

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO.688 OF 2012

Plaintiff : Mrs. Ambia Khatoon
through Mr. Rizwan Ahmed, Advocate

Defendants : Hidayatullah, defendant no.1
Through Mr. Ali Asghar Buriro, Advocate

Date of hearing: 02.02.2016.

Date of Judgment: 13th April.2016.

JUDGMENT

SALAHUDDIN PANHWAR J: Succinctly, facts as set out in the plaint are that plaintiff filed a suit for Declaration, Permanent Injunction, Removal of Encroachment, Possession & Damages amounting to the tune of Rs.21 Million contending therein that plaintiff is original allottee of plot no.5 Block No.'D' admeasuring about 400 Sq.yrds in M/s Ali Town Housing Project; possession thereof was handed over to the plaintiff; thereafter lease bearing registration No.200 was executed by one Malik Muhammad Asadullah, Landlord of M/s Ali Town Housing project, in favour of the plaintiff; since then the plaintiff is the lawful owner of the said plot. Plot owners of Ali Housing Project formed an Association: 'M/s Ali Town Allottee(s) Association bearing Registration No.6577'. The plaintiff also became member of the same association and paid different charges of the association and attended different meetings. Plaintiff constructed boundary wall and two rooms, on suit plot. On 15.5.2012 the residents of the area conveyed to the plaintiff that: "the constructions raised by her has been demolished by the defendant no.1, who is running a shop nearby on plot no.D-6 and is also raising constructions in the shape of shops on the plot of the plaintiff by demolishing the construction." Resultantly the

plaintiff's husband approached the defendant no.1 and disclosed him that the plot and constructions belongs to his wife, defendant no.1 refused to vacate the same. The husband of the plaintiff then rushed to police station 'Sohrab Goth' and tried to lodge FIR but not succeeded. Defendant no.1 in collusion with defendants no.2 and 4 has illegally taken over possession of the plaintiff's plot and demolished the house; raised his own construction on the vacant plot of the plaintiff, thereby causing mental tension and torture to plaintiff and her husband and has also caused financial loss to the tune of Rs.1000,000/- in shape of demolishing the constructions and occupying her plot valuing of Rs.5 Million and Rs.15 Million in shape of mental tension and torture, total Rs.21 Million. Plaintiff claimed documents of defendant no.4 as forged, fabricated and non-registered hence of no legal consequences.

2. The defendant no.4 was not one of the parties in original suit, however, he was allowed to be joined as defendant on his own application U/O 1 r 10 CPC. Defendant nos.1 and 2 *however* did not appear hence were declared *ex-parte*.

3. Defendant no.4 filed his written statement wherein pleaded that Mr. Muhammad Khalid Sheikh is original allottee of subject matter property. It was however admitted that defendant no.2 entered into written agreement with Mr. Abdul Rehman whereby defendant no.2 and Mr. Abdul Rehman Abbasi signed a joint venture in respect of Ali Town Housing project; defendant no.2 had also executed irrevocable general power of attorney in favour of said Abdul Rehman, vide registration no.248. Later on dispute arose between them hence Abdul Rehman Abbasi filed suit bearing No.792/1991 for Declaration and Perpetual injunction which was culminated under Order XXIII rule 3 CPC, vide order dated 26th May, 1994, whereby Mr. Abdul Rehman Abbasi was declared as owner of the project in respect of all affairs

pertaining to Ali Town Housing project; Muhammad Khalid Sheikh also paid Rs.200,000/- to Abdul Rehman Abbasi. It was also claimed that mere an act of becoming member of association does not create any legal character over property; defendant no.4 being allottee is not aware about any association in respect of Ali Town Housing Project. Claim of plaintiff for possession and raising construction was denied. Defendant no.4 claimed to be original and bonafide owner/purchaser of Plot No.D-5, while plot No.D-6 was claimed to be owned by Fareed and his brothers. It was pleaded that defendant no.4 purchased plot No.D-5 from Muhammad Khalid Sheikh; that after execution of sale agreement and General Power of attorney in favour of Muhammad Yaseen son of Noor Muhammad, the legal character devolves to Mr. Muhammad Yaseen who handed over possession of plot to his business associates so causing of damage to property, as claimed by plaintiff, was denied.

