

IN THE HIGH COURT OF SINDH AT KARACHI

C. P. No. S – 655 of 2004

[Dildar Khan and another *versus* Mst. Fatima Bibi and others]

and

II – Appeal No. 32 of 2006

[Dildar Khan *versus* Mst. Fatima Bibi and another]

Dates of hearing : 22.02.2024, 07.03.2024 and 11.03.2024.

Petitioners / Appellant : Dildar Khan and another, through Mr. Zahid Marghoob, Advocate.

Respondent No.1 : Mst. Fatima Bibi, through Mr. Moulvi Iqbal Haider, Advocate.

Respondent No.2 : Nemo.
[in the Second Appeal]

Case law cited by Advocate for the Appellant / Petitioner.

1. **P L D 1985 Supreme Court 382**
[*Alloo versus Sher Khan and others*];
2. **1991 C L C 2064**
[*Muhammad Ikhlag versus Sheikh Muhammad Saeed*];
3. **1980 C L C 513**
[*Abdul Majid (Represented by Legal Heirs) versus Dr. Din Muhammad (Represented by Legal Heirs)*];
4. **1984 M L D 951**
[*Ashiq Ali and 3 others versus Muhammad Hashim and 8 others*]; and
5. **P L D 1959 Supreme Court (Pak.) 9**
[*Muhammad Muzaffar Khan versus Muhammad Yusuf Khan*] – **Muzaffar Khan Case.**

Case law relied upon by Respondent's counsel.

1. Unreported Judgment dated 25.02.2021 in Civil Petition No.962 of 2016 [*Sheikh Muhammad Muneer versus Mst. Feezan*] – **Sheikh Muneer Case**; and
2. Unreported Judgment dated 20.10.2020 in Civil Petition No.84 of 2016 [*Sajjad Ahmed Khan versus Muhammad Saleem Alvi and others*].

Law under discussion:

- (1) Specific Relief Act, 1877 [**SRA**].
- (2) Sindh Rented Premises Ordinance, 1979 [**SRPO**].

- (3) Civil Procedure Code, 1908 [CPC].
- (4) Qanoon-e-Shahadat Order, 1984. [Evidence Law]; and
- (5) The Transfer of Property Act, 1882 [Property Law].

JUDGMENT

Muhammad Faisal Kamal Alam, J: Due to commonality, both the titled Constitution Petition (relating to Rent proceeding) and Second Appeal (relating to Suit for Specific Performance), are decided by this common Judgment. Subject matter of these Cases is two shops on ground floor in a built up property situated on Plot No.1416, admeasuring 104.62 Square Yards, situated in Welfare Colony, University Road, Katchi Abadi Sindh, Karachi.

2. Undisputed facts are that the Two Shops [demised premises] were let out to Petitioner in the titled C. P. No. S – 653 of 2004, who is the Appellant in titled Second Appeal No. 32 of 2006, (**Dildar Khan**) by Mst. Qasim Jan, the deceased Mother of present Respondent in both the Cases, namely, **Fatima Bibi**, on the monthly rent of Rs.2,200/- [for both Shops]. The deceased Mother through a registered Gift Deed had gifted the Subject Property to her three children, namely, Abdul Rasheed (son and brother of Fatima Bibi), Mst. Zubaida (daughter and sister of Fatima Bibi) and present Respondent – Fatima Bibi.

3. It is the claim of Dildar Khan that his wife Mst. Badarunisa had purchased the share of Mst. Zubaida (sister of Fatima Bibi) through a registered Instrument / Sale Deed dated 15.06.1999 [Exhibit P-3], and he

[Dildar Khan], purchased the share of Fatima Bibi / Respondent through a Sale Agreement dated 13.04.1997 [Exhibit P], against a sale price of Rs.350,000/-, out of which Rs.200,000/- and subsequently Rs.105,000/- on the insistence of present Respondent, were already paid to Fatima Bibi, leaving a balance of Rs.45,000/-, but due to her refusal to complete the transaction, Suit for Specific Performance, being Civil Suit No.774 of 1999 was filed. Subsequently, Respondent / Fatima Bibi filed the Rent Case No.450 of 2001 for evicting the Petitioner / Appellant from the demised premises.

