

IN THE HIGH COURT OF SINDH, KARACHI

Civil Revision Application No.46 of 2014
[Zafar Iqbal vs. Mst. Qaisar Jehan and others]

Date of hearing : 01.02.2024

Applicant
[Zafar Iqbal] : Through Ms. Amna
Usman, Advocate.

Respondent No.1
[Mst. Qaiser Jehan] : Through Mr. Muhammad
Siddique Shahzad,
Advocate.

Respondent No.4
[The President Muslim
Commercial Bank] : Through Mr. Ghulam
Rasool Korai, Advocate.

Respondents No.2 and 3
[Cantonment Executive Officer,
Malir Cantt, Karachi and
the Manager Director, HBFC] : Nemo

JUDGMENT

Muhammad Faisal Kamal Alam, J: This Civil Revision Application has called in question the Judgment and Decree dated 03.12.2012 handed down by the learned Trial Court in favour of Respondent No.1, and the Decision of 18.02.2014, passed by the learned Appellate Court, dismissing the Appeal of present Applicant.

2. Succinctly, Suit No.558 of 2006 was filed by present Respondent No.1 [Mst. Qaiser Jehan] against the present Applicant, as Respondent No.1 and other official Respondents, seeking, *inter alia*, the relief of possession of Plot No.A-30, in Survey No.427, Bostan-e-Raza Extension, Model Colony, measuring 130 Square Yards, together with structure / construction thereupon (**the ‘Suit Plot’**). The claim of Respondent No.1

(Plaintiff) about the Suit Plot is, that she has purchased the same through a registered Conveyance Deed dated 07.06.1981 (*at page-79, produced in the evidence*) from its erstwhile owner Mrs. Rasheeda Jilani [**Ms. Jilani**], who was leased out the Suit Plot by a Company-Salman Limited, vide a registered Indenture of Lease dated 15.01.1977 (*at page-95, also produced in the evidence*).

3. The above Suit was defended by the Applicant and other Respondents, through their Written Statements. The stance of the Applicant in his Written Statement is that he purchased a large area of Land, measuring 1.5 Acres from Survey No.427, Deh Mehran, Model Colony, Karachi, in the auction proceeding of Suit No.741 of 1976 and it's Execution Application No.165 of 1994 from the Banking Court No. I, on 14.07.1997. Averred that all lands and plots, including the Suit Plot were owned by M/s. Salman Limited and others and once the assets have been purchased by the Applicant, any right or interest of others, including the Respondent No.1 [Plaintiff] in the Suit Plot, which is part of the lands and plots owned by M/s. Salman Limited and others, has extinguished; besides, the said transfer is hit by the rule of lis pendens, as envisaged in Section 52 of the Transfer of Property Act. Denied that any construction was raised by the Plaintiff / Respondent No.1, or, the Applicant has encroached upon the Suit Plot, which till date was utilized as public path road to connect the area with Alamgir Society.

The Respondent-Muslim Commercial Bank (MCB), in its Written Statement, has in fact supported the claim of the Applicant; averred that the sale transaction between M/s. Salman Limited and above Ms. Jilani is / was illegal and is hit by Section 53 of the Transfer of Property Act, relating to fraudulent transfers.

4. The Respondent No.3-HBFC has opposed this Revision Application in its written objections, *inter alia*, stating that the loan was given to Respondent No.1 for raising construction at the Suit Plot after verification of title from the concerned Authorities, and that the Suit Plot was mortgaged with the Respondent No.3-HBFC, which is entitled to recover the outstanding dues. Somewhat similar position is taken in its Written Statement filed in the above Suit of Respondent No.1. Respondent-HBFC has supported the two impugned Decisions of the learned Appellate and Trial Courts.