4. Defendant no.3 (SBCA) in its written statement claimed that no approval has been granted by authority for construction nor any demolition permission was obtained from the authority. It was further asserted that land is legally under possession of government hence construction of two rooms is liable to be processed through Encroachment Cell of KMC. The contents of the plaint were denied being not related.

5. Out of the pleadings of the parties, the following issues were framed by order dated 17.02.2014, which are as under:-

- 1) Whether the suit suffers from non-joinder and misjoinder of parties?
- 2) Whether the plaintiff is owner of plot bearing No.5, Block-D, measuring 400 Square yards in M/s Ali Town Housing Project?
- 3) Whether the defendants No.1 to 4 are liable to be evicted from the subject property and handed its possession 12to the plaintiff?

- 4) Whether any amount outstanding and due against defendants No.1 to 4?
 - 5) Whether any construction is liable to be demolished by the defendant No.3?
 - 6) What should the decree be?
6. Commissioner was appointed for purpose of recording of evidence.
7. During evidence, the plaintiff submitted her affidavit in evidence and that of her witness i.e PW-1 Muhammad Nayaz Ahmed Khan while the defendant no.4 also filed his own affidavit in evidence so also of his witnesses i.e DWs-1 Ali Zafar; DW-2 Muhammad Zahir and Siddiquallah.
8. Plaintiff examined herself and produced her affidavit in evidence (PW/1); Registered indenture of Lease dated 15.01.1976 in respect of Ali Town for allotment of plot No.5, Block No.D (PW/1-2), Site plan for Plot no.5, Block-D of Ali Town Housing Project (PW/1-3), search Certificate dated 09.5.2012 on application No.2072 for period between 15.01.1976 to 31.12.1999 for plot no.5, Block-D, Ali Town (PW/1-4), Search Certificate dated 08.5.2012 on application No.169 issued on 15.5.2012 for period from 07.01.2000 to 31.12.2005 in respect of plot No.5, Block-D S.No.71/,75,76,77,83, Deh Gujro Tapo Songal, Karachi (PW/1-5), Search Certificate dated 07.5.2012 on application no.539 for period from 01.01.2006 upto date of issuance in respect of plot No.5, Ali Town Tapo Songal, Karachi admeasuring 400 Sq. yard (PW/1-6), receipt No.000610 issued by City Development Corporation dated 22.12.1978 for an amount of Rs.600/- only from Mst. Ambia Khatoon on account of commission for plot No.5, Block D (PW/1-7), receipt for a sum of Rs.3400 bearing No.000951 dated 22.12.1975 from Ambia Khatoon to Ali Town as advance on account of legal documentation in respect of plot no.5 (PW/1-8), Membership Card No.0090

issued to Mst. Ambia Khatoon by Ali Town Allottees Association (PW/1-9), receipt dated 08.12.1982 issued by Ali Town Allottees Association for monthly subscription of Rs.150 in favour of Mst. Ambia Khatoon (PW-1-9/1), notice from Ali Town Allottees Association (PW/1-10), Confirmation/Form for grant of membership to Mst. Ambia Khatoon by Ali Town Allottees (PW/1-11), two notices for meeting of Ali Town Allottees Association (PW/1-12 and PW/1-13), demand notice from Ali Town Housing Project issued to Ambia Khatoon asking for 1st instalment of Rs.1800 against plot No.5, Block-D (PW/1-14), certified copies of decree dated 26.5.1994 of suit no.792/1991 (PW/1-15) and un-certified copy of order dated 03.4.1995 in Suit No.792/1991 as X-1; she was also cross examined so also her witness.

9. Defendant no.4 was examined who produced his affidavit in evidence (Ex.DW/4-1), general power of attorney duly registered (DW-4/1/1), application form for Ali Town no.1 and no.2 dated 24.2.1978 (DW-4/1/2), receipt dated 29.4.1978 for a sum of Rs.25,000/- only issued by Ali Town (DW-4/1/3), receipt dated 10.01.1981 for a sum of Rs.20,000/- issued by Ali Town (DW-4/1/3), receipt dated 10.01.1981 for a sum of Rs.20,000 issued by Ali Town (DW-4/1/4), agreement to lease dated 1981, executed by defendant no.2 in favour of defendant no.4 (DW-4/1/5), possession order dated 11.01.1980 issued by Ali Town through defendant no.2'2 (Dw-4/1/6), copy of decree in suit no.792/1991 (DW-4/1/7), receipt dated 09.01.1997 for Rs.200,000/- issued by Ali Town to Muhammad Khalid (DW-4/1/8), copy of sale agreement and receipt for Rs.45,00,000/- between Muhammad Khalid and defendant no.4 dated 17u.4.2012 (Dw-4/1/9 & DW-4/1/10), plan/map for plot No.D-5 (DW-4/1/11); the witnesses of the defendant no.4 were also examined. They all were cross examined.

