

**IN THE HIGH COURT OF SINDH AT
KARACHI**

Suit No. 1095 of 2013

Fuad Azim Hashmi & others-----Plaintiffs.

Versus

Province of Sindh & others-----Defendants.

1. CMA No. 9210/2013
2. CMA No.2358/2015
3. CMA No.14872/2017
4. CMA No.3636/2018

Date of hearing: 27.04.2018

Date of Judgment 27.04.2018

Plaintiff: Through Ms. Rizwana Ismail,
Advocate

Defendant No.11: Nemo.

Province of Sindh: Through Ms. Rukshanda Waheed,
State Counsel.

J U D G M E N T

Muhammad Junaid Ghaffar, J. This is a Suit for Declaration, Possession, Permanent Injunction, cancellation of documents and damages; however, the primary grievance of the plaintiff appears to be that Defendant No.11 has attempted to encroach and take over part possession of their property unlawfully. The precise claim of the said Defendant is based on the premise that he is a tenant of one Fiaz Akhtar, who is the owner of the property. Various orders were passed in this matter and presently the property is under attachment with the Nazir of this Court, who has already

constructed a proper boundary wall to secure the property. On 07.03.2018, the Plaintiffs filed CMA No.3636/2018 (at Serial No.4) under Order 15 read with Section 151 CPC (listed at Serial No.4 which is the only application for consideration presently) as according to the Plaintiffs nothing at dispute remains, hence the Suit be decided in their favour by passing an appropriate judgment.

2. After issuance of notice and filing of counter affidavit to this application on 13.04.2018, Defendant No.11 was directed to be in attendance on 20.4.2018 for his examination under Order 10 CPC as the Court was of the view that in the given facts, such examination was necessary. On such date Defendant No.11 failed to turn up and even the Counsel was also called absent, whereas, another Counsel held brief that he is unwell. As to the absence of Defendant No.11, no response was given. As an indulgence, and in the interest of justice, matter was adjourned for today, with directions for attendance of defendant No.11, but none is in attendance and the Counsel is also called absent. Since specific directions were given for presence of Defendant No.11, and no assistance is provided as to that and he has remained absent before the Court, in terms of Order 10 Rule 4(2) C.P.C., this Court is competent to pass or pronounce Judgment or such order which it may think fit.

3. Learned Counsel for the Plaintiffs has contended that the Plaintiffs' father had purchased the land measuring 7.2 Acres in Deh Mehran, Tapo Malir, Karachi, and after his demise the land by way of inheritance is now owned by the present Plaintiffs. Plaintiff No.1 owns 2.34 Acres, which is now numbered as Survey No.157 and the Plaintiff No.2 owns 1.16 Acres known as Survey No.157/1

and Plaintiff No.3 owns 2.32 Acres known as Survey No.157/2, whereas, the Plaintiff No.1 has gifted/donated 2.016 Acres to SOS Foundation. In 1985 the suit land was encroached and predecessor in interest of Plaintiffs filed Suit No.260/1986, which was decreed in their favor vide Judgment and Decree dated 05.03.1987. Execution Application No.75/1987 was filed and in the year 1987 again the Suit land was encroached and another Suit No.378/1988 was filed, which was also decreed. It is the case of the Plaintiffs that after demise of their father as well as mother they are the lawful owners of the property and none disputes this, whereas, the same now stands mutated in their names and once again Defendant No.11 attempted to encroach upon this land and instant Suit was filed. Learned Counsel submits that time and again their land has been encroached thrice and they have come to this Court seeking justice, whereas, the land grabbers are making further attempts to take over the possession unlawfully. She submits that since Defendant No.11 has no case, therefore, the application under Order 15 be allowed and Suit be decreed and Nazir be directed to hand over the peaceful and vacant possession to the Plaintiffs.