Fatima Bibi had filed a Written Statement in the above Suit and has denied the entire sale transaction, *whereas*, present Petitioner in his Written Statement in the Rent proceeding has denied his status as Tenant and reiterated that he is a Purchaser. The Rent Application preferred by Fatima Bibi is on three grounds, viz. Default in payment of rentals so also utility bills, since 01.07.1996 at the rate of Rs.4,400/- per month up to 31.05.2001 (when the Rent Case was filed), personal *bona fide* need as four sons of present Respondent want to start their own business and making structural changes, which would impair the material value or utility of the demised premises.

In her Written Statement to the Specific Performance Suit, not only the sale transaction between the parties hereto (Dildar Khan and Fatima Bibi) has been categorically denied, terming the above Sale Agreement as bogus and fake, but Respondent-Fatima Bibi also denied that her sister Mst. Zubaida, executed any Sale Deed in favour of wife of Dildar Khan (Mst. Badarunisa). In Rent proceeding, the above named wife of Dildar Khan also became Opponent No.2, after her First Rent Appeal was allowed and then amended Rent Petition was filed by Fatima Bibi so also amended Written Statement was filed by Dildar Khan.

4. The Rent Case was decided against Fatima Bibi on the ground that above Specific Performance Suit is pending in which *status quo* is given, in addition to the fact, that Fatima Bibi is required to get established her title by filing a Suit for Partition and then prefer an Ejectment Application against the Opponent. This Order was successfully challenged in Appeal and was overturned in favour of Fatima Bibi against which Dildar Khan has filed the present Constitution Petition; *whereas*, the above Specific Performance Suit was decided and decreed in favour of Dildar Khan, which was overturned in Civil Appeal No.84 of 2005, preferred by Fatima Bibi, which is challenged now through the titled Second Appeal.

5. Mr. Zahid Marghoob, Advocate representing Appellant / Petitioner, has argued that the both the impugned Decisions in Suit and Rent proceedings, are contrary to law, *inter alia*, as appraisal of evidence was not properly done by the Appellate Courts and plausible reasons are not mentioned in the impugned Judgments, for overturning the Decisions of learned Trial Court and Rent Controller, which are based on proper appraisal of the evidence; contended that question of default and other grounds of eviction do not arise in the case of Dildar Khan, because no relationship of Landlord and Tenant exists between the Parties hereto, in view of the fact, that the demised premises was subsequently purchased by Dildar Khan and his wife, from the above Ladies, that is, Mst. Zubaida through a registered Sale Deed [*ibid*] and Fatima Bibi, through the Sale Agreement, thus, the finding of Rent Controller is correct, which was wrongly overturned in the Appeal and same should be set a naught in the present proceeding; contended that finding of the Appellate Court [in Appeal arising of Suit proceeding], that execution of Sale Agreement and Receipt by Fatima Bibi, has not been proved and Appellant did not invoke Article 59 of the Evidence Law (relating to expert opinion, *inter alia*,

concerning identity of handing writing or finger impression), is erroneous. Learned counsel has relied upon the case law mentioned in the opening part of this Judgment.

6. The above arguments are controverted by Mr. Maulvi Iqbal Haider, Advocate representing Fatima Bibi. While supporting both the impugned Judgments, he contends that even the alleged sale transaction between wife of Dildar Khan and sister of Fatima Bibi is highly doubtful, besides the fact, that the said sister (Mst. Zubaida) was never called to verify such a fact in favour of Dildar Khan. Onus to prove Sale Transaction was on Dildar Khan, which he failed to prove as required under Article 17 and 79 of the Evidence Law. He has cited two unreported Judgments of Honourable Supreme Court mentioned in the title of this Judgment.

