

THE HIGH COURT OF SINDH, KARACHI

Suit No. 1161 of 2009

[Muhammad Feroz Akhter through his LRs vs. Muhammad Nasim Akhter]

Plaintiff : Muhammad Feroz Akhter through his legal heirs Mst. Naz Bu widow of Late Muhammad Feroz Akhter and three [03] others through Mr. Muhammad Arif Shaikh, Advocate.

Defendant : Muhammad Nasim Akhter through M/s. Yousuf Moulvi and Raafia Murtaza, Advocates.

Date of hearing : 02-11-2023

Date of decision : 09-02-2024

JUDGMENT

Adnan Iqbal Chaudhry J. - Suit was filed by Feroz Akhter [**Feroz**] against his brother Nasim Akhter [**Defendant**] for possession of a house on Plot No. CB-4, ad-measuring 153 square yards, Survey No.74, off Deh Dapo, Malir, Kahkashan Housing Society, Karachi [**suit property**], and for mesne profits.

2. It was pleaded by Feroz that he was owner of the suit property under a registered lease deed dated 17-04-1979; that he had constructed the suit property and resided thereat along with his parents and siblings; that in 1981 he had also mortgaged the suit property to United Bank Ltd. [**UBL**]; that in order to accommodate his parents and siblings he shifted from the suit property in the year 1995; that the Defendant continued to reside thereat as a licensee; that after the father of the parties passed away in 2005, Feroz requested the Defendant to vacate the suit property but the latter refused, and eventually Feroz filed suit.

3. The Defendant denied that Feroz was owner of the suit property. With his written statement he filed a registered lease deed dated 16-03-1982 to show that the suit property vested in their late

mother, Samiun Nisa. The Defendant pleaded that the suit property had been purchased by him where after he sold it to Feroz under a sale agreement dated 26-12-1978; that thereafter, Feroz sold the same to their mother, Samiun Nisa, under a sale agreement dated 14-09-1981; hence the lessor leased the suit property to Samiun Nisa; that the suit property was constructed by their father; that after the death of Samiun Nisa all her children, including Feroz and the Defendant, became co-owners thereof.

4. To rebut the documents introduced with the written statement, Feroz was permitted to amend the plaint to pray for a declaration of title and for cancellation of the registered lease deed dated 16-03-1982 standing in the name of Samiun Nisa [**the impugned lease deed**]. Per the amended plaint, the impugned lease deed was void as the suit property was mortgaged with UBL at that time, and thus the impugned lease deed may have been manipulated or fabricated by the Defendant. However, the amended plaint did not join the other legal heirs of Samiun Nisa who were necessary parties to the relief for cancellation of the impugned lease deed standing in the name of their late mother.

5. Pending suit Feroz passed away and was succeeded by his legal heirs, the present Plaintiffs.

6. By order dated 25-09-2018 following issues were settled for determining the suit:

- (i) *Whether the suit is barred by law ?*
- (ii) *Whether the plaintiff is absolute owner of the suit property ?*
- (iii) *Whether the suit property is inherited property? If so its effect?*
- (iv) *Whether the lease deed dated 16-03-1982 in favour of Mrs. Samiun Nisa is manipulated and fabricated document ? If so its effect ?*
- (v) *Whether the plaintiff is entitled for the relief as claimed ?*
- (vi) *What should the decree be ?*

For the Plaintiffs, evidence was led by Mst. Naz Bu, who was Feroz's widow. The Defendant examined himself and one of his brothers namely Muhammad Haseen Akhtar.

7. Mr. Muhammad Arif Sheikh, learned counsel for the Plaintiffs submitted that the impugned lease deed (Exhibit D/7) was unlawful as the suit property was mortgaged at the time to UBL (Exhibit P/3 and P/4), and which was not redeemed until 2009; that the suit property continued to vest in Feroz under the registered lease deed dated 17-04-1979 (Exhibit P/2), as also evidenced by a Search Certificate (Exhibit P/5); and hence the Plaintiffs were entitled to the relief of declaration, cancellation and possession. However, learned counsel did not press prayer clause 'D' for mesne profits.

8. Mr. Yousuf Moulvi, learned counsel for the Defendant submitted that the relief for cancellation and for possession were time-barred; that the mortgage deeds were fictitious as those do not bear the seal of UBL, and Feroz himself was an employee of UBL at the time; that Exhibits D/2 to D/4 are evidence that the suit property was originally allotted to the Defendant, who transferred it to Feroz, and who transferred it to Samiun Nisa; that the utilities too were billed to Samiun Nisa (Exhibits D/5 and D/6); and that the Search Certificate relied upon by the Plaintiffs was of no help as it was confined to a period prior to the impugned lease deed.

9. Heard learned counsel and appraised the evidence.

Issue (i): Whether the suit is barred by law ?

10. Learned counsel for the Defendant submitted that the suit was barred by limitation. He submitted that the relief for possession was time-barred by Article 144 of the Limitation Act, 1908 as Feroz had admitted that he left the suit property in 1995. But, counsel did not notice that Article 144 had been omitted by Act II of 1995. In any case, Feroz had also pleaded that the Defendant continued to reside at the

suit property as his licensee, and that he had first asked the Defendant to vacate the suit property in 2005.

