

ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1440 of 2009

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DATE

ORDER WITH SIGNATURE OF JUDGE  
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1. For hearing of CMA No. 3321/20109
2. For hearing of CMA No. 10423/2009
3. For hearing of CMA No. 1346/2010

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Date of hearing: 26.06.2012

Mr. Malik Naeem Iqbal Advocate for the plaintiff  
Mr. Nafees Ahmed Osmany A.A.G  
M/s. Faisal Kamal and Fazalur Rehman Advocates for the defendant No.8  
Mr. Idrees Alvi Advocate for the CDGK

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**Mohammad Shafi Siddiqui, J.**- By this order I would dispose the applications at serial No.1 & 3.

2. Brief facts of the case are as under:

3. The plaintiff being the legal heir of Muhammad Abdul Samad son of Shaikh Dawood has filed this suit for declaration, cancellation and injunction with the following reliefs:

“a) Declaration that the plaintiff being real daughter of late M.A. Samad S/O Shaikh Dawood is lawful and absolute owner of the suit land viz Compact Land admeasuring 33 acres 925 Ghuntas in Block “A” Sector-12, Surjani Town, KDA Scheme No.41, Karachi.

b) Declare the registered conveyance deed dated 11.05.2004 having registration No.11453 Book No.I dated 09.02.2006 registered with Sub-Registrar Gadap Town, containing M.F. Roll No. U-1419/311399 dated 17.10.2007 purported to have been executed by M.A. Samad the father of plaintiff in favour of defendant No.8 is void, manipulated, forged, and fabricated and fraudulent and does not create any right or interest in favour of defendant No.8 and is liable to be cancelled and liable to be surrounded to this Hon’ble Court.

c) To cancel sale certificate issued by Mukhtiarkar (defendant No.5) in the name of deceased M.A. Samad.

d) To cancel the entry 410/41 dated 06.04.2009 kept on the basis of manipulated and forged document thus was without lawful authority with further directions to

the defendant No.4 to delete the said entry from the record of rights and restore/maintain entry No.267, 409 and 410 in favour of plaintiff.

- e) Permanently restrain defendant No.8 from claiming ownership of the suit property and or creating third party interest and further permanently restrain the defendant No.8 its servant(s), its employee(s), contractor(Ss) claiming under the defendant No.8 from dispossessing the plaintiff from the suit property or hindrance in suit property viz Compact Land admeasuring 33 Acres 925 Ghuntas in Block "A" Sector-12, Surjani Town, KDA Scheme No.41, Karachi.
- f) To direct the police of the area to protect the possession of the plaintiff in respect of suit property----."

4. It is, inter alia, contended by the learned Counsel for the plaintiff that by virtue of inheritance the plaintiff acquired a land measuring 33.37 acres situated in Survey No.8 (22.10) and Survey No.9 (11.27), Deh Surjanni, Tapo Songal, Karachi. The plaintiff belongs to Shia sect and being the only and real daughter of late M.A. Samad acquired the subject property after his sad demise. Originally the suit land was acquired/inherited by Muhammad Moosa son of Quadir Buksh and Khamiso son of Quadir Buksh vide foti kahta badal vide entry/Jaryan No. 267 dated 07.7.1985.

5. On 03.6.1985 Muhammad Moosa and Khamiso sold the suit land to plaintiff's father hereinafter referred to as the deceased through registered Sale Deed No. 2616 at Serial No. 2786. The suit land was acquired on consideration which was paid through pay orders and cheques and the deceased was put in exclusive possession of the land. Subsequently, the suit land was mutated in the name of plaintiff's deceased father in record of rights by the order of Assistant Commissioner, Karachi.

6. That a suit bearing No. 466/1985 was filed by one Muhammad Amin against Muhammad Moosa, Khamiso, deceased M.A. Samad and KDA for specific performance of contract and cancellation of Sale Deed in favour of deceased. However, the suit was disposed of as compromised between the deceased and the plaintiffs therein and the judgment and decree dated 02.5.1988 was passed which is available as annexures P-10 and P-11 to the plaint.

7. In the year 1988 again a suit bearing No. 705/1988 was filed by Muhammad Moos and Khamiso against the deceased which was also decreed in terms of the compromise which is available as annexure P-12 to the plaint.

