JUDGMENT SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

R.A. No. 172 of 1996

PRESENT: MR. JUSTICE MUHAMMAD SADIQ LAGHARI.

J U D G M E N T

Date of hearing: 16.5.2003.

Applicants: N.K. Mohammad and others through Mr. Yousuf Hussain, Advocate.

Respondents: None present.

MUHAMMAD SADIQ LAGHARI, J. Present Revision Application has come against the concurrent findings by XIVth Senior Civil Judge, Karachi South and VIIIth Additional District Judge, Karachi South in a dispute between the father and son over a plot size 36 Sq. Yds situated in Kachi Colony, New Kelry, Karachi

2. The facts of the case are that N.K. Muhammad a Muslim Melbari, was allotted plot No. 646 (36 Sq. Yds) at Suleman Dawood Road, Kachi Colony, New Kelry, Karachi by KMC. He was residing there with all his family members including N.M.Khalid and N.M. Hamza the two sons from his first wife. On 7.7.1975 the plot was finally leased out by KMC to him under Registered Lease Deed, as he fulfilled the conditions including that of constructions of house there upon.

3. About four months thereafter on 20.11.1975 a Sale Deed in respect of said plot said to have been executed by N.K. Muhammad was registered under the provision of Registration

Act in favour of his sons N.M.Hamza. However the sale deed was not presented for entry in the record of KMC in favour of N.M.Hamza the purchaser.

4. N.K. Muhammad and his family members continued residing in the house, built on the plot. His son N.M. Hamza expired on 17-03-1985. Even after that entire family including Jamila the widow and children of N.M.Hamza were residing there

5. After expiry of her Iddat period Jamila the widow of N.M. Hamza together with her children shifted to her parent's house. She then asked N.A. Muhammad and other members to handover the possession of the house to her as the same was their property on the basis of sale deed dated 20.11.1975. She also filed an application for grant of letter of Administration in respect of the disputed premises i.e. property left by her husband and the same was granted. In that application N.K.Muhammad the father of N.M.Hamza was not made party.

6. N.M.Muhammad filed Suit in 1987 (Suit No. 1169 of 1989) against Jamila, her children and Sub-Registrar T-Division Karachi , stating therein that he neither sold the disputed property to N.M.Hamza nor received any amount as consideration or executed Registered Sale Deed. That his son N.M.Hamza had taken the lease deed from him saying that it was required for grant of loan to him by Pakistan Insurance Corporation. He further pleaded that his signatures were also

obtained on some documents on the pretext that those were surety documents in connection with the loan. It was further pleaded by N.K.Muhammad /plaintiff that the sale deed was kept secret throughout and disclosure thereof was made to them first time on 10/8/1987 by Mst. Jamila who declared that the disputed property belonged to her and her children as it was purchased by her husband through Registered Sale Deed dated 20,11.1975. The plaintiff prayed for declaring the sale deed dated 20.11.1975 to be fraudulent, void and illegal. He also prayed for its cancellation; and permanent injunction restraining Jamila and other defendants from dispossessing him and from transferring/alienating and selling the disputed property to any one on the basis of sale deed dated 25.11.1975. In the last the plaintiff also prayed for return of original lease deed executed by KMC in his favour.

7 Mst. Jamila the Defendant No.1/Respondent No.1 resisted the suit and filed written statement denying therein the contentions advanced through the plaint. She claimed that allotment of the plot was got by her husband N.M.Hamza and lease in the name of N.K.Muhammad was only benami. She further pleaded that house was constructed by her husband and N.K.Muhammad and his family members were residing therein as licensee not as owner. That N.K.Muhammad had received Rs.8000/- as consideration for the disputed property and executed Registered Sale Deed in favour of her husband N.H.Hamza who had then obtained loan from his employer

corporation against the disputed property. It was also her case that due to hostile and insulting attitude of her father in law and others after death of her husband she had left the house and took refuge in the house of her parents. She also raised legal objections that the suit was not maintainable and also it was beyond pecuniary jurisdiction of XIVth Civil Judge Karachi, South and was also under valued.

8 After framing the issues and recording the evidence the trial Court dismissed the suit by judgment and decree dated 5.1.1995 and 10.1.1995 respectively. Appeal against them was dismissed by VIIIth, Additional District Judge Karachi, South, by judgment and decree dated 17.4.1996 and 23.4.1996 respectively.

9. Appellant's learned Advocate contended that decisions of the two Courts below are the result of on non reading and misreading of the material parts of the evidence. According to him both of the learned Courts ignored the facts in evidence that the applicant/plaintiff had no other house except the disputed property wherein he was residing with all members of his family and he had no reason to sale it. Secondly that the pleadings of Respondent No.1 that infact the lease was got by her husband and the petitioner was only benami is in direct conflict with her part of her evidence that her husband had purchased same property from his father (benami) paying him the consideration amount. He also argued that Courts below ignored the material

fact in the evidence that the house was existing on the plot before the date of sale deed still the purchase is shown to be of only plot. Also the sale deed was kept secret and was not presented for getting it entered in KMC record. The learned Advocate however, did not attack the findings on the question of admission by respondent Jamila in applicants favour before Malbar Muslim Jamat.

