

# IN THE HIGH COURT OF SINDH AT KARACHI

J. M. No. 51 of 2013

[Humayun Kabir Khan and another *versus* Mst. Gulshan Naseem Akhtar and another]

Date of hearing : 22.02.2023.

Applicants : Humayun Kabir Khan and another through Mr. Z.U. Mujahid, Advocate.

Respondent No.1 : Mst. Gulshan Naseem Akhtar, through M/s. Imdad Khan and Mehmood Ahmed, Advocates.

Respondent No.2 : Nemo.

Mr. S. Hussain Shah, Assistant Advocate General Sindh.

Mr. Imran Hussain, Advocate for Sub-Registrar Liaquatabad.

M/s. Sultan Sahar, District Registrar, Karachi and Zubair Khan, Sub-Registrar Liaquatabad, are present in person.

## **ORDER**

**Muhammad Faisal Kamal Alam, J:** Application under Section 12 [2] of Civil Procedure Code, 1908 (“CPC”) is filed, to challenge the Judgement dated 02.11.2012 and subsequent Decree of 17.11.2012, passed in Suit No.206 of 2009 filed by present Respondent No.1-[Mst. Gulshan Naseem Akhtar] against present Respondent No.2-[Izharuddin]. This application is treated as Judicial Miscellaneous Application No.51 of 2013.

2. Perusal of record shows that earlier a restraining Order was passed on 25.10.2013, which was recalled by the Order dated 15.08.2016, directing the Executing Court to proceed with the Execution Application No.02 of 2013. In the subsequent Order of 17.04.2017, it is observed that execution application was allowed and possession has been handed over to decree holder, that is, present Respondent No.1, against which present applicants

had preferred an Appeal, H.C.A. No.316 of 2016, which was dismissed for non-prosecution.

3. The controversy is that present Applicants / Intervenors are claiming ownership rights in respect of Flat No.B/1 and Flat No.B/2 [respectively], situated in a project known as 'Al-Hameed Homes', constructed at Plot No.FB/-1, Plot No.8, Row-12, Sub-Block – F in Block-III, Nazimabad, Karachi – **Subject Apartments**, through a registered Sale Deed dated 04.06.2011 and Sub-Lease Deed bearing Registration No.4327, dated 24.12.2009. It is averred in the Application under consideration that Applicants have no concern with the disputed property, that is, the Two Flats No.201 and 202, situated in Project known as 'AL-Fatima Centre', constructed at Plot No.3-F-12 / 8, Nazimabad No.3 Karachi – **Suit Flats**, which is claimed by present Respondent No.1 and regarding which the above suit proceeding was filed.

4. Mr. Z.U. Mujahid, learned Advocate representing both the Applicants, has argued that misrepresentation and fraud have been committed by the Respondent No.1 in obtaining the Impugned Judgment and Decree in respect of the Subject Apartments. Applicants' Advocate has referred to the documents filed by him under his Statement dated 17.11.2021, at page-373 of the Court's file, to substantiate his stance, that both the Subject Apartments were purchased by both the Applicants / Intervenors after completing all the legal formalities. The Statement contains the Sale Agreement dated 26.02.2011 between Sarfaraz Bhojani and Applicant No.1 in respect of Flat No.B/1, receipts for payment and finally a Registered Sale Deed of 04.06.2011 (at page-385), the said instrument is also appended with the main Application. Sale Deed dated 29.06.2010 between Riaz Javed and Sarfaraz Bhojani (from whom the

Applicant No.1 has purchased the Apartment) is also filed with the Statement; besides, Undertaking / Indemnification by Sarfaraz Bhojani.

5. *Whereas*, Indenture of Sub-Lease between erstwhile owners (*purportedly*) Mrs. Zahida Parveen and Azra Parveen and Applicant No.2 is also available, in respect of Subject Apartment No.B-2, along with Affidavit of one Abdul Rasheed, the Attorney of above two ladies and receipt of payment. A registered General Power of Attorney given by Mrs. Zahida Parveen and Mrs. Azra Parveen in favour of Abdul Rasheed, is available (at page-447). Mutation Order dated 16.07.2008 in favour of Mrs. Zahida Parveen and Mrs. Azra Parveen with regard to Plot No.8, Row-12, Block III-F, measuring 216 Square Yards, is at page-453. The record shows that earlier the above Attorney Abdul Rasheed through Conveyance Deed sold the Subject Plot to the two ladies (Mrs. Zahida Parveen and Mrs Azra Parveen). A document, viz. Deed of Extension in lease period is also referred by the learned Advocate, which is between the then City District Government Karachi as Lessor and Mr. Najmi Hasan, Mr. Shamsi Hasan, Mrs. Shabeeh Zehra Hassan and Mrs. Farha Javed Zaidi, the legal heirs of the original allottee [Late] Karrar Hussain. The said document in respect of Plot No.8, Row-12, Sub-Block-F, Block-III, measuring 216 Square Yards, situated at Nazimabad. It is stated that lease period has been extended from 50 years to 99 years from 01.01.1951.