8. That the Sindh Government subsequently acquired this land pursuant to the Land Acquisition proceedings by notification No. L.Acq/Sc.41/Surjani/ink/13 dated 14.2.1983

published in Sindh Government Gazette dated 20.1.1983 and in the year 1996 after acquisition, the land was mutated in the name of KDA authority vide Entry No.409 dated 3.9.1996 and the land was resumed by KDA on 10.9.1996 and the land was handed over to the KDA vide annexure P-15 of the plaint.

9. That since the land which was acquired by the KDA was scattered land comprising in Survey Nos. 8 & 9 of Deh Surjani, Tapo Songal, Karachi, KDA allocated compact land measuring 33 acres 925 ghuntas in Block-A, Sector-12, Surjani Town, KDA Scheme No.41, Karachi, which was handed over to the deceased M.A. Samad vide Entry No.410 dated 3.9.1996.

10. That the possession of the said alternate land was also handed over vide letter dated 10.9.1996 along with its site plan attached as annexures P-17 and P-18 respectively. Subsequently on 18.6.1997 the deceased paid a sum of Rs.673,955/- towards development charges. He further submitted that vide Search Certificate dated 30.5.2009 issued by the Sub Registrar, Central Record issued on 08.6.2009 that the suit land was recorded in the name of the deceased pursuant to the Sale Deed bearing Registration No. 2616. This record covers mutation upto 31.12.1999. It is submitted by the learned Counsel that on 28.5.2003 M.A. Samad expired leaving behind the plaintiff as the only legal heir. Such contention was supported by annexures P-1, P-2 and P-21 which are national identity card, birth certificate of plaintiff and death certificate of deceased M.A. Samad. He submitted that despite consistent approach no foti khata badal was made. In the month of June 2009, it is contended that the plaintiff realized that someone namely Fahim son of Azizur Rahman claiming to be the Attorney of Muhammad Moosa and Khamiso filed an appeal before District Officer Revenue against deceased M.A. Samad. By virtue of this appeal the Entry No. 267 dated 07.7.1985 pursuant to a Sale Deed in favour of plaintiff's deceased father was cancelled with all subsequent transaction of exchange of land vide Entries No. 409 and 410 dated 03.9.1996. The plaintiff aggrieved with the said order preferred an appeal under section 161 of the Sindh Land Revenue Act before the Executive District Officer (EDO) Revenue. In support of this the plaintiff also filed two affidavits of Muhammad Moosa and Khamiso mentioning therein that no such powers were given to Fahim son of Azizur Rahman for filing an appeal before the District Officer Revenue.

11. It is for the first time at this stage that the defendant No.8 joined the proceedings as Intervener in the said appeal who claimed to have purchased the suit land from the deceased by virtue of Sale Deed available as annexure P-26 to the plaint. By virtue of the order of EDO in the above appeal under section 161 of Sindh Land Revenue Act all entries i.e. entry No. 267 dated 07.7.1985, entry Nos. 409 and 410 dated 03.9.1996 of VF-VII and Entry No.41 dated 08.4.2009 of

VF-II were ordered to remain intact. The entry No.41 of 08.4.2009 of VF-II was in favour of defendant No.8 and hence per learned Counsel for the plaintiff the entry in favour of defendant No.8 should not have been incorporated as the Sale Deed by virtue of which the defendant No.8 claimed to be the owner was forged, fabricated, collusive since it is claimed to have been executed after the death of the plaintiff's father. It is contended by the learned Counsel that purported Sale Deed was submitted on 10.5.2004 for stamping purpose and was submitted before the Registrar for registration on 11.5.2004 i.e. after the death of the deceased father of the plaintiff.

12. It is submitted by the learned Counsel that two inspections were carried out by the Commissioner namely Mr. Javed Akhtar Qazi. The first inspection was carried out pursuant to the order 15.10.2009 and the other inspection was carried out pursuant to the order dated 18.11.2009. The first report was filed on 22.10.2009 and the second report was filed on 09.12.2009. It is contended by the learned Counsel that when the first inspection was carried out, it was reported by the Commissioner that plaintiff's Attorney Muhammad Sharif and representative Ahmed Ali reached at the site situated at Block-12/A, Surjani Town, KDA Scheme No.41, Karachi at 04:15 p.m on 15.10.2009. He further reported that this was an open plot with three watchmen namely Muhammad Hatim, Ali Sher and Abid Hussain claimed to be appointed by Mr. Muhammad Sharif. It is also reported that a house of approximately 240 sq. yards covered with boundary wall with two rooms, kitchen, bath room and water tank with guard room was built. In addition approximately 1700 blocks on east side were available. It is reported by Commissioner that Muhammad Sharif claimed this land and on the other side of this land Rupali Builders had announced a project as Rupali City.

