

Judgment sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Present

Mr. Justice Muhammad Jaffer Raza

Suit No. 1548 of 2006

Najmuddin through his legal heirs & others

Versus

Mst. Zaitoon Alavi and others

Suit No. 37 of 2004

Mohsin Ali

Versus

Mst. Zaitoon Alavi and others

Plaintiffs : Najmuddin through his legal heirs & others through Mr. Muhammad Arif, Advocate

Defendant No.3 : Mohsin Ali, through Mr. Rehan Aziz Malik, Advocate

Date of Hearing: 20.02.2025

Date of announcement: 24.02.2025

J U D G M E N T

MUHAMMAD JAFFER RAZA – J : Both these suits have been filed by the respective Plaintiffs seeking relief in respect of the same subject property i.e. portion of lands measuring 450.93 sq. yds., bearing survey Sheet No.LR.3, Lawrence Road, Karachi. For the purposes of clarity, the usage of the terms Plaintiffs and Defendants shall indicate the relevant parties for the purposes of Suit 1548/2006.

Brief facts in Suit 1548/2006

2. Learned counsel for the Plaintiffs in suit 1548/2006 has argued that the Plaintiffs entered into a Sale Agreement dated 22.07.1974 with the Defendants No.1 and 2 for the subject property described fully in paragraph No.1 above. The details of the sale agreement for the purposes of the present suit are not relevant as the Plaintiff seeks the following prayers: -

a) To dispossess/eject the defendants, their agent or any person(s) claiming through or under them from portion of land measuring 450.93 sq. yds. of Plot bearing Survey No.1, Sheet LR.3 Lawrence Quarters, Karachi and order to hand over the vacant and peaceful possession to the plaintiffs.

b) To direct the defendants No.1 to 3, to pay the sum of Rs.75,000/- per month to the plaintiffs as being Mesne Profit from 31 December, 2002 to December, 2005 amounting to Rs.18,00,000/- and so future Mesne Profit at the rate of 10% increase rate per annum till the recovery of the same.

c) To grant Permanent Injunction restraining the defendants from selling, transferring, encumbering and creating third party interest, from raising any sort of construction in the suit property.

d) Any other relief's which this Hon'ble Court under the circumstances deem fit and appropriate in the interest of justice, equity and law.

3. The learned counsel has argued that the Defendants No.1 and 2 did not honour their commitment under the Sale Agreement mentioned above on one pretext or the other, leaving the Plaintiffs with no option but to enforce their rights through courts of competent jurisdiction.

4. The exhaustive history of litigation between the parties is as under: -

(a) Civil Suit No.1550/1996 was filed by the present Plaintiffs against Defendants No.1 & 2. The suit of the Plaintiffs was decreed vide judgment and decree dated 24.12.2001. Further, the Defendants were directed to execute the sale deed in favour of the Plaintiffs within thirty (30) days from the date of judgment and in case of failure to do so, the Nazir was directed to execute the same in favour of the Plaintiffs.

(b) Thereafter, Civil Appeal bearing No.51/2002 was filed by the present Defendants No.1 and 2 against the Plaintiffs. The said Civil Appeal was dismissed on 24.12.2002 and the learned Appellate Court found the Appellants (Defendants No.1 and 2 in the present suit) committed breach of contract.

(c) Thereafter, a Revision application was preferred against the order of the above-mentioned Civil Appeal bearing No.28/2003 and the same was also dismissed vide order dated 11.07.2003. Thereafter, the conveyance deed was executed in favour of the

Plaintiffs for the subject property by the Nazir of the trial Court and the same according to learned counsel for the Plaintiffs, is still in the field.

5. The learned counsel for the Plaintiffs has further stated that though the registered conveyance deed is in the favour of the Plaintiffs, the Defendant No.3 is denying the Plaintiffs possession of the suit property and the instant suit has been filed for possession and mesne profits.

6. The Defendants No.1 and 2 filed their respective written statement and perusal of the same reflects that they did not specifically deny the history of litigation highlighted in paragraph No.4 above and neither did they deny the execution of the above-mentioned Sale Agreement.

7. Written statement was also filed by Defendant No.3. In the same the said Defendant denied the execution of the Sale Agreement and essentially claimed himself to be the owner of the Suit Property. The said Defendant took the stance that the property was purchased by him from Defendant No.1 and 2. Interestingly, the written statement filed by the Defendants No.1 and 2 is silent regarding any purported sale to Defendant No.3. The said Defendant No.3 admitted to be in possession of the Suit Property and stated that he is carrying on his business from the same. To augment his stance vis a vis possession the said Defendant annexed various utility bills. Lastly, the said Defendant, incongruously, stated that the earlier suit decreed in favour of the Plaintiffs (Civil Suit No.1550/1996) was a result of collusion between the parties to the said suit and he was oblivious to the same.

