

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No.247 of 2004

Date	Order with Signature of Judge
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1. For hearing of CMA No.16653/2017.
2. For hearing of CMA No.18165/2018.
3. For hearing of CMA No.13825/2016.
4. For final arguments.

Present: **Mr. Justice Nazar Akbar**

Plaintiff : Tahir Hasan Qureshi. (Nemo).

Versus

Defendant No.1 : Ghulam Rasool
Defendant No.2 : Gul Construction Company
Defendant No.3 : Mst. Hadi Begum
Defendant No.4 : Architect & Engineering Employees
Cooperative Society.

Defendant No.5 : Mst. Atiya Siddiqui
Through Mr. Babar Ali Shaikh, Advocate.

Date of hearing : **19.04.2021**

Date of Decision : **24.05.2021**

JUDGMENT

NAZAR AKBAR, J. The Plaintiff on **13.03.2004** filed the instant suit for Declaration, Injunction, Possession and Damages against Defendants No.1 to 4 and deliberately kept defendant No.5 out of the array of defendants and managed to obtain and exparte decree on **30-04-2008**. On the application of defendant No.5 under **Section 12(2)** CPC the decree was reversed by order dated **20-1-2016**.

2. The background of the case is that the Plaintiff through an attorney Aurangzeb Qureshi, his brother, filed a suit only against defendants No.1 to 4 claiming that he is the owner of land No.76, Category B, Block No.8 Scheme No.36, measuring 400 sq. yards in

Survey No.9, 11, 12, 13, 14, 173, 176, 211, 227 and 230 of Deh Safooran, Tappo Songal, Taluka and District East, Karachi which he has purchased through a registered sale deed dated **10.06.1989** from Defendant No.2 and he was in physical possession of the suit property. The Plaintiff averred that in the year 1999 he was transferred to Holland where he lived for about five years. On **01.3.2004** during his stay in Pakistan, he found that Defendant No.1 was digging the foundation of the suit plot, on query, Defendant No.1 replied that he has been engaged by Defendant No.2 a contractor for raising construction on the suit plot. Therefore, the Plaintiff filed the instant suit against Defendants No.1 to 4.

3. Defendants were served with notices/summons, however, on **15.09.2004** Defendants No.1 and 2 and on **19.12.2006** Defendants No.3 and 4 were debarred from filing written statement and the matter was proceeded ex-parte against them. The Plaintiff conveniently obtained exparte decree by order dated **30.04.2008** at the back of Defendant No.5 though she was already in possession of the suit property as lawful owner. Then the Plaintiff filed Execution Proceedings bearing Execution No.64/2008 and got the exparte decree executed against Defendant No.5. Therefore, as soon as Defendant No.5 came to know about the judgment and decree, she preferred an application under **Section 12(2)** CPC which was registered as **J.M No.38/2009**. The said J.M was allowed by order dated **20.01.2016** and the exparte judgment and decree dated **30.04.2008** was set aside and Defendant No.5 was impleaded in the suit. The Plaintiff through Attorney preferred High Court Appeal **No.38/2016** against the order dated **20.01.2016**, whereby J.M. No.38/2009 filed by Defendant No.5 was allowed. The said High Court Appeal was also dismissed by order dated **22.09.2016**.

Consequently, Defendant No.5 filed written statement in which counter claim was also raised.