7. Arguments heard and record perused.

8. Summary of the case law cited by Petitioner / Appellant's counsel, Mr. Zahid Marghoob, Advocate, is, that if a purchaser purchased an undivided 'Khata' is clothed with the same right as the Vendor has in the property, and the Vendee must be regarded as stepping into the shoes of his transferer *qua* his ownership rights in the joint property, to the extent of area purchased by him. First Appellate Court should give reasons, if differing on finding of fact reached by the learned Trial Court, only then its decision would be immune from interference in Second Appeal. When the two attesting witnesses of the sale agreement are examined and they have confirmed the signature of Vendor (who is not alive), then on mere conjecture, it cannot be held, that Vendor has not signed the sale agreement. Receipt is proven in a sale transaction of a property, then burden to prove fabrication is clearly on the defendant. When a payment receipt is an undisputed document, then it can be treated as agreement of sale between

the parties, if the said receipt mentions the total sale consideration, payment receipt, Vendor, Vendee and description of the property. Signature denied on a receipt, then Rent Controller (of the reported case) should have got the signatures of appellant compared with the signatures on the admitted document.

9. First the Second Appeal is considered. Dildar Khan besides examining himself has produced three witnesses, namely, Farzaman son of Noor Ali, Imtiaz son of Fazul-ur-Rahman and Bashir Ahmed son of Nawab, *whereas*, Fatima Bibi examined herself and one more witness Mst. Areeza.

10. Sale Agreement in question is produced as Exhibit-P, Payment Receipt as Exhibit P/3, Sale Deed dated 15.06.1999 between Zubaida Khanam (sister of Fatima Bibi) and Dildar Khan is also produced as Exhibit-P/3 (*Page-125 of the R&P*), the undisputed Gift Deed is produced by both Dildar Khan and Fatima Bibi [Exhibit D/2]. An Iqarnama (اقرارنامه) dated 20.07.1996, *purportedly*, signed by deceased mother of Fatima Bibi, as Exhibit P/4 (*Page-141 of R&P*). With regard to this Iqarnama, it is stated in the Affidavit-in-Evidence (Paragraph-7), that it was signed by the Deceased Mother [of Respondent], because she received a sum of Rs.165,000/-, from Dildar Khan for selling out a portion in the Subject Property. However, this plea was never taken in the Complaint, nor it is mentioned in cause of action or prayer clause.

11. It is pertinent to mention that the purported Sale Agreement has been witnessed by Attaullah son of Hazratullah and Saleem Shah son of Nazir Hussain, but both witnesses were not produced by the present Appellant / Petitioner-Dildar Khan to corroborate the execution of the said Sale Agreement by the Parties as Vendor and Vendee. This was mandatory, in view of the fact that the entire Sale Transaction and the said Sale

Agreement has been categorically disputed not only in the Written Statement of Fatima Bibi filed in the above Suit, but also in the Rent Case filed by her (*supra*).

12. Dildar Khan in his cross-examination did not deny his original tenancy in the demised premises so also the fact that entire Subject Property was gifted by late mother (Mst. Qasim Jan) to her children in the year 1994. Admitted the fact that his wife (Mst. Badarunisa) did not apply for partition of the Subject Property after purchasing the share of Mst. Zubaida (sister of Fatima Bibi); denied the suggestions that the subject Sale Agreement is a forged one so also Payment Receipt of Rs.200,000/-; to a question, he showed his ignorance that when the Sale Agreement was prepared. He refuted the suggestion that no address of witnesses is mentioned either in the Sale Agreement [Exhibit-P] or in the Payment Receipt [Exhibit P/3]; which is self-contradictory and incorrect, as in both these Documents, addresses of the witnesses are not mentioned.

Dildar Khan was confronted on Exhibit P/4-the purported Iqarnama (*ibid*). He denied the suggestion that it was a post-dated document, because already the Subject Property was gifted by the deceased mother to her children, including Fatima Bibi. To a question, he has stated that he did not know about execution of Gift Deed and reiterates his stance about the Acknowledgement / Iqarnama in his favour. **This portion of his testimony belies his stance**, which is mentioned in his Affidavit-in-Evidence / examination-in-chief and earlier part of cross-examination, in which he himself has stated that the Subject Property was gifted by the deceased Mother to her children including the Respondent vide Gift Deed dated 18.10.1994 (bearing registration No.2557, available in the record of

this Second Appeal, so also at page-31 of the R&P), which Dildar Khan himself had produced in the evidence.

