

# IN THE HIGH COURT OF SINDH AT KARACHI

HCA No. 189 of 2016

Before : **Mr. Justice Irfan Saadat Khan**  
**Mr. Justice Fahim Ahmed Siddiqui**

S. Shafique-ur-Rehman through LRs. .... Appellant

Versus

Ministry of Housing & Works  
 Through the Secretary,  
 Government of Pakistan. .... Respondents

Dates of hearing : 08.11.2019, 04.12.2019 and 06.12.2019

Legal heirs of Appellant S. Shafique-ur-Rehman through Mr. Muhammad Vawda, advocate.

Respondent Ministry of Housing & Works, through the Secretary, Government of Pakistan through Mr. Bilal Khilji, Assistant Attorney General of Pakistan.

## J U D G M E N T

**FAHIM AHMED SIDDIQUI, J:-** This appeal arises out of impugned decree dated 23-05-2016 based on the judgment dated 03.05.2016, passed by the learned Single Judge in Civil Suit No.877/2011. Through the impugned judgment and decree, the Suit filed by the appellant (plaintiff of the Suit) was dismissed, which urged him to prefer the instant appeal.

2. The relevant facts, in short, as ascertainable from the impugned judgment and other records are that the appellant claimed the ownership of a property bearing Plot No. 72-O, Block No. 2, P.E.C.H.S., Karachi (hereinafter referred to as 'the said property'). The said property was originally allotted to one Mr. Ahmadullah Akhtar in whose favour the

P.E.C.H.S. issued Allotment Letter dated 25.01.1953 (Exhibit 5/5) and also executed an Agreement to Lease (Exhibit 5/6). The said original allottee executed a General Power of Attorney (GPA) in favour of Mr.Sajjad Mirza, with the power to sell the property (Exhibit 5/7). Subsequently, Mr. Ahmadullah Akhter intended to sell the property through his aforementioned attorney, as such he obtained permission to sell the said property through letter dated 31.12.1965 (Exhibit 5/8). Afterward an agreement to sell dated 09.03.1966 (Exhibit 5/9) was executed regarding the said property between the original allottee through aforementioned attorney and M/s. Pakistan Plantation & Industries Ltd. (hereinafter referred to as 'PPIL') having office at 5-Magh Bazar, Outer Circular Road, Dhaka in the then East Pakistan (now Bangladesh). The said agreement to sell (Exhibit 5/9) was signed by the appellant on behalf of PPIL. After completing all the legal formalities, a conveyance deed was executed (Exhibit 5/14) and the said property was mutated in the name of PPIL, as revealed through the letter of the respondent and P.E.C.H.S. (Exhibits 5/16 & 5/17). The said PPIL also executed a Special Power of Attorney in favour of the appellant (Exhibit 5/18). Later on, PPIL, through its duly authorised person and Director of the company namely Mr. Shaikh Khurshid Anwar, executed a 'Deed of Disclaimer' in favour of the appellant regarding the said property. The appellant specified that all the original documents of the said property were in his possession and after execution of such 'Deed of Disclaimer', the appellant became the owner of the said property.

3. We have heard the arguments of both the sides and have also perused the records.

4. After reading the entire judgment, Mr. Muhammad Vawda, learned counsel for the appellant, formally opens his arguments. He submits that the appellant was the beneficial owner of the said property and he was

residing therein for the last more than 60 years and since then none has disputed his right over the title of the said property. According to him, although the appellant had all the relevant documents in his possession to establish his title but the respondent has wrongly refused to mutate the said property in his name, as such the aforementioned Suit was filed. He submits that the letter of PECHS dated 28.08.2008 and the Ministry (respondent) dated 23.12.2008 have created the cause of action for filing the Suit. He submits that PPIL was a family concern and the property was purchased in the name of said company in 1966 with the sale proceeds of a property of Lahore belonging to the family. Per him, the property was purchased by father-in-law of the appellant as marriage gift for the couple and just after purchasing the said property, the appellant with his wife made the same as their marital abode and since then they were residing in the said property. He submits that the sale agreement and conveyance deed of the property were executed by the appellant on behalf of PPIL and a power of attorney was also executed in favour of the appellant by the said company. According to him, after some time, a 'Deed of Disclaimer' dated 30.06.1970 was also executed by one of the Director on behalf of PPIL in favour of the appellant. He submits that the entire documents of the said property were already handed over to the appellant and all the amenities were installed in the said property in the name of the appellant by showing him as the owner. He submits that even the taxes and charges of KMC and KW & SB were being paid by the appellant, while PT-1 was also in the name of appellant as the appellant was regularly paying the property tax and all such documents were available with the appellant. He points out that although PPIL was registered in the former East Pakistan but the 'Deed of Disclaimer' was executed much before creation of Bangladesh. He submits that after formation of Bangladesh, all the Directors migrated to Pakistan but the company was neither migrated nor registered in Pakistan. According to him, the company did not have any

