

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO. 164/1996

Lt. Cdr. Mirza Mansoor Hussain

Versus

Syed Mohammad Faheem & others

Date of hearing: 17th September, 2015

Plaintiff: Through Mr. Muhammad Wasif Riaz

Defendants No. 3 & 4: Through Mr. Waqar Muhammad Khan Lodhi
Advocate

Defendant No. 5: Through Mr. Jawed Iqbal Advocate

J U D G M E N T

Muhammad Shafi Siddiqui, J.- This is a suit filed by the plaintiff for declaration, cancellation damages and mandatory injunction with the following prayer:-

(a) To declare that the plaintiff is lawful owner of the commercial plot bearing No.82-C, 13th Sunset Street, Phase-II, admeasuring 200 square yards and he has not transferred the plot to defendant No.1 or any other person and the transfer/transaction/mutation/lease and all other title documents in relation to the aforesaid plot in favour of defendants No.1 to 4 are forged, illegal, fraudulent and has no legal effect.

(b) To cancel all the transfer documents, lease, building plan, mutations, in the record of defendant no.5 in respect of aforesaid plot in the names of defendants No.1 to 4 and restore the title documents of the plaintiff.

- (c) To award damages to the plaintiff as the plaintiff has been fraudulently deprived to utilize his property by directing the defendants No.1 to 5 jointly and severally to pay the plaintiff Rs.10 lacs as a damages addition to restoration of the plot.
- (d) To direct the defendants No.3,4 and 5 to remove the construction immediately with their own expenditure and handover the vacant possession of the plot to the plaintiff.
- (e) To further direct that all the income of the plot be deposited with the Nazir of this Hon'ble Court.
- (f) To restrain the defendants, their officers, employees, staff, representatives, attorneys, or any other person from further transferring, parting with possession, alteration, addition and further construction/or transferring the plot bearing No.82-C (Co.) situated at 13th Sunset Street, Phase-II, Defence Housing Authority, Karachi and construction thereon.
- (g) Any better/further relief/reliefs which this Hon'ble Court deem fit and proper in the circumstances of the case may also be awarded.
- (h) Cost of the proceedings.”

2. In brief the facts as alleged are that a commercial Plot bearing No.82-C situated at 13th Sunset Street, Phase-II, Defence Officers Housing Authority measuring 200 square yards was allotted to the plaintiff vide allotment letter No.DS/SS-1/WL-605 on 29.9.1971. It is contended that at the relevant time when the plot was allotted it was situated in the deserted area except a few constructions in the vicinity. It is alleged that after retirement from Pakistan Navy in the year 1975 the plaintiff joined Merchant Navy as a Captain and he occasionally used to come Pakistan on account of his duties. In the year 1996 when he planned to raise construction it is claimed that he moved an application for demarcation on 01.1.1996 which was not replied by DHA. Since the

plaintiff could not pursue his application in view of his occupation, he executed General Power of Attorney in favour of his wife and despite constant approaches of the Attorney no satisfactory reply was given and ultimately on 24.1.1996 a legal notice was served to the Administrator of Defence Housing Authority through registered A/D. This legal notice was replied vide letter dated 25.2.1996 wherein the plaintiff was informed through his advocate that the plot was transferred to defendant No.1 on 22.8.1990 and it was further transferred by defendant No.1 to defendant No.2 on 27.11.1990 within a short period of three months and then defendant No.2 on 08.7.1991 (within eight months) transferred it in favour of defendants No.3 & 4. It is argued that defendant No.3 in fact is a Managing Director of defendant No.4. The Attorney of the plaintiff on receiving such information of fraudulent transfer contacted the plaintiff and they could not have imagine that such fraud could be perpetuated in Defence Housing Authority which is considered to be safest authority. It is alleged that such fraud was exercised in collusion with the staff of defendant No.5 and defendants. It is contended that the plaintiff was not available in Pakistan on the dates when the alleged transfer in favour of defendant No.1 took place. They have not even forwarded the notice of alleged transfer in favour of defendant No.1 which claimed to have been signed by the plaintiff. It is alleged that quick and frequent transfer from one to another shows that there were collusion and meant to usurp the valuable rights of the plaintiff in the subject plot. He submits that since it is a collusive transaction therefore all subsequent transactions and transfers are liable to be cancelled.

3. On the other hand defendant No.1 & 2 have been declared *exparte* whereas the Counsel for defendants No.3 & 4 argued that they are bonafide purchasers without notice of any fraud perpetuated by the defendants No.1 & 2. They however submitted that the allotment letter in fact is a *simplicitor* intimation about the decision but does not confer any actionable right.