5. The learned Advocates have addressed their respective arguments in support and against the above stated facts.

Counsel for the Applicant has submitted her comprehensive Written Synopsis, containing the following Case Law_

- i. **2015 CLD 366 [Supreme Court of Pakistan]**
[National Bank of Pakistan through Attorney and another vs. Paradise Trading Company and others]
- ii. **2003 CLD 552 [Lahore]**
[Raja Riaz Ahmad Khan vs. United Bank Limited and 7 others]
- iii. **2012 SCMR 983**
[Mst. Tabassum Shaheen vs. Mst. Uzma Rahat and others]
- iv. **2010 CLC 1405 [Lahore]**
[Atta-ur-Rehman and others vs Housing and Physical Planning Committee and others]

Whereas, the Counsel for Respondent No.1 has placed reliance on the following Case Law, in particular, the reported Decision of the Hon'ble Supreme Court in *Shafi Case*, *inter alia*, the High Court has limited jurisdiction in revisional proceeding to disturb the concurrent findings of fact recorded by the Courts below.

- i- **PLD 1969 Karachi 586**
[Syed Azizuddin vs. The Deputy Collector and D.S.C. (Lands) and others]

ii- **2007 SCMR 368**
[Shafi Muhammad and others vs. Khanzada Gul and others]

6. Following Issues were framed_

- “1) *Whether this Court has got no jurisdiction to entertain the Suit?*
- 2) *Whether the Suit of the Plaintiff is time barred by any law?*
- 3) *Whether the Plaintiff is exclusive owner of the Suit Property on the basis of Mutation, Letter No.MLR/MC/Mutation A-30/BZR/81 dated 04.08.1981?*
- 4) *Whether the Defendant No.1 has purchased the land including Suit Property in open auction held in Execution No.165 of 1084 by the Banking Court No.1, Karachi?*
- 5) *Whether the lease between M/s. Salman Limited and Mrs. Rasheeda Jilani in respect of Suit Property and its subsequent transfer and mutation is nullity in the eye of law?*
- 6) *What should the Decree be?”*

7. Only Applicant and Respondent No.1 led the evidence and not the Respondents No.2 and 3.

8. **Issues No.3, 4 and 5** are decisive. Learned Trial Court has discussed in detail the Deposition of the Parties, *inter alia*, explaining the procedure, Respondent No.1 went through for the purchase of the Suit Plot through a Registered Conveyance Deed dated 07.06.1981 produced in the evidence by Witness of Respondent No.1, as **Exhibit-P/2**, and the registered **Lease Deed of 15.01.1977** by M/s. Salman Limited (*ibid*), as **Exhibit P/3**. On behalf of Respondent No.1, her Son [Attorney] Saleem Qazi deposed. His assertion that loan was granted by Respondent-HBFC, which could not be paid in time, due to financial constraint, as husband of Respondent No.1 passed away in the intervening period; the original title documents are in the custody of Respondent-HBFC, has gone unchallenged and proved. Successfully denied the fact about the prior

knowledge when the Suit Plot was purchased by Ms. Jilani and the same [Suit Plot] was not purchased by the Applicant in the auction [held in the above Suit filed by the Respondent Bank].

Neither the authenticity of the above registered documents is in dispute, nor, the sale consideration; but main stance of the Applicant is, that since he purchased the entire area of One and a half Acres in auction proceedings that included Plot No.A-30 (Suit Plot) as well, hence, the entire transaction of the Suit Plot is illegal [as stated in the foregoing Paragraphs]. This aspect has been deliberated upon by the two Courts in detail. The existence of the above Suit Plot (Plot No.A-30) is also proven through the record produced by the official Witness, and in this regard, the Applicant has admitted in his cross-examination that the approved site plan submitted by the Respondent No.1, and all the plots mentioned therein exist, which contradicts his deposition stated in the Affidavit-in-evidence [Examination-in-Chief].

9. The available record of the earlier litigation shows that Suit No.741 of 1976 filed by Respondent No.3-Muslim Commercial Bank against M/s. Salman Limited, was decreed on 08.04.1978, preceded by the Preliminary Decree dated 07.09.1977, passed by this Court in the above Banking Suit, whereas, admittedly, before that, the Suit Plot was leased in favour of Ms. Jilani [the predecessor-in-interest of the Respondent No.1], where after the Suit Plot was transferred through the above Conveyance Deed in the year 1981 (07.06.1981); the Applicant purchased the above Land in Survey No.427 from the Banking Court many years thereafter, as evident from the Sale Certificate, produced by the Applicant himself, which is of 26.08.1997, followed by the Mutation on 4th June 1998.