property in Pakistan and practically has become a defunct and dead company as all the Directors of PPIL have passed away. Amongst the two marginal witnesses, one is still alive i.e. Shaikh Abdul Aziz son of Mian Haji Allahdita. The said Shaikh Abdul Aziz has sworn an affidavit before an official of Consulate General of Pakistan, Dubai in which he has supported the execution of Deed of Disclaimer in favour of the appellant and its contents, which has been produced before this Court under a statement. He closes his arguments by emphasising that none in the entire world has any adverse claim over the property, as such only the appellant is the owner of the property. While responding a query, the learned counsel for the appellant submits that the property in question was not declared as abandoned property under the provision of Abandoned Properties' (Taking over and Management) Act, 1975 and the Board constituted within the said Act has never published any such claim, and the said Board has no right as PPIL has already disowned the property through the 'Deed of Disclaimer'. In support of his above contentions, he relied upon the cases of **Nazir Ahmed vs Karim Bakhsh (2017 SCMR 1934)**, **Allah Dad and 3 others vs Dhuman Khan and 10 others (2005 SCMR 564)**, **Pakistan Railways vs Noor Jahan Begum through LRs (2015 YLR 456)**, **Iftikhar Hussain Khan and 13 others vs Muhammad Gulzar Khan and 5 others (2015 MLD 400)**, and **Muhammad Sadiq vs Muhammad Ramzan and 8 others (2002 SCMR 1821)**.

5. Mr. Bilal Khilji, Assistant Attorney General submits that it is not clear whether the executant of the 'Deed of Disclaimer' was authorised by the Board of Directors of PPIL, as they don't have the resolution of board in their possession. He submits that if all Directors had expired then the appellant should have brought the LRs of those Directors on the record, which was not done. He submits that the alleged 'Deed of Disclaimer' was never produced in the Court, as the same was not in the possession of the appellant. According to him, it appears that the 'Deed of Disclaimer' was

not registered, which has no sanctity in the eyes of law. He submits that only production of the photocopy, being secondary evidence, was not sufficient to substantiate the claim of the appellant. Per him, it will make no difference that PPIL was a family concern because being a corporate body it enjoyed the status of a juristic person being distinct and distinguishable from its Directors and even after their death it remained alive. He submits that the appellant has to discharge his onus to prove the 'Deed of Disclaimer'. According to him, the appellant may have a good case if he succeeds in proving the 'Deed of Disclaimer'. He states that the subject property was not an abandoned property and there was no such claim by the Board. He submits that in spite of having all the original title documents with the appellant, the respondent did not transfer/mutate the said property in the name of appellant as there were some clouds on his ownership that is way he was advised to get those clouds removed under a Court's verdict. According to him, if this Court considers that the appellant has a right and issues such verdict, the respondent would be ready to act upon the directives of this Court.

6. We have noted that in the instant case, certain aspects are important. We are surprised to hear from the learned Assistant Attorney General that the Deed of Disclaimer was never produced before the learned Court, as the same is very much available in the record and it was exhibited as Exhibit-5/11. It also reflects that the original 'Deed of Disclaimer' was produced before the Court, by the appellant, who has the said deed in his possession. In these circumstances, it is not correct that the 'Deed of Disclaimer' was never produced in original before the Court. In fact, the same was produced in original and was exhibited. Meaning that not only the original was produced but the Court has gone through its contents, as if a document is exhibited, it means that the Court has appreciated its content also. Even the learned Single Judge has nowhere mentioned in his judgment that the original 'Deed of Disclaimer' was not

produced during the trial. Nevertheless, the learned Single Judge has given his verdict against the appellant on three counts. Firstly, the appellant (plaintiff) could not produce evidence in support of the 'Deed of Disclaimer', which was signed by only one Director, while the same was not a registered document. Secondly, although it was mentioned in the 'Deed of Disclaimer' that Board has authorised the signatory Director to sign the 'Deed of Disclaimer' but the original resolution of the Board of Directors of PPIL was not produced. Lastly, the property belonged to a company, which was a separate legal entity and the said company has not been wound up, as such the company and directors were also to be included as party to litigation. We would like to address all these concerns of the learned Single Judge in the foregoing paragraphs.