10. Learned counsel for plaintiff *inter alia* contends that the registered lease in favour of the plaintiff is prior in time and no proof of its cancellation has been produced by the defendant no.4 hence plaintiff is legally entitled for decree in her favour; a registered document shall prevail over the subsequent document even if executed by same owner. He placed reliance on the case law, reported as PLD 2003 SC 88 and PLD 2013 Sindh 327.

11. On the other hand, counsel for defendant no.4 argued that sale in favour of the defendant is established/proved as both marginal witnesses have been produced; he also referred to para-5 of plaint and letter (page-65) that possession is also with the defendant hence he prayed for dismissal of the suit with costs.

FINDINGS.

Issue No.1	negative.
Issue No.2	affirmative
Issue No.3	affirmative.
Issue No.4	as discussed.
Issue No.5	as discussed.
Issue No.6	partly decreed.

ISSUE NO.1

Whether the suit suffers from non-joinder and misjoinder of parties?

12. This is a legal issue *however* burden whereof lies upon the defendants. It is well settled principle of law that a non-joinder or mis-joinder shall not result into dismissal/rejection of the plaint and such error/mistake is always open to be corrected either on application of the parties or *even* the Courts can *competently* exercise such jurisdiction without waiting for such an

application if it appears to the Courts that proper determination of all *involved questions* require impleading of any such person as *party*. In the instant matter, there has been a *title document* in favour of the one Muhammad Khalid Sheikh, who *earlier* was not made as one of the defendants by the plaintiff but he was joined as *defendant no.4* in the suit, hence it, *prima facie*, appears that non-joinder, *if any*, stood covered as defendant no.4 has *hotly* contested the suit. In view of this position, the issue no.1 is answered in negative

ISSUE NO.2

‘Whether the plaintiff is owner of plot bearing No.5, Block-D, measuring 400 Square yards in M/s Ali Town Housing Project?’

13. The *onus probandi* undeniably falls upon the plaintiff to prove this issue. At this juncture, it is material to mention here that since the claim is revolving round the *registered document* therefore, I *would* first make it clear that though a registered document attaches sanctity thereto yet it (registered document) is not absolved from examination by competent Court of law, as held in the case of *Rasheed Bibi v. Mukhtar Ahmed* (2008 SCMR 1384) that:-

9. The mere admission of making thumb-impression or appearing before the Sub-Registrar is not sufficient..... **Moreover, mere registration of a document in itself is not under the law proof of its execution by a person by whom it was alleged to have been executed**, if any of the parties in litigation had denied its execution by the said person. **In the case in hand, the executants themselves disputed the execution of the document. Therefore, the person claiming the execution of such document is required under the law to prove its execution by producing evidence that it was in fact executed.** Reliance in this behalf can be placed on the case of *Muhammad Sharif Uppal v. Akber Hussain* PLD 1990 Lah. 229

In another case of *Muhammad Khan v. Rasul Bibi* (PLD 2003 SC 676) it is held that :

12. The issue of presumption of correctness and authenticity of a registered document in the context of certificate of registration under section 60 of Registration Act was considered by Lahore High Court in Muhammad Sher v. Muhammad Azim (PLD 1977 Lahore 729). After distinguishing earlier judgment in Piara v. Fattu (AIR 1929 Lahore 711), it was held that certificate of registration is only to show the execution of the document and presumption beyond that cannot be drawn therefrom.

It was held that it was clear that if in the given circumstances of a case genuineness or bona fides with regard to the execution of a document were in doubt then the inquiry could be held in that behalf and no presumption to the effect that such and such document had actually been executed by a genuine person in all circumstances could be drawn.

