

**IN THE HIGH COURT OF SINDH AT KARACHI**

**Suit No. 1187 of 2006**

**Mrs. Fouzia Nazir -----Plaintiff.**

**Versus**

**Muhammad Talib-----Defendant.**

**Dates of hearing: 17.11.2017, 24.11.2017 & 08.12.2017**

**Date of Judgment 10.01.2018**

**Plaintiff: Through Mr. Saleem-uz-Zaman,  
Advocate.**

**Defendant: In person.**

**J U D G M E N T**

**Muhammad Junaid Ghaffar, J.** This is a Suit arising out of a Counter Claim filed through Written Statement in Suit No.1361/2003 which already stands dismissed.

2. Precisely, the facts are that one *Muhammad Talib* (plaintiff) filed Suit No.1361/2003 for Declaration, Injunction and Damages against one *Muhammad Sarwar Naz* as Defendant. Subsequently, Mrs. Fouzia Nazir was impleaded as Defendant No.2. and filed its Written Statement and a Counter Claim and after dismissal of Suit No.1361/2003 this Counter Claim was numbered as Suit No.1187/2006 (instant Suit), which is being decided through this Judgment. For ease of reference and to avoid confusion, the parties would be referred with their names as above.

3. The facts as set up by Mrs. Fouzia Nazir are to the effect that she purchased property bearing Flat No.6, constructed on Plot No.12-C, Stadium Lane No.4, Phase-V, DHA, Karachi (**Suit Property**) from Muhammad Sarwar Naz, who executed a registered Sub Lease dated 29.08.2001 and was put into possession. It is further stated that Muhammad Talib filed his Suit on 23.12.2003 and thereafter took over the possession of **Suit Property** forcibly on 06.01.2004 against which a Police Complaint was made and it transpired that Muhammad Talib has already filed Suit No.1361/2003, in which she was later on impleaded. It is the case of Mrs. Fouzia Nazir that she purchased the **Suit Property** prior in time through registered Sublease; therefore, possession be handed over to her, whereas, claim of damages and mesne profit may also be allowed.

4. Learned Counsel for Mrs. Fouzia Nazir has contended that Muhammad Talib claims ownership and possession on the basis of an Agreement and alleged unregistered Sublease, and therefore, he has no right in law to claim any such ownership; that his Suit already stands dismissed, whereby, these documents have been declared as forged and fabricated; that after dismissal of his Suit even Appeal also stands dismissed as Muhammad Talib failed to comply with directions of this Court for deposit of rent/mesne profit with the Nazir of this Court; that Muhammad Talib stands debarred from filing any written statement in this Suit, whereas, the evidence already recorded by the Court under Order 10 CPC in Suit No.1361/2003 may be considered as evidence in this matter. In support he has relied upon **PLD 1997 Karachi 146 (Ali Akbar v. The State)**, **2003 CLC 1288 (Mst. Qudrat Bibi and 6 others v. Ghulam Shabbir Hussain Shah)**, **1986 CLC 770 (Ghulam Hussain**

*and another v. Muhammad Hussain*, 2011 SCMR 794 (*Ghulam Rasool and others v. Akbar Ali and others*), 2002 SCMR 1821 (*Muhammad Sadiq v. Muhammad Ramzan and 8 others*), 2010 SCMR 1871 (*Abdul Rashid v. Muhammad Yaseen and another*), 2010 YLR 2473 (*Shaukat Ali Khan v. Muhammad Hussain*), 1983 SCMR 1265 (*Sultan Wasi Jan v. Sultan Saeed Jan and others*), PLD 1969 SC 136 (*Malik Din and another v. Muhammad Aslam*), PLD 1978 Quetta 45 (*The Commerce Bank Ltd. Karachi v. Habib Bakhsh and another*) and PLD 2005 SC 430 (*Messrs Gadoon Textile Mills Ltd and others v. Chairman, Area Electricity Board WAPDA, (PESCO), Peshawar and others*).

5. On the other hand Muhammad Talib has argued his case in person and has contended that no evidence has been recorded or led by Mrs. Fouzia Nazir in this case, therefore, Suit is liable to be dismissed; that I had paid money to Muhammad Sarwar Naz, who has not come forward to deny my ownership; that I am in possession and paying the utility bills all along; that the Suit is liable to be dismissed on these grounds.

