

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 365 of 1994

J U D G M E N T

Date of hearing: 25.10.2013

Saleem Ahmed Mirza
Plaintiff : through Mr. Abdul Qadir Khan, Advocate.

Retd: Major Syed Iftikhar Hussain Zaidi
Defendant No.1 : None present for the Defendant No.1

Muhammad Saleem
through LR's
Defendant No.2 : None present for the Defendant No.2

Syed Hussain Ali Zaidi
Defendant No.3 : None present for the Defendant No.3

NAZAR AKBAR, J. The plaintiff through this suit has sought declaration, possession, mesne profits/damages permanent injunction.

1. Briefly stated the facts of this case are that the plaintiff entered into an agreement of sale with Mst. Shahida Ghafoor under preliminary agreement of sale dated 12.09.1993 and confirmatory sale agreement dated 20.10.1993 for a total sale price of Rs.12,00,000/- (Rupees twelve lacs only) in respect of plot of land bearing No.D-94, in KDA Scheme No.1 (DRD), Karachi admeasuring 595 square yards together with constructed thereon. (hereinafter called the "suit premises"). The Karachi Development Authority on completion of requisite formalities transferred the said plot in the name of the Plaintiff vide mutation order dated 06.01.1994 and on 06.04.1994 executed a registered indenture of lease conferring ownership, title and leasehold rights in favour of

plaintiff. Later on, the Defendant No.1 illegally and forcibly took possession of the suit premises during temporary absence of the Plaintiff from Karachi. When the plaintiff came to know about the illegal possession by the Defendant No.1 the plaintiff lodged a complaint in the Court of Assistant Commissioner & S.D.M. Ferozabad, Karachi (East) against the Defendant No.1 on or about 10.02.1994. The complaint was disposed on 22.2.1994 with the brief order that the matter was purely of civil nature and the applicant (the plaintiff herein) could file a suit for possession in the competent civil Court. The plaintiff on 30.5.1994 filed the present suit and during pendency of the suit the Defendants No.2 and 3 in the second week of August, 1995 with the Defendant No.1 have also jointly occupied the suit property with malafide designs of defeating the decree that may be passed in this suit against the Defendant No.1. It was further averred in the plaint that the Defendant No.1 is the real son of Defendant No.3 as is evident from the title of the appeal memo in HCA No.31/1998. Learned counsel states that this relationship has been intentionally concealed by the defendants with malafide designs to mislead this Hon'ble Court. It is also averred in the plaint that Defendants No.2 and 3 fraudulently fabricated a so called Arbitration Award dated 22.10.1993 and obtained on its basis decree dated 20.2.1994 in Suit No.190/1994 passed by the learned IInd Sr. Civil Judge, East, Karachi wherein the Plaintiff was not a party; however, the decree was set aside on 27.11.1997 upon an application under Section 12(2) CPC moved by the Plaintiff and the Appeal No.1/1998 filed by the Defendants No.2 & 3 was also dismissed on 22.10.1998.

2. The Defendants No.2 & 3 filed application under Order 1 Rule 10 CPC being (CMA No.5282/1997 for getting themselves impleaded in the present Suit NO.365/1994 but it was dismissed by the then Hon'ble Mr. Justice Rana Bhagwandas on 17.11.1997. However, HCA No.31/1998 filed by the Defendants No.2 & 3 was allowed by consent on 27.3.2001. The plaintiff filed amended plaint and challenged the purported agreement to sell dated 16.5.1973, the receipt for Rs.60,000/- and also the purported General Power of Attorney relied upon by the Defendants No.2 & 3 forged, bogus and fabricated documents with forged signatures of late Ghulam Ali Khan father of Mst. Shahida Ghafoor. It is also averred by the Plaintiff that the defendant No.1 and the so-called Attorney whose names appear in Suit No.190/1994 before IInd Sr. Civil Judge, East, Karachi are imposters and fake persons. Even otherwise, the said alleged Power of Attorney purported to have been given by late Ghulam Ali Khan, automatically came to an end upon his death on 11.12.1973. Moreover, the purported Power of Attorney is not valid document is not properly stamped it does not empowers to execute conveyance deed of the immovable property involved in the present suit. The plaintiff's further case against the Defendant No.2 & 3 is that they had filed a frivolous and vexatious Suit No.1361/1997 in this Hon'ble Court against the present Plaintiff and others on the basis of illegal and fraudulent Award and decree in Suit No.190/1994 which was subsequently set aside by an order dated 27.11.1997 and the Appeal No.01/1998 filed by the defendants No.2 & 3 was also dismissed by judgment dated 22.10.1998 and as such the Defendants No.2 & 3 have no right in this suit property.