It was ruled that section 60 only provides that when a certificate containing the words 'registered' was endorsed by the Registering officer on the document, document was admissible for the purpose of providing that it was duly registered in the manner provided by the Act and the fact mentioned in the endorsement referred to in section 59 occurred as mentioned therein.

(Underlining is supplied for emphasis)

Thus, I can *safely* conclude that the Courts are competent to examine the legality and validity of a registered document but *normally* it would be the executant thereof *only* to question the *bonafide execution* thereof however questioning legality thereof is not limited to it.

14. Reverting to merits of the case, the record shows that in order to substantiate, the plaintiff examined herself and one witness. She has produced number of documents, including the *registered indenture of Lease dated 15.01.1976* in respect of plot in question. This document (*registered lease*) is executed by the defendant no.2 (Malik Muhammad Asadullah), whose competence and legal status as *owner* is not denied by the defendant no.4 *even* as is evident from his pleading and evidence:

In para-1 of written statement, the defendant no.4 stated that:

‘1. That contention of para no.1.....Mr. Muhammad Khalid Sheikh was allotted a plot no.D-5, admeasuring 400 sq. yds in Ali Town Housing project. (such copy of application and receipt

duly acknowledged by the defendant no.2 was issued to the defendant no.4). However..

The defendant no.4 in his *affidavit in evidence* that:

”V. The **defendant no.2** after the receipt of above final payment had executed agreement to lease with Muhammad Khalid Sheikh in year 1981 and had also handed over physical possession....”

At this juncture, it is worth mentioning here that things admitted in pleadings, needs not be proved because only those are to be proved or disproved which are *disputed*. A reference in this respect may be made to the case of *Muhammad Iqbal v Mehboob Alam* (2015 SCMR 21) wherein it is observed that:

‘It is a settled principle of law that a fact admitted needs no proof, especially when such admission has been made in the written statement (see PLD 1975 SC 242), and it is also settled that no litigant can be allowed to build and prove his case beyond the scope of his pleadings.....’

15. Thus, competence and legal authority of the *executant* of such document (*defendant no.2*) should not be a question of dispute *any more* rather is an *admitted fact*. She has also brought on record the certificates, issued by the Sub-Registrar-II, Gulshan –e-Iqbal town Karachi which certifies execution of *registered lease deed* by Malik Muhammad Asadullah (*defendant no.2*) in favour of the plaintiff Mst Ambia Khatoon, hence execution of such registered lease deed in favour of the plaintiff by *competent* person before competent authority stood proved. At this point, it is relevant to mention that as per law the registered document has sanctity attached to it and *normally* is a notice to all, therefore, it binds not only the parties *thereto* but also upon 3rd person in respect of *subject matter*. The *presumption* is so because it is not practicable to put the *whole world* on notice before entertaining a document for registration by Registering Officer and he is only to make inquiry in respect of *competence* of the *executant*. The document, *duly entertained and*

registered by Registering Officer therefore attaches sanctity thereto unless proved *otherwise* before competent Court of law. A reference in this regard can be made to the case of *Rasool Bukhsh & another v Muhammad Ramzan* (2007 SCMR 85) wherein it is observed that:

‘It is a settled law that the registered document has sanctity attached to it and stronger evidence is required to cast a aspersion on its genuineness as law laid down by this Court in Mirza Muhammad Sharif’s case NLR 1993 Civil 148. It is pertinent to mention here that the registered document is not only binding to the parties in the document but is equally applicable to the 3rd party. See Gosto Beharidas’s case AIR 1956 Kalkata 449.’

16. As discussed above, from the discussion, it is quite clear that factum of execution of registered lease deed in favour of the plaintiff stood proved. The moment the execution of a document stands proved but if some body else (not executant himself) disputes legality thereof, the burden shifts upon such a person because in such eventuality such person would be the *beneficiary* of ‘declaration of such *registered document* as **illegal**’.