6. I have heard the learned Counsel for Mrs. Fouzia Nazir as well as Muhammad Talib Defendant in person, and perused the entire record including Suit and Evidence File of Suit No.1361/2003. It appears that Muhammad Talib filed his Suit No.1361/2003 initially against Muhammad Sarwar Naz for Declaration, Injunction and Damages and his precise case was to the effect that he is owner of the **Suit Property** and is in possession. According to him he had earlier booked another Flat No.1, situated on Commercial Lane-3, Khayaban-e-Bukhari, Plot No.8-C, Phase-VI, DHA, Karachi and paid the entire amount to

Muhammad Sarwar Naz and thereafter in January, 2002 he requested Muhammad Sarwar Naz for transfer of the flat, who executed a Sub Lease on 10.03.2001, whereafter, he requested Muhammad Sarwar Naz for an adjustment against the said flat and he was put into possession. His case is that instead of transferring the flat in question by way of registered Sub Lease, Muhammad Sarwar Naz due to greed and increased market value became dishonest, hence his Suit for Declaration, Damages and Injunction. Subsequently, Mrs. Fouzia Nazir came into picture and was arrayed as Defendant No.2 who filed her Written Statement and Counter Claim in Suit No.1361/2003. Muhammad Talib was examined by the Court under Order 10 CPC and so also Mrs. Fouzia Nazir and her two witnesses. However, neither Muhammad Sarwar Naz turned up nor Muhammad Talib could lead any evidence through any other witness. Thereafter vide Order dated 18.02.2004 Suit No.1361/2003 was dismissed on the basis of evidence available before the Court against which an Appeal bearing HCA No.52/2004 was preferred, which was disposed of by consent and Order dated 18.02.2004 was set-aside with directions to Muhammad Talib to deposit Rs.10,000/- per month with the Nazir of this Court regularly and in case of default his Suit shall stand dismissed. It further appears that he only deposited Rs.1,40,000/- against due amount of Rs.8,80,000/- and instead of making further deposit, on 11.09.2006 he made a request to the Court to allow withdrawal of his Suit with permission to file afresh, if need arises and on this the Suit was dismissed as withdrawn. Upon this the Counter Claim of Mrs. Fouzia Nazir was numbered as Suit No.1187/2006, whereas, Muhammad Talib filed a fresh Suit on the same cause of action bearing Suit No.1230/2006 and

by Order dated 12.02.2007 both these Suits were tagged together. On 10.11.2008 in Suit No.1187/2006 Muhammad Talib made a Statement that he will deposit Rs.200,000/- within 2 months on which he was further directed to deposit future dues on or before 15<sup>th</sup> of every month with the Nazir of this Court until disposal of both the Suits. Thereafter another Order was passed on 18.02.2009, in which he undertook to deposit the amount due within two months failing which his Suit shall stand dismissed. He failed to comply with the Order and filed an Application under Section 148 CPC for extension in time, which was dismissed along with his Suit on 11.05.2009. Thereafter certain orders were passed in Suit No.1187/2006, whereby, he was directed to comply with Order dated 17.01.2006 passed in HCA No.52/2004 (whereby order dated 18.2.2004 regarding dismissal of his Suit was set-aside) failing which he will be debarred from filing any written statement. Through Order dated 19.04.2010 he was debarred from filing Written Statement due to his failure to comply with various orders of the Court. Thereafter, he filed HCA No.89/2010 which was also dismissed through Order dated 21.12.2011. The admitted facts clearly reflect that insofar as the conduct of Muhammad Talib is concerned, he has failed to comply with various orders / directions of the Court given from time to time in his Suit as well as by the Appellate Court. He claims his possession only on the basis of an Agreement dated 20.01.2002, which is subsequent in time to the registered Sublease of Mrs. Fouzia Nazir. Moreover, he has not been able to seek any relief from the Court for his possession and lawful ownership through his own independent Suit. I had confronted Muhammad Talib as to whether he ever made any effort to seek cancellation of the registered Sub Lease duly executed by

Muhammad Sarwar Naz in favour of Mrs. Fouzia Nazir in respect of the same **Suit Property**, to which his reply was in negative; but he contended that all along he has acted on the advice of his Counsel. I am afraid; this is not a reply which could be entertained by the Court as his defence. Insofar as his claim is concerned it would be advantageous to refer to his Examination by the Court in Suit No.1361/2003, which reads as under:-

“I do hereby state on oath that:-

My name is Mohammad Talib son of Shamsul Arifin

Age 34 years, Profession furniture work

Residing at Flat No. 6, Plot No. 12-C, Stadium Lane No. 4, Phase V, DHA, Karachi.

