

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1265 of 2005

[Anwar Khan & othersv.....Fozia Khan & another]

Date of Hearing : 08.9.2021
Plaintiffs : Through M/s. Shabana Ishaque and S.K. Lodhi, Advocates
Defendants : Mian Ashfaq Ahmed, Advocate a/w Mr. Muhammad Usman Ahmed

JUDGMENT

Zulfiqar Ahmad Khan, J:-The plaintiffs through the instant suit has sought declaration, cancellation, possession and permanent injunction against the defendants while making the following prayers:-

- a). To direct the Defendants to handover the peaceful vacant possession of suit Shop No. B-8/2/2, SB-8/3, Preedy Street, Saddar, Karachi, to the Plaintiffs.
- b). To cancel the tenancy agreement (Annex. "E/2") which was filed by the Defendant No.2 with the collusion of Defendant No.1 as the same is forged, fake and fabricated.
- c). To direct the Defendant No.1 to pay the mesne profit in respect of the abovesaid amount since (3) years, till filing of this suit and also direct the Defendant No.2 to deposit the rent amount i.e. Rs. 3500/- before the Nazir of this Hon'ble Court.
- d). To restrain permanently to the defendants their legal heirs, friends, agents, servants, subordinates, attorneys, workers, representatives, men or any other person or persons working under them or on their behalf or for their interest, from construction, selling/auction/disposing off, gift, transfer, mutated or mortgaged the suit property bearing Shop No. B-8/2/2, SB-8/3, Preedy Street, Saddar, Karachi, without course of law.
- e). Cost of the suit.

f). Any other relief(s) may deem fit and proper according to the circumstances of the case.”

2. The averments of the Plaintiffs made in their pleadings are that they claim to be owners of Shop No.B-8/2/2, SB-8/3 situated at Preedy Street, behind Anwar Mahal Hotel, Saddar, Karachi (“**said shop**”) that was allegedly purchased by the fathers of the plaintiffs jointly from the previous joint owners, and having purchased the said shop, fathers of the Plaintiffs started business in the name and style of M/s. Frontier Eggs Company, and soon after starting the said business, the father in law of Defendant No.1 namely Faqir Muhammad also joined as partner in the said business. It is further alleged that Plaintiffs’ fathers expired owing to which the plaintiffs took over the said business, started managing accounts and other ancillaries. Incidentally, the father in law of Defendant No.1 (who as mentioned earlier was a partner in the said business) also died, due to which the husband of Defendant No.1 joined as partner in the said business. The Plaintiffs further state in their pleadings that they handed over the said shop to the husband of the Defendant No.1 at later’s request who started his own business in the said shop. Incidentally, he also died, whereafter the Plaintiffs contacted Defendant No.1 for handing over possession of the said shop but the Defendant No.1 kept the Plaintiffs on hollow hopes. The Plaintiffs further averred that on 07.09.2005 the Plaintiff No.1 & Plaintiff No. 2 visited the said shop and noted construction going on there, as well as they found the Defendant No.2 running a footwear stall at the said shop upon which they inquired from the Defendant No.2 who informed that the Defendant No.1 had permitted him to run the said footwear stall and she is also taking commission from him on the

daily basis. It is also stated that on 08.09.2005 at about 05:00 p.m. the Plaintiffs visited the said shop and placed two locks of their own, but on the said date when they latter on visited the said shop at about 07:30 p.m. they found that the locks were broken, upon which the Plaintiffs inquired from the Defendant No.2 about the said incident who informed them that the defendant No.1 had caused such breakage, not only so she used contemptuous language against the Plaintiffs and threatened them also. The plaintiffs further averred that the Defendants hatched a conspiracy to deprive the Plaintiffs from the said shop and filed a civil suit No.978 of 2005 before the learned Civil Judge, Karachi South wherein the Defendant No.1 shown the Defendant No.2 as her tenant.