4. This Court on **14.09.2017** from the pleadings of the parties framed followings issues:-

1. Whether the plaintiff is entitled to a declaration that he is the owner of land No.76, Category-B, Block-8, Scheme No.36, measuring 400 sq. yds in survey No.9, 11, 12, 13, 14, 173, 176, 211, 227 and 230 of Deh Safooran, Tappo Songal, Taluka and District East, Karachi?
2. Whether the defendants inclusive defendant No.5 has no right or interest in the said land and therefore are not owners?
3. Whether the possession of the plaintiff is to be confirmed?
4. Whether the plaintiff is entitled to a decree of damages of Rs.20,00,000/- for vexing the plaintiff?
5. Whether the plaintiff before filing the present suit sent any legal notice under section 70 of Corporative Society Act, 1925 to the A.E.E. Cooperative Housing Society, Karachi?
6. Whether in J.M 38/2009 filed by defendant No.5, the order dated 20.01.2016, on the application under Order 21 Rule 99 CPC, passed by this Court, the documents of defendant No.5 declared as genuine and the plaintiff documents declared not genuine in the light of report of administrator of A.E.E.C.H Society?
7. Whether the defendant No.5 has been dispossessed by the Nazir of this Hon'ble Court in Execution No.64/2008 in execution of judgment and decree wherein defendant No.5 was not the party in the suit and neither in the Execution?
8. Whether the plaintiff intentionally and deliberately not make the defendant No.5 as the necessary party in the suit?
9. Whether the defendant No.5 is entitled to claim mense profit from the plaintiff @ of Rs.40,000/- per month, after dispossessed from the suit property, and also claim the non-payment of K-Electric bill?
10. Whether the defendant No.5 is entitled for restitution of suit property, possession under section 144 CPC after passing the order to set-aside the judgment and decree on 20.01.2016?
11. Whether after declared the documents of plaintiff is non-genuine by this Court, the entries of lease deed and other

registered documents in the official record of Sub-Registrar (Central Record) and Sub-Registrar (T-Division III) at present Gulshan Town-II, also become null and void and liable to be canceled?

12. What should the decree be?

5. After framing of issues, the evidence was ordered to be recorded through Commissioner, however, neither the Plaintiff has led evidence nor he appeared before the Commissioner for recording evidence, therefore, by order dated **02.4.2018** side of the Plaintiff for evidence was closed. Then the Plaintiff filed application for recalling of the order dated **02.04.2018**, which was also dismissed by order dated **26.09.2018**. Therefore, Defendant No.5 filed her own affidavit in evidence and affidavit-in-evidence of two of her witnesses before the learned Commissioner for recording evidence. The Commissioner on each affidavit-in-evidence provided opportunities to the Plaintiff and his counsel to cross-examine Defendant No.5 and her witnesses. But none appeared on behalf of the plaintiff to cross examine defendant. Therefore, on Commissioner's report dated **23.02.2021** this Court by order dated **02.3.2021** closed the side of the plaintiff for cross-examination to the witnesses of defendant No.5.

6. Defendant No.5 during the pendency of her J.M.No.38/2009 was unlawfully dispossessed from the said property and she has preferred CMA No.13825/2016 under **Section 144** of CPC for restitution of possession of the suit property. Later on, two other applications were also filed by her. The first one was CMA No.16653/2017 under **Order XL Rule 1** of **CPC** for appointment of Receiver pending the suit. On the said application the only order passed during pendency of the suit was an order dated **26.11.2018**, whereby, the Nazir of this Court was appointed Commissioner to inspect the suit premises and verify who is in physical possession of the suit property. The Nazir after inspection of the suit property on

13.12.2018 reported that to one Mr. Muhammad Nadeem son of Naik Muhammad holding CNIC No.42301-9268589-9 was in possession on the basis of a sale agreement with the plaintiff. The other application filed by defendant No.5 was CMA No.18165/2018 under **Section 195(1) Cr.P.C.** for action against Aurangzeb Hasan Qureshi for filing false affidavits in the suit as attorney of Tahir Hasan Qureshi (the Plaintiff). On **02.3.2021** when this case was listed for hearing of all these applications i.e (1) CMA No.13825/2016; (2) CMA No.16653/2017, and (3) CMA No.18165/2018 it was ordered that all the applications shall be heard and decided along with final arguments.

7. The plaintiff and his counsel are absent for the last several years and even evidence has not been produced by the plaintiff. I have heard arguments of learned counsel for Defendant No.5 both on all the issues framed by this Court on **14-09-2017** and also on each of these applications. My issue-wise findings are as follows:-

Issues No.1, 3 , 4, & 5.