Brief facts in Suit 37/2004.

8. The said suit has been filed by the Plaintiff (Defendant No.3 in Suit 1548/2006) seeking the following prayers: -

A. For a declaration that the Suit property is in exclusive and uninterrupted possession of the Plaintiff and his predecessors-in-interest since 1942, and that Defendants 1 and 2 had agreed to sell the Suit property to Plaintiff's predecessors-in-interest and had received the entire agreed sale consideration in pursuance of such agreement;

B. For a declaration that, in view of the exclusive and uninterrupted possession of the Suit property since 1942 and after payment of the entire agreed sale consideration to Defendants 1 and 2, and also after the death of Mst. Rubab Bai, the Plaintiff is the sole and absolute owner of the Suit property, and Defendants 1 and 2 are liable to complete the sale in favour of the Plaintiff;

C. For specific performance directing the Defendants 1 and 2 to execute a proper sale deed in respect of the Suit property in favour of the Plaintiff, and in case of their failure, the Nazir of this Hon'ble Court may be directed to do the needful;

D. For a declaration that Defendant 3, 4 and 5 have no right, title or interest in the Suit property, and that the Decree in Suit No.1550/1996 (old Suit No.727/1981) was obtained by them through fraud, misrepresentation and collusion;

E. For Cancellation of the alleged conveyance deed in respect of the Suit property executed in favour of Defendants 3, 4 and 5 on 14.07.2003 by the Nazir in Execution No.05/2002 before the IInd S.C.J. Karachi South;

F. For permanent injunction restraining the Defendants, jointly and severally, from claiming any right, title or interest in the Suit property and/or from interfering in Plaintiff's peaceful possession of the Suit property;

G. For any other / additional relief(s) that this Hon'ble Court may deem fit and proper in the facts and circumstances of this case; and

H. Costs of the Suit.

9. Without reiterating the stance adopted by the parties, suffice it to say that the parties principally adopted the stance taken in suit 1548/2006. However, it is noteworthy that the Defendants No.1 and 2 (also Defendants No.1 and 2 in Suit 1548/2006) in the present suit have categorically denied the execution of any purported Sale Agreement between themselves and the Plaintiff in the present suit.

10. After filing of the respective written statements, on 25.01.2010 the following consolidated issues were framed: -

- (1) Whether the plaintiffs being owner of the suit property, by virtue of sale deed executed by the Nazir of IInd Sr. Civil Judge, Karachi South, is liable to get the physical and constructive possession of the suit property? If not what is its effect?
- (2) Whether the possession of the defendant No.3 is illegal on the suit property and he is liable to be ejected from the suit property?

- (3) Whether the defendants are liable to pay the plaintiffs, being owner of the suit property, a sum of Rs.75,000/- per month from December, 2002 till the time vacant and constructive possession is handed over to the plaintiffs and also future mense profit at the rate of 10% increase rate per annum till recovery of the same?
- (4) Whether the defendants are in collusion with each other?
- (5) Whether the defendant No.3, being the adopted son, has any locus standi to defend this suit?
- (6) What should the decree be?

FINDINGS

ISSUE NO:1	In Affirmative
ISSUE NO:2	In Affirmative
ISSUE NO:3	In Affirmative
ISSUE NO:4	In Negative
ISSUE NO:5	Answered accordingly
ISSUE NO:6	Suit of the Plaintiff is decreed as prayed in terms of prayer clause (a) and (b).

11. Thereafter, on 24.03.2014, by consent, Mr. Kabeeruddin Khan, Advocate, was appointed as Commissioner to record evidence. The worthy commissioner recorded the evidence of the respective parties and returned the commission to this court.

The findings on the above issues are as under: -

Issues Nos.1 & 2

12. Both these issues are interlinked and will be dealt with collectively. Brief facts of the case have already been dilated upon in the foregoing paragraphs, hence the same need no reiteration.