7. The initial two points regarding proof in respect of the 'Deed of Disclaimer' and non-availability of Board's Resolution are interconnected; therefore, both will be addressed simultaneously. No doubt, the 'Deed of Disclaimer' was not a registered document but in our view the said document has created some right in favour of the appellant and no one has challenged the same. In these surrounding circumstances, the said document cannot be discarded only on the ground that it was not registered at the time of its execution. Non-registration of a document may have some deprecation due to its not registration as per law but it cannot be an outcome that the said document is not in existence. Even in exceptional circumstances, the said document may enjoy all sanctity under the law, and in the present case such exceptional circumstances were in existence, as no person has challenged the said document or the right of the appellant on the subject property. So far as furnishing proof of the execution of the 'Deed of Disclaimer' is concerned, the deficiency, which was pointed out by the learned Single Judge is that the witnesses of the 'Deed of Disclaimer' were not produced, while the Board's Resolution of PPIL giving authority to one of the Directors namely Shaikh Khursheed

Anwer was not produced, as the same was not available with the appellant. It is also observed that the 'Deed of Disclaimer' was not a registered document. It is noteworthy that it has come on the record that all the Directors of the defunct PPIL are no more alive. From the contents of the 'Deed of Disclaimer', it appears that three Directors of the company namely M/s. Fazal Illahi, Shaikh Khursheed Anwer (the executant of deed in favour of appellant) and Shaikh Naseem Anwer have given authority through a resolution. Although it is not mentioned what was the total number of Directors of the company, but it is evident that the majority had signed the resolution. It is also mentioned within the 'Deed of Disclaimer' that another Director Mrs. Zakia Begum had also verified the said 'Deed of Disclaimer' by counter-signing the same. In these circumstances, it is rationally understood that in fact there were only four Directors in the company and due to some reasons, one of the Director Mrs. Zakia Begum was not in attendance at the time of passing resolution; therefore, it was considered appropriate to get the said 'Deed of Disclaimer' verified by her through counter signing the instrument of disclaimer.

8. It has already been pointed out that no Director now is alive (Annexures FF, FF-1, FF-2 and FF-3), while one of the witnesses of the said document, who was still alive, has sworn an affidavit verifying the execution of the said 'Deed of Disclaimer' and the said affidavit was sworn before an official of the Consulate General of Pakistan situated in Dubai. The said affidavit has also been produced before this Court, under the statement of the learned counsel for the appellant, and we consider that to determine the case finally, there would be no impediment to consider said affidavit as part of record by exercising powers under Section 107 and Order XLI Rules 27 and 28 of the Code of Civil Procedure (hereinafter referred to as 'CPC'). The reason for admitting this affidavit as an additional evidence is that the person, who has sworn the said affidavit (i.e. Mr. Shaikh Abdul Aziz son of Mian Haji Allahdita) was the only

surviving witness of the said 'Deed of Disclaimer' and the appellant in para-7 of his Affidavit-in-Ex-Parte proof has mentioned about the Director of PPIL Mr. Shaikh Khursheed Anwer (alive at the time of filing affidavit in ex-parte proof) and the two marginal witnesses i.e. Mr. Muhammad Shamim (alive at the time of filing affidavit in ex-parte proof) and Mr. Shaikh Abdul Aziz, who were willing to give evidence. However, the said surviving Director expired and witness Mr. Muhammad Shamim also expired during the pendency of the Suit. It appears that while considering the ex-parte proof, this aspect of the case was overlooked by the learned Single Judge otherwise the Court had ample power to call those witnesses, if they were alive to verify veracity of the 'Deed of Disclaimer'. Nevertheless, the only marginal witness i.e. Mr. Shaikh Abdul Aziz was neither called nor produced as witness. In our view, this also is not fatal for the appellant's case. The reason is obvious that a witness, who was out of country could not be called by the Court to appear as witness due to embargo as per provision of Order XVI Rule 19 of CPC, but the alternate mode under Order XIX Rule 1 of CPC might be followed by issuing a direction to file his affidavit, but that option was not considered by the learned Single Judge while dealing with the matter. Nevertheless, now there was only one person surviving i.e. Mr. Shaikh Abdul Aziz before whom the aforesaid deed was executed and his duly attested affidavit has already been filed. In his affidavit the said Mr. Shaikh Abdul Aziz has verified the execution of 'Deed of Disclaimer' and its contents on oath. We are of the view that there is no impediment to consider the said affidavit as the part of record as additional evidence. In such a situation, when one of the witness had expired and no one has come forward to challenge the 'Deed of Disclaimer' as well as the right of the appellant over the Suit property, and the suit was proceeded as ex-parte, there would be no occasion to discard the said document.



