

THE HIGH COURT OF SINDH, KARACHI

Suit No. 1552 of 2009

[Abdul Qadir Musani v. Mian Aftab Iqbal & others]

Plaintiff : Abdul Qadir Musani son of Abdul Razzaq Musani (Late) through Mr. Naveed Ahmed, Advocate.

Defendants 1 & 6 : Nemo.

Defendants 2-5 : Qaiser Saleem son of Mazhar Hussain and three [03] others through M/s. Mayhar Kazi and Mr. Zahid Ali Sahito, Advocates.

Dates of hearing : 07-11-2023, 20-11-2023, 27-11-2023, 06-12-2023 & re-hearing on 30-05-2024.

Date of decision : 02-07-2024

JUDGMENT

Adnan Iqbal Chaudhry J. - The suit property is Plot No. 41-A, measuring 2000 sq. yds., originally leased by the Mohammad Ali Memorial Cooperative Housing Society Ltd. to the Defendant No.1 by a registered deed dated 15-04-1975. The Plaintiff prays *inter alia* for a declaration of title to the suit property against the Defendants 2 to 4; for its possession; for damages; and for an injunction directing the Society (Defendant No.6) to mutate the suit property to the Plaintiff.

2. The Plaintiff claims that the suit property was sold to him under a sale agreement dated 07-07-2007 executed by one Azizuddin Babar as the Attorney of the Defendant No.1. For specific performance of that sale agreement the Plaintiff filed Suit No. 907/2007 before this Court, which was decreed by consent on 01-10-2007 upon a compromise application made by the Plaintiff and said Azizuddin Babar. On Execution Application No. 86/2007 filed by the Plaintiff, the Nazir of this Court executed a registered sale deed of the suit property in favor of the Plaintiff on 11-01-2008. However, when the Nazir went to deliver possession of the suit

property, the Defendants 2 to 4 came forward claiming to be co-owners thereof pursuant to a registered conveyance deed dated 28-09-1977 executed in their favour by one Akhtar Rizvi as registered Attorney of the Defendant No.1.

3. Confronted with dispossession of the suit property, the Defendants 2 to 4 moved CMA No. 122/2008 before the Executing Court under Order XXI Rule 58 CPC for investigating their prior title to the suit property. On the other hand, the Plaintiff moved CMA No. 165/2008 for possession of the suit property. By order dated 10-03-2008, the Executing Court dismissed the application under Order XXI Rule 58 CPC as not maintainable, and allowed the Plaintiff's application for possession. The Defendants 2 to 4 filed an application under section 12(2) CPC (JM No. Nil/2008), but that too was dismissed. The Defendants 2 to 4 appealed both orders. By order dated 08-10-2008, HCA No. 83/2008 filed against the order dated 10-03-2008 was allowed by the Division Bench and Execution Application No. 86/2007 was restored along with all miscellaneous applications moved therein for a decision afresh. HCA No. 205/2008 brought against the dismissal of the application under section 12(2) CPC too was disposed with the same order.

4. On remand by the appellate court, the following applications were revived before the Executing Court: CMA No. 122/2008 by the Defendants 2 to 4 under Order XXI Rule 58 CPC, and CMA No. 165/2008 under section 151 CPC by the Plaintiff for possession, essentially an application under Order XXI Rule 97 CPC. Since possession of the suit property had already been delivered by the Nazir to the Plaintiff, the Defendants 2 to 4 also moved CMA No. 807/2008 for restoration of possession under section 151 CPC, essentially an application under Order XXI Rule 100 CPC. By order dated 06-03-2009, the Executing Court allowed the applications of the Defendants 2 to 4, restored possession of the suit property to them, and dismissed the Plaintiff's application for possession with the

observation that the Plaintiff may avail remedy against the judgment debtor i.e. the Defendant No.1. The facts that prevailed before the Executing Court were that the registered conveyance deed of the suit property held by the Defendants 2 to 4, dated 28-09-1977, was prior in time to the one obtained by the Plaintiff from the Nazir of the Court on 11-01-2008; that the Defendants 2 to 4 were in possession of the suit property after redeeming its mortgage in proceedings before the Banking Court; and that the original documents of the suit property were also found to be with the Defendants 2 to 4 having been retrieved by the Nazir of the Court from the locker of the deceased father of said Defendants in succession proceedings.

5. Against the order dated 06-03-2009, whereby possession of the suit property was restored to the Defendants 2 to 4, the Plaintiff preferred HCA No. 85/2009. However, that appeal was dismissed as not pressed *vide* order dated 08-04-2009. Learned counsel for the Plaintiff drew attention to a second order dated 20-10-2009 passed in the same appeal whereby the appeal was again dismissed with the observation that the Executing Court is expected to decide CMA No. 122/2008 and CMA No. 807/2008 expeditiously. Apparently, after dismissal of the appeal on 08-04-2009, the Plaintiff had moved an application for its restoration. But that application was never allowed, and in dismissing the appeal once again the Bench seemed to be under the impression that it was dealing with a fresh appeal, which was not the case. Be that as it may, the second order dated 20-10-2009 passed in HCA No. 85/2009 is of no help to the Plaintiff. The file of Execution No. 86/2007 shows that he never pursued that second order before the Executing Court. Rather, after a lapse of two years the Plaintiff proceeded file the instant suit.