10. Nothing adverse produced in the evidence, which can conclude that the above Purchaser / Lessee (Ms. Jilani) acquired the Suit Plot through

the Registered Instrument [Lease], fraudulently. The observation of the Trial Court is also significant, that even Mortgaged Deed of the above Survey number has not been produced in the evidence; although the Respondent-MCB participated in the Proceeding.

11. Ms. Jilani was never impleaded as Defendant in the above Banking Suit of Responded MCB. Admittedly, Salman Limited was the actual Owner of the entire Land of 1.5 acres including the Suit Plot from whom the said Ms. Jilani, Respondent No.1 and the Applicant are deriving their respective Title, which means that there was no defect in the Title of the original Transferor, viz. Salman Limited; the Suit Plot was mutated in favour of Ms. Jilani, which is confirmed by the Official Witness [Ali Imran] who produced the official record kept with the City District Government Karachi. He also deposed that earlier the Record was with the Cantonment Board Malir. He was never cross examined by any of the contesting Parties, and thus, the above fact is undisputed. It has also come on record during the evidence of the Applicant, that the above Surveyed Land of 1.5 Acres was / is subdivided into numerous Plots, which the Applicant in his testimony has stated, that the houses have been constructed on Plots No. A-1 to 25 as per the Master Plan, whereas Plots No.A-28 and 29 are owned by his Wife [Mst. Azra Parveen]. When the entire area is sub-divided into different plots, one of which is the Suit Plot, that was purchased way back in 1977 and subsequently **officially mutated in the name of Ms. Jilani, without any objection, then, the onus is on the Applicant** to show that he purchased the entire 1.5 Acre Land after making requisite due diligence, in order to prove the applicability of the rule of *lis pendens* and fraudulent transfer [as envisaged in Sections 52 and 53 of the Transfer of Property Act]. No conclusive evidence is led

about this crucial fact either by the Applicant or the Respondent Bank [MCB].

Secondly, the registered Lease and the Conveyance Deeds [Exhibit P/2 and P/3, *ibid*] are public documents and could have been easily ascertainable by the Applicant when he was in the process of purchasing the above Land, but, neither the Applicant made any endeavour in this regard, nor, the Respondent Bank disclosed this fact. Conversely, in terms of Section 3 [Explanation 1] of the Interpretation Clause of the Transfer of Property Act, the Applicant was in knowledge of the fact about the Suit Plot being owned by the Respondent No.1. Therefore, no fraud was committed by the Respondent No.1 and her predecessor-in-interest, Ms. Jilani.

Thirdly, the Decree of the Respondent Bank [being Creditor] was satisfied upon the purchase of the Land by the Applicant, who also made settlement with the other Occupants as evident from the Record of the above Suit No.741 of 1976 and the Execution No.165 of 1984 [*supra*]. The Settlement / Compromise Applications are at Pages-271 to 283, dated 24th February 1998 [many years after the above Sale Transaction between the Respondent No.1 and Ms. Jilani]. Interestingly, the opening part of these Applications state that the different Plots [as mentioned in the above Compromise Applications] “*bonafidely purchased*” by the Occupants from the Judgment-Debtor / Defendant, viz. the above named Salman Limited. The salient stipulation of the above Settlement is, that the Occupants **had to repurchase their respective Plots** from the Applicant as Auction Purchaser, and the latter agreed to Sub-Lease these Plots. It means when the Applicant purchased the entire Land it was already under lawful occupation of various persons, including, the Respondent No.1.

