

# IN THE HIGH COURT OF SINDH AT KARACHI

## Suit No.882 of 2013

[Shafaat Hydri and another v. Naila Hydri and another]

Date of hearing : 12.10.2021  
Date of decision : 08.03.2022  
Plaintiffs : Through M/s. Ghulam Rasool Korai and Khalid Mahmood Siddiqui, Advocates  
Defendants : Through Mr. Muhammad Shahnawaz Khan, Advocate

### JUDGMENT

**Zulfiqar Ahmad Khan, J:-** This suit is filed for declaration, injunction and possession, with the following prayers:-

- (A) To hold and declare that the Plaintiffs are absolute joint owner(s) of the property in House No. R-544, Block-8, Federal B Area, KDA Scheme # 16, Karachi measuring 120 square yards with construction thereupon.
- (B) To restrain the Defendants or anybody acting on their behalf from illegally dispossessing the Plaintiffs from Suit Property or interfering with their respective possession or peaceful enjoyment thereof.
- (C) To direct the Defendants to vacate and handover the 1<sup>st</sup> Floor of the Suit Property or any part thereof to the Plaintiffs.
- (D) Grant costs of litigation.
- (E) Any further relief, which this Honorable Court deems fit in the circumstances of the case.

2. Relevant facts as averred in the plaint are that the plaintiffs are claiming to be the absolute joint owners of the House constructed on Plot No.R-544, Block-8, Federal B Area, KDA Scheme No.16, Karachi, admeasuring 120 square yards (the subject property) by virtue of the registered Conveyance Deed dated 26-05-2008, which was originally allotted and leased to their elder brother namely Saadat Hydri (late) S/o Hidayat Hydri by KDA, who is also husband of defendant No.1 and father of defendant No.2. It is alleged that at the time of execution of the

Conveyance Deed late Saadat Hydri was living at 1<sup>st</sup> floor of the suit property alongwith his family and the plaintiffs were living at the ground floor, as well as in one room at the 1<sup>st</sup> floor.

3. Upon notice of the instant suit, defendant No.1 (who is also attorney of defendant No.2) filed written statement and has taken the preliminary legal objections that the plaintiffs have concealed the real facts pertaining to the ownership of the subject property and that the suit is not maintainable being hit by misjoinder of the parties. Apart from above objections, defendant No.1 asserted that she is the real owner of the subject property, which has been duly mutated in her favour after her husband's death on 16.01.2013 by way of inheritance and plaintiffs' conveyance deed is nothing but a forged and fabricated document. It is alleged that the plaintiffs had committed dacoity and stole original title documents of the subject property.

4. On 17.08.2017, following issues were adopted by this Court and parties were directed to file list of witnesses and documents:-

1. Whether the suit is maintainable?
2. Whether the plaintiffs had committed dacoity at the house of Defendant No.1 and stolen original documents of the suit property on 26.5.2008?
3. Whether the Registered Conveyance Deed dated 02.06.2008 in favour of plaintiffs is forged, fabricated and bogus?
4. Whether the mutation order dated 16.01.2013 has been obtained by the defendant No.1 through fraud and misrepresentation.
5. Whether the sale deed filed by the plaintiff is liable to be cancelled" if so what extent?
6. What should decree be?

5. Whereafter on 30.08.2018, Commissioner was appointed to record evidence of the parties, who after completing the Commission submitted his report, which was taken on record on 01.02.2019. During evidence Plaintiff No.1 examined himself and produced his affidavit-in-evidence as Exh.P.1 and copy of the Conveyance Deed dated 26-05-2008 as

Exh.P/1. Plaintiff No.2 also examined himself and produced his affidavit-in-evidence as Exh.P/2 and copy of the said conveyance deed dated 26-05-2008. Their brother namely Farhat Hyderi also appeared before the learned Commissioner and produced his affidavit-in-evidence as Exh.P/3.

6. On the other hand, the defendants also led their evidence. Defendant No.1 examined herself and produced her affidavit-in-evidence as Exh.D/1. She produced copy of Special Power of Attorney dated 08-08-2018 as Exh.D/2 and copy of Mutation Order dated 16-01-2013 as Exh.D/3. She also produced one of the neighbour namely Muhammad Sharukh Khan S/o Shahid Naveed, who produced his affidavit-in-evidence as Exh.DW/1.

