

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Suit No.1684/2006

Date	Order with Signature of Judge
Date of hearing	: 18.02.2015
Plaintiff	: Mr. Muhammad Ali, through Mr. Shaiq Usmani, Advocate.
Defendant No.1	: M/s. Union Construction (Pvt.) Ltd.
Defendant No.2	: Beharilal.
Defendant No.3	: Mrs. Shella Kumari.
Defendant No.4	: Modaraba Al-Tijarah.
Defendant No.5	: Ghulam Rasool.
Defendant No.6	: Sub-Registrar, T. Division-XI. City Court, Karachi. All Exparte.

JUDGMENT

NAZAR AKBAR, J. Plaintiff has filed this suit for declaration, cancellation of documents and injunction against the defendants.

2. Brief facts of the case are that the Plaintiff is the lawful owner of Shop No.1, Ground Floor, Plot No.3, Survey No.5, Survey Sheet No.35/P-I, New Karachi Co-operative Housing Society, Karachi (hereinafter referred to “the suit property”) by virtue of Indenture of sub-lease executed by Defendant No.1 in favour of the Plaintiff duly registered with Sub-Registrar T-Division XI, Karachi vide Registration No.7593 dated 20.10.1994 at Book No.1 M.F. Role No.2003 dated 01.12.1994. Defendant No.1 is a construction company which had constructed the building on the aforesaid plot apparently belonging to Defendant No.5, who had also given a General Power of Attorney to them, while Defendant

No.2 and 3 are Directors of Defendant No.1 Company. It is important to note that Defendant No.3 also happens to be the wife of Defendant No.2. The Plaintiff is in possession of the suit property since 1994 and running a business of carpets and draperies since then and paying all taxes, utility bills etc. in respect of the suit property regularly.

3. The Plaintiff at the time of purchase of property, was unaware of the fact that Defendant No.1 through its Director namely Defendant No.2 as attorney of Defendant No.5 had transferred the suit property to Defendant No.3, who happened to be wife of Defendant No.2, vide registered Indenture of Sub-lease dated 18.11.1992. It is significant to note that while the Indenture of Sub-lease for the said property in favour of Defendant No.3 has been registered on 17.11.1992, the sub lease itself has been entered into between Defendant No.5 through Defendant No.1 one day after i.e. 18.11.1992. The Defendant thereafter deposited the alleged title deed of the suit property under a Memorandum of Deposit of Title Deeds dated 20.12.1993 with Defendant No.4 in consideration of finances to be advanced to Defendant No.3. At the same time, the Defendant No.3 also gave a General Power of Attorney in respect of the suit property to Defendant No.4. It is significant to note that one of the witnesses to both these documents was Defendant No.2 husband of Defendant No.3, who had transferred the property in her name in the first instance. It appears that later a Collateral Mortgage Deed dated 10.10.1996 was registered between Defendant No.3 and Defendant No.4 in respect of the suit property when on the said

date, the suit property had already been transferred to the Plaintiff and was in their possession. It appears that defendant No.3 defaulted in payment of the finances advanced to her by Defendant No.4, whereafter Defendant No.4 filed Cr. Complaint No.08/2000 against the Defendants No.2 and 3 pursuant to which a warrant of attachment was issued and was served on the Plaintiff on 21.03.2002. However, on examination of the Criminal Complaint No.08/2000, it was found that the Criminal Complaint had been filed in respect of some other shop in the same building namely Shop No.81 on the ground floor and not Shop No.1, which is the suit property. The Plaintiff filed his objections to the said Criminal Complaint and in consequences thereof the warrant of attachment was not executed against suit property. It appears that subsequently Defendant No.4 also filed Suit No.04/2004 against Defendants No.1, 2 and 3 in the Banking Court No.I at Karachi, which was decreed *ex parte* vide Judgment dated 17.05.2004, followed by an Execution Application No.61/2004, which was allowed and once again warrant of attachment in respect of the suit property was issued on 18.09.2004. It would appear that earlier in response to directions of Banking Court, the Sub-Registrar, Central Record, City Courts, Karachi had filed copies of two search certificates under cover of his letter dated 21.04.2003, one of which shows the said property to be registered in the name of only the Defendant No.3 and the other shows it to be registered in the name of Plaintiff as well as the Defendant No.3 and also shows that mortgage existed on the said property.