13. Subsequently the second report was filed on 09.12.2009 pursuant to the order dated 18.11.2009. In compliance of the order dated 18.11.2009 the Commissioner namely Javed Akhtar Qazi issued notices and one Rizwan, Manager Administration for defendant No.8 who was also available at the time of this inspection. On 24.11.2009 this inspection was carried out in the presence of parties. In this report it is mentioned by the commissioner that the land which they inspected is an open and barren land without boundary wall. It is also mentioned in the report that one Suleman, Site Supervisor and Mushtaque Ahmed, Supervisor and some security guards of Dragon Security Company were present. One security guard namely Nadir Ali informed that he is performing the duties for the last seven days and another one namely Qamaruddin stated that he is performing his duties for the last two months. It was reported by Rizwan, Administration Manager that the guards were being changed from time to time. It is reported that the land appears to be

divided in several portions some are marked by small white stones and the rest is unmarked. Some road is carpeted whereas the major portion is uncarpeted. The corners of these roads are affixed with temporary signboards of Rupali Shehar. These carpeted roads claimed to be newly constructed along with fresh plantation and fresh guard rooms of 5/6 feet. He also found some shuttering having structure of hall and Veranda over an area of 400 to 450 sq. yards with newly constructed columns. The mixture of crush, cement and iron rods were also available. Mr. Mumtaz Ali, Assistant Mukhtiarkar Gadap Town and Hashim, Tapedar, stated that as per revenue record this piece of land is Naiclass 90, Deh Surjani and it is approximately 300 acres of land and has been acquired by KDA as Scheme 41, Block 12.

14. The report also says that earlier the inspection of the same land was carried out on 15.10.2009 and that the position of possession found in the earlier report dated 15.10.2009 has been changed as it is now occupied by the people of defendant No.8.

15. As against this, learned counsel for defendant submitted that the defendant No.8 who is a licenced builder and developer purchased the subject property situated in Block A, Sector 12, KDA Scheme No.41, Surjani Town, Karachi, admesuring 33.37 Acres from one Abdul Samad son of Shaikh Muhammad in the year 2004 which was conveyed to defendant No.8 by registered sale deed dated 11.05.2004 bearing registration No.11453 registered with Sub-Registrar, Gadap Town. They announced the project in the name of Rupali Shehar in the subject property which was widely advertised through electronic and print media. They have also completed the internal development work such as underground water tank, sewerage lines and compaction of roads. All this was done prior to 2007. It is submitted that the earlier inspection that was carried out on 15.10.2009 was an exparte inspection and it was only on the pointation of the plaintiff that the commissioner inspected a wrong property though also belonged to defendant No.8. The earlier inspection was carried out without notice to the defendant No.8. The description of the property which was inspected by the learned commissioner is Plot C, Block 12, Sector 41, Surjani Town, measuring 24 acres approximately whereas the address of the subject property is Block A, Sector 12, KDA Scheme 41, Surjani Town, Karachi. It is submitted that since the property was lying vacant, the plaintiff taking undue advantage were able to show possession over wrong property and these illegal occupants of other than subject land showed themselves as employees of the representative of the plaintiffs during the first inspection and this is how the commissioner was misled.

16. He submitted that the second inspection that was carried out was correct and the commissioner had in fact depicted the correct picture as correct property was inspected. He further

submitted that the report submitted by the learned commissioner is self-contradictory and incorrect as far as identity of land is concerned.

17. He submitted that the death certificate on the basis of which the suit has been filed is bogus as he has obtained report from Union Council No.6 Gulshan Town Karachi that no such death certificate was issued from Union Council No.6, Gulshan Town. He has also placed on record the certificate of "Qabristan" showing date of burial which is after the date of registration of sale deed in favour of defendant No.8. He submitted that defendant No.8 is a bonafide purchaser for value of the said property and huge portion of sale consideration is paid to M.A. Samad.