13. I have heard the learned counsels and examined the plaint and affidavit-in-evidence of the witness, namely, Aziz Najmuddin. In paragraph 6 of the plaint, it is stated that an Execution application was filed by the Plaintiffs vide Execution No.5 of 2002, before the learned trial Court for execution of the decree in Suit 1550/1996. In

this regard Nazir of the trial court executed Conveyance Deed dated 14.07.2003 (registered at No.1156 Book No.I Sub-Registrar T. Div. VI-B) in favour of the Plaintiffs and execution application was disposed of. After the execution of the conveyance deed, by the Nazir of the trial Court, the Plaintiffs were legally entitled to the possession of the suit property being lawful owners of the same. In response to the said paragraph, all the Defendants have denied the averments made therein and have in a nutshell stated that the proceedings which resulted in the execution of the conveyance deed are a result of collusion, fraud and misrepresentation. It is ironic for the Defendants to make the above submissions in light of the previous litigation mentioned above, which has attained finality.

14. The Defendants (more particularly defendants No.1 & 2) availed respective remedies as highlighted above and failed in their endeavors. I have also examined the file of Suit No.37/2004. The Plaintiff in the said suit (Defendant No.3 in Suit No.1548/2006) is seeking cancellation of the conveyance deed, which has been executed by the Nazir of the trial Court vide judgment and decree passed by courts of competent jurisdiction. No appeal was filed by the said Defendant in respect of any of the litigation highlighted in paragraph No.4 above. Further, the said Defendant has not annexed with his written statement in Suit No.1548/2006 and Suit No.37/2004 an iota of evidence, whereby, he can claim ownership of the subject property. To the contrary his claim for ownership and/or specific performance has been categorically denied by Defendants No.1 and 2. The said Defendant (Plaintiff in Suit No.37/2004) is seeking declaration of ownership based on uninterrupted possession since the year 1942 and is further seeking specific performance for an agreement entered into by himself with Defendants No.1 & 2, which has been denied by the said Defendants. In this respect it is held that this Court is not a Court of appeal and the prayers sought for by the Plaintiff in Suit No.37/2004 cannot be granted by this Court.

15. The stance taken by the Plaintiffs has gone unrebutted and the Plaintiffs even otherwise has proved through cogent evidence that he is entitled to the relief sought. The evidence file reveals that the examination in chief of Aziz son of Najamuddin, PW-1, was held on 06.12.2014 and the learned counsel on behalf of the Defendants

sought various adjournments (as reflected in the Commissioner report dated 11.03.2017) and failed to cross examine the Plaintiffs' witness. It is a settled principle of law and under Article 79 of the Qanoon-e-Shahadat Order 1984 (“Order”), a registered instrument is presumed to be correct unless it shown otherwise. The said provision is reproduced below for the sake of convenience: -

“79. Proof of execution of document required by law to be attested. If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence: Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.” (Emphasis added)

Under Article 129 of the Order the court also has the power to presume the existence of any fact/s it thinks likely to have happened. The same is reproduced below: -

“129. Court may presume existence of certain facts. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course to natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume—

(e) that judicial and official acts have been regularly performed;

In the case of **Mst. NAZEERAN and others Versus ALI BUX and others**¹ the Honourable Supreme Court of Pakistan in paragraph Number 13 held as under: -

“13. The standard of evidence required to discharge the initial burden depends on the facts and circumstances of each case. It cannot be said that it will be consistent in all situations. Sometimes, a simple denial is adequate to shift the burden to the opposite party, while at other times, material evidence is necessary for the same purpose. Therefore, the standard of evidence is not uniform when challenging a registered document as compared to challenging an unregistered document. It has been observed that in disputes relating to registered documents, a

¹ 2024 S C M R 1271

common misconception may arise when an executant attempts to dispute the validity of the document through mere denial. It is essential to emphasize that the act of registration is not a perfunctory formality but rather a deliberate and legally binding process. When a document is registered, it becomes an official record available to the public. This adds credibility to the authenticity and legal purpose of the transaction.

On the other hand, unregistered documents lack the same level of legal endorsement. While they may carry evidentiary weight, their value is inherently lessor as compared to the registered document. The absence of registration renders unregistered documents vulnerable to challenges regarding their authenticity and enforceability. Moreover, a document duly registered by the Registration Authority in accordance with the law becomes a legal document that carries a presumption as to the genuineness and correctness under Articles 85(5) and 129(e) of the Q.S.O. and which cannot be dispelled by an oral assertion that is insufficient to rebut the said presumption.”
(Emphasis added)

16. The Defendants have only filed their respective written statements and have not cross-examined the witness of the Plaintiffs. Therefore, in this regard the averments made in the plaint and affidavit-in-evidence are deemed to be admitted by the Defendants. Moreover, registered instrument i.e. conveyance deed has been registered in favour of the Plaintiffs and despite the same it is Defendant No.3, who is enjoying the possession of the property. The Defendant No.3 has not stepped into the witness box and neither has the said Defendant filed any document with his written statement, demonstrating that he is in legal occupation of the property. In light of what has been held above, I see no cavil in holding that the Plaintiffs being the owners by virtue of the conveyance deed are liable to get physical and constructive possession of the suit property and the Defendant No.3 is liable to be evicted from the suit property. The said issues are answered in the affirmative.