Witness Farzaman has corroborated the evidence of Dildar Khan, besides, stating that above Receipt of Rs.200,000/- [Exhibit P/3] was also signed by Mushtaq Ahmed, husband of Respondent and at the relevant time, Nazar Hussain son of Fatima Bibi was also present. In his cross-examination, he admitted that although payment of Rs.200,000/- was made to Fatima Bibi in his presence, but he did not sign the Sale Agreement.

Imtiaz corroborated the evidence of Dildar Khan and his reply in his cross-examination is similar to that of Farzaman. He is also one of the witnesses of the Receipt-Exhibit P/3.

Bashir Ahmed is also claiming to be the Attorney of Mst. Zubaida Khanum (sister of Fatima Bibi), who has executed the Sale Deed on her behalf in respect of her share in the Subject Property, in favour of wife of Dildar Khan. In his cross-examination, he has denied the suggestion that no Power of Attorney was executed by Mst. Zubaida Khanum in his favour (Bashir Ahmed); but, he did not produce the General Power of Attorney claimed to be executed by Mst. Zubaida [sister of Mst. Fatima Bibi]. This witness has endorsed his Signature on the back side of the Receipt.

13. It is averred by Dildar Khan that the Husband [Muhammad Mushtaq] of Fatima Bibi also signed on the said Receipt-Exhibit P-3, in presence of the witnesses, but Muhammad Mushtaq was never examined.

14. The Respondent – Fatima Bibi in her examination-in-chief has testified that none of the Legal Heirs [her Siblings] have sold their share to anyone; Dilawar Khan was / is the tenant and not a purchaser. Produced the title document of the Subject Property, Search Certificate and the Gift Deed

as Exhibit D/2, D/3 and D/4, to prove that it is still in her name along with her Siblings [Brother Abdul Rasheed, Sister-Mst. Zubaida].

In her cross-examination, she denied the suggestion about selling of their shares by her Siblings in the Subject Property to the above named wife of Dildar Khan or Bashir (who is also a witness of Dildar Khan and his evidence is discussed in the foregoing paragraphs); has refuted the suggestion that she sold her share [in the Subject Property comprising of the Demised Premises] to Dildar Khan for an amount to Rs.350,000/-. She has refuted the suggestion that her husband Muhammed Mushtaq signed the Receipt-Exhibit P/2, or she received any amount towards sale consideration in presence of the above-named witnesses of Dildar Khan. She has denied the suggestion that her Deceased Mother received Rs.165,000/- from Plaintiff (Dildar Khan) towards sale of portion in the Subject Property, as claimed by the said Dildar Khan in his Affidavit-in-Evidence [*ibid*]. In her cross examination, Fatima Bibi could to be contradicted on any material part of her deposition.

The other witness of Defendant is Areeza, who is a resident of the same neighborhood. She corroborated the testimony of Fatima Bibi in her Examination-in-Chief, but, in cross-examination, showed ignorance to the suggestions about the sale transaction.

15. A glaring contradiction in the testimony of Dildar Khan has surfaced during appraisal of the evidence. He has attempted to introduce a new case in his evidence, by deposing that he paid a sum of Rs.165,000/- to the deceased mother of the Respondent towards purchase of a portion of the Subject Property (as mentioned in the preceding paragraphs), through an Acknowledgement Document [*ibid*] and such transaction, according to his evidence, took place on 20.07.1996, *whereas*, it is an admitted fact that the entire Subject Property was gifted to Fatima Bibi and her Siblings by way

of a registered Gift Deed on 18.10.1994, that is, prior to the alleged Sale Transaction between the deceased Mother and Dildar Khan; once, the deceased Mother had transferred her right and interest as the Owner of the Subject Property to her Children, she then cannot deal with the Subject Property subsequently and the above Acknowledgment Document has no legal value. This part of the testimony [of Dildar Khan] is completely false and is properly dealt with by the Appellate Court in its impugned Judgment. This crucial aspect was neither properly appreciated by the learned Trial Court, nor surprisingly even argued by the Respondent's counsel in the present Cases.