Approval of building plan issued by the then Karachi Building Control Authority [now the Sindh Building Control Authority] dated 21.04.2007 has also been appended under the above Statement, conveying approval of building of ground plus two upper floors at “Plot No.12, Row-8, Sub-Block-F, Block-III, Nazimabad, Liaquatabad Town, Karachi”.

Mr. Z.U. Mujahid, Advocate, has relied upon the following case law to augment his arguments\_

- i. **1994 S C M R 782 [Supreme Court of Pakistan]**  
[*GOVERNMENT OF SINDH Through the Chief Secretary and others versus Khalil Ahmed and others*]; and
- ii. **2016 Y L R 890**  
[*Allah Dino and 6 others versus Ali Muhammad and 9 others*].

6. The above arguments are rebutted by Mr. Imdad Khan, Advocate, representing the Respondent No.1. Contented that no fraud and misrepresentation has been done by the said Respondent No.1, because the Suit Flat and the Plot on which it is constructed are different as claimed by Applicants / Interveners. He has challenged the documents referred to by Applicants' counsel, appended with his Statement [*ibid*]. The counsel for Respondent No.1 has drawn the Court's attention to the document-Indenture of Sub-Lease dated 26.11.2009, between the above ladies through their attorney Abdul Rasheed and one Riaz Javed, and states that it is with regard to a proposed Flat to be constructed and it has no nexus with the Suit Flats claimed by Respondent No.1. He has further challenged the authenticity of the building plan [*supra*] and contended that it is with regard to some other plot and owner is different. He further states that the present Judicial Miscellaneous proceeding is barred by time, as Applicants acquired knowledge about the same on 31.08.2009 and a proceeding should have been filed within Three Years, in terms of Article 181 of the Limitation Act; thus, the present proceeding is barred by at least one year and be dismissed. The following case law is cited by learned counsel for Respondent No.1\_

- i. **1996 C L C 1006**  
[*Ammar Housing Services (Pvt.) Ltd. versus Jalaluddin Ahmed and others*];
- ii. **1985 C L C 420**  
[*Muhammad Usman and another versus Rehmatullah and 4 others*];
- iii. **1990 C L C 366**  
[*Iqbal Sultan versus Miss Chand Sultan and 2 others*]; and
- iv. **2019 M L D 537 [Lahore]**  
[*Muhammad Iqbal versus Sajid Hussain Bhatti and others*].

7. Arguments heard and record perused.
8. Record of Suit No.206 of 2009 is also considered, in order to appreciate the present controversy.

Earlier, present Respondent No.1 filed the above Suit against present Respondent No.2 for Specific Performance of Contract on the basis of two Agreements to Sell of the same date, that is, 15.04.2008, between present Respondent No.2 and Respondent No.1. This Agreement to Sell has been exhibited in the evidence of Respondent No.1 as P/2 and P/3. *Whereas*, Respondent No.2 was declared *ex parte*. The Agreement to Sell is about Flat No.201, on Second Floor, measuring 1100 Square Feet, situated in a building known as Al-Fatime Centre, built at Plot No.3-F-12/8, Nazimabad No.3. *Whereas*, the Second Agreement to Sell of the same date is with regard to Flat No.202, on Second Floor in the same building.

9. After recording of evidence, this Court in the above Suit, accepted the version of Respondent No.1, after appraisal the evidence and decided in favour of Respondent No.1, followed by the subsequent Decree, which, as already mentioned hereinabove, has been executed.

10. The main question is whether both Applicants / Intervenors and Respondent No.1 are contesting about the same properties, that is, two Flats or they are distinguishable.