8. The burden of these issues was on the plaintiff who has filed this suit for possession of the suit property and damages. The record shows that the plaintiff after obtaining exparte decree and possession of suit property in Execution No.64/2008 but after reversal of judgment and decree in J.M No.38/2009 by order dated **20.01.2016**, the plaintiff has only tried to drag the proceedings. The plaintiff despite repeated notices did not appear in the witness box though he had filed affidavit-in-evidence before the Commissioner for recording of evidence. He did not file affidavit-in-evidence of the any of his witnesses in support of his pleading to discharge his burden of proof on Issue Nos.1, 3, 4, 5 & 8. Defendant No.5, as against the plaintiff, has filed comprehensive affidavit-in-evidence with supporting documents as proof of her claim in the written statement including

the claim of mense profit. In view of lack of evidence the plaintiff is not entitled for the declaration of ownership of the suit property nor he is entitled to retain possession of the suit premises, which he has obtained through this court in execution of exparte proceedings in the instant suit. Likewise the plaintiff is not entitled to decree of damages. The plaintiff has also failed to establish that he has sent any notice u/s 70 of the Co-operative Societies Act, 1975. Therefore, Issues No.1, 3, 4, 5 and 8 are decided in negative.

Issues No.6, 7 & 8 are interconnected.

9. These are connected issues and the burden of these issue is on defendant No.5. She in her examination in chief has produced order of this Court dated **20-01-2016** on an application under **Order XXI Rule 99 CPC** read with **Section 151 CPC**, as Ex.D-W-1/16. She has also relied on the following report of the Nazir of this Court in compliance of order dated **12.11.2014** in J.M.No.38 of 2009.

“1. With reference to this Hon’ble Court order dated 12.11.2014 I respectfully submit the committee photocopy report dated 1.2.2015, filed before this Hon’ble Court in C.P.No.D-795 of 1993 and 5 others C.Ps.

2. Applicant Mst.Atia Siddiqui (defendant No.5) has the basic documents with her i.e. share certificate dated 17.05.1997 share No.2776, provisional allotment order dated 24.6.1979 vide member ship No.B-1776 and allotment order dated 1.1.1983 all above documents are in the name of Mr.Akhtar Zaidi the first original allottee of the society in question; issued by the than office bearers the “ZAFAR GROUP”. **The said documents are genuine as per the Committee report dated 1.2.2015.** There-after transfer of plot on 14.5.1977 to Muhammad Younus and on 21.10.2000 to applicant Atia Siddiqui by a group “KAYANI GROUP” are not valid because ‘Kayani Group’ self styled office bearer was never accepted by the Cooperative department as office bearers of the

society in question and they were never allowed to issue any documents in respect of the plots of the said housing society.

3. Respondent No.1 Tahir Hussain Qureshi has only one basic document that is share certificate No.1890 issued on 14.10.1975 in the name of Farhat first allottee. There is neither provisional allotment order nor allotment order in the name of Farhat. There is neither lease dated 29.6.1983 executed by the "KAYANI GROUP" who had no authority to execute the same. There-after other sale deed i.e. in between Farhat and Hadi Begum, Hadi Begum and Tahir Hassan Qureshi (Resp.1) are executed. The first document the lease through "KAYANI GROPU" Riafat Zaman Kayani is not genuine document, therefore further documents have lost its genuineness.

4. Submitted report after appearance of parties & Counsel before Committee.

Sd/-
(Moinuddin Ahmed Qureshi)
Administrator A&E.E.C.H.S.
Cell Phone No.0333-2065966

10. Pursuant to the above report and other several facts and circumstances her main application under **Section 12 (2) CPC** registered as J.M.No.38 of 2009 was also allowed by order dated **20.1.2016**. The plaintiff has preferred High Court Appeal No.38/2016 which was also dismissed vide order dated **22.9.2016** and the defendant No.5 has also produced certified copies of the order in HCA No.38 of 2016 as **D.W-1/21**. It is born from the record that defendant No.5 has been dispossessed by the Nazir of this court in Execution No.64 of 2008 for satisfaction of an exparte of judgment and decree in the instant suit which was obtained by the plaintiff at the back of defendant No.5. It is also born from the record that plaintiff for obtaining an exparte decree as impleaded fictitious defendants and has not given particulars of occupant and proper address of the suit property even in the plaint and its title. The

perusal of title and para No.1 of the plaint confirm that even the suit property was not properly identified in the plaint. Para No.1 of the plaint is reproduced:-