17. Perusal of the record shows that the executant of such document i.e *defendant no.2* has not come forward to dispute the bonafide thereof nor the defendant no.4 got him (*defendant no.4*) examined rather came forward with a plea that :

“*q. Please see page 8 para marked ‘g’ of the indenture of lease, is it correct to suggest that by virtue of this para, your plot has been cancelled and there after re-possessed?*”

This means that defendant no.4 was not disputing legality of registered lease deed in favour of the *plaintiff* but was alleging that it was *cancelled*, ‘repossessed’ and then re-allotted, however, the perusal of the record shows that the defendant no.4 produced nothing to substantiate such claim except

mere words. However, let's have a direct reference to referred portion of the lease deed in favour of the plaintiff which is:

'(g) In case the Ground Rent or any other dues/charges reserved herein remain unpaid 21 days after due date (whether demanded or not) the Lessor shall charge interest at the rate of 7 ½ % or terminate and forfeit this lease together with 25% of the occupancy value of the demised plot and resume possession of the said plot at the Lessor's discretion;'

18. The termination and forfeiture clause is not *first* step, even where there is a default from the lessee. Be that as it may, pertinent to say that even by mentioning such clause the lessor shall not earn an absolute authority/right to cancel/terminate a *legally* created right particularly when it causes penal effects. There can be no denial to the legally established principle of law that no penal action can be taken without *proper procedure* least service of notice. In short, a registered document, even if containing a clause of termination, cannot be cancelled without proper procedure least a notice.

19. It is a matter of record that lease deed in favour of the plaintiff pertains to 15.01.1976 while the allotment in favour of Muhammad Khalid Sheikh (defendant no.4) is claimed to vide application dated 24.02.1978 which *prima facie* establishes to the fact that allotment in favour of the defendant no.4 is subsequent to registered lease deed in favour plaintiff. At this point, it would be relevant to mention here that unless *earlier* document is not adjudged as *'illegal or void'* or *'cancelled/terminated'* the subsequent documents cannot create any legal right in favour of subsequent purchaser. Even if, the subsequent deed (document) is established to be proved validly executed yet it shall create no right in respect of subject matter if earlier deed is not established to have lost its legality at time of execution of subsequent deed (document) because the executant cannot *legally* possess/hold **'competence'** which stood passed from his hands to purchaser/lessee, as the

case may be. In absence of '*competency*' no legal right can be validly transferred. It can safely be concluded that in events of two document(s), the *prime burden* is to establish room for execution of subsequent transaction which *legally* cannot be available unless *first* (earlier) transaction continues holding field. Let me insist that even a decree of Court will not effect the legal rights of those documents and persons, not subject matter and party to such proceedings else provision of Section 39 and 42 of Specific Relief Act shall loose their objects. The execution of general power of attorney by defendant no.2 in favour of Abdul Rehman Abbasi on 06.5.1991 and even decree, drawn in a suit filed by Abdul Rehman Abbasi, shall not disturb the rights already created by defendant no.2 in favour of any person, including the plaintiff else, it shall frustrate the basic object of well established principle of law i.e '*one cannot transfer better title than what he holds*'. Thus, subsequent acts, documents and even decree in Suit No.792 of 1991 are of no help for the defendant no.4 because all these things (events), *no where*, establish legal cancellation/termination of lease deed dated 15.01.1976. In absence thereof, all such things (events) *at the most* can allow a right in favour of the defendant no.4 to claim damages from the defendant no.2 or any other person, acted in his name, as defendant no.2 or any other person at time of execution of document in favour of defendant no.4 was not *legally* competent for transferring the rights in respect of subject matter property because same already vested in favour of plaintiff. Now, it can safely be concluded that the failure of the defendant no.4 to establish *cancellation/termination* of the lease deed in favour of the plaintiff by competent person shall leave him (defendant no.4) with only remedy to sue the executant for damages *only*.

In view of above discussion, the issue no.2 is answered as '*affirmative*'.

ISSUE NO.3

Whether the defendants No.1 to 4 are liable to be evicted from the subject property and handed its possession to the plaintiff?

20. This issue is sub-ordinate to the issue no.2 because in law to retain possession one must have legal authority for holding such possession. In absence of legal authority, the possession cannot be termed as 'lawful' even if one claims to have spent '*huge amount*' for possessing. It is not the amount/money which earns a right but legal *consideration* which matters. Since the discussion on the issue no.2 has made it clear that the plaintiff is lawful owner of the subject matter property, hence defendant nos.1, 2 and 4 or any other person, claiming under them, is not legally justified to retain possession over the subject matter. In absence of legal title, the defendant nos.1 to 4 or any other person, claiming under them, cannot keep the lawful owner (plaintiff) out of possession of the subject matter.