6. The Defendants 2 to 4 have also filed Suit No. 1952/2010 for cancellation of the registered sale deed held by the Plaintiff. However, by order dated 29-10-2021 that suit was adjourned *sine die*.

7. Heard learned counsel and perused the record.

8. The central issue in this suit is whether the Plaintiff is entitled to possession of the suit property as against the Defendants 2 to 4, which was a matter directly and substantially in issue in Execution Application No. 86/2007 and which was decided in favor of the Defendants 2 to 4 *vide* order dated 06-03-2009. Therefore, of the issues settled in this suit on 24-11-2010, the first is to the maintainability of the suit. Per learned counsel for the Defendants 2 to 4, the suit is barred by *res judicata*.

9. As discussed above, the order dated 06-03-2009 passed by the Executing Court was on applications under Order XXI Rules 58 and 100 CPC moved by the Defendants 2 to 4, and on an application under Order XXI Rule 97 CPC moved by the Plaintiff. Rule 58 provides a remedy to a claimant or objector against the attachment of his property in execution of a decree. Rule 100 provides a remedy to a person other than a judgment debtor who is dispossessed of immovable property by the holder of a decree. Rule 97 provides a remedy to the decree holder against resistance to possession of the immovable property so decreed. Insofar as the order dated 06-03-2009 allowed the application under Rule 58, it was an order under Rules 60 and 62. Insofar as that order allowed the application under Rule 100 CPC, it was an order under Rule 101; and insofar as it dismissed the application under Rule 97, it was an order under Rule 99.

10. Order XXI Rule 62 CPC then stipulates that all questions relating to the right, title or interest of the claimant/objector in the attached property shall be determined by the Executing Court and not by a separate suit. Similarly, Order XXI Rule 103 CPC stipulates that all questions arising as to title, right or interest in, or possession of, immovable property between an applicant under Rule 97 or Rule 100 and the opposite party, shall be determined by the Executing Court and not by a separate suit. Thus, Rules 62 and 103 of Order XXI

CPC expressly bar a suit to agitate or re-agitate matters covered by Rules 58, 97 and 100.¹ Instead, orders passed under Rules 62 and 103 are made appealable under clause (ii) of Order XLIII Rule I CPC, and by way of a deeming clause in section 2(2) CPC, orders passed under Rules 60, 98, 99, 101 or 103 of Order XXI CPC are treated as a decree. Consequently, even if section 11 CPC does not apply, the decision of the Executing Court *vide* order dated 06-03-2009 rendered on applications under Order XXI Rules 58, 97 and 100 CPC, is nonetheless *res judicata* under the general principle as between the Plaintiff and the Defendants 2 to 4. Reliance is placed on the cases of *Ch. Abdul Majid v. Sadaqat Saeed Malik* (2004 SCMR 1325); *Kulsoom Bai v. Nargis Bano* (1985 SCMR 1275); *Muhammad Ilyas v. Muhammad Siddique* (2002 YLR 2770); and *Muhammad Amin v. Haji Abdul Wahid* (2024 CLC 340).

11. The argument against *res judicata* advanced by learned counsel for the Plaintiff was that the order dated 06-03-2009 was erroneous as the provisions of Order XXI Rule 58 CPC were not attracted to the case, and that the Defendants 2 to 4 also did not lead evidence thereunder to prove their case. Firstly, it has been held by a learned Division Bench of this Court in *Arshad Naseemuddin Ahmed v. Javed Baloch* (2012 CLC 1293) that it is for the Executing Court to decide whether the case before it under Order XXI Rule 58 CPC requires the recording of evidence. And secondly, the arguments advanced by learned counsel could have been considered only by the appellate court under Order XLIII Rule 1(ii) CPC against the order dated order dated 06-03-2009. Though an appeal had been filed by the Plaintiff, being HCA No. 85/2009, that was dismissed as not pressed *vide* order dated 08-04-2009. The effect of the subsequent order in that appeal has already been discussed above.

¹ See *Sheikh Ghulam Nabi v. Ejaz Ghani* (1982 SCMR 650); and *Habiba Kassam v. Habib Bank Ltd.* (1989 CLC 1433).

12. In view of the foregoing, issue No.1 is answered in the affirmative i.e. the suit is barred by *res judicata*. The remaining issues become redundant. The suit is therefore dismissed.

JUDGE

Karachi:

Dated: 02-07-2024