

**JUDGMENT SHEET**  
**IN THE HIGH COURT OF SINDH, KARACHI**  
**IInd Appeal No.121 of 2023**

Abdul Khalique ..... Appellant  
 Vs.  
 Nadeem Tarique Khan & others..... Respondents

Mr. Mashooque Ali Soomro, advocate for appellant.  
 Mr. Abdul Qadir Khan, advocate for respondent No.1.

**Date of hearing** 09.08.2024.  
**Date of order:** 26.08.2024

**JUDGMENT**

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**MUHAMMAD IQBAL KALHORO J:** Appellant filed a suit No.285/2013 in the court of Senior Civil Judge, Malir, Karachi for declaration, cancellation, possession, injunction and damages against respondents. His case was that he was an old member, since 1996, of respondent No.4, Sindh Government Employees cooperative Society Ltd.(Society) and was allotted a plot bearing No.193 type "B", Block A, Sector-I, situated in Gulshan-e-Mehran, Government Employees Cooperative Housing Society, KDA Scheme 33, Karachi admeasuring 400 Sq. Yds. After payment of all dues, the Society executed a lease deed in his favour which was duly registered with Sub Registrar T-Division Karachi bearing No.5287 of book No.II dated 28.07.1996 MF Roll No.2236 dated 26.08.1996.

2. However, suddenly in December, 2011, he came to know that respondent No.1, Nadeem Tarique Khan had filed a constitutional petition in this court claiming the said plot to have been gifted to him by his father, respondent No.2, who had purportedly purchased the same from respondent No.3, Major Tanveer Ali (Rtd). Alongwith petition, he filed some documents viz. gift deed, lease deed etc. registered initially on 08.04.1996 in favour of Mst. Asmat Begum, the purported original allottee by the Society, who then had sold out the property to respondent No.3, Major Tanveer Ali (Rtd). In the petition, respondent No.3 sought directions from the court to the Society to mutate his name at the place of his father's name in the record.

3. When appellant came to know of such fact, he filed an application u/o 1 rule 10 CPC pleading his case but subsequently respondent No.1 withdrew the petition. Later on, when appellant found respondent No.1 in constructive possession of his plot, he filed the above suit.

4. The respondents were served with summons and some advocates filed powers on their behalf. When they failed to submit written statement, they were debarred from putting up their defence. The appellant was called upon to submit an affidavit in exparte proof. Later on, respondents filed applications for recalling the order debarring them from filing written statement alongwith an application u/o VII rule 11 CPC seeking rejection of the plaint, supported by documents such as lease deed executed in favour of Mst. Asmat Begum, complaint filed by the appellant against respondent No.2 with Anticorruption etc. But since both the applications were not pursued, the same were dismissed in non-prosecution and appellant's attorney's evidence was recorded. He in affidavit in exparte proof, filed a copy of petition filed by respondent No.1, Photostat copy of lease deed/indenture of lease No.5287 dated 28.07.1996, copy of memo of receipt of payments to the Society and other documents of the plot but in Photostat state.

5. The trial court after hearing and appreciating evidence dismissed the suit vide judgment dated 29.03.2019 mainly on two grounds. First, the appellant had produced Photostat copies of the documents, hence, failed to discharge burden of proving his bonafide ownership of the plot. It has been observed that Photostat copies of the documents are inadmissible in evidence which in absence of any explanation to the destruction of original one cannot be looked into to ascertain genuineness of the contents. Second, the lease deed executed in favour of respondent was registered on 06.09.1996 and as per provision of Article 91 of Limitation Act, the suit seeking its cancellation was to be filed within three years. Further, in a suit for declaration, without there being any specific provision describing limitation for filing such suit, Article 120 of Limitation Act would be applicable and under that the suit has to be filed within six years, whereas the suit filed by the appellant was admittedly beyond such period and was time barred. The trial court however, in the judgment did not frame any point for determination and by discussing merits of the case together gave its findings dismissing the suit.

6. The appellate Court when approached also did not agree with the appellant and dismissed the appeal vide impugned judgment dated 05.04.2023. The appellate court also did not frame points for determination for deciding the appeal as required in law.