4. Insofar the allegations against defendants No.3 & 4 are concerned learned Counsel submitted that they are baseless and false as they have taken every care to ascertain the title of the person from whom they have purchased the subject plot. Learned Counsel submitted that since the record of the DHA was seen they were satisfied that they are purchasing the subject plot from a right owner therefore no malafide can be attributed on the part of the defendants No.3 & 4. Learned Counsel submitted that there is no evidence on record to show that it was a collusive exercise between the officials of Defence Housing Authority and private defendants.

5. Insofar as the defendant No.5 is concerned, learned Counsel has not addressed any arguments except that he is now relying on the statement filed on behalf of defendant No.5 whereby the objections to the Nazir report dated 09.4.2013 filed by the Defence Housing Authority be treated as withdrawn.

6. Heard the learned Counsels and perused the material available on record. In terms of the pleadings of the parties following issues were framed:-

- “(i) Whether the allotment creates an interest in the property, if so, does the plaintiffs have a right in the suit property?
- (ii) Whether the allotment was cancelled and/or changed without notice to the plaintiff by defendant No.5?
- (iii) Whether the plaintiff has created a transfer of the suit property? If so its effect?
- (iv) Whether the plaintiff is entitled to claim damages from defendant No.5?
- (v) What should the decree be?”

7. In support of their respective contentions the parties recorded evidence of their witnesses. The plaintiff has filed his affidavit-in-evidence and he was cross examined. Similarly witnesses of the plaintiff namely Javed Anwar and Aamir Abbas Ashary were also examined and

cross examined. On behalf of defendant No.5 one Lt. Col. Khalid Mumtaz and Major Shamim the Administrative Officer Transfer & Record Branch, DHA were examined and were also cross examined. On behalf of defendant Nos.3 & 4 Syed Hashimuddin Ghazi filed his affidavit-in-evidence and was subjected to cross examination.

My findings on the above issues with reasons are as under:-

FINDINGS

Issue No.1	-----	Affirmative
Issue No.2	-----	Affirmative
Issue No.3	-----	Negative
Issues No.4 & 4A	-----	Affirmative
Issue No.5	-----	Suit is decreed

REASONS

ISSUE NO.1

8. In order to prove this issue, burden of which lies on the plaintiff, allotment order dated 29.9.1971 were filed which shows that managing committee of Pakistan Defence Services Officers Cooperative Housing Society, as it then was, decided to allot the plot No.82-C. The subject allotment order is also exhibited as P-1/2. The plaintiff was also subjected to cross examination by defendant No.5. Somehow contrary questions were put to the plaintiff as at one point of time the defendant No.5's Counsel questioned him as to whether the remaining dues of the plot has been paid and on the other hand he questioned that the subject allotment order dated 29.9.1971 was not issued by the DHA. The Counsel for defendant No.5 further suggested that instead of Ex-P-1/2 (which is an allotment order dated 29.9.1971) DHA sent a letter of similar date i.e. 29.9.1971 which was denied by the witness. The witness has also denied the suggestion that he (plaintiff), had sent the letter

dated 23.7.1990 to DHA requesting for allotment order of the plot. This is quite surprising that DHA is admitting that the transaction was lawful which transaction was based on the aforesaid allotment order dated 29.9.1971 since it is suggested by the DHA's Counsel that it was done on the request of the plaintiff in terms of letter dated 23.7.1990. In the affidavit-in-evidence the witness of defendant No.5 in para-2 stated that plaintiff was informed on 04.2.1996 that the subject plot had already been disposed of. In the affidavit-in-evidence defendant No.5's witness has not denied the issuance of the allotment order. They have stated in para-3 that the transfer of the disputed plot was done on the basis of transfer affidavit, undertaking and certified true copy of the allotment order. In view of such contrary stand, it does not lie in the mouth of defendant No.5 to challenge the allotment order which they themselves are relying to transfer the subject plot in favour of defendant No.1. The allotment letter thus stands proved and it does not need any further discussion that the allotment in fact creates right in rem and the plaintiff has every right on the basis of the aforesaid allotment letter dated 29.9.1971 hence the issue No.1 is answered in affirmative.