4. The Plaintiff on receipt of this warrant of attachment came to know of the existence of prior sub lease in respect of the suit property in favour of Defendant No.3 and also that a mortgage had been created on it. He, therefore, immediately filed objections to attachment of the said property in the Banking Court but his objections by order dated 07.12.2005, were rejected by the Banking Court. Since the Banking Court had been pleased to pass order without any investigation, the plaintiff preferred an appeal, which is pending before the Division Bench of this Hon'ble Court. The Plaintiff further pleaded in the plaint that an examination of Indenture of Sub-lease in favor of Defendant No.3 would show that it was clearly malafide and void for the reasons that the said property was transferred by husband (Defendant No.2) to wife (Defendant No.3); the date of Indenture was subsequent to the date of its registration; there is no evidence of any consideration in addition to the nominal consideration towards the occupancy value, passing from the purchaser (Defendant No.3) to owner (Defendant No.1, 2 and 5; who never appeared to defend the Suit No.04/2004 in the Banking Court inspite of notices being duly served on them. It is obvious from the foregoing that the sale of the said property to Defendant No.3 was resorted to by her husband i.e. Defendant No.2 purely to obtain finances and was malafide and inherently fraudulent. It has been further pleaded by the plaintiff that this suit is not barred by time as he learnt about the earlier fraudulent sale of the said property only when warrant of attachment of the said property issued in Execution Application No.61/2004 was served on him on or about 18.09.2004.

5. The plaintiff has prayed for the following relief:-

- i) Declare that the Indenture of Sub-lease dated 20.10.1994 registered in the name of the Plaintiff is a valid document of title in respect of Shop No.1 on Ground Floor of leasehold Plot bearing No.3, Survey No.5, Survey Sheet No.35/P-1, New Karachi Cooperative Housing Society, Karachi and the Indenture of Sub-lease dated 18.11.1992 Registration No.2990 dated 17.11.1992 registered in favour of Defendant No.3 in respect of the same property is void and of no legal effect.
- ii) Direct Defendant No.6 to cancel with immediate effect the Indenture of Sub-lease dated 08.11.1992, Registration No.2990 dated 17.11.1992 in favour of Defendant No.3 (Mrs. Shela Kumari wife of Biharilal) in respect of Shop No.1 on Ground Floor, constructed on leasehold plot of land bearing No.3, Survey No.5, Survey Sheet No.35/P-1, New Karachi Cooperative Housing Society, Karachi.
- iii) Grant permanent injunction restraining the Defendants from interfering with peaceful possession and use by Plaintiff or any one on his behalf, of Shop no.1 on Ground Floor, constructed on the premises described above.
- iv) Grant any other or better relief(s), which this Hon'ble Court may deem fit, proper under the circumstances of the case.

6. The notices/summons were issued to the defendants, which were not served in due course and after exhausting other modes of service, the publication was ordered as on the basis of publication by order dated 08.10.2007 and 06.08.2008 all the defendants were declared exparte. The plaintiff filed affidavit-in-exparte proof on 18.12.2008.

7. In support of his pleadings the plaintiff has filed affidavit-in-exparte proof as Exh.PW-1/5 and other documents as Exh.PW-5/1 to Exh. PW-5/8.

8. I have examined the evidence and also heard learned counsel for the Plaintiff.

9. The plaintiff has produced original documents which amongst other include Ex.P-5/2, Ex.P-5/7 and Ex.P-5/8 namely registered lease deed in favour of the plaintiff, another lease deed in favour of defendant No.3 and the deed of redemption of mortgage from M/s. Moderaba Al-Tijarah managed by JS Finances Limited executed on 06.04.2006. These three original documents are very material to accept the contentions of the plaintiffs as even otherwise nobody has ever challenged the claim of the plaintiff. The plaintiff's evidence has gone unrebutted and unchallenged. Therefore, there is no option but to believe the unchallenged version of the plaintiff. The suit was decreed on 18.02.2015 for reasons to be recorded. The above are the reasons for the decree awarded by short order.

JUDGE

Karachi,
Dated:24.02.2015