11. The present J.M. has not specifically mentioned the fact about acquiring knowledge of the Impugned Judgment and Decree, but it is mentioned in paragraphs-vii, viii and ix of the J.M., that Intervenors came to know about the suit proceeding, when Court's staff pasted the notice of the execution proceeding at the Subject Apartments claimed by the Applicants / Intervenors. The Execution Application No.02 of 2013, filed in above Suit by Respondent No.1 against Respondent No.2 is at *page-57*. If

the date of knowledge is taken from the pasting of the Court's notice about the said execution proceeding, then the present J. M. proceeding is within time, in terms of Article 181 of the Limitation Act, which prescribes three years' time to file such nature of proceeding; as this J.M. is also filed in the same year, that is, on 24.10.2013. Consequently, the contention of learned Advocate for Respondent No.1 in this regard is misconceived in nature.

12. The Applicants are claiming to be the owners of the above Subject Apartments situated in 'AL-HAMEED HOMES'. The documents filed by the Applicants' Counsel under his Statement have been taken into the account. The Building Plan issued by the Authority for ground plus two upper floors only, **is in respect of Plot No.12 [and not Plot No.8, as claimed by the Applicants and mentioned in their Documents], Row-8, Sub Block-F, Block-III, Nazimabad, Liaquatabad Town, Karachi, wherein the name of the owner is mentioned as Mst. Salma Khan.**

13. The Lease of Land, relied upon by the Applicants' Counsel is also perused, which is in the name of one Karrar Hassan, for a period of 50 years, issued by the Karachi Development Authority [KDA] in respect of Plot No.8, Row No.12, Sub Block-F, in Block No.III, measuring 216 Square Yards. It is **pertinent to mention** that this Lease Document gives a different description of the Plot mentioned in the Approved Building Plan issued by KBCA dated 21,04.2007 [*ibid*], which is attached with the Statement of Applicants' Advocate and on which they have placed their reliance. Hence, contention of Advocate for Respondent No.1 is correct that this Building Plan is for some other Property.

14. Sale deed of 04.06.2011, on the basis of which Applicant No.1 is claiming his entitlement, **for the Flat No.B/1**, has been considered. It states

that the said Flat is situated in the above Project, viz. ‘Al Hameed Homes’, at Sub Plot No.FB/1, of Plot No.8, Row No.12, Sub Block-F, in Block No.III, Nazimabad; area of the Flat No. B-1 is mentioned as 1000 Square Feet. The Sale Deed dated 29.10.2010 in favour of the above Sarfaraz Bhojani, from whom the Applicant No.1 has purchased the Subject Apartment is at page-401, is perused; it mentions the same description of the Subject Apartment as is in the above Sale Deed of Applicant No.1. It is mentioned in this Second Sale Deed that the Subject Apartment, viz. B-1, was originally allotted to Riaz Jawed son of Abdul Majeed, through an Indenture of Sub-Lease No.4328, dated 24.12.2009; this material DOCUMENT in favour of Riaz Jawed is at page-421. It is executed by Mrs. Zahida Parveen and Azra Parveen through their General Attorney Abdul Rasheed. It is mentioned in the Ninth RECITAL that Subject Apartment, viz. B-1, proposed to be allotted by the above ladies which is proposed to be constructed one second floor of the sub-divided – Sub Plot bearing No.FB/1, in Plot No.8, Row No.12, Sub-Block F, in Block No.III, Nazimabad, Karachi. Neither any official Sub-Division Plan is appended with this Sub-Lease, or brought on record by the Applicants, which is material to the resolution of controversy at hand nor any Occupancy Certification [by SBCA] is filed to show that the proposed Apartment [B-1] on the proposed Sub-Division of plot, has been constructed and can be occupied by the Sub-Lessee / Applicant No.1. **Secondly**, the Occupancy Value as mentioned in the Tenth Recital is also questionable, as, it states that the said Riaz Jawed [one of the Predecessors-in-Interest of present Applicant No.1], paid a sum of Rupees Five Thousand only (towards the Occupancy Value), in addition to Rupees Ten, being one year’s ground rent. This Sub-Lease is of 19.03.2010, and it is really surprising that a “**proposed Apartment**” is leased out for a meagre amount of Rs.5,000/- only, which is supposed to be in a developed area of this City. **Thirdly**,

such type of Lease or Sub-Lease in respect of a multi-storey projects are executed when they are structurally complete and not for something which is non-existent at the relevant time. **Fourthly**, in one of the Recitals of the Sub-Lease [*supra*], a reference is made to the Approved Building Plan issued by the Karachi Building Control Authority [now SBCA-The Sindh Building Control Authority], having reference No.KBCA/DCB/[Liaq/Town]/Prop/07/51/58, dated 21.04.2007. The Approved Building Plan with the above reference number is in respect of a different plot, as discussed in the foregoing paragraphs and not the Plot or the Sub-Plot in question where the purported Subject Apartment is situated or would be constructed.