ISSUE NO.2

9. This issue is very crucial as it would decide the fate as to whether the allotment order was cancelled lawfully after giving notice to the plaintiff. The burden of this issue is on Defendant No.5. The stand taken by the defendant No.5 that the plot stood cancelled after due notice to the plaintiff is self-destructive for defendant No.5. If at all it was cancelled after giving notice to the plaintiff then how and on what basis they relied upon the transfer letter Ex-DW-5/III allegedly issued by the plaintiff in favour of defendant No.1 and the transfer affidavit (though it has not been exhibited but relied upon and filed by the defendant No.5), Ex-DW-5/IV which is a transfer order in favorur of defendant No.1 copy of which was claimed to have been issued to plaintiff. The said witness of defendant no.5 namely Khalid Mumtaz has not even suggested or

stated that it was cancelled by defendant No.5 nor any document in this regard was filed or exhibited. The other witness of the defendant No.5 namely Major Shamim Ahemd Malik was examined in Court and he produced one allotment order dated 05.8.1990, Ex-P-5/10. The witness has also produced the same allotment order again as office copy as Ex-P-5/11. The witness has admitted in the cross examination that the actual date of allotment is 15.8.1971. It is inconceivable that the decision of the managing committee dated 15.8.1971 wherein they have decided to allot of the subject plot in favour of plaintiff was communicated to plaintiff on 05.8.1990 i.e. after about 19 years and that too at the address which is other than one available in the original allotment order issued on 29.9.1971. The minutes of meeting have not been placed on record by the defendant No.5. It does not takeaway anything from the plaintiff as the date of allotment is 15.8.1971 in fact not denied. What is to be ascertained is as to whether the allotment order in pursuance of such decision made on 15.8.1971 was issued to the plaintiff in August, 1990 or 29.9.1971. I do not see any notice which appears to have been served upon the plaintiff cancelling subject allotment on any account. Apart from the dates of issuance the only difference is that the disputed allotment order dated 05.8.1990 contains a condition that the allotment is issued subject to the condition that the authority reserves right to recover subsequent to this allotment any dues and subsequent increase in the development charges from the allottee. Another significant point that requires consideration was that it was nowhere suggested to plaintiff that in fact it was the allotment order issued on 05.8.1990 and not 29.9.1971 hence credibility of the subsequent allotment order as relied upon is disputed. DHA has not been able to substantiate as to how the addresses shown in the disputed allotment order was correct. No explanation was provided as to how and why the allotment order was issued after nineteen years. Surprisingly, soon thereafter i.e. issuance of disputed allotment order, within 16 days, the plot was transferred in

favour of defendant No.1 i.e. on 22.8.1990. Hence I have no doubt in my mind that the cumulative effect of all above shows that subsequent allotment dated 05.8.1990 is a false and manipulated document and is collusive exercise of officials of defendant No.5 and defendant No.1. The issue No.2 is therefore, answered as under:

10. The subject allotment dated 29.9.1971 was never cancelled nor any notice in this regard was issued or served upon plaintiff.

ISSUE NO.3:

11. Insofar as this issue is concerned, both the sides have recorded their evidence. Plaintiff has filed his affidavit-in-evidence and submitted that he was not available in Pakistan at Karachi on the date of so called transfer of the suit plot in favour of defendant No.1 on 22.08.1990 or at any date when such transfer allegedly took place. Plaintiff stated in paragraph 7 of his affidavit-in-evidence that he was out of Pakistan and was available in Rome on 30.08.1990 which can be verified from his passport entry which shows his availability at Rome. It is further urged in Para 8 that as servant of Merchant Navy CDC he had issued and sent articles of M.V. Tiger on 23.03.1990 and discharged on 22.11.1990 at Bombay, which entries are reflected in his passport available as Ex. P-1/6 pages 7 and 8 of the passports which are available to verify the above dates.

12. Similarly in paragraph 9 the plaintiff claims that the so called allotment order of 1990 or transfer order are bogus and so also the address mentioned in the subsequent bogus allotment/transfer order is also incorrect. The plaintiff has also filed a certificate to the extent that such address is not in existence as mentioned in the bogus allotment order dated 05.09.1990 as there is no block IV in PECHS.

13. Nothing worse could have been done when in the cross examination the counsel for DHA suggested the plaintiff that he was out

of country from 03.08.1990 to 22.11.1990. The witness was also suggested by the DHA's counsel that he had applied for the allotment of the disputed plot on 07.10.1970. It is not the case of DHA in written statement that instead of allotment order some letter dated 29.09.1971 was issued and sent to plaintiff. Further the witness has denied to have issued any letter dated 23.07.1990 nor such letter was produced by the defendant No.5.

