ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

HCA No. 243 OF 2007

Date Order with signature of Judge

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1. FOR KATCHA PESHI.
2. FOR HEARING OF CMA NO. 2107/2007.
3. FOR HEARING OF CMA NO. 2108/2007.
4. FOR HEARING OF CMA NO. 2109/2007.

29.01.2008

Mr. Muhammad Shafi Siddiqui, advocate for appellants.

Mr. Farooq H. Naek, advocate for respondents No.1 to 3.

Mr. Arshad Tayebali, advocate for respondent No.4.

Mr. Tasawwur Ali Hashmi, advocate for respondent No.9

M/s. Ghulam Abbas Peshori and Sajjad Halai, advocates for respondent No.11.

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Being aggrieved by the order passed in Suit No. Nil of 2007 on 05.10.2007, whereby the suit of appellants was dismissed with the observations that "to claim a declaration in terms of section 42 of Specific Relief Act in respect of the two apartment blocks B & C, plaintiffs have to show that it has some legal character or any right in the property. The plaintiffs have neither shown any legal character viz-a-viz in two apartment Blocks B & C nor any right to the property. To the extent of the plaintiffs' claim that the two apartment Blocks B & C may not be demolished, apparently the same is barred by law and to this extent the plaintiffs suit is found to be not maintainable and is dismissed."

However, in second portion of the impugned order, appellants' possession was protected on the undertaking given by respondents No.1 to 5 and 11 that they will not dispossess the appellants/ plaintiffs forcibly nor any of the amenities available to them will be discontinued by them except in due course of law. Suit to the extent where respondents/defendants have given undertaking as noted above stands disposed of in terms thereof.

It is contended by learned counsel for the appellants that the impugned order on the face of it is not in accordance to law as without framing of issues and producing evidence by parties a portion of the suit cannot be dismissed observing to be barred by some law. Either the plaint should have been rejected or the suit should have been disposed of finally and that too can be done only after calling the parties to produce evidence. To support his argument that suit cannot be dismissed, learned counsel has referred an unreported order passed in HCA No. 200/2003, wherein it is observed that "if the learned Single Judge is of the view that the appellant/plaintiff has no cause of action, he can reject the plaint but with notice to the appellant/plaintiff." The facts of the cited case are not on record, therefore, it is difficult to assume that in what circumstances these observations were made but after perusal of impugned order we fond that learned Single Judge has fully discussed the merits of the case and on the face of it the suit filed by appellants/plaintiffs was not found maintainable, as appellants were not able to satisfy their legal status in Block "C", wherein they were not in occupation.

Grievance of the appellants is that by the demolition act of respondents, appellants' easement right to enjoy the amenities available to them under tenancy agreement will be effected. Although appellants are residing as tenants in Blocks A & D but as the whole project which is the subject matter of this appeal has only one car parking on the ground floor of Block "C" so if Block "C" is demolished their right will be highly effected.

After perusal of tenancy agreement and as pointed out by learned counsel for respondents No.1 to 6 and 11 that even if the tenancy rights of appellants executed on 01.09.2003 are taking into consideration that speaks only about the amenities attached to the premises rented out to the appellants availability of car parking facility to them in any portion of the whole project, does not find place in the rent agreement. Further, contents of the plaint filed by appellants/ plaintiffs are also silent with reference to any relief sought by appellants for enjoying car parking facility by appellants/plaintiffs granted under tenancy agreement. The impugned order also does not reflect that any such plea of availing car parking facility by appellants was ever raised by them before the learned Single Judge. It is for the first time this plea has been raised in appeal. Anyhow even if the contention raised by learned counsel for appellants that every flat in a project is assumed to have a car parking facility, which needs not to be reduced in writing, we conclude that he deem it to be an attached facility with rented flat, although it is not, then also admitted position is that no order of demolition of premises has ever been issued by respondent No.6 nor the owner/respondents can demolish it in view of the restraining order of this court passed in Suit No. Nil of 2007, whereby they have been restrained not to dispossess the appellants/ plaintiffs without due course of law. According to learned counsel for respondent No.11, that suit was filed by appellants on the basis of apprehension of demolition, which neither has been carried out, nor intended to be carried out, therefore, hue and cry of appellants prior in hand is absolutely on wrong footing. It is argued by learned counsel for appellants/plaintiffs that as respondents are having a soil test of the area of demised premises, which leads to the conclusion that for their future plan they are getting the soil tested to know the strength of the soil for raising a multi storey building thereon. One cannot go on

presumption, sound and satisfactory evidence is required to prove that his rights are being effected because of any particular act of the other side, which in the present case is not appearing.

Owner of premises cannot be restrained to plan for future, if his act is in accordance to law. Even otherwise in a suit for declaration by virtue of Section 42 of Specific Relief Act aggrieved person has to prove his legal character and right in the property, which condescendingly has not been proved by the appellants.

In view of the foregoing reasons, we find no substance in the appeal and the same is hereby dismissed in limine alongwith the listed applications.

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