7. Learned counsel for the plaintiffs contended that the original title documents of the subject property were in possession of the plaintiffs, which could not have been transferred in favour of anyone without original title documents. He further contended that the registered conveyance deed has preference over mutation, as mutation is not proof of the title, rather registered sale/conveyance deed is a stronger proof. In this regard, he has placed reliance on the cases of *Abdul Waheed Butt v. Member (Judicial-V) Board of Revenue Punjab and others* (2011 YLR 1425), *Maqsooda Begum and 5 others v. Mst. Jan Begum and another* (1998 SCMR 2052) and *Siraj Din and others v. Ghulam Nabi and others* (PLD 2003 SC 159).

8. On the other hand, learned counsel for the defendants contended that whilst the plaintiffs are claiming that they possess original title documents, but in the evidence failed to produce the same, rather produced only photocopy thereof. He further contended that admittedly the plaintiffs have failed to produce payment of any sale consideration. Counsel argued that the plaintiffs are further claiming that they are residing at the ground floor of the suit property whereas no single document has been produced by them in order to prove delivery of

physical possession. He also contended that the mutation took place on 16.01.2013 before the very institution of the suit on 09.07.2013, however the plaintiffs did not challenge such mutation, hence the suit is not maintainable for non-joinder of the concerned Sub-Registrar as well as Fahad Hyderi and Abeer Hyderi, as necessary and proper parties, and failure of the plaintiffs to produce the marginal witnesses is also a lethal defect in plaintiff's case. In support of his arguments, he has placed reliance on the cases of *Mst. Akbar Jan through L.Rs. and 9 others v. Mst. Kalsoom Bibi and 6 others* (2015 CLC 549), *Muhammad Arshad and 2 others v. Haq Nawaz and 9 others* (2019 YLR 958) and *Muhammad Shafi and others v. Allah Dad Khan* (PLD 1986 SC 519).

9. Arguments heard and record perused.

**Issue No.1**

10. With regard to the issue No.1 as to the maintainability of the instant suit, learned counsel for the defendants contended that the plaintiffs have concealed the real facts relating to the ownership of the subject property. Per learned counsel, the suit is not maintainable as no cause of action is accrued in favour of the plaintiffs and that the suit is bad for non-joinder of necessary and proper parties and as such liable to be dismissed. It is settled law that necessary party is a person who must be joined as a party and in whose absence no effective decree can be passed at all by the Court. If a necessary party is not impleaded the suit itself is liable to be dismissed while proper party is a party who though not a necessary party but is a person whose presence enables court to completely, effectively and adequately adjudicate upon all matters in dispute in suit, though he is not a person in favour of or against whom decree is to be made.<sup>1</sup> In the case at hand, the mutation has already taken place in the names of legal heirs of late Saadat Hyderi, namely Mst. Naila Hyderi, Saad Hyderi, Fahad Hyderi and Abeer Hyderi, vide

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<sup>1</sup> 2017 YLR 1579 [Sindh].

Mutation Order No.R-544/8, Sch-16 dated 16.01.2021 however the plaintiffs have not arrayed Fahad Hyderi and Abeer Hyderi as defendants. Not only so, the plaintiffs have also not arrayed concerned sub-Registrar as party, whose presence would have enabled the Court to completely, effectively and adequately adjudicated the controversy at hand. Hence Issue No.1 is decided in **Negative** and against the plaintiffs.

**Issue No.2**

11. With regard to the dacoity, no such question was posed to any of the plaintiff's witnesses. The defendant No.1 in her cross stated that some dacoity took place however she has not lodged any FIR before the police. In support of the contention of the defendant No.1, Muhammad Sharukh Khan, defendants witness also denied that any dacoity took place in the suit property and he has uttered the following:-

**"I do not know the dacoity took place in the suit property." It is correct to suggest that my friend told me the name of Farhat Hyderi S/o Samad Hyderi about the dacoity."**

Accordingly, Issue No.2 is decided in **Negative** and against the defendants.