3. The Defendant No.1 & 2 filed their written statements respectively. The Defendant No.1 in her written plea/written statement denied the version of the Plaintiffs as set out in the plaint and alleged that the suit at hand was not maintainable and claimed that the suit is barred by limitation as well as Section 42 of the Specific Relief Act, 1877, and asserted that the Plaintiffs have no legal character to file the present suit. The main stance of the Defendant No.1 is that her husband namely Nisar Muhammad purchased the said shop from fathers of the Plaintiffs on 08.06.1974 through a Sale Agreement while paying consideration to the tune of Rs.900,000/- whereupon fathers of the Plaintiffs prepared a Sale Deed and handed out the same to the husband of the Defendant No.1. The Defendant No.1 further asserted that per clause 3 of the Sale Agreement executed between fathers of the Plaintiffs and husband of Defendant No.1, fathers of Plaintiffs had to execute an

Irrevocable General Power of Attorney in favour of husband of Defendant No.1 but the said clause was not complied with as fathers of the Plaintiffs died beforehand thereafter husband of the Defendant No.1 requested the Plaintiffs to finalize the said transaction in furtherance of the Sale Agreement, but the Plaintiffs avoided the said transaction and, instead have filed the present suit. The defendant No.1 beseeched to pass judgment and decree for specific performance directing the Plaintiffs to execute title documents in respect of the said shop in her favour. The Defendant No.2 also denied the assertions of the Plaintiffs in his written statement. The main stance of the Defendant No.2 is that he is tenant of Defendant No.1.

4. The record reflects that originally the suit was filed by the Plaintiffs namely Anwar Khan, Abdul Rasheed and Ghalib Aziz, however, with the passage of time, the Plaintiff No.1 & 2 also died and now their legal heirs are in the field and such amended titles were also filed vide order dated 15.12.2014.

5. Record shows that on 08.04.2013, with the mutual consent of the learned counsel for the respective parties, issues were framed and on the same day matter was referred to the Commissioner for the recording of evidence. The issues settled by this court are as under:-

- “1. Whether the plaintiffs are legal and lawful owner of suit property bearing Shop at Plot No. B-8/2/2, SB/8/3, measuring 151 sq. yards situated at Preedy Street Anwar Mahal Hotel, Saddar, Karachi?
2. Whether there is any documents regarding the ownership of the defendant or not?

3. Whether the plaintiffs are entitled for possession of suit property?
4. Whether any business partnership was made between plaintiff's father and father-in-law of the defendant No.1 in suit property at what capacity?
5. Whether the defendant illegally occupied the suit property and enjoyed the benefits?
6. Whether the present suit filed by the plaintiffs is maintainable in law?
7. Whether the husband of defendant No.1 purchased the property in dispute from the fathers of the plaintiffs above named in the sum of Rs. 9,00,000/- (rupees nine lacs only) and paid entire sale consideration amount in lump sum as full and final payment and a sale agreement was executed between the parties on 28.06.1974 and a payment receipt was passed on?
8. Whether the defendant No.1 is enjoying the physical possession of the property/shop in dispute legally and lawfully through her husband and at present being legal heir/widow of her husband?
9. Whether the taxes/government charges were being paid by the father of defendant No.1 and her husband to the concerned department in all respect?
10. Whether the defendant No.1 being bonafide purchase/owner of the shop in dispute applied to KBCA for permission of roof repaid of the shop in dispute?
11. What should the decree be?"

6. The crux of arguments of learned counsel for the plaintiffs is that later's predecessor-in-interest purchased the said shop by virtue of sale deed and now the present plaintiffs are lawful owner (as legal heirs) of the said shop by way of inheritance. Counsel's stance was that overwhelming documents are produced by the plaintiffs during the recording of evidence, which were admitted by the defendant No.1 in her cross-examination and that the defendant No.1 is

claiming the said shop on the basis of a sale agreement only, and it is a settled principle of law that a mere an agreement to sell does not confer any title upon the purchaser in the immovable property. To a query posed to the learned counsel for the plaintiff that the prayer sought in this suit for cancellation is hit by latches. She replied that Article 120 of Limitation Act applies. She further submitted that the plaintiffs are lawful owners of the said shop and the defendant No.1 is earning mesne profit, therefore, plaintiffs have filed this suit to seek possession of the shop etc. To support her submissions, learned counsel relied upon the precedents of Superior Courts reported in 2017 SCMR 367, 1994 MLD 1267, 2017 YLR 1323 and 2002 MLD 1901.

