the Evidence Law are also attached and applicable to these documents produced by the Plaintiffs' side, which goes in their favour.

14. From the above, it is quite clear that the above mentioned proceeding before the Court of law was filed merely to perpetuate fraud, as, *inter alia*, in the presence of the two registered sale deeds (*ibid*) that too admittedly earlier in time, the Impugned Instrument could not have been executed (purportedly), by Defendant No.1 in respect of the same Suit Property, which impugned Instrument is subsequent in time, that is, dated 21-5-2009; secondly, at the relevant time the said original owner/lady was not alive, thus, the above suit proceeding was filed against a dead person and suffered from an inherent illegality. Hence, it is not difficult to conclude that the Impugned Instrument is a bogus document.

15. The Hon'ble Supreme Court is of the consistent view that Section 39 of the SRA is only invoked when the instrument / document sought to be cancelled is voidable and not void *ab initio*. The cases of Muhammad Akber Shah and Abdul Rahman (*supra*) are relevant and provide guidance. In the subsequent case of Abdul Rahman [2010 S C M R page-978], the Hon'ble Supreme Court has come to the conclusion that an instrument inherently *void* does not require a formal cancellation under Section 39 of the SRA. It would be advantageous to reproduce the relevant portion of paragraph-7 (of the above decision) herein below_

"7.

"The principle is that if the transaction which is sought to be set aside was a voidable one, it is essential that the transaction be set aside. If it be not voidable, but void, the question of setting it aside would not arise. As to whether a transaction is voidable or void there is simple criterion: did the transaction create any legal effects, that is, did the transaction transfer, create or terminate or otherwise affect any rights? In a void transaction no legal effects are produced. In a voidable transaction legal effects are produced but some person has the right to avoid the transaction

and if he exercises that option to process by which rights were affected is reversed and the original situation as it existed before the transaction is restored (subject to adjustment of equities). If the Court which is dealing with the question of limitation reaches the conclusion after considering the evidence before it that the transaction in dispute by its own force produced legal effects it would be necessary that the transaction be set aside and limitation will be governed by the Article applicable to the setting aside of the transaction. It if comes to the conclusion that by itself the transaction produced no effect no need for setting it aside will arise. It is necessary to state here that a voidable transaction should not be confused with a transaction which prima facie looks valid and in relation to which the burden of proof will be on the party alleging its invalidity. There may be a document in existence a registered deed of sale or mortgage or some other transaction, which is by presumption genuine and the person who purports to be its executant may have the burden on him to show that it is a forgery. Still it is not a voidable transaction because ultimately when the court comes to the conclusion that it is a forgery it will be found that in fact the document never affected any right. That is the criterion for determining whether a document is void or voidable. Its apparent validity or the question of burden of proof is in this respect irrelevant. No person is bound to sue for setting aside a document, just because it is raising a presumption against him. There is no need for the person who is shown to be the executant of the forged document to sue for its cancellation or for setting it aside though he may be taking a risk in allowing the document stand for proof of forgery may become difficult as time passes. A transaction which is not genuine may have been incorporated even in the Revenue Records which have a presumption of correctness. Still there is no need to have the transaction set aside for Revenue Records are only evidence of it and do not affect title."

16. The other inescapable aspect of the case is that the object and spirit of law is to advance the justice and remedy the wrong forthwith, instead of putting a law abiding person / citizen through the mill. In a reported decision handed down by the learned Division Bench of this Court in the

Ashraf case (*supra*), the above aspect has been highlighted and resultantly, the petitioner (of the reported case) who was a tenant was put back into the possession of the demised premises. It would be advantageous to reproduce herein under the relevant portion of the decision_

“.....(iv) an implied objective of law is to ensure an orderly behavior in a society and if on one hand a wrongful act is left unattended on the basis of certain technicalities and on the other hand a victim of wrongful act is left to run from pillar to post, then in due course of time, an orderly system of a society would be diminished and will be replaced by a disorderly and intolerant behaviour as well as lawlessness.”

17. The upshot of the above is that the impugned Instrument/Sale Deed dated 21-5-2009 is void ab initio, and though it does not even legally required to be adjudged as cancelled, as held, by the Hon'ble Apex Court (*ibid*), but, as an abundant caution, in my considered view, since the Plaintiffs have already challenged the same in the present proceeding, thus, the impugned Instrument be dealt with accordingly. Since the onus of ownership and possession in respect of the Suit Property has been successfully discharged by the Plaintiffs and Defendant No.1 never came forward to contest the claim of the Plaintiffs despite service of notices about the present proceeding, therefore, the Impugned Instrument/Sale Deed dated 21-5-2009 ought to be adjudged as Cancelled. Issue No.2 is answered in the Affirmative.

ISSUE NO.3:

18. Plaintiffs have not led convincing evidence in respect of their claim of damages of Rs.1,03,50,000/-.

19. Learned counsel for the Plaintiffs has submitted that on account of fraudulent acts of Defendant No.1 (Iqbal Ahmad), the Plaintiffs had to

initiate the present litigation and pursuing the same for the past one decade. It is further submitted that such deceptive and dishonest acts and the actions should be dealt with strictly in order to reduce the sufferings of lawful owners.

20. Broadly, damages are of two kinds; general and special. Special damages are awarded only when a party successfully proves actual losses suffered by him / her. In the present case, the Plaintiffs' side has failed to adduce evidence with regard to their claim of rupees one crore three lacs and fifty thousand towards damages, which in fact are special damages. Notwithstanding this aspect of the case, the Superior Courts have held in number of decisions, *Abdul Majeed Khan v. Tawseen Abdul Haleem* [2012 C L D page-6], being one of the leading cases, that if circumstances so warrant, general damages can be awarded by invoking the rule of thumb; particularly where violation of legal rights exists. It is a matter of record that Plaintiffs are pursuing their genuine remedy for enforcement of ownership rights for the past ten years and have incurred expenses towards litigation. In these circumstances, I am of the considered view that the Plaintiffs are also entitled for general damages to the tune of Rs.200,000/- (Rupees Two Hundred Thousand only).

ISSUE NO.4:

21. In view of the above, the present suit is decreed in terms of prayer Clauses A, B, C, D, E and F. However, the damages are awarded as mentioned herein above.

Judge

Karachi Dated: 28.01.2019.

Riaz / P.S.