9. In this respect, another aspect is also important. The said 'Deed of Disclaimer' was executed in the year 1966 i.e. more than 53 years have passed and during this long time no adverse claim has ever been made regarding the subject property. It is the admitted position that the appellant is residing in the subject property since the time it was purchased and mutated in the name of the company i.e. PPIL. It is also an admitted position that all the original documents pertaining or belonging to the subject property are in possession of the appellant. The original 'Deed of Disclaimer' was also produced by the appellant before the respondent, when he tried to get the subject property mutated in his name and subsequently it was shown at the time of recording of evidence in the Suit filed by him. The 'Deed of Disclaimer' was executed about more than 53 years back and since then none has challenged the same. As per Article 100 of Qanoon-e-Shahadat, a presumption of genuineness is attached to a document, which is more than 30 years old. We are of the view that when there is no adverse claim and during such a long period none of the Directors or their legal heirs have ever disputed the said 'Deed of Disclaimer'; therefore, it can safely be presumed that the said document is genuine and this presumption is further fortified from the fact that the said document was produced in Court by the proper party and one of the marginal witness is supporting the same.

10. So far as non-production of the Resolution of the Board of PPIL is concerned, the same also is not fatal for the appellant's case. The resolution of the board was recorded in the minutes book and it is not necessary to make the said resolution annexed with the 'Deed of Disclaimer', as such non-availability of the same with the appellant is comprehending. Besides, the citation of the said resolution is available within the 'Deed of Disclaimer' and if on the basis of the presumption coupled with the production of the affidavit of one of the marginal witness, the execution of the said 'Deed of Disclaimer' is considered as a genuine

document, the contents of the same regarding the existence of the Board's Resolution would be suffice, as a secondary evidence. In these circumstances, we can say that the property was rightly and properly disclaimed by the company in favour of the appellant and as soon as the 'Deed of Disclaimer' was signed, a vested right in favour of the appellant was created upon the subject property.

11. Now the next point that was discussed by the learned Single Judge was regarding the status of company as a separate entity, as such unless the same is legally wound up. In this respect, it is important to consider that the defunct PPIL was registered in former East Pakistan prior to creation of Bangladesh, the Directors have migrated to Pakistan without transferring the registration of company. The 'Deed of Disclaimer' had already been executed on behalf of the property, when the East Pakistan was segregated to form a new country Bangladesh. Even in Bangladesh, law recognized only those abandoned companies, which have some assets or shares in Bangladesh, or at the most such a company in Bangladesh will be considered a defunct company. In such a situation, practically the family concern of PPIL was practically defunct and non-existent as it was neither present in Pakistan nor in Bangladesh and it is actually a defunct or non-existent company. Hence a non-existent company and its Directors cannot be made party to the litigation. Besides, it is also a settled legal proposition that a party to litigation cannot be defeated or failed just because of non-joinder of the parties. Nonetheless, the company was not in existence as during its lifetime the company had relinquished its rights over the subject property in favour of the appellant, which is evident from the language of the said deed, hence the obvious intention was to pass on the title of the property to the appellant, hence it created right of ownership regarding the subject property in favour of the appellant. In the existing position of affairs when no one has challenged

the right of the appellant on the subject property, hence there remains no hurdle to declare that the title of the subject property in favour of the appellant is established.

12. We, therefore, are of the candid view that the appellant has successfully established his right of ownership over the subject property, as such the instant appeal was allowed through our short order dated 06.12.2019 and the Suit of the appellant was directed to be decreed. These are the reasons for the said short order. Respondents are directed to do the needful within a period of 30 days from the date of receipt of a copy of this judgment. Listed application also stands disposed of.

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