7. In contrast to the above submissions, learned counsel for the defendant No.1 argued that suit filed by the plaintiffs is not maintainable. Learned counsel contended that the deceased husband of Defendant No.1 purchased the said shop from fathers of the Plaintiffs on 08.06.1974 through Sale Agreement for Rs.900,000/- whereupon fathers of the Plaintiffs handed over a Sale Deed to the husband of the Defendant No.1 and as per clause 3 of the Sale Agreement supra, fathers of Plaintiffs had to execute an Irrevocable General Power of Attorney in favour of the husband of Defendant No.1 but the said clause was not complied with and fathers of the Plaintiffs died thereafter husband of the Defendant No.1 requested the Plaintiffs to finalize the said transaction complying the Sale Agreement but Plaintiffs avoided not to complete the said transaction rather filed the suit which is nothing but to linger on the matter and to hurt the interest of the bona fide purchaser. He stated that the subject shop is not an inheritable property as parents of the plaintiffs

sold out the same for valid consideration and passed on possession thereof to husband of the defendant No.1 who (now having been survived by his legal heirs) has been in possession thereof since. He also stated that fathers of the plaintiffs never filed any suit against the defendants (other their predecessors) seeking possession, as they honoured the sale agreement and the plaintiffs have become greedy to deprive a widow from her livelihood and estate. Even no complaint under the Illegal Dispossession Act, 2005 was ever made by their fathers, the counsel added.

8. Heard the arguments and perused the record. The issue of facts and law are involved in the lis at hand, however, it is considered pertinent to discuss the Issue No.6 first which relates to the maintainability of the suit.

9. Issue No.6 is correlated and concomitant to the maintainability of the suit, therefore, I deem it appropriate to decide the same in the first go. Whilst, the nomenclature of the suit expresses and articulates a suit for declaration, cancellation, possession and permanent injunction but in the nutshell and practicality it is a suit for direction, cancellation, possession and permanent injunction. The plaintiffs have not approached or walked up to entreat a declaration of their ownership rights or title but they have knocked the door for directions against the defendants to handover them over the possession of the said shop as well as sought an indulgence of this Court to cancel the sale agreement alleged to have executed between the predecessors-in-interest of the plaintiffs and the husband of defendant No.1. It is an admitted position that the plaintiffs sought indulgence of this Court conferred to this Court

under Section 39 of the Specific Relief Act, 1877 seeking cancellation of the said sale agreement dated 28th June, 1974 and the present suit has been filed only on 10.10.2005 which is beyond the period of three years. For the purposes of cancellation of a document, three years of limitation is provided under Article 91 of the Limitation Act and time begins running when the fact entitling the plaintiffs to have the instrument cancelled or set aside becomes known to them. The argument of the learned counsel for the plaintiffs that in this case Article 120 of the Limitation Act applies is in my humble view without any force. Article 120 is a residuary Article for the suits for which no period of limitation is provided elsewhere in the Schedule of Limitation Act and limitation of six years begins when the right to sue accrues. The relief claimed in the suit for cancellation of sale agreement clearly comes within the ambit and scope of Article 91 of the Limitation Act, hence the present suit is time barred under the said Article and not maintainable. Similar view was held in the case of **Ilyas Ahmed v. Muhammad Munir & others (PLD 2012 Sindh 92)**. It is considered pertinent to reproduce the relevant excerpt of the dictum which is delineated hereunder:-

“(d) Specific Relief Act (I of 1877)
S. 39 Limitation Act (X of 1908). Art. 91 Cancellation of document Limitation. Plaintiff came to know about conveyance deed, sought to be cancelled, in the month of June/July, 2005 and suit for cancellation was filed in the month of May, 2009. Suit was filed beyond the period of three years, as for the purposes of cancellation of documents three years of limitation was provided under Art. 91 of Limitation Act, 1908 and time began to run when fact entitling plaintiff to have the instrument cancelled or set aside became known to him. Suit was time barred in circumstances.”

10. So far as the relief of declaration is concerned, the plaintiffs in their pleadings never prayed for the declaration rather they prayed

for the directions against the defendants to hand them over the said shop to them. Under the provisions of Section 42 of the Specific Relief Act a person entitled to any legal character or to any right to a property can institute a suit for declaratory relief in respect of his title to such legal character or right to property. The expression, legal character has been understood as synonymous with the expression “status”. Section 42 of the Specific Relief Act applies only to a case where a person files a suit claiming entitlement to any legal character or any right to property which entitlement is denied by the defendants. It cannot apply to a case where the plaintiffs do not allege their entitlement to any legal character or any right to property or its denial by the defendants. As a necessary corollary, it cannot apply to a case where only the entitlement to the legal character or the property of the defendant is denied by the plaintiffs. Section 42 is attracted to a case in which the plaintiffs approach a court for the safeguard of their right to legal character or property but where right to their own legal character or property is not involved, the suit is not maintainable. In the present suit, the plaintiffs have not approach this court for a declaration of their own right to property or their right to a legal character but have asked for the cancellation of the sale agreement and challenged the defendants’ pretension to a legal character and to right to property. Section 42 does not permit an unrestricted right of instituting all kinds of declaratory suit at the will and pleasure of the parties, such a right is strictly limited. Suit for mere declaration aliunde is not permissible under the law, except in the circumstances mentioned in Section 42, therefore, the suit in question in my view is also barred