3. The plaintiff prayed for the following relief(s):-
- A. Declaration that the Plaintiff is true and lawful owner of the case property consisting of the plot of land bearing No.D-94, in KDA Scheme No.1 (DRD), Karachi, admeasuring 595 square yards, together with a partially constructed house thereon;
 - B. Delivery of peaceful and vacant possession of the aforesaid property and every part thereof to the plaintiff by the defendants No.1, 2 & 3 and / or anyone else claiming through or under the said Defendants;
 - C. Payment of mesne profits and/or damages at the rate of Rs.Five hundred per day from 18th November, 1993 till the date of delivery of vacant possession of the aforesaid property to the Plaintiff by the Defendants jointly and / or severally and / or anyone else claiming through or under the Defendants;
 - D. Payment of damages to the plaintiff by the defendants jointly and / or severally in the sum of Rupees One Million arising from ever increasing cost of construction, construction materials, and labour charges due to inordinate delay in construction on the aforesaid plot of land owing to trespass and illegal possession of the defendants thereion;
 - E. Permanent injunction restraining the defendants and/or anyone else claiming through or under them from denying and interfering with the legal right and title of the Plaintiff in and over the aforesaid property and every part thereof in any manner whatsoever;
 - F. Permanent injunction restraining the Defendants and/or anyone else claiming through or under them from selling, conveying, transferring, mortgaging, charging, encumbering, leasing, letting out, parting possession of, and / or dealing with the aforesaid property or any part thereof and doing any other act to the detriment and prejudice of the Plaintiff in any manner whatsoever;
 - G. Permanent injunction restraining the Defendants and/or anyone else claiming through or under them from raising any construction, effecting alteration, addition and / or demolition in and over the aforesaid property

to the detriment and prejudice of the Plaintiff in any manner whatsoever;

- H. Cost of the suit and incidental proceedings throughout; and / or,
- I. Any other relief(s) as may be just and proper to meet the ends of justice in the events and circumstances of this case.

4. Defendant No.1 filed written statement on 23.8.1994 denying the facts that he has any concern with the suit property. He averred that has been wrongly joined as defendant and prayed that suit may be dismissed against defendant No.1. The defendants No.2 & 3 filed their written-statement and beside raising preliminary objections, they denied each and every assertions and statements made in the plaint. They averred that the plaintiff was never in possession, use or occupation of the property or any part or portion thereof and as such there cannot be any question of taking over possession of the property by the defendant No.1 specifically because the defendant No.1 has no concern with property. The defendants No.2 & 3 have purchased the property on 16.5.1973 from its previous owner and original allottee Ghulam Ali Khan who had put the defendants No.2 & 3 in possession of the said property on 16.5.1973 and since then the defendants have been in peaceful and undisturbed physical possession of the said property in their own rights. It is further submitted that the plaintiff had complete knowledge that the defendants No.2 & 3 have been in peaceful and lawful possession of the property and maliciously initiated the proceedings against the defendant No.1 with his ulterior motives. Defendants No.2 & 3 denied that the plaintiff is a bonafide purchaser of the property or that he has paid any consideration. It was submitted that the plaintiff has

committed fraud in collusion with KDA staffs by falsely manipulating a fictitious person to get the property transferred in her name by showing the said fictitious person as daughter of original allottee Ghulam Ali Khan and thereafter got a lease deed executed and registered in his own name illegally, unlawfully and maliciously. It was also denied by the defendants that at any time it was concealed that the defendant No.1 is son of the defendant No.3. It was also denied that the defendants No.2 & 3 have fabricated the Award dated 22.10.1993 or obtained the order dated 20.2.1994 in Suit No.190 of 1994 in any unlawful manner. It was also denied that Shahida Ghafoor is a daughter of Ghulam Ali Khan. It is further denied that the defendants No.2 & 3 ever entered into any agreement of sale with any Mst. Shamima. It is submitted that Mst. Shamima is playing in the hands of the plaintiff and at the instigation of the plaintiff the said Mst. Shamima has filed suit No.1528/1997 which is false, incorrect and malafide and the defendants No.2 & 3 have filed their written statement in the said suit No.1528/1997. It is denied by the Defendants No.2 & 3 that suit No.1361/1997 filed by the defendants No.2 & 3 is a frivolous or vexatious suit. It is submitted that the said suit No.1361/1997 is legal and bonafide suit and the same is based on true correct and genuine facts. It was further submitted that the transfer as well as the lease of the property in favour of the plaintiff is illegal, unlawful and void and the same do not confer or create any right, title or entitlement of the plaintiff in the property and the transfer as well as the lease of the property in favour of the plaintiff are thus liable to be cancelled and present suit is liable to be dismissed.