In Court:-

I purchased the Flat No. 1, First Floor, constructed on Plot No. B-C, Bokhari Commercial Lane No. 3, Phase VI, DHA Karachi in March 2001 from Defendant No. 1. I did not obtain the receipt of the sale payment of consideration which I paid to the Defendant No. 1. This flat was purchased for cash amount I was only provided a sublease (unregistered) which was signed by me and Defendant No. 1. The wife of the Defendant No. 1 is attesting witness of the sublease of this Flat besides two others one is Salamat Raza who is a broker and the other is Majid who is my younger brother. I have not bought any of these witnesses with me though an order of the nature was passed on the last date of hearing.

Note: The signatures of Defendant No. 1 appearing on unregistered sublease of Bohkari Commercial Lane Flat and or the agreement produced by the Plaintiff on comparison with the signatures of the Defendant No. 1 appeared on the registered sublease in favour of the Defendant No. 2 of the flat in suit are different. The signature on the unregistered sublease and or the agreement which the plaintiff claims to have been signed by the Defendant No. 1 has tremor in it besides the flow of pen is also missing which clearly also establish that the signatures of the Defendant No. 1 on these documents i.e. unregistered sublease and agreement, are false.

In Court:- The flat which is the subject matter of these proceedings was purchased by me from the Defendant No. 1 who was staying therein. I took possession of the suit flat in January 2002 on the basis of the agreement 2.1.2002 signed by the Defendant No. 1. It is correct that the signatures of the Defendant No. 1 and mine on the first page of the agreement dated 2.1.2002 was with black ink whereas the signature on page 2 of this agreement were with blue ink. It is correct that the Defendant No. 1 and I have signed by using black ink on the first page whereas second page of the agreement is signed by me and the Defendant No. 1 with blue ink. The reason was that since the black ink was spreading on the first page of the agreement, therefore, we changed the pen and signed with blue ball pen on the second page of the

agreement. It is correct that I signed with black ball pen on the first page but I did not sign the second page with same black ball pen. It is also correct that the ball pen does not spread the ink nor it is so reflected on the first page of the agreement. Salamat Raza, the wife of Defendant No.1 and Mohammad Afzal are the attesting witnesses to the agreement dated 2.1.2002. I made the payment in cash to the Defendant No.1. I have not obtained any receipt for the payment which I have made to the Defendant No.1.

Note: I have compared the signatures of the Defendant No.1 appearing on the agreement with his signatures appearing on the registered sublease dated 29.8.2001 which the Defendant No.2 claims to have been executed by the Defendant No.1 in her favour in respect of the Suit flat. The signatures of the Defendant No.1 on both the pages of the agreement dated 2.1.2002 has tremor whereas the signatures appearing on the registered sublease do not have such tremor. The signature of Defendant No.1 on the first look shows that it has not been signed in one flow whereas the signatures of Defendant No.1 appearing on agreement on comparison do not have the same flow of pen besides they appear to be different signature. It is an admitted fact that the Plaintiff has no title documents in his favour either in respect of the flat of Bokhari Commercial Lane on the Suit flat and the documents on which he relies upon which the documents have no legal value as I have compared the signatures of Defendant No.1 and found them forged. Even otherwise the registered sublease of the Defendant No.2 is a authentic document which is prior in time and any subsequent agreement on the basis of which the Plaintiff rests his claim even otherwise, will have no legal value."

7. Perusal of the aforesaid Examination reflects that his Agreement has been treated by the Court as fake and forged, whereas, admittedly the Sublease relied upon by him is not a registered document. To his objections that no evidence was led in this matter by Mrs. Fouzia Nazir, it would suffice to observe that in fact he has failed to file his Written Statement and stands debarred due to his continuous failure to comply with the Court orders. Perhaps he never made any effort to get such order recalled, and or modified; therefore, on record the averments of Mrs. Fouzia Nazir have gone unchallenged and the Court is within its rights to decree the Suit even on such basis. Notwithstanding this observation, I have also deeply examined the entire case before me including the evidence led in Suit No.1361/2003, which is in fact an evidence / examination of the parties under Order 10 CPC initiated by the Court for its own satisfaction and therefore, in view of various

precedents, this forms a part of pleadings and can be considered by the Court. Even otherwise, Muhammad Talib has failed to satisfy the Court for passing of any decree as to his lawful possession or any registered document with him except a Sale Agreement. For considering the evidence in Suit No.1361/2003 reliance may be placed on the case of **Malik Din and another** (Supra), wherein, the Honourable Supreme Court has been pleased to observe as under:-