by Section 42 of the Specific Relief Act. I hence feel no reluctance to hold that this suit is not maintainable so issue No.6 is answered in negation.

11. In my considerate view, the Issue No.1 & 3 are inextricably linked based upon similar evidence of the plaintiffs and their witnesses therefore, it would be advantageous to discuss the same simultaneously, in the same breath.

12. P.W.-1 Abdul Azeem one of the legal heirs of plaintiff No.2 in his affidavit in evidence introduced on record the factum of filing of instant lis and produced documentary evidence. Though, he was not put to the test of cross-examination by the defendants and the cross was treated "Nill" for the reason that none had affected appearance on behalf of the defendants. P.W.-1 Abdul Azeem who was introduced to be the legal heir of plaintiff No.2 produced exhibit PW-1/5 which is a Deed of Sale executed in favour of predecessor in interest of the plaintiffs. Vide exhibit PW-1/5 it transpires that predecessor-in-interest of the plaintiffs purchased the said shop from joint owners on 14th January, 1964, thereafter, Deed of Sale was also executed on 26th day of September, 1969 in their favour. Exhibit PW-1/5 further insinuates that valuable consideration was also paid by the predecessor-in-interst of the plaintiffs for purchasing the said shop. The defendant No.1 in her affidavit in evidence introduced on record the Sale Agreement at exhibit DW1/1. Vide exhibit DW1/1 it transpires that the husband of defendant No.1 namely Nisar Muhammad S/o Faqir Muhammad purchased the shop/suit property from the fathers of the plaintiffs namely Mehar Dil Khan, Abdul Farah

Shah and Mir Abdul Aziz on 28.06.1974 against full and final sale consideration of Rs.900,000/- (Rupees Nine Lac.), vide receipt annexed as exhibit DW1/3. Apart from above, she also produced the following documents:-

- Application dated 18.07.2005 addressed to the KBCA seeking permission of roof repair of the shop/suit property as exhibit DW1/4.
- At exhibit DW1/5, photocopy of the application dated 05.09.2005 addressed to the SHO, PS Saddar Town against occupation of the plaintiffs on the shop/subject property and removal of the locks.
- Death certificate of Haji Faqeer Muhammad S/o Feroz dated 15.09.1989 at exhibit DW1/6.
- PT-I Form dated 26.08.2004 issued by the Excise & Taxation Officer T Division, Karachi as exhibit DW1/9.
- Notices of 'Demand' under section 29 of the Income Tax Act, 1929 dated 07.01.1957 and 14.05.1961, as exhibits DW1/10 and DW1/11.
- Photocopies of Notice issued by the Income Tax Officer dated 19.02.1968 and Return filed by Mr. Faqir Muhammad Khan (father in law of the defendant No.1) dated 22.09.1970, as exhibits X-1 and X-2 and Income Tax statements of Assets dated 07.04.1966 and 31.03.1971 as exhibits X-3 and X-4.
- Paid challan of Property Tax 23.08.2002 as exhibit DW1/12 in her husband's name.
- Notice under section 114 of the Sindh Local Government Ordinance, 1979 issued to her husband, as exhibit DW1/13
- Notices for imposition of penalty and forfeiture of subject property issued by Excise & Taxation as exhibits DW1/14 and DW1/15.
- Challan for payment of property tax for tax year 2011-2012 issued by Excise & Taxation Department as exhibit DW1/16.

12. Having perused the above material documents and evidence introduced on record, it would be suffice for a prudent mind to hold that the said shop had been undoubtedly sold out by the predecessors in interest of the plaintiffs to deceased husband of

defendant No.1 in the year 1974 (page 25) whereas this suit has been filed in the year 2005, therefore, neither the present plaintiffs could be held as owners of the said shop nor they are entitled for the possession thereof. Their claim is clearly time-barred and the fact that their fathers never challenged the said sale also goes against them. In view of the rationale and deliberation contained hereinabove, the issues No. 1 & 3 are answered in negation.