10. No arguments were advanced on respondent's side as none appeared for them.

11. The Plaintiff N.K.Muhammad expired before recording his evidence. After that his elder son N.M.Khalid being one of his legal heirs deposed as principal witness on plaintiff's side. He denied the sale of plot/house and execution of sale deed by their father N.K.Muhammad claiming the sale deed to be fraudulent document. On Defendant's side Jamila the Respondent No.1 recorded her evidence claiming the sale deed to be a genuine and perfectly legal documents.

12. The copy of the controversial Registered sale deed has been produced in evidence. It contains that it was executed in consequence of an agreement of sale executed by N.K. Muhammad in favour of his son N.M. Hamza on 31-03-1975, but no such agreement has been produced in evidence. Thus the existence of very contract claimed to be the basis for the sale deed is not established. Further the sale deed is in respect of the plot only whereas the evidence on record proves the presence of the residential hou …se on the plot since before its

execution. The lease deed executed by KMC in respect of the plot, in favour of N.K.Muhammad on 07-07-1975, itself contains expressly that completion of the construction on the plot was the condition precedent for grant of lease and N.K. Muhammad had fulfilled that condition by completing the construction of the building upon it. The contents of this document and the evidence of N.M.Khalid one of the applicants/plaintiffs that the house was constructed by their father upon the plot and his marriage took place in that home during 1972 confirm each other. Evidence of N.M.Khalid on this point has not been challenged. Even the evidence of Msdt. Jamila the respondent No.1confirms the presence of house upon the plot before grant of its lease to N.K. Muhammad. It is in her evidence that when she can in the house after her marriage in 1973 it was in deteriorated condition. Thus it is proved that at the time of execution of sale deed, residential house was existing upon it. In presence of above discussed evidence the sweeping oral words of the lady respondent that after purchase of the disputed plot he had obtained loan and part of it was spent on the construction of the Suit premises are of no significance. That part of her evidence is in conflict with her own word that she came in the house after marriage in 1973 which is an admission of the existence of the house much before the disputed sale deed. Therefore, the sale dead in respect of plot only and the payment of price of the plot cannot be believed to be a legitimate document.

13. Beside the false fact that property was the plot only there is one other false statement alo in the sale deed. It is about the delivery of possession of the plot to the purchaser on the date of execution of the sale deed. As mentioned above the house was existing on the plot and the applicants were residing therein. Even now they are residing therein. Thus the possession of plot however delivered to the so-called purchaser.

14. In addition to the above it is in the evidence of Mst. Jameela the respondent No.1 that the plot in disputed was, infact, purchased by her husband in the name of her father-in-law and payment was also made by him. Clarifying further, she stated that expenses on the lease of the plot in the name of her father–in-law were incurred by her husband. This evidence makes the plea of the purchase of the disputed plot by N.M. Hamza ridiculous. If he was the real man having managed the grant of lease and had also paid the lease money then he would purchased the same plot from his front man. Also the fact that sale deed was not got entered in the record after its registration is of much significance in the circumstances. If it was genuine document why the same was not got entered in the record of KMC. The excuse given by the respondents in that respect is that the sale deed was deposited with Pakistan Insurance Company in connection with the loan obtained by N.H.Hamza. This excuse is not convincing one. Even extract from the record of rights could be used for establishing the ownership, while processing the loan case. Certified true copy of the sale deed could be had

and used for the purpose of obtaining the loan. Even original deed was to be returned back by KMC authorities after making entry on the basis there of. Therefore, the fact of not getting the mutation changed in favour of N.M.Hamza, on the basis of sale deed supports applicant's case that the document was kept secrete yet another fact reflecting the fraudulent conduct of the respondent Mst. Jamila against her father in law N.K. Muhammad is that when she filed an application for grant of letter of Administration, in respect of the house in dispute she did not join him as party despite the fact that he was among the heirs of his son.

15. Not only the material aspect and the fact in evidence highlighted above were ignored but the misleading of the evidence is also visible in the impugned decision. It is the answer given by N.M. Farooq (plaintiff/petitioner No.1) in the cross-examination, which has not been read and appreciated in its spirit. He stated while answering a question in the last part of the cross-examination that @It is correct that N.M. Hamza was owner of the suit property and after his death his legal heirs/defendants have become owners". The trial Court treated it an admission of the legal and valid ownership of N.M. Hamza on the basis of sale deed and the learned appellate Court concurred with it. In fact, the answer was never an admission or acceptance of the legal ownership of N.M.Hamza over the property in dispute. The spirit of the reply was that since there was a registered sale deed the N.M.Hamza was owner of the

disputed property and after his death his legal heirs have become the owners. That answer was sto be read with his other evidence and was subject to their challenge. In his entire evidence N.M.Khalid challenged the validity and genuineness of the sale deed. Even after the above answer he replied the next question in following words:-

> "It is not correct that I have given false statement in the examination-in-chief"

As mentioned above in the examination-in-chief this witness has denied the execution of sale deed by their father and challenged its genuineness. Through above answer he reaffirmed that position. Ignoring all that the learned two Courts below took the answer about the ownership as admission of legal and valid ownership which is nothing but a misleading of the evidence.

16. In views of above facts and circumstances the sale deed in respect of the plot cannot be believed or accepted as a genuine and valid sale document. The learned two courts below, accepted the sale deed as genuine document, ignoring the above-discussed material in evidence and misreading part thereof. Their decisions are, therefore, not sustainable, consequently they are set aside and the suit filed by the applicants/plaintiffs is decreed as prayed. With this order the revision application is accepted, with no order as to costs.

J U D G E