Regarding the relief for cancellation, learned counsel submitted that even if Feroz came to know of the impugned lease deed from the written statement, that was filed on 09-04-2010, whereas CMA No. 5007/2015 for amending the plaint to pray for cancellation was moved on 25-03-2015, hence time-barred under Article 91 of the Limitation Act. But then, learned counsel did not show when the copy of the written statement was provided to Feroz. In any case, the amendment application was not contested, nor was any appeal filed against the order allowing the amendment. As held in *Barkat Bibi v. Khushi Muhammad* (1994 SCMR 2240), once an amendment of the plaint is granted, it relates back to the date when the suit was filed. Therefore, the suit is not barred by limitation. Issue (i) is answered in the negative.

Issue (ii): Whether the plaintiff is absolute owner of the suit property ?

Issue (iv): Whether the lease deed dated 16-03-1982 in favour of Mrs. Samiun Nisa is manipulated and fabricated document ? If so its effect ?

11. Issues (ii) and (iv) above are connected, and are therefore decided together. The decision on these issues will be determinative of the other issues as well.

12. Before the Court, two lease deeds of the suit property were produced; the first by the Plaintiffs, dated 17-04-1979 in favor of Feroz (Exhibit P/2); and the second by the Defendant, dated 16-02-1982 in favor of his mother, late Samiun Nisa (Exhibit D/7-the impugned lease deed). Both leases are registered documents and both were executed by the same person as lessor, namely one Abu Bakar acting as Attorney of Bhiryo, apparently a private land developer.

13. Though the Defendant had contended that he was the first owner of the suit property, that much is not relevant to the issues

above inasmuch as, the Defendant had acknowledged that thereafter he sold the suit property to Feroz. Apparently, the lessor then issued a registered lease dated 17-04-1979 to Feroz (Exhibit P/2). On cross-examination the Defendant admitted that: *"It is correct to suggest that the suit property lease out in the name of the plaintiff on 17-04-1979."* Therefore, the fact that the suit property was leased to Feroz was admitted. However, the case of the Defendant was that Feroz had thereafter sold the suit property to their mother, Samiun Nisa, by a sale agreement dated 14-09-1981 (Exhibit D/2), where after the lessor executed the impugned lease deed in her favor. Against that, the case set up by the Plaintiffs in the amended plaint was that the impugned lease deed could not have been executed in 1982 as the suit property was mortgaged by Feroz with UBL at the time. To substantiate that averment, the Plaintiffs produced registered mortgage deeds dated 25-10-1981 and 17-03-1982 (Exhibit P/3 and Exhibit P/4).

14. The mortgage deeds relied upon Feroz were disputed by the Defendant from the onset. As pointed out by learned counsel for the Defendant, the mortgage deeds do not bear the seal of UBL, nor do they identify the person who had allegedly executed them on behalf of UBL. Yet, the Plaintiffs did not summon any officer of UBL to prove execution of those mortgage deeds in terms of Article 78 of the Qanun-e-Shahadat Order, 1984. Therefore, the mortgage deeds relied upon by the Plaintiffs (Exhibit P/3 and P/4) were never proved.

15. In any case, the mortgage deed dated 17-03-1982 (Exhibit P/4) recited that it was a 'simple mortgage', *i.e.* a mortgage under section 58(b) of the Transfer of Property Act and not a mortgage by deposit of title deeds under section 58(f) of the Transfer of Property Act. Therefore, it could not be the Plaintiffs' case that the original title documents of the suit property were with UBL at the time of the impugned lease deed. Feroz may well have sold the suit property to Samiun Nisa despite the mortgage or subject thereto, and if so, it was for the mortgagee bank to come forth and plead that the impugned lease deed was subject to a prior mortgage. But that is not the case, as

admittedly the mortgage loan, if any, was subsequently settled. In other words, even assuming that the suit property was mortgaged at the time, that was no evidence that the impugned lease deed was manipulated or fabricated.

16. The Plaintiffs had then produced a Search Certificate dated 15-03-2018 (Exhibit P/5) which reflects Feroz's lease deed dated 17-04-1979. But, as pointed out by learned counsel for the Defendant, that certificate also reflects that it is confined to the record as on 17-04-1979 and does not take into account any subsequent transaction. Therefore, the Search Certificate too does not help the Plaintiffs.

17. The Defendant also did not help his case. The impugned lease deed in Samiun Nisa's favor, produced by the Defendant as Exhibit D/7, was an attested document which was denied by the Plaintiffs. Therefore, notwithstanding that it was a registered document, it was incumbent on the Defendant to call at least one attesting witness to prove its execution. I say 'one' because the impugned lease deed was allegedly executed prior to Article 79 of the Qanun-e-Shahadat Order, when the requirement under section 68 of the Evidence Act, 1872 was of calling "one attesting witness at least".¹ Since the document was denied, the exemption for a registered document in the proviso to section 68 from calling the attesting witness was not available.² The Defendant did not call any of the attesting witnesses. It is settled law that the requirement of section 68 of the Evidence Act, or Article 79 of the Qanun-e-Shahadat Order is mandatory and uncompromising, and failure to meet that requirement is fatal "to the admissibility of the document".³

¹ Held in *Rasheeda Begum v. Muhammad Yousuf* (2002 SCMR 1089) and *Noor Muhammad v. Nazar Muhammad* (2002 SCMR 1301) that where an instrument had been reduced into writing during the erstwhile section 68 of the Evidence Act, 1872, and had been attested by witnesses, it had to be proved in accordance with that provision.