13. Issues No.2 & 7 are germane to the ownership of the defendant No.1. Defendant No.1 amid her examination-in-chief introduced on record a sale agreement alleged to have been executed between the plaintiffs and deceased husband of defendant No.1 as Exh. D.W.1/2 (available in evidence file). According to the defendant No.1, her deceased husband was owner of the said shop on the basis of sale agreement. Whilst it is an established legal position that an agreement is merely a contract to fulfill terms and conditions agreed between the parties but it does not create any right title or interest in the immovable property other than what it is good for.

14. The defendant No.1 during the course of examination-in-chief produced the Sale Agreement as Exh. DW1/2 (available at page 23 of evidence file) alleged to have been executed between the predecessors in interest of the original plaintiffs and husband of defendant No.1 on 28.06.1974. The defendant No. 1 in her counter claim has prayed that the Plaintiffs who claim to be legal heirs of the earlier owners of the property be directed to execute sale deed in her favor, or in alternate, expects this court to do the same through the Nazir of this court as verbally requested. What is the fate of

specific performance of a 1974's agreement admittedly signed by the predecessors in interest of both the parties is a question that needs to be answered while answering these issues. Position with regards enforcement of contracts by legal heirs finds mention in Sections 25 and 27 of the Specific Relief Act, 1877 which sections and Illustrations thereunder are reproduced hereunder:

25. Contracts to sell property by one who has no title or who is a voluntary settler.- A contracts for the sale or letting of property, whether moveable or immovable, cannot be specifically enforced in favour of a vendor or lessor-

(a) who, knowing himself not to have any title to the property, has contracted to sell or let the same;

(b) who, though he entered into the contract believing that he had a good title to the property, cannot, at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt;

(c) who, previous to entering into the contract, has made a settlement (though not founded on any valuable consideration) of the subject-matter of the contract.

Illustrations

(a) A, without C's authority, contracts to sell to B an estate which A knows to belong to C. A cannot enforce specific performance of this contract, even though C is willing to confirm it.

(b) A bequeaths his land to trustees declaring that they may sell it with the consent in writing of B. B gives a general prospective assent in writing to any sale which the trustees may make. The trustees then enter into a contract with C to sell him the land. C refuses to carry out the contract. The trustees cannot specifically enforce this contract, as, in the absence of B's consent to the particular sale to C, the title which they can give C is, as the law stands, not free from reasonable doubt.

(c) A, being in possession of certain land, contracts to sell it to Z. On inquiry it turns out that A claims the land as heir of B, who left the country

several years before, and is generally believed to be dead, but of whose death there is no sufficient proof. A cannot compel Z specifically to perform the contract.

(d) A, out of natural love and affection, makes a settlement of certain property on his brothers and their issue, and afterwards enters into a contract to sell the property to a stranger. A cannot enforce specific performance of this contract so as to override the settlement, and thus prejudice the interest of the persons claiming under it.

27. Relief against parties and persons claiming under them by subsequent title.- Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against-

(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

(d) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation;

(e) when the promoters of a public company have, before its incorporation, entered into a contract, the company: provided that the company has ratified and adopted the contract and the contract is warranted by the terms of the incorporation.

Illustrations

to clause (b)-

A contracts to convey certain land to B by a particular day, A dies intestate before that day without having conveyed the land. B may compel A's heir or other representative in interest to perform the contract specifically.

A contracts to sell certain land to B for Rs.5,000. A afterwards conveys the land for Rs.6,000 to C, who

has notice of the original contract. B may enforce specific performance of the contract as against C.

A contracts to sell land to B for Rs.5000. B takes possession of the land. Afterwards A sells it to C for Rs.6,000. C makes no inquiry of B relating to his interest in the land. B's possession is sufficient to affect C with notice of his interest, and he may enforce specific performance of the contract against C.

A contracts, in consideration of Rs.1,000, to bequeath certain of his lands to B. Immediately after the contract A dies intestate, and C takes out administration to his estate. B may enforce specific performance of the contract against C.

A contracts to sell certain land to B. Before the completion of the contract, A becomes a lunatic and C is appointed his committee. B may specifically enforce the contract against C.
to clause (c)-

A, the tenant for life of an estate, with remainder to B, in due exercise of a power conferred by the settlement under which he is tenant for life, contracts to sell the estate to C, who has notice of the settlement. Before the sale is completed, A dies. C may enforce specific performance of the contract against B.

