

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Suit No.1853 of 2014

DATE ORDER WITH SIGNATURE OF JUDGE

For hearing of CMA No.7768/17 (U/O 39 Rule 1 & 2 CPC)

12.04.2018.

Mr. Muhammad Vawda, Advocate for Plaintiff.
M/s. Abbas Ali & Malik Muhammad Ejaz, Advocate for Defendant
No.4.
Ms. Rukshanda Waheed, State Counsel.

This is an Application under Order 39 Rule 1 & 2 CPC filed on behalf of Defendant No.4, seeking orders against the Plaintiff from raising any sort of construction, alteration or creating any third party interest in respect of the Suit property till disposal of the Suit.

Learned Counsel for Defendant No.4 submits that the land of Defendant No.4 has been encroached and occupied by the Plaintiff, whereas, the Plaintiff's lease was for 30 years and stands expired in 2016. He further submits that the Defendant No.4's land is surveyed, whereas, the land of the Plaintiff falls in Na-class, therefore, Plaintiff is not entitled to raise any illegal construction as he is no more a Lessee or owner of the property in question. Per learned Counsel, the Plaintiff may be directed to maintain status-quo as he is an encroacher on the Defendant's land and this will not cause any prejudice and property will be preserved. He has also relied upon Nazir's Report dated 28.09.2017 in support of his contention.

On the other hand, learned Counsel for the Plaintiff submits that the application is misconceived inasmuch as the Plaintiff's injunction application was allowed vide Order dated 30.08.2016,

which was impugned in HCA No.300/2016 but was withdrawn vide Order dated 20.04.2017, and therefore, application is not even maintainable. Learned Counsel further submits that all these arguments, which are now being raised, were also taken before the Court at the time of hearing of the injunction application, whereas, Plaintiff was and is in possession and in fact the wall constructed by the Plaintiff was demolished and it is only the reconstruction of wall, which has been done by the Plaintiff and no further construction is being raised. According to the learned Counsel the plaintiff's title has not been challenged by Defendant No.4 and the prayer made in this application is outside the scope of this Suit, hence the same may be dismissed.

While exercising the right of rebuttal, learned Counsel for the Defendant No.4 submits that the appeal was withdrawn, however, with a right to seek inspection of the property in question and such application already stands allowed and instant application has been filed after fresh inspection, and therefore, no reliance can be placed on the Appellate Court's Order.

I have heard both the learned Counsel and perused the record. At the very outset, learned Counsel for Defendant No.4 was confronted as to how this application is maintainable and can be entertained in this Suit, which has been filed by the Plaintiff seeking relief in respect of his ownership of the land in question as it is the case of the Plaintiff that his land is distinct and separate, to which the learned Counsel could not satisfactorily respond but referred to the order of the Appellate Court, which according to the learned Counsel had permitted the Defendant No.4 to file such application. However, it may be noted that before the Appellate Court, it was only

a request and permission to file another application for inspection and once such application was filed, the same was granted by this Court vide Order dated 29.08.2017 but carrying out of such inspection does not permit or entitles the Defendant No.4 to file a counter application against the Plaintiff seeking restraining orders in view of the fact that the injunction application of the Plaintiff already stands allowed. Though in exceptional cases, such an application can be considered even on behalf of defendant in Suit, (Order 39 Rule 1(a) makes reference to **any party**), if the facts of the case so warrant, but at least in this matter no such case is made out by the defendant. The Plaintiff in his injunction application bearing CMA No.12450/2014 had sought orders to restrain the Defendants or any other person acting on their behalf from interfering with the Plaintiff's peaceful possession of plot in question. Such application was allowed and Defendant No.4 was restrained from dispossessing the Plaintiff forcibly till final decision of the Suit. Now after such application has been allowed and appeal against which stands withdrawn, it would be too harsh and unjust to restrain the Plaintiff from using his own property, for which, his possession has been duly protected by the Court.

In view of hereinabove facts and circumstances of this case and discussion as above, I am of the view that no case is made out on behalf of Defendant No.4 to restrain the Plaintiff from using his property. Accordingly, the listed application is dismissed.

J U D G E

Ayaz