² The proviso to Article 79 of the Qanun-e-Shahadat Order (section 68 of the Evidence Act) does not confine the denial of execution of a document to the executing party, and such denial can also come from another party to the suit against whom it is sought to be used. See *Bilal Hussain Shah v. Dilawar Shah* (PLD 2018 SC 698).

³ *Tassaduq Hussain v. Muhammad Din* (PLD 2011 SC 241).

18. But, the matter does not end with the inadmissibility of the impugned lease deed for the Defendant had brought other evidence to show that Feroz had divested himself of the suit property in favor of Samiun Nisa.

19. Exhibit D/2 produced by the Defendant is a sale agreement of the suit property between Feroz and Samiun Nisa dated 14-09-1981. Exhibit D/4 produced by the Defendant is an Allotment Certificate of the suit property, dated 04-01-1979, issued to the Defendant by 'Kahkashan Housing Project', apparently the business name of the lessor. The Allotment Certificate shows that the suit property had been initially allotted to the Defendant as contended by him. The reverse-side of that certificate then bears two endorsements by the lessor of subsequent transfers of the allotment. The first is dated 16-04-1979, which records a transfer from the Defendant to Feroz; and the second is dated 03-02-1982, which records a transfer from Feroz to Samiun Nisa. Exhibit D/3 is a receipt dated 03-02-1982 issued to Samiun Nisa by the lessor for the transfer fee paid by her, and Exhibits D/5 and D/6 dated 23-04-1984 and 25-06-1984 are bills issued to her for gas and water connection to the suit property. The Defendant also examined his brother, Muhammad Haseen Akhtar, who too deposed that the suit property had been sold/transferred by Feroz to their mother, Samiun Nisa.

20. The sale agreement between Feroz and Samiun Nisa dated 14-09-1981 (Exhibit D/2) and the Allotment Certificate recording the transfer to Samiun Nisa (Exhibit D/4) were documents that were filed with the written statement. However, in filing the amended plaint the Plaintiffs took issue only with the impugned lease deed. The prayer for cancellation too is confined to that. Not a single word, let alone a denial, appears in the amended plaint with regards to the said sale agreement and the Allotment Certificate. The sale agreement was executed by Feroz, whereas the impugned lease deed by the lessor, therefore, denial of the latter was not denial of the former. At trial also, the Plaintiffs never objected to the production of said sale

agreement and Allotment Certificate, nor was the Defendant cross-examined on those documents. During final arguments as well, counsel for the Plaintiffs took no issue to the admissibility of said documents as evidence. In such circumstances, the sale agreement between Feroz and Samiun Nisa (Exhibit D/2) and the Allotment Certificate issued by the lessor to Samiun Nisa (Exhibit D/4) were admitted documents which were not required to be proved in view of Article 113 of the Qanun-e-Shahadat Order. In fact, the entire case of the Plaintiffs was simply that the impugned lease deed could not have been executed owing to a prior mortgage, which aspect of the matter has already been dealt with *supra*. Consequently, even if the impugned lease deed was inadmissible evidence, either one of the sale agreement dated 14-09-1981 (Exhibit D/2) or the Allotment Certificate (Exhibit D/4) by itself was sufficient evidence to belie the Plaintiffs case.

21. On a preponderance of evidence it appears that Feroz had surrendered his lease of the suit property to the lessor in lieu of the transfer of allotment to his mother, Samiun Nisa, where after Feroz ceased to be the lessee of the suit property. Even if there was no deed of surrender between Feroz and the lessor, the surrender can nonetheless be implied from the conduct of the parties in terms of section 111(f) of the Transfer of Property Act.⁴ That being the case, issue (ii) and issue (iv) are answered in the negative.

Issue (iii): Whether the suit property is inherited property ? If so its effect ?

22. Having concluded that the suit property vested in late Samiun Nisa, on her death it devolved on all her legal heirs as per law. Issue (iii) is answered accordingly.

Issue (v): Whether the plaintiff is entitled for the relief as claimed?

⁴ See *Sm. Sailabala Dasee v. H. A. Tappassier* (AIR 1952 Calcutta 455); *Konijeti Venkayya v. Thammanna Peda Venkata Subbarao* (AIR 1957 Andh. Pra. 619); and *P.M.C. Kunhiraman Nair v. C.R. Naganatha Iyer* (AIR 1993 Supreme Curt 307).

Issue (vi): What should the decree be ?

23. In view of the foregoing, the Plaintiffs are not entitled to any relief. The suit is therefore dismissed.

Karachi
Dated: 09-02-2024

JUDGE