14. In fact in para 1 and 2 of the written statement filed by defendant No.5, DHA has admitted the allotment letter to have been issued on 29.09.1971. Hence, there should not be any dispute with regard to the allotment letter dated 29.09.1971. In the written statement the defendant No.5 has not made any case as to any allotment letter issued in the year 1990 to the plaintiff and in fact they have admitted the allotment order of 1971 but their case is based on the transfer documents filed by the plaintiff which the plaintiff has disputed by producing his passport and also by relying on the cross examination conducted by defendant No.5's counsel.

15. The signatures on these transfer letters and affidavits of transfer were also sent to handwriting expert through Nazir of this Court which report also suggested that these signatures on alleged transfer affidavit appears to be a credible forgery. The signatures on the transfer affidavits appear to be dissimilar inasmuch as pen presentation, curve, tremor in connectivity of pen movement and credible evidence of copied forgery with those of specimen and routine signature of Mirza Mansoor Hussain were found forged. This report when read with the entries of the passport and evidence could only lead to the conclusion that these transfer documents as relied upon by defendants are manipulated and forged and in fact were procured by the officials of defendant No.5 in collusion with the defendant No.1. A very strange suggestion was also given by the defendant No.5's counsel Mr. Nazar Hussain Dhoon that

though the plaintiff was not present in Pakistan but he appeared before the designated officer for verification and identification of plot. This suggestion is available in the second page last para of cross examination of plaintiff. It is reproduced as under:-

“----It is incorrect to suggest that I appeared before a designated officer for verification and identification of the plot on 09.8.1990, though I was not present in Pakistan on that date.”

16. Defendants No.1 and 2 have already been declared exparte whereas defendants No.3 and 4 have contested the suit on the ground of being bona fide purchasers and without notice of such forgeries.

17. Hence, in view of the above I am clear in my mind that the plaintiff has not created any transfer of title/allotment whatsoever of the suit property, as claimed by the defendant No.5. Accordingly, the issue No.3 is answered in negative.

ISSUE NO.4.

18. Although one of the crucial issues which was left to be framed was an issue as to whether the defendants No.3 and 4 are the bona fide purchaser without notice however since evidence is available and all Counsels have suggested for framing such material issue, I therefore frame the issue and decide it along with issue No.4. The issue is as under:-

(4A) Whether the defendants No.3 & 4 are bona fide purchaser without notice?

19. This issue No.4 hence is decided along with issue No.4A, which I have framed in view of the pleadings and evidence that is available on record.

20. Counsel for defendants No.3 and 4 submitted that the defendants No.3 and 4 are bona fide purchasers without notice of any dispute or forgery, as alleged by the plaintiff. He submitted that the said defendants have inquired from the office of DHA regarding entitlement

of the defendant No.2, which was verified and only after considering the record, the defendants No.3 and 4 entered into such transaction and paid sale consideration accordingly.

21. It appears that though the plaintiff was cross examined in detail by the defendant No.5 but he was very formally cross examined by Counsel for defendants No.3 and 4 as same is available at page 119 of evidence file. Apart from the plaintiff two additional witnesses were also examined by the plaintiff namely Jawed Anwar who knew the plaintiff and another witness Aamir Abbas Ashary. There is no record that these two additional witnesses of plaintiff were cross examined by defendants No.3 and 4.

22. One witness namely Khalid Mumtaz appeared on behalf of defendant No.5 who in the cross examination stated that one has to apply for the issuance of certified true copy then it is to be published in newspaper. The witness also admitted that they have not issued any certified true copy for the subject plot. He has admitted in the cross examination that the plot was transferred on certified true copy on an application and undertaking by the plaintiff. This fact was admitted by witness on the strength of paragraph 2 of the counter-affidavit to application in terms whereof he has admitted that the plot was transferred on the basis of certified true copy of the subject plot which is stated by Brig. (R) Muhammad Younus Chaudhry in his counter-affidavit to a application filed by him on behalf of defendant No.5. These versions are contrary to each other. At one end defendant No.5 say that on the strength of allotment letter dated 05.8.1990 DHA has transferred the plot whereas on the other, witness admitted that it was transferred on the basis of CTC. This witness namely Khalid Mumtaz was also unaware as to whether the original allotment order/letter dated 29.09.1971 was cancelled. Defendants No.3 and 4 have cross examined this witness who stated that they are bonafide purchasers. Although the

counsel for defendants No.3 and 4 Mr. Salman Hamid has cross examined the plaintiff but only to the extent that he was out of country from 03.08.1990 to November 1990.