1. That the plaintiff is the owner of a plot of land No.76, Category-B, Block-8, Scheme No.36 Gulistan-e-Jauhar measuring 400 sq.yards of land in survey No.9, 11 12, 13, 14, 173, 176, 211, 227 & 230 of Deh Safooran Tappo Songhal Taluka and District East, Karachi bounded on the North by plot No.75 on the South by plot No.77 on the East by plot No.135 and on the West by 44 ft wide road. This plot herein after shall be referred to as disputed plot.

11. The perusal of the above reflects that the suit property was shown as a piece of land measuring 400 sq.yards spreading in several survey No.9, 11 12, 13, 14, 173, 176, 211, 227 & 230 of Deh Safooran Tappo Songhal Taluka and District East, Karachi. Even it is not mentioned in the plaint that the suit property is situated in Architects & Engineers Employees Cooperative Society, Karachi. However, suddenly at the execution stage the plaintiff has introduced the address of defendant No.5. None of the original defendant was shown on the address of the suit premises, therefore, there were no question of sending even a notice/summons at the address of defendant No.5 and of course all this was intentional to obtain exparte decree against the disinterested defendants, who were neither in possession nor claiming any title on the suit property and capitalized exparte decree against the actual owner in occupation. In view of these undisputed facts Issue No.6,7, & 8 are decided in affirmative.

Issue No.2 & 9

12. These issues are interconnected. The defendant No.5 has examined herself and witnesses namely Mr. Hasnaat Ahmed Ismail

and Muhammad Farooq who have fully supported her case. She has produced following title documents:-

- i. Share Certificate dated 17.05.1997 as Exh.DW/1/2
- ii. Receipt No.6282 dated 14.07.1980 issued by AEECHSL as Exh.DW/1/3
- iii. Provisional Allotment dated 24.06.1979 issued by AEECHSL as Exh.DW/1/4
- iv. Allotment order dated 01.01.1983 as Exh.DW/1/5
- v. Site Plan issued by AEECHSL as Exh.DW/1/6
- vi. First transfer/mutation order dated 14.05.1997 issued by AEECHSL as Exh.DW/1/7
- vii. Second transfer/mutation order dated 21.10.2000 issued by AEECHSL as Exh.DW/1/8
- viii. Membership Card bearing No.B-1776, dated 21.10.2000, issued by AEECHSL as Exh.DW/1/9
- ix. Acknowledgment of possession, dated 27.10.2000 as Exh.DW/1/10
- x. No objection certificate dated 27.10.2000, issued by AEECHSL as Exh.DW/1/11
- xi. Sale Agreement alongwith Receipt dated 06.06.2000 and copies of NICs as Exh.DW/1/12
- xii. KBCA application No.34782/382 as Exh.DW/1/13
- xiii. Approved Building Plan as Exh.DW/1/14
- xiv. Covering letter dated 27.03.1991, issued by the KBCA as Exh.DW/1/15

All these exhibits have been confirmed as genuine by the Administrator of the A&E.E.C.H.S. during the hearing of J.M.No.38/2009 as already referred in para 10 above. She has produced an unpaid bill for the month of September 2016 as Ex.D.W-1/31 showing electricity arrears amounting to **Rs.4,59,812/-** and she has also produced tenancy agreement in respect of the premises bearing House No.A-134 ground floor Architects Engineering and Employees Housing Society Block-A Gulistan-e-Jauhar Karachi, where defendant No.5 has shifted on being removed from the suit property in execution of exparte decree. Defendant No.5 in terms of rent agreement has paid a sum of Rs.40,000/- per month with 10% increase and she has also examined witness Muhammad Farooq, land lord of the said tenement who has confirmed that as land lord has been receiving rent from defendant No.5. Therefore, it has been proved beyond any doubt that defendant No.5 has incurred expenses of rent at least at the rate of Rs.40,000/- per month with 10%