4. On the other hand, the case of the Defendant No.11 as reflected from the counter affidavit as well as the written statement is, that he is a tenant in his own legal right and one Sohail Akhtar has provided him the registered Sale Deed dated 28.12.1983 and mutation in Deh Form-VII, which shows that one Fiaz Akhtar S/o Ejaz Akhtar is owner of two Survey Nos. 157, having an area of 7.2 Acres and 158 having area of 7.32 Acres and the said Sohail Akhtar rented out two acres from the above Survey numbers in

April, 2012 at the rate of Rs.30,000/- per month, whereas, he has spent an amount of Rs.3 Million on the construction. It is further stated that he is in lawful possession without having any knowledge of any right or interest of the Plaintiffs, whereas, it is further case of the Defendant that Survey No.157 is different than 157/1 and Survey No.157/2, which is claimed by the Plaintiffs, therefore, they have no case. Alongwith his written statement, the Defendant No.11 has filed only the purported Rent Agreement.

5. I have heard the learned Counsel for the Plaintiffs and perused the entire record. On 13.04.2018 an order was purposely passed for examination of the Defendant No.11 as the Court was of the view that his examination was necessary to decide this case on the basis of Application of the Plaintiffs under Order 15 CPC and for such purposes he was directed to be in attendance under Order 10 CPC. He didn't turn up and matter was then posted to 20.4.2018 and 27.4.2018, but none has affected appearance to assist the Court.

It appears to be an admitted position that when this Suit was filed, attempts were being made to encroach upon a portion of the Suit Property, therefore, on 30.08.2013, on an application filed on behalf of the Plaintiff, a Commissioner was appointed to inspect the land without notice to the parties to determine the exact nature of the subject land, whereas, the Commissioner was also directed to take photographs at the time of inspection. The Commissioner furnished his report before the Court on 06.09.2013 and according to his report, on the suit land five laborers were working and were busy in placing bricks on a free standing wall, which appeared to be around 4 to 5 feet in height and approximately more than 50

meters in length, whereas, on enquiry, he was informed that such wall was being raised on behalf of and under the orders of one Colonel Tariq. He has further stated **that the subject land was otherwise lying vacant.** Thereafter on 27.09.2013, another inspection application was filed by the Plaintiff as despite restraining orders, the construction was being continued. Again a Commissioner was appointed, who furnished his report dated 05.10.2013. Again according to his report, the construction activity was being continued and when enquired, the laborers informed that it was being done under the orders of Major Tariq. **The conclusion of the learned Commissioner was that there is a development of construction work and further activity, which was not found at the time of first activity** and a detailed report to that effect was given. In view of such position on 07.10.2013, the Court passed an order to preserve the Suit land from further encroachment and Nazir of this Court was directed to seal the Suit property and to depute security guards as deemed appropriate at the cost of Plaintiff, whereas, the Police officials and Government authorities were directed to ensure protection and assistance to the guards deputed by the Nazir. It further appears that time and again the orders were violated and even hindrances were created in the exercise being carried out by the Nazir, whereas, contempt proceedings were also initiated. Nazir was directed to raise a proper wall, which was though initially resisted, but thereafter was constructed and the property was secured. It is also a matter of record that Nazir in his report dated 14.03.2014 stated that the persons at the Site committed series of offences and he sought permission to lodge an FIR, which was also ultimately registered. This kept on continued through various frivolous applications and

again pursuant to Order dated 16.11.2015. Nazir furnished his Report dated 15.04.2016 and stated that the said plot was encroached by Defendant No.11 and there were certain belongings of Defendant No.11, which he has failed to take over and orders were sought. Thereafter in response to the objections of Defendant No.11 that in fact the land being claimed by the Plaintiffs is located somewhere else, an order was passed on 21.08.2017 and pursuant to that Nazir furnished his report dated 14.10.2017 in respect of carrying out survey of the land to that effect. His report of such date reflects that the Survey Superintendent identified the Suit land as Survey Nos.157, 157/1 & 157/2, which is in his possession and even the objection of Defendant No.11 was overruled by the Survey Superintendent, who identified the exact location, which was already under possession of the Nazir. It further appears that on 15.12.2017 further direction were given for demarcation of the land to the Nazir and to that he placed his Report on 18.01.2018 on the basis of the Report of Survey Superintendent. Para-5 of the Nazir Report reads as under:-

“5. According to the said survey report submitted by the Survey Superintendent, Karachi alongwith Map of Demarcation Plan performed through theodolite machine, the following result has been ascertained:

“Demarcation plan of Survey No.157 which was subsequently bifurcated into Survey Nos.157, 157/1 & 157/2 measuring 07-02 Acres, Deh Mehran, Karachi Malir, on the Order of High Court in Suit No.1095/2013, carried on 08/01/2018 in presence of Deputy Nazir, High Court of Sindh, Revenue Tapedar, Revenue Assistant Mukhtiarkar, Plaintiffs & concerned parties.