18. Learned counsel further submitted that the payment of the sale consideration was made to M.A. Samad by way of "banking channel" and the payments are documented. It is further submitted that in terms of order dated 14.10.1999 the Nazir has taken over the possession of the suit property and as such the development work has come to a halt and consequently they are suffering losses on daily basis and their good-will and reputation is also at stake. He claimed that though the interim orders were vacated by order dated 09.02.2012 but the defendant No.8 is not in the right frame to continue to develop the land unless orders are passed. It is submitted that the plaintiff has no prima facie case nor the balance of inconvenience is in her favour nor she would suffer irreparable loss. It is submitted that the plaintiff has very cleverly filed the instant proceedings at a time when the defendant No.8 was about to convey various allotments in suit property to the buyers.

19. I have heard the learned counsels at length and also perused the record. The core issues on which instant application revolves are the registration of the sale deed and the death certificate of deceased M.A. Samad as it is claimed by the plaintiff that at the time of registration of the sale deed plaintiff's father M.A. Samad was no more and as such the signatures thereon are forged though it is disputed by the defendant No.8 who has filed documents in support thereof that no such death certificate was issued by Union Council No.6, Gulshan Town, Karachi and also by a burial certificate issued by representative of Qabristan authority which raises question on the authenticity of death certificate.

20. It is claimed by the learned counsel for the plaintiff that vide death certificate available as Annexure P/21 to the plaint, the alleged executant of the sale deed expired on 28.05.2003 at 9.00 a.m. whereas the presentation of the sale deed and registration thereof as well as date of the pay orders are much after the date of the death. As against this, the documents which have been filed by the defendant No.8 to controvert the position/stand taken by the plaintiff inasmuch as the

documents claimed to have been issued by the Union Council No.6, Gulshan Town, suggests that the death certificate was not issued by the said Union Council and allegedly it appeared to be forged one in terms of the record. These documents are also supported by another burial certificate issued by Qabristan authority.

21. Before dilating upon this issue, I would discuss another aspect of the case that comes out of the pleadings which is the payment of sale consideration paid through certain vouchers some of which are claimed to have been made through pay orders. The legible copies of the documents such as conveyance deed in respect of the subject property in favour of defendant No.8 along with certain other documents was separately filed through a statement which was shown to the counsel for the plaintiff also. The total sale consideration, as reflected in the subject sale deed, appears to be Rs.17 Million whereas the documents which have been filed by the defendant No.8 in support of their contention that they have paid total sale consideration which is available at page 517, allegedly shows payment of Rs.9 Million through pay order No.POH 724951. It is also supported by a photocopy of pay order issued by Bank Al-Habib Limited bearing the said pay order number in the sum of Rs.9 Million presented for clearance on 12.05.2004 prepared on 10.05.2004. The pay order has not been disputed or denied by plaintiff or precisely no explanation regarding its clearance or authenticity was addressed by the plaintiff. The pay order was in the name of deceased M.A. Samad.

22. Learned counsel for defendant No.8 on query that this amount is not the total sale consideration as reflected in the "sale deed" replied that the rest of the amount was paid in cash to different individuals on the pointation of plaintiff's father. Learned counsel for defendant No.8 also showed a pay order of Bank Al-Habib dated 06.07.2004 in the sum of Rs.170,000/- in favour of Sub-Registrar T. Division, however, from this document it cannot be ascertained that this pay order pertains to the registration charges of the subject property.

23. I am at the moment considering two sets of documents which are in contradiction. In my opinion it is yet to be determined as to which document holds the field. The certificates which have been filed by the respective parties to show their respective contention is a triable question as in view of the two contrary versions of facts supported by respective certificates does not enable this Court to reach a conclusive state regarding the death of one Muhammad Abdul Samad who alleged to have executed the Sale Deed nor I could as it is only the interlocutory stage and any comments on these document would prejudice the trial of the case. I am conscious of the fact that at this stage these factual controversies are not to be resolved on affidavits. I, however leave this issue to be tried in evidence to be recorded, if the parties so desire. However, the fate of the application in hand is to

be decided on the basis of material available on record. It is a fact that a registered Sale Deed has been filed by the defendant No.8 which allegedly shows that the deceased signed the same though plaintiff disputed the authenticity of this registered document by saying that it is not signed by the deceased but the plaintiff did not dispute its registration as it was never claimed that the said document is not registered. The plaintiff also did not provide explanation about pay order of Rs.9 Million.