16. Admittedly, witnesses of the purported Sale Agreement-Exhibit P, were never examined. This is fatal to the entire claim of Dildar Khan, because the said Sale Agreement and the transaction has been categorically disputed by Fatima Bibi. It means that the Sale Agreement in question had to be proved, as required under Articles 17 and 79 of the Evidence Law, but, the Appellant/Petitioner failed in this regard. The rule laid down in the Judgments cited by the learned Counsel for the Respondent, are relevant, in particular, *Sheikh Muneer Case (supra)*, because in this Case also the alleged sale agreement was said to be executed by the respondent-lady. The Hon'ble Supreme Court has maintained the Decisions of the Courts, dismissing the specific performance suit of the petitioner [*of the Sheikh Muneer Case*], while holding that if only one witness is examined out of the three witnesses of the sale agreement, and no plausible justification is given in terms of Article 80 {*proof where no attesting witness found*} of the Evidence Law, then, the requirement to prove an agreement as envisaged in Articles 17 and 79 are not fulfilled, followed by the adverse consequences against the claimant of a sale transaction.

17. Dildar Khan's claim regarding payment of Rs. 105,000/- to Fatimah Bibi, for releasing the title document of the Subject Property from the Court, which were kept as Surety, has been disproved, because no receipt has been produced about payment of this amount, which has been denied by Fatimah Bibi in her evidence, and that remains unshaken. Since Dildar Khan has failed to prove the Sale Agreement, hence, Receipt [*ibid*] allegedly issued in pursuance of the said Sale Agreement, has no legal value.

When the original tenancy is not disputed and a Tenant takes a defense that he has purchased the property through a Sale Agreement, then onus to prove a genuine and *bona fide* Sale Transaction is on the Tenant, *inter alia*, in order to avoid adverse consequences mentioned in Article 115 of the Evidence Law [an estoppel] and rule enunciated through Judgments of the Superior Courts, that in such a situation, first possession should be delivered to the landlord and then tenant can contest his case for Specific Performance; the reported Decisions of the Apex Court – P L D 2014 Supreme Court 347 [*Muhammad Nisar versus Izhar Ahmed Shaikh*] and 2011 S C M R 320 [*Abdul Rasheed versus Maqbool Ahmed & others*], are relevant.

18. Claim of Dildar Khan suffers a further setback in view of the Exhibit D/4, which is a Search Certificate dated 17.03.2001, showing the names of Fatima Bibi and her Siblings as the Owners of the Subject Property, which has cast doubt on the genuineness of the said Sale Deed [Exhibit P-3], through which it is claimed that the wife of Dildar Khan has purchased the portion in the Subject Property from Mst. Zubaida, through her above-named Attorney Bashir Ahmed, who came as a Witness of Dildar Khan. Considering these material aspects of the controversy, the evidence of Mst. Areeza - the Witness of Fatimah Bibi loses significance, *inter alia*, as she is not a witness of any of the Documents involved in the present controversy.

19. The above discussion leads to the conclusion that Decision of the learned Trial Court handed down in Suit for Specific Performance [Suit No.774 of 1999] has misread the evidence and overlooked the legal principles. The findings of the learned Trial Court that evidence of the present Appellant and his witnesses remained unshaken, is not only contrary to record, but uncalled for in the circumstances, and has been rightly overturned in the impugned Appellate Judgment.

20. No illegality or substantial error is there in the impugned Appellate Judgment and thus, it is maintained. Consequently, the IInd - Appeal No.32 of 2006, is dismissed.