5. The Court on 9.4.1995 from the pleading of the parties framed the following issues:-

1. Whether the plaintiff is owner of the suit property?
2. Whether the lease deed dated 16.4.1994 in favour of plaintiff was obtained by fraud and misrepresentation?
3. Whether the defendant has unlawfully trespassed in the suit property and liable to pay mesne profits/damages for use and occupation of the property?
4. Whether the suit is barred by Section 32 of the Limitation Act, by reasons of award in respect of suit property having been made rule of the Court in Suit No.190/1994 by the learned Second Civil Judge, Karachi East?
5. Whether the suit is not maintainable against the defendant?
6. Whether the plaintiff is entitled to the reliefs prayed for?

On 27.5.2002 two following additional issues were also framed.

7. Whether the arbitration award dated 22.10.1993 and rule of the Court/decree on its basis dated 20.2.2004 in Suit No.190/1994 passed by the Court of II Senior Civil Judge – Karachi East, in favour of the Defendants No.2 & 3 have been set aside on 27.11.1997 under Section 12(2) CPC by the said Court, and appeal against it has been dismissed by the IVth ADJ Karachi East, and have both these orders legally attained finality?
8. Whether the Plaintiff is entitled for the reliefs prayed for by him in his amended plaint in this suit?
9. What should the decree be?

Heard the arguments of Plaintiff's counsel and none appeared for the counsel for the defendants. The Court order sheets shows that on 11.12.2012 counsel for the Defendants No.2 & 3 have informed the Court that the defendants were not in contact with him and subsequently after complying the requirement of Section 50 of SCCR he withdrew his power. The Court showed indulgence and sent notices to the defendants and even SHO was directed to serve the defendants but all efforts have gone fruitless. Since evidence is already on record from either side, therefore, after hearing of the counsel and perusal of the record and evidence as well as written arguments, my issue wise findings are as follows:-

Issue No.1.

The burden of this issue was on the Plaintiff. The Plaintiff has filed duly executed original sale agreement dated 12.9.1993 and 20.10.1993 and newspaper cutting of daily Dawn dated 15.9.1993 showing the public notice inviting public objections to the sale of suit premises by Mst. Shahida to the Plaintiff, original mutation order of the property by inheritance in the name of Shahida Ghafoor daughter of original owner and mutation order as well as original registered lease executed by KDA in favour of the Plaintiff. The Plaintiff in the cross-examination has categorically denied any adverse suggestion of any fraud or misrepresentation in obtaining the lease. The Plaintiff has also filed original allotment order in the name of the original allottee Ghulam Ali Khan. The witnesses of the Plaintiff from KDA office namely Ather Hussain, Assistant District Officer, Directorate of Land & Estate, KDA in his

deposition has confirmed that the original allottee was Ghulam Ali Khan and after his death the property was mutated in the name of his daughter Shahida Ghafoor as legal heirs of Ghulam Ali Khan and thereafter lease deed was executed by KDA in favour of Plaintiff on 5.4.1994. No adverse suggestion has come forward in the cross-examination of Assistant District Officer KDA thus the Plaintiff has discharged his burden and successfully established that he is the owner of the suit property. It was claimed by the Defendants that a Suit No.1361/1997 was filed by them and in the cross-examination the witness admitted that the said suit No.1361/1997 has been dismissed by this Court. The following admission of the attorney of the defendants is very material [*Suit No.1361/1997 was filed by my principals Syed Hussain Ali Zaidi and Muhammad Saleem regarding the subject suit property in the High Court of Sindh. I have taken part in Suit No.1361/1997 as attorney. I do not remember that suit No.1361/1997 was filed under my instructions as attorney of the Plaintiffs. The said suit No.1361/1997 has been dismissed by the Court. It is correct that as attorney of Defendants No.2 & 3 I am giving reports to them about the proceedings in different suits relating to the subject property*].

After this admission of the Defendants' witness that their suit whereby they were seeking declaration of ownership of the suit premises on the basis of the so called agreement of sale dated 16.5.1973 and cancellation of lease by KDA in favour of Plaintiff herein has been dismissed, the possession of the suit property even if it was lawful at one point of time under the cover of so called agreement to sell has become unlawful. Since Defendants have failed to place on record original of even their own agreement

of sale dated 16.5.1973, it cannot be presumed that the Defendants are in unlawful possession of the suit premises. Issue No.1 is answered in affirmative.