7. A perusal of latter judgment shows that during pendency of appeal, appellant was allowed to file an application for production of certified true copies of the documents, the Photostat copies of which he had already filed in the trial court but which were not looked into and discarded. This application was

allowed and he filed the certified true copies of documents, for which the matter was sent to the trial court for recording additional evidence. The documents included all the documents filed in shape of Photostat copies and in addition registered lease deed with Sub Registrar T. Division Karachi, with MF Roll No.2236 dated 26.08.1996. Yet, the appellate court did not get satisfied and gave almost the same findings that the appellant has failed to prove his title by filing certified true copies instead of original documents. Further, the appellate court while dismissing the appeal has looked into documents filed by the respondent alongwith application u/o VII rule 11 CPC to determine that the suit filed by the appellant was time barred. It is in such context, this appeal has been filed.

8. I have heard learned counsel for the parties. Learned counsel for appellant has questioned validity of both the judgments below by pointing out to facts of the case. Whereas learned counsel for respondent No.1 has argued that concurrent findings are running in favour of respondent, the appellant even in the face of failure of respondents to contest the matter, failed to prove the case to the satisfaction of both the courts below to earn relief of declaration in respect of suit property. According to him, the burden to prove the case was upon the appellant/plaintiff who has miserably failed to discharge the same. The suit was time barred, is evident from the documents filed by the appellant himself. He has relied upon 2002 SCMR 677, 2020 CLC Note 12, 1992 SCMR 2298, 2014 SCMR 513, 1998 CLC 2070 to support his arguments.

9. I have considered submissions of the parties and perused material available on record and has taken guidance from the case law relied at bar. The concurrent findings recorded by the courts below are never considered sacrosanct. If the record shows that such findings are based on either misappreciation of evidence or on some material which is extraneous or the law has been misapplied, the same can be set-aside and either the case can be decided on merits or if there is some lacuna that has distracted the courts below to come to a just conclusion, by remanding the case to the original court to decide it afresh in view of the guiding principles laid down by the superior courts in this regard.

10. Both the courts below have erred to conclude that the case of the appellant/plaintiff was time barred by looking at the lease deed purportedly executed in favour of Mst. Asmat Begum, the predecessor in interest of the respondent, by the Society. They have ignored the fact that very genuineness of this document was under question and that question shall necessary include the date of its execution. This very document was sought to be cancelled by the appellant on the ground that it was false and forged and has not been executed by

the Society. When the validity of the document in its entirety is challenged on the ground of being false and fabricated, then the date of its execution would not be taken up as a reference for determining limitation period for filing the suit against it in absence of a thorough enquiry/the trial to determine its exactness first.

11. The courts below did not consider the fact that it was not the case of appellant/plaintiff that he was aware of document challenged by him since execution, or that the purported date of its execution was correct but contents have been distorted or manipulated, to make the date of execution as a reference point to decide limitation of the case. Instead, the plaintiff has asserted in the plaint that it was only in the year 2011, when respondent No.1 filed a petition in the High Court seeking directions to the Society for inserting his name in the record on the basis of a gift deed purportedly executed by his father deriving title from Major ® Tanveer Ali, he came to know of such manipulation and challenged it by filing the suit in the year 2013 within three years.

12. As has been observed above, when a person questions validity of a document as a whole, it shall also include the date of its execution. In this case, since the appellant has challenged the entire document by questioning its validity, the courts were required to determine first whether the document was genuine or not before referring to the execution date and counting limitation for filing of the suit from. Leaving aside the question to its validity unattended or undetermined, the courts presumed the date of execution of the document as valid and proceeded to hold the suit of the appellant as time barred. If the court determines a document to be valid first, and second is sure, on the basis of evidence, about knowledge by plaintiff of its execution, then the findings of the suit being barred by time with reference to its execution date would be justified. But if the court proceeds to make such a decision, without first attending to the document itself and without considering the ground of fraud taken by the plaintiff to challenge it, it would reflect as if the court's mind was already made up regarding the date of execution of the document as being correct.