A and B are joint tenants of land, his undivided moiety of which either may alien in his life time, but which, subject to that right, devolves on the survivor. A contracts to sell his moiety to C and dies. C may enforce specific performance of the contract against B.

15. As seen from a close examination of the above sections, the possibility of specific performance of a contract signed in the year 1974 is made possible by both of these sections. More appropriately the issue of specific performance by legal heir is covered under section 27 and clearly demonstrated by the first Illustration to its clause (b). In the similar circumstances in the case of MUHAMMAD BAKHSH through Representatives v. MUHAMMAD JAMEEL (2005 YLR 2464) the Hon'ble Lahore High Court while dilating on the

interpretation of Section 27(b) in respect of an unregistered agreement held that not only such an agreement is protected under Section 53-A of the Transfer of Property Act 1882, but a suit for specific performance was also maintainable under proviso of S.50 of the Registration Act subject to the provisions of S.27(b) of the Specific Relief Act, 1877. The Hon'ble Supreme Court in the case of MUHAMMAD SHAFIQ ULLAH v. ALLAH BAKHSH (DECEASED) reported as 2021 SCMR 763 held that in cases where purchasers had bought the land for consideration and 'in good faith' in terms of S. 41 of the Contract Act, 1872 they are protected by clause (b) of S. 27 of the Specific Relief Act, 1877. In the case at hand that Plaintiffs have not raised any objection that value of the property was any higher than what was paid by the buyer in the year 1974, they have only denied the said agreement which has been inked by their fathers, but why they are doing so after their fathers' death, they have no proper answer when a question was posted to this counsel. In such cases of specific performance, study yields to "Some Problems in Specific Performance" a research paper authored by George L. Clark, published in the Harvard Law Review, Dec., 1917, Vol. 31, No. 2 (Dec., 1917), pp. 271-287 Published by the Harvard Law Review Association which answers the questions related to specific performance of contracts by legal heirs. By giving an example of building contracts, the author writes that where the defendant contracted with the plaintiff to erect a building on his own land, equity will usually grant specific performance as the inadequacy of the common-law remedy is apparent in such cases and the amount of damage suffered by the plaintiff is difficult to estimate because the

loss is that suffered by not obtaining the increase in value to the plaintiff's property in the neighborhood. The early English case of *Holt v. Holt* [1 EQ. ABRIDGMENT] held that if the owner dies before the house was built "the heir may compel the builder to build it and the father's executor to pay for it as it is at least likely that at that time the father himself could have obtained specific performance, so that the court did not place the builder in a different position from that which he occupied before the father's death". In view of the above, the **issue No. 2 & 7 are answered as discussed.**

16. **Issue No.4** relates to business partnership between the predecessors-in-interest of the plaintiffs as well as father-in-law of defendant No.1. During the course of recording examination-in-chief, two partnership deeds; one dated 13.05.1975 and another dated 01.12.1977 were exhibited as Exh. P1/7 (available at page 87 of evidence file) and Exh. P1/9 (available at page 95 of evidence file) executed between the predecessors-in-interest of the plaintiffs and father in law of defendant No.1. They were carrying on the business of supply eggs under the name and style of "Frontier Eggs Co.". As the time went by, one of the partner i.e. Faqir Muhammad (father in law of defendant No.1 as well as father of deceased husband of defendant No.1) died on 15.09.1989 in Peshawar, thereafter, the Partnership Deed revised and executed on 17.04.1990 between the plaintiffs only. The partnership deeds introduced on record and exhibited during recording evidence show that there was a business relationship between the plaintiffs and the father-in-law of defendant No.1, therefore, the **issue No.4 is answered in affirmation.**