15. Adverting to the title document of the Applicant No.2 in respect of Subject Apartment No.B-2. Applicant No.2 is claiming his entitlement through a **registered Indenture of Sub-Lease dated 26.11.2009, executed between the above ladies, Mrs. Zahida Parveen and Azra Parveen through their Attorney Abdul Rasheed.** The said Indenture of Sub-Lease is at page-499 of the Court's file. It is almost identical, of the same date and contains the same terms as mentioned in the above Sub-Lease between the same Ladies and Riaz Jawed [*ibid*, one of the Predecessors-in-Interest of Applicant No.1 in respect of Apartment No. B-1]; thus, the same observations as mentioned in the foregoing Paragraphs are also applicable to this Sub-Lease concerning the Subject Apartment No. B-2.

16. The Report submitted by the learned Additional Advocate General through his Statement dated 17.02.2023, *inter alia*, contains the Conveyance Deed dated 05.04.2007 between the legal heirs of [Late] Karrar Hassan and Abdul Rasheed. The last page of this Document contains the Microfilming Role No.27 / 62 / 4196 dated 11.04.2007, *whereas*, the Conveyance Deed between the above Abdul Rasheed and the two ladies,



viz. Mrs. Zahida Parveen and Azra Parveen [*at page-455 of the Court File*], is of 12.04.2007, **that is, only after a day after the Conveyance Deed** [*ibid*] between the legal heirs of late Karrar Hassan and Abdul Rasheed was registered.

17. The conclusion of Reports submitted by the learned Nazir, shows that the Officials have confirmed the ownership of both the Applicants and Respondent No.1, with regard to their respective Subject Apartments and Suit Flats-201 and 202 [of Respondent No.1]; *inter alia*, because in the case of Respondent No.1, the learned Nazir of the District and Sessions Court, Karachi-Central, has executed the Sub-Leases dated 24.11.2016 for Flat Nos.201 and 202, situated in “AL-FATIMA CENTRE”. These registered Documents are available in the record and have been filed under the Statement of the learned Advocate for Respondent No.1 [Statement dated 18.10.2018, at page-199 of the Court’s File]. These Sub-Leases in favour of Respondent No.1, **admittedly**, is subsequent in time, as compared to the Documents relied upon by the Applicants in respect of their Subject Apartments. If the Subject Apartments of Applicants are the Suit Flats of Respondent No.1, then the Officials would have informed about such fact to the Nazir before hand and the process would have stopped; but, after due process the Sub-Leases for the Suit Flats were executed by the Nazir in the Execution Proceeding. **Secondly**, the Completion Building Plan available in the above Statement shows the name of the Owner as Respondent No.2, and the Building comprises of ground plus four upper floors, which is different from the Building in which the Applicants are claiming their Subject Apartments [in AL-HAMEED Homes].

18. From the above facts, documents and discussion, the apparent conclusion is that Subject Apartments claimed by the Applicants / Interveners are not the Suit Flats, regarding which Respondent No.1 is also

holding the Title Documents in the shape of Sub-Leases. Therefore, the above question about the Flats / Apartments is answered accordingly.

19. Since, the claim of Applicants are also based on the registered Documents, therefore, it is necessary to probe the matter further. The learned Nazir of this Court with the assistance of the Senior Officials from the Sindh Building Control Authority, District Registrar [himself], Senior Officials from Karachi Development Authority and any Authority, shall provide the following information.

1. Whether the Plot No.8, in Row-12 [*ibid*] was further sub-divided; if yes, then Sub-Division Plan should be submitted.
2. The legal status of the Two Projects, viz. AL-FATIMA CENTRE and AL-HAMEED HOMES should be specifically and clearly highlighted.
3. Any other information or Document necessary for the controversy. It is expected that the inquiry would be completed within six weeks, whereafter the learned Nazir will file the same in the form of a Report and the matter shall be fixed for hearing in Court, *inter alia*, to consider whether, the matter can be finally decided on the basis of the Official Documents or issues are required to be framed for a full dress trial.

**Judge**

**Karachi.**  
**Dated: 05.07.2023.**

Riaz / P.S.