.....“For this limited purpose, we think, that the High Court was right in holding that the recital, in the order of the Collector, of the substance of the pleadings was admissible to show, as to what was the ground of attack there. Judgments, whether inter parties or not, are conclusive evidence for and against all persons whether parties, privies, or strangers of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered. In other words, the law attributes unerring verity to the substantive as opposed to the judicial portions of the record. But where the judgment is inter parties; even recitals in such a judgment are admissible. A previous judgment is admissible also to prove a statement or admission or an acknowledgment made by a party or the predecessor-in-interest of a party, in his pleadings in a previous litigation. Similarly, a judgment narrating the substance of the pleadings of the parties to a litigation is admissible to establish the allegations made by them on that occasion.”

8. Reliance may also be placed on the case of the **Commerce Bank Ltd. Karachi** (Supra), wherein, the Quetta High Court has held as under:-

“ I have given my anxious consideration to the point raised before me keeping in view the provisions of sections 40, 42 and 43 of the Evidence Act and the case-law on the point and I am of the view that the inter partes judgments though not conclusive evidence for or against the parties on any point dealt with in them, they can be relied upon to prove a statement or admission made in the earlier case and also to discover the nature of the pleadings in a previous litigation in comparison to the stand in the subsequent case in respect of the same subject-matter. In this view I am supported by the case of Malik Din and others v. Muhammad Aslam(1).”

9. Further reliance may also be placed on the case of the **Ali Akbar** (Supra), wherein, a learned Single Judge of this Court has been pleased to observe as under:-



“14. The first point to be considered is whether or not the evidence of the complainant could be considered by the trial Court. It appears that by consent his evidence was brought on record and subsequently it was relied upon. Section 353, Cr.P.C., lays down that all evidence taken, under Chapters XX, XXI, XXII and XXII-A of Cr.P.C., shall be taken in presence of accused or when his personal attendance is dispensed with, in presence of his pleader. Article 47 of the Qanun-e-Shahadat, 1984 prescribes the conditions under which secondary evidence of the testimony of a witness in the former proceeding, civil or criminal, is admissible in subsequent proceeding or in a later stage of the same proceeding where the question in controversy in both proceedings is identical and where the witness is dead or cannot be found or is incapable of giving evidence. Before such evidence could be made admissible, the following conditions are necessary to be complied with;

- (i) That the earlier evidence was taken in a judicial proceedings.
- (ii) That the first proceeding was between the same parties.
- (iii) That the party against whom deposition is tendered had a right and full opportunity of cross-examining the deponent when the deposition was taken.
- (iv) That the issues involved are the same or substantially the same in both proceedings.
- (v) That the witness is incapable of being called at the subsequent proceeding on account of death, or incapability of giving evidence or being kept out of the way by the other side or an unreasonable amount of delay or expenses.”

10. Insofar as question of a registered document executed much prior in time as against a Sale Agreement is concerned it is settled law that a registered instrument will always be on a higher pedestal as against an Agreement (unregistered even otherwise). Reliance may be placed on the cases of **Ghulam Rasool & others** (Supra), **Muhammad Sadiq** (Supra) and **Abdul Rashid** (Supra).

11. In view of hereinabove facts and circumstances, of this case, I am of the view that Mrs. Fouzia Nazir has made out a case for Judgment and Decree in her favour. Accordingly, Suit No.1187/2006, as above, is decreed by directing Muhammad Talib to hand over vacant and peaceful possession of the **Suit Property** immediately to Mrs. Fouzia Nazir, failing which the Nazir of this Court is directed to take over possession of the **Suit Property** and

hand it over to Mrs. Fouzia Nazir and or her nominee. The Suit is further decreed by awarding mesne profit at the rate of Rs.30,000/- per month from 06.01.2004 till handing over of the vacant and peaceful possession of the Suit Property. Mrs. Fouzia Nazir shall also be entitled for mark-up on such amount at the rate of 6% per annum (non-compound basis) from 06.01.2004 till handing over of possession. The Suit is further decreed by directing the Nazir of this Court to make payment of the amount available with him deposited by Muhammad Talib in lieu of the rent / mesne profit on the directions of this Court and once such amount is so received, the decretal amount of mesne profit shall stand adjusted accordingly.

12. The Suit stands decreed in the above terms. Office to prepare decree accordingly.

Dated: 10.01.2018

**J U D G E**