increase per annum from the date of eviction i.e.17-06-2014 when she was dispossessed by Nazir of this Court. Defendant No.5 is still residing in the rented premises. The counsel for the plaintiff though opportunity was given has not cross-examined any of the witnesses. Even otherwise the evidence is quite confidence inspiring. Therefore, Defendant No.5 is declared to be lawful owners and entitled for receiving mense profit from the plaintiff and his attorney at the rate of **Rs.40,000/-** per month from June 2014 till the time she is put in possession of the suit property through the Nazir of this court in compliance of the orders passed today on her application (CMA No.13825/2016) under **Section 144 CPC** for restitution of possession of the suit property to her. She is also entitled to recover entire electricity bill and other utility charges/ bill due and payable on the date of taking over possession. In view of these facts Issue No.2 and 9 are decided in affirmative.

Issue No.10 & 11.

13. In view of my finding on issue No.1 to 9 it is obvious that the documents executed by the Sub-Registrar (Central Record) and Sub-Registrar T.Divison-III at present Gulshan Town-II in favour of plaintiff were neither lawful nor legally executed. The same have even otherwise not been proved to be lawfully executed and, therefore, the same are liable to be cancelled and declared null and void. Consequently, it is hereby ordered that any registered lease and/or sale deed in respect of the suit property more particularly indenture of lease dated **29-06-1983** between Architect & Engineers Employees Cooperative Society Ltd. Karachi and Mst.Farhat and other sale deeds between Mst.Farhat and Hadi Begum and between Hadi Begum Tahir Qureshi are cancelled and declared null and void and such entries incorporated in the official record of relevant Sub-Registrar (Central Record) and Gulshan Town-II shall be treated

as cancelled from the date of their executions. The issue No.11 is therefore, decided accordingly. As far as issue No.10 is concerned suffice it to say that this issue was raised by defendant No.5 in her application **(CMA No.13825/2016)** for restitution of possession of the suit property. It should have been decided instantly on the basis of finding of this Court in J.M.No.38 of 2009, whereby the exparte judgment and decree had already been set aside. There is no dispute to the fact that the defendant No.5 was dispossessed by Nazir of this Court in Execution No.64 of 2008 arising out of an exparte decree obtained by the plaintiff in the instant suit at the back of defendant No.5.

Issue No.12 and order on pending applications.

14. In view of the above facts and discussion the instant suit is dismissed. The counter claim of Defendant No.5 is decreed. Defendant No.5 is declared owner and entitle to the possession of the said property with mesne profit at the rate of Rs.40,000/- per month from the date of her dispossession i.e. **17-06-2014** by the Nazir of this Court in execution proceedings till she is put in possession. Her application **CMA No.13825/2016** for restitution of possession of the suit property is hereby allowed. The Nazir is directed to take over the suit property i.e. House on plot No.76, Category B, measuring 400 sq. yards, A&E.E.C.H.Society KDA. Scheme No.36, Gulistan-e-Jauhar, Karachi within **seven days** from the date of this order and hand over its peaceful physical possession to Defendant No.5. In case of any resistance by anyone whosoever, the Nazir is allowed to break open the locks and he is also directed to seek assistance of area police without seeking any fresh order in this regards. Compliance be reported to this Court in Chamber within **10 days** for perusal in chamber.

15. **CMA No.16653/2017** is dismissed as it has become infructuous. On **CMA No.18165/2018** under **section 195 (i) (e)** of the **Cr.P.C.** Issue bailable warrant in the sum of Rs.100,000/- for appearance of plaintiff Tahir Hassan Qureshi and his attorney Aurangzeb Hassan Qureshi residents of Flat No.A-7, Maryiam Centre Phase-I, Block-H, North Nazimabad Karachi through concerned SHO of area police station.

16. To come up on **04.06.2021** only for hearing of CMA No.18165/2018.

JUDGE

Karachi, Dated: 24.05.2021

Ayaz Gul