Issue No.2

The burden of this issue was on the Defendants who alleged that Plaintiff has obtained lease by fraud and misrepresentation. The evidence of Assistant District Officer, KDA has confirmed that no fraud has been committed in leasing the suit property in favour of the Plaintiff. The defendants have failed to even remotely suggest the particulars of fraud and misrepresentation. Without any tangible evidence suggesting fraud, it cannot be held that the Plaintiff has committed any fraud, therefore, the Issue No.2 is answered is negative.

Issue No.3

The Plaintiff has placed on record complaint filed by the him against Defendant No.1 who happened to be son of the Defendant No.3 that has forcibly taken over possession of the suit property and it has not been disputed by the Defendant that such complaint was not lodged and disposed of by the concerned SDM Ferozabad, Karachi with the observation that this being a Civil dispute parties should approach the Civil Court. Thereafter the Plaintiff has filed this suit. The Defendant No.2 & 3 were not initially party to the suit as they had joined the Defendant No.1 and subsequently filed an application under Order 1 rule 10 CPC to be joined as Defendants. Their application was granted and amended plaint was filed wherein the claim of the Defendant was also challenged by the Plaintiff. In view of my findings on issue

No.1 & 2, once the ownership of suit property is established in favour of the Plaintiff, the possession of Defendants cannot be lawful. An unlawful occupant of the suit premises can only be termed as “trespasser”. The Plaintiff in para-5 of his affidavit-in-evidence has claimed mesne profit @ Rs.500/- per day from the Defendant and in the cross-examination it is not being even remotely suggested that the Plaintiff are not entitled to the mesne profit or the claim is exaggerated. It is admitted position that from the date of filing of criminal complaint by the Plaintiff against the Defendant No.1 on or about 10.2.1994 the Plaintiff was denied to enjoy ownership right in the suit premises which he owned lawfully with valid title documents in his favour and as such the Plaintiff from the date of illegal possession of the Defendants is also entitled to mesne profit @ Rs.500/- per day from 07.02.1994 when he lodged complaint of forcible possession against the defendants. However, the Plaintiff has not produced documentary evidence to justify claim of damages, therefore, no damages can be awarded on account of increase in cost of construction material. The Plaintiff is only entitled to mesne profit as prayed. The Issue No.3 is decided accordingly.

Issue No.4 & 7

Issue No.4, & 7 are common and the burden of these issues was on the Defendants to show that how the arbitration award dated 22.9.1993 has any effect on their claim and therefore, the suit is not maintainable against the defendants. The defendants have mostly relied on agreement of sale dated 16.5.1973 with the owner Ghulam Ali Khan coupled with General Power of Attorney dated 26.5.1973 given by him to one Muhammad Ali. The

Defendants have not come in witness box and they have preferred to send one Abdul Mateen as their attorney and witness. The attorney has only produced photocopy of agreement dated 16.5.1973 as well as the photocopy of so called power of attorney executed by Ghulam Ali Khan. Originals were neither produced nor any justification was offered that under what circumstances photocopies of material documents have been produced. It is also admitted by the witnesses of the Defendants in the cross-examination that the award, which was made rule of the Court in Suit No.190/1994 was set aside. The following admission is material to this effect "*it is correct that the decree which was passed on the basis of the Award given in the Arbitration proceedings was set aside in respect of the subject property.*" The issues No.4 & 7 are decided in negative.

Issues No.5, 6 & 8

Since the Defendants have themselves chosen to come forward and become party in this case on the basis of sale agreement dated 16.5.1973 and award dated 22.10.1993 the plaint was rightly amended and the relief in the amended plaint against the defendants No.2, and 3 is obviously maintainable. In view of my finding on issues No.1 to 4 and issues No.7, the suit is very much maintainable against the defendants, since the defendants were threatening the ownership of the Plaintiffs and were in illegal occupation of suit premises, the plaintiff is entitled to the relief claim against the Defendants No.2 & 3. The issue No.5 is answered in negative and issue No.6 & 8 are answered in affirmative.

Issue No.9

In view of the above findings, it is hereby declared that the Plaintiff is lawful owner of the suit premises bearing Plot No.D-94 KDA Scheme No.1 measuring 595 sq.yds and entitled to the peaceful vacant possession from the Defendants No.1, 2 & 3 or any one claiming through or under them alongwith mense profit from the defendants jointly and severally. Hence suit is decreed only in terms of prayer clause 'A', 'B' & 'C' alongwith cost of the suit.

JUDGE

Karachi
Dated:_____

S.M