

IN THE HIGH COURT OF SINDH AT KARACHI

Civil Revision Application No.121 of 2016
Muhammad Nadir Hayat Khan & others v. Mst. Fatimunnisa & others

2nd Appeal No. 142 of 2016
Mrs. Fahim Sayeed Ziai v. Mst. Fatim-un-Nisa & others

Mr. Munawar Ghani, Advocate for applicants.
Mr. Muhammad Aslam Rajpar, Advocate for appellant.
Mr. Naseer Ahmed Khan, Advocate for respondent No.2.
Mr. Muhammad Aqil Zaidi, Advocate for respondents No.4 & 5.
Mr. M. Mohsin Khan, Advocate for KMC.
Mr. Talib Ali Memon, APG.

JUDGMENT

Omar Sial, J.: A brief background to these proceedings is as follows.

1. In the year 1968, a lady by the name of Fatimunnisa (who is respondent no. 1 in these proceedings), owned a plot of land measuring 1122 square yards, bearing number 31-D situated at Al-Hilal Co-operative Housing Society, Block No.4 and 5, KDA Scheme No. 7 in Karachi.
2. The plot of land was unofficially and privately sub-divided, and on 344.5 square yards, Fatimunnisa, after obtaining permission from the Karachi Municipal Corporation, built 7 units and subsequently sold those units as follows:

| Flat No. | Sold to | Date of Mutation |
|----------|--|------------------|
| 1 and 6 | Mrs. Fahim Sayeed Ziai (respondent no. 9) | 16-7-1981 |
| 2 | Record does not reveal the name of the transferee (not a party in these proceedings) | |
| 3 | Khawaja Moinuddin (whose legal heirs are respondent no. 8) | 16-7-1981 |
| 4 | Mohammad Nadir Hayat Khan (whose legal heirs are applicant no. 1) | 10-10-1988 |
| 5 | Aaisha Bibi (whose legal heirs are applicant no. 2) | 16-7-1981 |
| 7 | Bismillah Begum (not a party in these proceedings) | 15-2-1987 |

3. Each of the above units was sold through a conveyance document, registered and mutated in the names of their respective owners. The ownership and possession of the above 7 units is admittedly not in dispute.
4. The issue arose when Fatimunnisa, in the year 2010 sold a part of the plot measuring 777.5 square yards (which did not include the land on which the flats were constructed) to Jumma Khan (respondent no. 2) through a registered conveyance deed. The owners of the flats were of the view that the 777.5 square

yards could not have been sold to Jumma Khan as they had acquired rights in that portion of land as well when Fatimunissa sold the 7 units.

5. The owners of flats number 1, 3, 4, 5 and 6 in their challenge to the sale of 777.5 square yards to Jumma Khan, filed a suit for declaration, cancellation of documents and permanent injunction before the learned 2nd Senior Civil Judge, Karachi East on 28.07.2011 (Suit No. 924 of 2011). **The Suit was dismissed on 11.12.2013.**

6. The owners challenged the judgment of 11.12.2013 before the learned District Judge, Karachi East (Civil Appeal No. 17 of 2014). **The appeal was also dismissed on 06.09.2016.**

7. Through these proceedings the applicants (in Civil Revision Application No.121 of 2016) and the appellant (in 2nd Appeal No.142 of 2016) have challenged the judgments dated 6. 9.2016 and 11.12.2013.

8. Mr. Munawar Ghani, the learned counsel for the applicants has raised two grounds in his arguments. One, that in the description of the flats sold to the flat owners it is mentioned that the vendor (Fatimunissa) had sold 1/6th undivided share of the land measuring 1122 square yards and that if 777.5 square yards are taken away from the total 1122 square yards then the area of the plot sold to each of the flat owner would decrease from the 1/6th ratio. Two, that section 8 of the Transfer of Property Act, 1887 created a right of the flat owners in the 777.5 square yards of free space and hence the same could not have been sold to Jumma Khan in any case. The learned counsel in Civil Appeal No. 17 of 2014 have adopted the arguments of Mr. Ghani. To the contrary, the learned counsel for Jumma Khan has argued that the applicants have failed to establish their ownership on the 777.5 square yards on two forums and that the conveyance deeds executed in favour of the flat owners have specific descriptions of what is being sold to them and that that description does not include any right in the 777.5 square yards which were sold to Jumma Khan.

9. I have heard the counsels for the parties and have gone through the available record with their able assistance. My observations are as follows.

10. The judgment dated 11-12-2013 of the learned trial court reveals that while sufficient opportunities were given to both Fatimunissa and Jumma Khan to appear and contest the case, both did not effect an appearance and the case against them was decided ex parte. The learned trial judge however went on to

hold that the suit was not maintainable and thus dismissed the same. The reason that prevailed over the learned trial judge was that as a sale deed had been registered in the name of Jumma Khan and as Fatimunissa was the owner of the 1122 square yards and competent to sell the 777.5 square yards to Jumma Khan, the sale was a valid sale. Also, that each of the apartment owners had their own title document specifying the area of their flat. The learned trial court appears to have not addressed the primary grievance of the flat owners that the sale deed in favour of Jumma Khan had wrongly been executed as they were entitled to the entire area of 1122 square yards and that the said sale deed was an outcome of fraud with the collusion of the concerned sub-registrar. No evidence was led by Jumma Khan or Fatimunissa that the assertion of the flat owners was incorrect and that Fatimunissa was indeed entitled to sell the 777.5 square yards to Jumma Khan. The sub-registrar, who according to the flat owners had illegally registered the sale deed in favour of Jumma Khan also remained absent throughout the trial. The conclusion of the learned trial court, in the circumstances, appears to be a bit arbitrary. Key issues involved in this dispute, which were never rebutted by any of the defendants at trial, were not addressed by both the learned trial and appellate courts while holding that the suit of the flat owners was not maintainable. As mentioned above the suit of the flat owners was, inter alia, for cancellation of the sale deed executed in favour of Jumma Khan, which according to them was executed and registered through fraud and misrepresentation. It appears that the learned trial and appellate courts were not assisted properly and provisions of section 39 of the Specific Relief Act, 1877 were not brought to their notice. In my opinion the learned courts erred on dismissing the suit as being not maintainable especially when no evidence had been led on the part of the defendants.

11. The case involves a complicated question of title. As no evidence was recorded in the case and the issues framed were not decided, it is not possible for this court in its revisional jurisdiction to decide the same.

12. In view of the above the judgments of both the learned trial court and the learned appellate court are set aside and the case remanded back to the learned trial court to re-hear and decide the matter afresh. The case should be decided expeditiously and preferably within 6 months.

JUDGE