**Issue No.3**

12. This was the main contentious issue of the counsel. It appears that none of the witnesses from the plaintiffs' side have produced original Conveyance Deed. Plaintiff No.1 namely Shafaat Hyderi in his examination-in-chief stated that he has produced copy of the Conveyance Deed dated 26-05-2008, Plaintiff No.2 namely Nusrat Hyderi has stated in his examination-in-chief that he has produced copy of the same Conveyance Deed, whereas, their witness namely Farhat Hyderi has not produced any document. When the plaintiff's counsel was exposed to this query, he stated that original was seen and returned by the Commissioner however no such remarks are made by learned

Commissioner that original Conveyance Deed has been seen and returned during recording of evidence. When posed with the question whether plaintiffs' counsel is in possession of the original title documents, he stated that at this juncture he is not in possession of the original documents, but could brought in the Court, if permitted. This being stage of final arguments, no further evidence could be recorded and whatever is available in the form of the evidence to this Court, I presume that original title documents were never produced before the learned Commissioner.

13. Most alarming part of the said Deed is that only it had one thumb impression, while there are four signatories, as seen from the title page being Saadat Haidari, Shafaat Hydri, Nusrat Hydari and Farhat Hyderi.

14. Thumb impression of Mr. Farhat Hyderi has been shown at page 29 however the said signatory has admitted that he had issued power of attorney to Mr. Nusrat Hyderi for the execution of the alleged Conveyance Deed, however he has not produced the said Power of Attorney, rather admitted in his cross that he did not remember the exact date of such power of attorney. It is also strange that in his cross he has admitted that he was present when the Conveyance Deed was executed, however in the same breath he has taken the stance that he gave power of attorney to Nusrat Hyderi, therefore even the thumb impression allegedly affixed by the said signatory could also not be ascertained in the circumstances surrounding this case.

15. As to the payment of alleged sale consideration, plaintiffs' witness namely Farhat Hyderi in his cross examination admitted that neither plaintiffs nor he himself produced any document with regard to the payment of the sale consideration.

16. In this case the plaintiffs have failed to implead concerned Sub Registrar, who could have ascertained whether the Conveyance Deed

was genuine or not therefore this Court could not answer this issue in favour of the plaintiffs. Also, they have failed to implead Fahad Hyderi and Abeer Hyderi in whose favour mutation has taken place.

17. The case laws relied by the learned counsel for the plaintiff are quite distinct from the facts of the instant suit. Plaintiffs' counsel contention that the registered conveyance/sale deed has preference over mutation, does not take force from the referred cases. For instance, in the first case reported as 2011 YLR 1425, the *identity* of the suit-land in absence of demarcation was challenged by the petitioner relying on the mutation, which took place after the registered sale deed that was *admitted* by the petitioner himself, while in the second case (1998 SCMR 2052), *competency* of the vendor was under challenge, who mutated the subject property and in the last case (PLD 2003 SC 159), the mutation was challenged on the ground of *fraud*. However in the instant suit, both the rival parties claim that the suit property belonged to late Saadat Hydri and despite having knowledge of the mutation in favour of the defendants (legal heirs), the plaintiffs did not even challenge it, and neither prayed for its cancellation, nor joined the concerned sub-Registrar as party. On the other hand, the case laws relied by the learned counsel for the defendants inspire confidence.

18. In view of above evidence this Court has reached to the conclusion that the Conveyance Deed is a forged, fabricated and bogus document. For the reasons mentioned above, this Issue is decided in **Affirmative** against the plaintiffs.

**Issue No.4**

19. With regard to the mutation in favour of defendant No.1, counsel for the defendants contended that he has supplied CTC to KDA to show that mutation took place in favour of the legal heirs of the deceased, whereas, the plaintiffs also failed to put such question to defendant's

witness, nor they have associated any officer of KDA in their favour if that was the case. Furthermore, no specific prayer is made through the instant suit challenging the mutation. In the above, this Issue is answered in **Negative**, against the plaintiffs.

**Issue No.5**

20. With regard to cancellation of sale/conveyance deed, it was contended by the learned counsel for the defendants that the deceased late Saadat Hydri was suffering from serious disease and in the month of March/April 2008 his foot was cut by the doctors, as such he was unable to move anywhere without help and the plaintiffs failed to disclose that when and where the sale/conveyance deed was executed, rendering it as doubtful. Since the Conveyance Deed is already declared in the preceding paragraph as forged, fabricated, bogus and ineffective, the same could not be acted upon and is liable to be cancelled. Issue No.5 is hence answered in **Negative** against the plaintiff.

**Issue No.6**

21. In view of the above discussion, the suit of the plaintiffs is dismissed. Nazir to seize the Conveyance Deed and ensure that any entry, if any, in the Register, be deleted. Parties to bear their own costs.

Judge