21. In view of above discussion and legal position, I am of the clear view that the defendant nos.1 to 4 or any other person, *claiming* under them, are liable to be evicted from the subject matter. Accordingly, the issue no.3 is answered as '*affirmative*'.

ISSUE NO.4

Whether any amount outstanding and due against defendants No.1 to 4?

22. This issue seems to be relating to *damages*, claimed by the plaintiff in the suit hence thereof burden is upon the plaintiff to prove the same. The plaintiff though claimed to have suffered mental tension and financial loss due to act of defendant nos.2 to 4 because of demolishing of construction and possession over subject matter but except mere words, brought nothing on record to substantiate claim of damages. It is settled

principle of law that mere words of ‘damages’ are not sufficient to earn damages but one is required to prove the same by leading cogent and reliable evidence. In absence thereof, no damages can be awarded. A reference may be made to the case of ‘*Malik Gul Muhammad Awan v. Federation of Pakistan* (2013 SCMR 507)’ wherein it is held as:

3.....‘However, awarding of damages is discretionary and the said discretion is to be exercised in the light of the evidence led qua the extent of damages suffered by a party. Petitioner claimed damages to the tune of Rs.81.82 Million but it has concurrently been found that petitioner failed to substantiate the claim to the said extent by cogent evidence. In these circumstances, a duty is cast on the court. In *Sufi Muhammad Ishaque v. the Metropolitan Corporation, Lahore through mayor (PLD 1996 SC 737)*, it was held as under:-

‘Once it is determined that a person who suffers mental shock and injury is entitled to compensation on the principles stated above, the difficult question arises what should be the amount of damages for such loss caused by wrongful act of a party. There can be no yardstick or definite principle for assessing damages in such cases. The damages are meant to compensate a party who suffers an injury. It may be bodily injury loss of reputation, business and also mental shock and suffering. So far nervous shock is concerned, it depends upon the evidence produced to prove the nature, extent and magnitude of such suffering, even on that basis usually it becomes difficult to assess a fair compensation and in those circumstances it is the discretion of the Judge who may, on facts of the case and considering how far the society would deem it to be a fair sum, determines the amount to be awarded to a person who has suffered such a damage. The conscience of the Court should be satisfied that the damages awarded would, if not completely, satisfactorily compensate the aggrieved party.

4. It is by now a well established principle that the person claiming special damages has to prove each item of loss with reference to the evidence brought on record and for general damages as claimed by petitioner relating to mental torture, agony, defamation and financial loss, those are to be assessed following the Rule of Thumb and the said exercise falls in the discretionary jurisdiction of the court which has to decide it in the facts and circumstances of each case. The Courts below having appreciated the evidence led have already determined the damages to which petitioner could be entitled. In order to show that the amount of damages determined by the learned Division Bench vide the impugned judgment is not commensurate with

the extent of shock and injury suffered by the petitioner, he has placed on record photocopies of certain documents which were never tendered in evidence during trial or appeal. These documents at this belated stage are of no avail to him. At no stage, the petitioner filed application for additional evidence either.”

(Underlining is supplied for emphasis)

23. In the instant matter, the plaintiff produced nothing on record to prove/substantiate nature, extent and magnitude of such suffering hence in absence thereof, the plaintiff is not entitled for damages. This issue is accordingly answered as such.

ISSUE NO.5.

Whether any construction is liable to be demolished by the defendant No.3?

24. The defendant no.3 (SBCA) is the authority which controls and regularizes the constructions within its beat. The defendant no.3 has claimed the construction on the subject matter to be *unauthorized*. It is the domain of the defendant no.3 to examine the legality or *otherwise* of a construction which it (defendant no.3) shall continue enjoying. Thus, without much debate, it would be sufficient for this issue that the defendant no.3 shall be competent to exercise its discretion and if any construction is found to be *illegal & unauthorized* then the defendant no.3 shall be competent to proceed according to relevant rules, procedure and law.

ISSUE N O.6.

What should the decree be?

25. In result of the discussion, *made* on issue nos.1 to 5, the suit of the plaintiff is decreed in above terms while she is not entitled for the relief

claimed as prayer clause (3) hence suit to that extent is dismissed. Let such decree be drawn. However, parties are left to bear their own costs.

Sajid

JUDGE