24. For the purpose of existence or absence of a prima facie case in relation to exercise under Order XXXIX rules 1 & 2, facts canvassed by both sides have to be examined and it is on preponderance of facts as based on documentary material and averments in the way of affidavits that concept of arguable case has to be determined. In addition, while deciding application under Order XXXIX rules 1&2 CPC, Court is required to travel beyond four corners of plaint to determine, though tentatively, as to on what facts, finding is to be based. Thus spectrum of Order XXXIX rules 1 & 2 CPC is broader and more comprehensive.

25. Considering the assertions of both the parties I would give way to this registered document coupled with pay order of Rs.9 Million for deciding applications in hand only. This registered document, in my view for the purpose of deciding these applications only should prevail over submission of respective parties regarding date of death of deceased till the issue is tried and correct picture would depict on record.

26. Without touching the issue of signing of the Sale Deed if its contents are considered, which is relied upon by defendant No.8, it appears that the total sale consideration was agreed at Rs.17.00 million. This is the third consideration that I am dealing now in order to reach some conclusion regarding the rights of the parties at this interlocutory stage. A perusal of the Sale Deed shows that the total sale consideration was agreed at Rs.17.00 million. However, the record shows that the defendant No.8 was able to satisfactorily establish payment of Rs.9.00 million out of the sale consideration. Though learned Counsel for the defendant submitted that the rest of the payment was made to different individuals on the pointation of plaintiff's father. Applying the same principle as discussed above regarding the registered document it is not conceivable that the buyer who is buying this property at a huge price has not been able to pay such huge amount either through cross cheque or through pay order or against acknowledged receipts. It is also the normal practice that usually buyer and seller entered into an Agreement of Sale with different amount and the Sale Deed at different. Normally the Sale Deed is executed at the amount which is to be paid through pay



order or cross cheque. This is a fact which cannot be ignored. The payment of amount of Rs.17.00 million thus has not been established satisfactorily by the buyer though he has been able to establish to some extent that the Sale Deed has been registered against part payment. This leaves the rights open for an unpaid seller.

27. The rights of the unpaid sellers are discussed in section 55(4) of the Transfer of Property Act, 1882. Since the entire sale consideration has not been established to have been made, it leaves a room open for the seller to exercise rights under the Transfer of Property Act on account of being unpaid seller. I am also conscious of the fact that the defendant No.8 has demonstrated that they have been able to establish to some extent that they are in possession and developing the land of survey No.8 & 9 whether lawfully or unlawfully and that they have announced Rupali Project on the said land. The printed advertisement, which has been filed on the record shows that they are developing the land since long and if not from year 2004 then at least from the year 2007. On 10<sup>th</sup> February 2004 the KBCA issued NOC in favour of one Shahbuddin son of Qutubuddin the Attorney of Baba China Builders which is claimed to be owned by defendant No.8 and there is no denial. These documents are available at P-241 annexure A-40 to the counter affidavit to the application bearing CMA No.9321 and at page 253 to this counter affidavit is also seen a public notice of CDGK which shows an approval of the layout plan of one part of this land i.e. 14 acres situated at Survey No.8 & 9, Plot No.A, Sector No.12, Deh Surjani, Karachi. This was done in April 2007. This is highlighted in daily "Jissarat" and daily "Times" of the relevant time.

28. The cumulative effect of all the above submissions and observations lead me to conclude these interlocutory applications as under:

- i) The plaintiff prima facie appears to be unpaid seller and his rights are protected under the law.
- ii) The defendant No.8 is developing this land since 2004 therefore, it would not be fair and convenient to restrain the defendant No.8 from developing this land or from raising any structure for their proposed/alleged project. However, defendant No.8 will do this at its/his own risk and cost and shall not consider this development as a claim over the subject property subsequently if he fails in the suit.
- iii) Defendant No.8 however, shall not create any 3<sup>rd</sup> party interest in the subject property till disposal of suit.

29. These applications are disposed of in the above terms. It is, however clarified that the above findings are only tentative and have no effect on the outcome of the suit.

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