13. Such approach would be skewed from the inception, and prejudicial to the case of the plaintiff, who has come to question the very document but the court says since it was executed more than 3 years ago, the suit is time barred. This approach would be valid and could be adopted when the cancellation of the document is sought on the ground other than fraud and fabrication but not in the cases such as the one in hand. Further, the courts have failed to note that respondents had failed to pursue their case before the trial court and did not file any written statement to support their point of view. In absence of any evidence

contradicting claim of the plaintiff about getting knowledge of the questioned document in the year 2011, there was no material before the courts to come to a conclusion that the appellant was aware of the document but he failed to question the same before any forum within time. Therefore, in my humble view, both the courts below have erred in concluding that the suit filed by the appellant was time barred by making a reference to its execution date.

14. Appellate court has gone a step further to determine the point by looking at the documents such as purported complaint filed by the appellant against respondent No.2 before Anticorruption Establishment etc. filed alongwith application u/o VII rule CPC. It has concluded that such documents show that appellant was aware of the purported document's execution in favour of respondent. What the appellate court failed to appreciate was the fact that application U/o VII rule 11 CPC was rejected by the trial court in non-prosecution and the documents filed in support thereof were not looked into by the trial court either or held to be true or even confronted to the appellant to see his response. Presuming those documents to be genuine for determining limitation of filing the suit without an opportunity to the appellant to give his point of view or contradict them is apparently an illegality and at best a result of hypothesis. The appellate court in the context of the complaint has observed that its filing by the appellant shows that he was aware of the document executed in favour of respondent since 2002. It apparently did not cross its mind that had an opportunity been given to the appellant, he might have even denied filing of such complaint before any authority against the respondent and thereby disputing the very document made as a reference for determining limitation of his suit.

15. The findings of the appellate court in respect of certified true copies of documents produced by the appellant to establish his title on the property are cursory in manner. It is mainly observed that appellant has failed to examine relevant officials to establish registered lease deed and his claim to be owner of the suit property. The court is not supposed to dismiss the matter on technicalities by considering some omission which is curable by a simple exercise of jurisdiction by it. The court was empowered to call the relevant officials and examine them for determining genuineness of the document produced by the appellant in support of his case particularly when it was registered document with MF roll No.2236 dated 26.08.1996 duly attested. The court cannot proceed in void by referring to the relevant articles of Qanoon-e-Shahadat to affirm that its requirement has not been met and which has rendered the plaintiff's claim baseless. When it is within jurisdiction of the court to rectify such omission and call relevant officials to

decide the controversy once and for all, it shall not choose to let the controversy simmer, and stay a bone of contention between the parties forever.

16. It is not out of place to mention here that in the year 2008, when a dispute arose between appellant and respondent No.2, father of respondent No.1, regarding ownership of the said plot, the appellant had filed ABN Case No.08/2008 before the District Officer Cooperative Societies Karachi which was referred to the court of Registrar's nominee. The court after hearing the parties and examining the record passed Award in favour of appellant on 12.05.2008. The court has observed that the society was the real culprit which had illegally and with malafide intention allotted one plot to two members and had issued two lease agreements in their favour. However, since the membership of the appellant was older to the membership of the opponent, he decided the case in his favour and issued Award. This award was challenged not only by the Society but by respondent No.2, father of respondent No.1 separately by filing separate appeals which were decided by Registrar, Cooperative Societies on 08.09.2008. He has upheld the award and has believed the genuineness of lease agreement executed in favour of the appellant. He has also upheld findings of the original court of Registrar's nominee that the appellant being senior member had a preferential rights on the subject property. Respondent No.2 was aware of such decision. Yet he created a third party interest in favour of his son by gifting him the property and seeking direction from this court in a constitutional petition to the Society to insert his name in the record. When these two documents: Award and order of Appellate Authority are put in juxtaposition, the judgments rendered by both the courts below seem to have been passed on technicalities without looking into merits of the case. The claim of the appellant has been declined on the point of limitation not only by believing the document, the genuineness of which he has challenged on the ground of fraud but also by not believing certified true copies of the documents, which he was allowed to file by the appellate court itself in order to defeat the observations of the trial court against him on filing of the Photostat copies thereof.

17. In view of above, this appeal is allowed in the terms, whereby the matter is remanded back to the learned trial court to decide the same afresh in accordance with law after affording a proper opportunity of hearing including but not limited to recording evidence afresh to the parties.

Judge