21. Adverting to C. P. No. S – 655 of 2004. Since it has been proven that Petitioner [Dildar Khan] is not a Purchaser but Tenant of Respondent No.1 – Fatima Bibi, therefore, the Order of the learned Rent Controller in favour of Dildar Khan, which is overturned in Appeal through the impugned judgment, have been taken into account.

22. The learned Rent Controller has mixed up the two Issues of the Sale Deed purportedly executed between Dildar Khan and Siblings of Fatima Bibi and the Sale Agreement in dispute. It has decided Rent Case against the present Respondent by misreading the evidence, *inter alia*, that since Fatima Bibi did not know the sale of share by her brother to Basheer [one of the above Witnesses], therefore, disputed sale transaction between Fatimah Bibi and Dildar Khan was also adjudged as valid. The Rent Controller erred while deciding the Point No.1 about relationship, *inter alia*, on ‘presumption’ that the title Documents [of the Subject Premises] are used for the purpose of execution of Sale Agreement [in dispute], by

overlooking the admitted fact that the original Tenancy between the Parties was never disputed.

23. Affidavit-in-Evidence of Fatima Bibi is available in record [at page-129 of C. P. No. S – 655 of 2004], wherein, she has reiterated her stance that the Sale Agreement is a forged document and the above Suit No.774 of 1999 filed by Dildar Khan is tainted with *mala fide*, besides, that Dildar Khan is a defaulter in payment of rent of the demised premises; yet the Rent Controller in his Order, under the Issue No.2, overlooked the evidence in this regard and gave the finding that since property is still un-partitioned and undivided between the joint owners, coupled with the fact that since above Suit No.774 of 1999 was *sub judice*, therefore, title of Fatima Bibi is to be established, although the same was never in dispute. The learned Appellate Court after appraisal of the evidence has overturned the findings, which is correct, in view of the discussion mentioned in the foregoing paragraphs.

24. The case law cited by the learned Advocate for Appellant / Petitioner is distinguishable. The Judgment of the Honourable Supreme Court in *Muzaffar Khan Case*, relates to Suit for Pre-emption, where an unpartitioned property was sold to a third party; however, in this Judgment also, it is stated that the transferor cannot claim in addition to what has been transferred to him by his transferee. Therefore, even if the Sale Deed in the present *Lis* between Zubaida Khanum and wife of Dildar Khan are treated to be valid, the said Dildar Khan cannot claim anything in the demised premises, which is owned and gifted to Fatima Bibi. Similarly, Judgment in Ashiq Ali case (*ibid*) handed down by this Court, the sale agreement was proven to be correct, because the two attesting witnesses, besides, the scribe of the sale agreement were examined, but in the present *Lis*, admittedly

attesting witnesses were not examined and hence it is fatal to the case of present Appellant / Petitioner-Dildar Khan.

25. No illegality is successfully pointed out by the Petitioner's counsel in the impugned Appellate Judgment, justifying the issuance of writ of *certiorari*, thus C. P. No. S – 655 of 2004, is dismissed and the impugned Judgment dated 22.09.2004 [passed in First Rent Appeal No.150 of 2004] is affirmed. The demised premises should be vacated within fifteen days, or Writ of Possession will be issued by the learned Rent Controller acting as Executing Court.

26. Respondent can withdraw the rents deposited in MRC and is entitled to be paid the arrears of rents till the Demised Premises is vacated by Dildar Khan. The arrears of rent should be cleared by the Appellant/Petitioner within fifteen days from the date of handing over of possession of the demised premises, or, the Executing Court upon an application of the Respondent, shall pass necessary orders.

27. If for any reason, Executing Court comes to the conclusion that gifted portion in favour of Fatima Bibi is to be partitioned and separated from the other portion of subject property, then Executing Court can pass necessary directions to the learned Nazir [of the Trial Court] and will ensure that without any delay, the partition is done so that vacant, peaceful and physical possession is handed over within the shortest possible time, considering the protracted litigation.

Judge

Karachi.
Dated: 05.04.2024.

Riaz / P.S.