23. Another witness namely Major Shamim Ahmed produced certain documents on behalf of defendant No.5 which include allotment order of August, 1990. He has also admitted in cross examination that the actual date of allotment of the subject plot is 15.08.1971 in Ex. P/5/10. Despite this admission, which relates to the alleged controversy as to when original allotment order was issued, the DHA was unable to satisfy as to how and in what manner the subsequent allotment order was again issued to the plaintiff after 19 years and that too at the address which the plaintiff does not verify and which address itself is incorrect as apparently there is no Block-IV in PECHS. The witness of DHA has also admitted that he has no knowledge as to why the allotment order was issued after 19 years.

24. Although on the basis of certain manipulated record including the transfer affidavit the plots were transferred in the name of defendant No.1 and then in favour of defendant No.2, the defendant No.3 and 4 claimed to have purchased this property from defendant No.2 as being bona fide purchasers of the disputed plot for consideration. He has alleged that he has taken all steps which are expected from a prudent and diligent man. It is claimed that they have verified title of defendant No.2 from the record of defendant No.5. They have denied all allegations as leveled insofar as collusion is concerned. They have submitted that if at all anybody was negligent it was defendant No.5 on whose acts of omission and commission defendants No.3 and 4 suffered damages.

25. In this regard learned counsel for the plaintiff has relied upon judgment reported in 1999 CLC 296 i.e. case of Messers Raees Amrohvi Foundation (Regd.) v. Muhammad Moosa & others and contended that it

may have been an act of negligence that no public notice was issued but it cannot take away anything from defendant No.3 & 4 as being bona fide purchaser without notice. Generally people do issue a public notice before purchasing property but I have not been assisted as to whether it is a legal requirement for a buyer, though it may have been for any authority or society under their rules.

26. I am of the view that though the defendants No.3 & 4 have not opted to issue public notice before purchase of property however it would be difficult to assume that it was done in bad faith, particularly when the record of the DHA shows the alleged entitlement of defendant No.2 to sale. Of course the defendants No.3 & 4 could not have traced the forgery as now come on surface. More importantly the defendants No.3 and 4 still are in occupation of the premises in question and raised construction at the relevant time. Had there been an iota of fraud they would have got away in these six years i.e. from 1990 to 1996. Since public notice is not considered as a legal requirement it cannot be stretched down to the wire that it was in fact in bad faith. Therefore, it cannot contribute towards mala fide which could cast any shadow on his bona fide. Hence, I am of the view that the issue No.4A is decided in affirmative that the defendant is a bona fide purchaser without notice. The plaintiff is however entitled to claim damages, which are to be calculated according to the market value of the subject plot.

27. In my view it is not a case of serious negligence but a deliberate attempt to deprive the plaintiff from his property. It could not be believed that an admitted allotment decision made on 15.8.1971 could have been issued to plaintiff after nineteen years and that too at the address which is incorrect. The handwriting expert report also favours plaintiff. Entire evidence is against the defendant Nos.1, 2, 5. All the facts and circumstances together contribute a deliberate attempt to

usurp the property of plaintiff by defendant No.5 and its officials and by defendants No.1 & 2.

28. In addition to value of plot the plaintiff is also entitled to special damages as throughout since 1996 they have been suffering mentally and monetarily. Hence are also entitled for special damages of Rs.10 Million. Apart from this special damages, the Nazir in order to ascertain the value of the subject plot is directed to appoint three renowned estate agents at the cost of defendant No.5 who (Nazir) shall then obtain the expert opinion as to the valuation of the plot and the average value shall then be considered and deemed to be the market value of the property. The plaintiff is thus entitled for a decree jointly and severally against defendants No.1, 2 & 5 as under:-

- (a) Special damages in the sum of Rs.10 Million.
- (b) Damages in the sum of rupees equivalent to the current value of the subject plot as determined by the Nazir and/or in the alternate entitled for a plot/plots of same, value, character in the same vicinity and/or at any other location within and up to Phase-VIII of Defence Housing Authority, Karachi.
- (c) In case the Defence Housing Authority opts to provide an alternate plot/plots of the same value, worth and character as above, Nazir shall determine the value of the said alternate plot/plots in the same process as he would determine the value of the plot in question.

ISSUE NO.5

29. In view of the above the suit is decreed in the above terms with cost.

Judge