Fourthly, even for the sake of argument, the Applicant did not get the entire 1.5 acres of Land and its physical possession, then, the claim should have been filed against the above Salman Limited-the Defendant and Judgment Debtor in the above Suit No.741 of 1976; but, surprisingly it was not done, which is an act of acquiescence on the part of the Applicant, and he now cannot take a contrary stance. Considering the above discussion, in my considered view, the second part of Section-53 is applicable here, which extends protection to rights of a transferee who/which purchased the property in good faith and for consideration; which in fact is the present Case, in view of the above discussion. Thus, the transaction of the Suit Plot in favour of the Respondent No.1 is not adversely affected by Sections 52 and 53 [*supra*], rather is covered by Section-41 [of the Transfer of Property Act] and Section-27 [b] of the Specific Relief Act, viz. the Respondent No.1 is the Bonafide purchaser for value without notice. Conversely, to the extent of Suit Plot, there is an inverse *bona fide* attributable to the Applicant.

12. The Case Law cited by the Applicant's Counsel is distinguishable. The Hon'ble Supreme Court, in National Bank of Pakistan Case [*ibid*], has set-aside the sale transaction along with the registered Sale Deeds in respect of the mortgaged property, on the grounds that the Appellant Bank when came to know about the sale of the property by the mortgagor / customer to third Party [respondents No.5 and 6 of the reported case], the Bank took steps by addressing a Letter to the father of said Respondents [Buyers] about the existence of mortgage on the property, published public Notice, so also notified the Military Estate Office [MEO] Lahore Cantt. vide a Correspondence dated 10.04.1991; thus, it was held, that the subsequent buyers purchased the property after acquiring full knowledge about the existence of mortgage and hence the sale was declared illegal. In

the present case, all these material facts are absent, as already discussed in the foregoing paragraphs.

In *Uzma Rahat Case*, the Hon'ble Supreme Court has explained the principle of *Lis Pendens* as envisaged in Section 52 of the Transfer of Property Act, vis-à-vis Section 41 (protection given to *bona fide* purchaser for value without notice). The sale of the disputed plot (of the reported case) by the husband of respondent to the petitioner was set-aside, primarily on the ground, because the residential plot belonged to the respondent (wife), not the husband, and the petitioner purchased the same during pending litigation. The object and logic for enforcement of *Lis Pendens* Doctrine has been summed up by the Supreme Court in Paragraph-5 of the Judgment, ruling that alienation of property during legal proceedings would defeat the rights and interests of plaintiff, even before the Judgment or Decree, and if the plaintiff would have to initiate a *de novo* proceeding, in that case too he would be "lurking fear that he could again be defeated by the same trick". With due deference, this Judgment also is not applicable to the peculiar facts of present *LIS*, because, admittedly, the above large piece of Land belonged to the Company-Salman Limited, from which, both the Applicant and the predecessor-in-interest of Respondent No.1 derived their respective titles.

The learned Division Bench of the Lahore High Court, in **Raja Riaz Case** [*supra*], *inter alia*, held, that Application / Petition preferred by a subsequent purchaser (the said appellant) of a mortgage property under Order XXI Rule 58 of CPC (resisting the Execution filed by respondent Bank) was not maintainable, because, admittedly, the appellant / purchaser had the knowledge that the property is mortgaged with the respondent Bank (United Bank Limited); *secondly*, an Agreement to Sell does not create any right, title or interest in favour of a person, vis-à-vis the

property in question, however, the learned Court while stating so, has observed that since buyer had filed a Suit for Specific Performance, therefore, further finding on the question of Agreement to Sell would *prejudice* his Suit. Sections 53 and 53-A of the Transfer of Property Act, were also considered and it is held that there is an exception in Section-53, favouring a transferee of the property in good faith and for valuable consideration. The learned Court has reiterated the established Rule that mortgage travels with the property being a charge against it, and go with the same even if the property in question is alienated. Conversely, the facts of present LIS are entirely different, *inter alia*, because the SUIT PLOT was purchased through a registered Conveyance Deed [as stated herein above] and not Agreement to Sell.

13. In view of the above discussion and the evidence produced, was correctly appraised by the Courts. No illegality exists in the impugned Decisions of both the Courts, which justify interference in this revisional jurisdiction. Consequently, this Civil Revision Application is dismissed.

14. Parties to bear their respective costs.

Karachi.

Dated: 10.02.2025.

M.Javid.P.A.

JUDGE