17. **Issue No. 5 & 8** relate to the enjoyment of possession of the said shop. During the course of recording examination-in-chief, various Partnership Deeds were exhibited as Exh. P1/7 (available at page 87 of evidence file), Exh. P1/9 (available at page 95 of evidence file) and Exh. P1/10 (available at page 103 of evidence file) executed between the predecessors-in-interest of the plaintiffs and father in law of defendant No.1 as discussed in the above paragraph. They were carrying on the business of supply eggs under the name and style of "Frontier Eggs Co.". As the time went by, one of the partner i.e. Faqir Muhammad (father in law of defendant No.1 as well as father of deceased husband of defendant No.1) died on 15.09.1989 in Peshawar, thereafter, the Partnership Deed revised and executed on 17.04.1990 between the plaintiffs only and the said Partnership Deed was also exhibited as Exh. P1/12 (available at page 153 of the evidence file). The husband of defendant No.1 neither remained partner of Frontier Egg Co. being run at the said shop nor he joined as partner or any partnership deed was ever executed between the present plaintiffs as well as the husband of defendant No.1. The cumulative effect of the above circumstance leads to the conclusion that since 1990, neither the husband of the defendant No.1 nor the defendant No.1 herself had any relationship with the Frontier Eggs Co. The plaintiffs in order to support their version, produced an independent witness namely Muhammad Zakir Qureshi, who in his affidavit-in-evidence testified the version of the plaintiffs. In paragraph-3 of affidavit-in-evidence, the said witness went on to state that father in law of the defendant No.1 was only a working partner in the business of predecessors-in-interest of the plaintiffs.

Exh. P1/12 is a Partnership Deed that came into being upon demise of one of the partners i.e. Faqir Mohammad (father in law of defendant No.1). It is considered illustrative to point out here that after the death of father in law of defendant No.1, the husband of defendant No.1 did not remain partner of Frontier Egg Co., the business being carried out at the said shop nor he was joined as partner in any other business being run between the present plaintiffs and husband of defendant No.1. The claim of the possession of the said shop by the Defendant No.1 does not originate from anyone of these partnerships, instead is derived from agreement of sale dated 28.06.1974, while answering issue Nos. 2 & 7, I have discussed reasons which led me to believe that possession of the suit shop by the defendant No.1 cannot be disturbed by legal heirs alleging that their fathers were owners. If this becomes the reason to handout possession, this will negate all sale transactions made by parents as their sons/daughters relying on their fathers' title would claim all such properties. If they believed that the property belonged to their fathers, they should have claimed it under Succession Act, 1925. While making the defendants as objectors and such claim would have been considered under the procedure designed by the Succession Act. In the present case only one of the plaintiffs has done so, whose father had 1/3 share in the property, however, whether he made the defendant No.1 as a party or objector is also not shown to the court. It is not even brought to record that all legal heirs of the deceased old owners (the fathers) have their eggs grinded as only one son (each) has filed this suit. Their brothers and sisters (which I assume would be there) have not come forward, giving me reasons to believe that those absentees

chose to honour the agreement made by their fathers with the husband of defendant No.1. I am therefore not convinced at all that the shop be handed out to the plaintiffs just because they happen to be sons of earlier owners, (now deceased) who never claimed title or possession of the said shop in their life time. In similar circumstances where original owners have chosen not to challenge possession in their life time but their legal heirs have attempted to do so, courts have viewed such interventions dishonest. Resultantly legitimacy of possession of the suit shop is proved by the defendants, **issue No.5 & 8 are answered as discussed.**

18. **Issue No. 9 & 10.** The stance of plaintiffs' legal heirs is that the husband of defendant No.1 had no source of income and livelihood, therefore, considering his state of affairs, they asked the husband of defendant No.1 to look after the said shop and he was thus permitted to carry on his business in the said shop to earn livelihood and it is the reason that since 1990, the utilities and applicable taxes were being paid by the father in law of defendant No.1 and her husband too and they applied to the defunct KBCA for doing some repair work in the said shop. While mere paying applicable tax and utilities does not create any right, title or interest in any immovable property, but interesting the plaintiffs have failed to show why they did not maintain the shop, why they did not pay any such utility bills and why the defendant No.1's husband was given such authority. The plaintiffs have not brought any document on record to show that they were residing abroad or were pursuing any other income generating activity leaving no time to pay such dues and maintain the shop. These documents when seen in juxtaposition

with the sale agreement fill the missing gap that in fact the plaintiffs have had no legal authority to do such maintenance work as Defendants were in the possession of the shop. In view of the above, **the issue No.9 & 10 are answered as discussed above.**

19. So far as **issue No.11** is concerned, sanguine to the set of circumstances and ramification as well as connotation of statues, the suit filed by the plaintiffs is dismissed with no order as to costs, while claim of the defendant No.1 for having the subject shop transferred in her name sustains through execution of sale deed through legal heirs of the deceased fathers or alternatively through the Nazir of this Court.

Karachi
Dated: 13.09.2022

JUDGE