Issue No.3.

17. Plaintiffs in prayer clause (b) are also seeking mesne profit for the period that they have not been in possession of the subject property. Mesne profits are defined in Section 2 (12) of the CPC as under: -

“(12) "Mesne profits" of property means those profits which the person in wrongful profession of such property actually received or might with ordinary diligence have received therefrom, together with

interest on such profits but shall not include profits due to improvements made by the person in wrongful possession.”

The power of the court to grant mesne profit stems from Order XX Rule 12 CPC. The same is reproduced as under: -

“12-(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree

- a) for the possession of the property;*
- b) for the rent or mesne profits, which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;*
- c) directing an inquiry as to rent or mesne profits from the institution of the suit until*
 - i. the delivery of possession to the decree-holder;*
 - ii. the relinquishment of possession by the judgement-debtor with notice to the decree- holder through the Court; or*
 - iii. the expiration of three years from the date of the decree whichever event first occurs.*

(2) Where an inquiry is directed under clause(b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.”

In the case of **Gul Bano Versus Shahnaz Bano and others**² the learned single judge of this court in paragraphs number 10 and 11 held as under: -

“10. It is an established position that mesne profit is damage or compensation recoverable from a person, who has been in wrongful possession of an immovable property. It is a settled principle of law that wrongful possession is the very essence of claim for mesne profit and for seeking mesne profit, a person must be owner of the captioned property or having right to its possession. Clause (12) of Section 2, C.P.C. gives meaning to the term "mesne profit" to include those profits, which the person in wrongful possession of such property actually received (or might with the ordinary diligence) have received therefrom. According to the said clause, a person becomes entitled to mesne profit only when he has right to obtain possession from another person whose possession is unauthorized and who keeps the former deprived of such a possession. The first and foremost condition for awarding mesne profit is the unlawful possession of the occupant of the property.

11. A bare reading of the above definition makes it is clear that any person in possession of a property and enjoying benefit therefrom to the exclusion of rightful owner(s) is liable to pay rent or mesne profit.”

² 2023 C L C 861

18. The test for grant of mesne profits can be broken down as follows: -
- a. The person seeking mesne profit has to first establish entitlement and/or ownership of the property;
 - b. Thereafter, the person seeking means profit has to establish wrongful possession by the person against whom a decree of mesne profit is sought.

19. It is well established that once the court records a finding that the Defendant was in unauthorised possession or that it was the Defendant who was instrumental in depriving the Plaintiff of the lawful enjoyment of his property, he would be liable to pay mesne profits. It has already been established in the findings given in respect of Issues No.2 and 3 that the Plaintiffs are owners of the subject property and entitled to the possession of the same, consequently I see no cavil in holding that the Plaintiffs are entitled to mesne profits as prayed. Therefore, this issue is answered in the affirmative.

Issue No.4.

20. The Plaintiffs have not led any cogent evidence in this regard regarding the alleged collusion between all the Defendants. It was specifically enquired from the learned counsel for the Plaintiffs as to what benefit this issue, if answered in affirmative, would be to the Plaintiffs. Learned counsel in response, very categorically stated that he does not wish to allege the said collusion as long as the suit is decreed in terms of prayer clause (a), (b) (c), therefore, this issue is answered in negative.

Issue No.5.

21. It has been claimed by the Plaintiffs that the Defendant No.3 is the adopted son of Plaintiffs No.1 & 2. Learned counsel for the Plaintiffs in this regard has very categorically and correctly stated that under Islamic injunctions there is no concept of adoption and his adoption, if at all, is otherwise immaterial to the case. I agree with the contention of the learned counsel for Plaintiffs. Once the ownership and/or entitlement of the Plaintiffs has been adjudicated upon in earlier rounds of litigation (mentioned in paragraph number 4) there is no need to deliberate the parentage of the Defendant No.3. This issue being of no consequence is answered accordingly.

22. In light of what has been held above the suit is decreed in favour of the Plaintiffs in terms of prayer clauses (a), (b) and (c), as prayed.

Office is directed to prepare the decree in favour of the plaintiffs in the above terms.

JUDGE

Nadeem