At the Site the Land within the Boundary is 7-02 Acres.”

The overall perusal of the aforesaid facts reflect that this is a case of high handedness and nothing. Time and again attempts

have been made to encroach the land, by the same parties, but under different ways and manner and for this reason the defendant No.11 was ordered to be in attendance for his examination. It would be advantageous to refer to the provisions of Order 10, which reads as under:-

ORDER X EXAMINATION OF PARTIES BY THE COURT.

1. *Ascertainment whether allegations in pleadings are admitted or denied.* – At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

1A. The Court may adopt any lawful procedure not inconsistent with the provisions of this Code to

(i) conduct preliminary proceedings and issue orders for expediting processing of the case;

(ii) issue, with the consent of parties, commission to examine witnesses, admit documents and take other steps for the purposes of trial;

(iii) adopt, with the consent of parties, any alternative method of dispute resolution including mediation, conciliation or any such other means”.

2. *Oral examination of the party or companion of party.* – At the first hearing of the suit, or at any subsequent hearing, and party appearing in person or present in Court, or any person able to answer any material question relating to the suit by whom such party or his pleader is accompanied, [shall] be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

3. *Substance of the examination to be written.* – The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

4. *Consequence of refusal or inability of pleader to answer.*-- (1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and it likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

6. The aforesaid provisions empowers the Court that at the first hearing of the Suit or at any subsequent hearing, any party appearing in person or present in Court, or any person answering any material relating to the Suit by whom such party or his pleader is accompanied, shall be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination, questions suggested by either party, whereas, Rule 4 provides that if any pleader of such a person as stated in Rule 2, refuses to or is unable to answer any material question relating to the Suit, the Court may postpone the hearing of the Suit, and direct any such party to appear in person and answer the questions. Rule 4 Sub Rule-2 provides that if such party fails without lawful excuse to appear before the Court, the Court may pronounce Judgment or pass Order as it may think fit. To this in my view sufficient compliance has been made, and after failure of the Defendant's Counsel to answer the questions asked by the Court, presence of Defendant No.11 was ordered, but he has failed to attend.

This case has a chequered history inasmuch as twice the owners of the property had to come before this Court to protect their possession. For the first time they came before the Court for a Suit of possession, declaration, permanent injunction and damages and Suit was numbered as 260/1986. The Suit was decided by Judgment dated 05.03.1987. The operating part of the said Judgment reads as under:-

"The defendant No.6 has not established that he is a bonafide purchase for valuable consideration without notice of the prior sale. I therefore grant declaration that the plaintiffs are the owners being the legal heirs of Dr. Saghir Ahmed Hashmi, are the lawful owner

of the entire land bearing Survey No.157, Deh Mehran, Tappo Malir, District Karachi and are entitled to possession. The sale deed between defendant No.2 and 3 and the defendant No.6 is collusive and fraudulent and is hereby cancelled. The defendants are permanently restrained from interfering with the peaceful possession of the plaintiffs. The occupier or any one claiming any right under the defendants should have over peaceful and vacant possession to the plaintiffs. The defendants are permanently restrained from raising any construction and transferring the plot to any third party. The claim for damages has not been established as there is no independent evidence to support it. The claim for damage is rejected. The suit is therefore decreed in the terms stated above with no order to costs."

7. The Decree was prepared on 22.03.1987 and Execution Application No.75/1987 was filed. The said Execution Application was decided and possession was handed over to the Plaintiffs/Decree Holders vide Order dated 29.11.1987, which reads as under:-

"Perused the report of bailiff. The Bailiff is directed to handover the possession of the open plot to the Decree Holder. So far as the hutment is concerned the bailiff is directed to apply another law on the lock of the hutment which shall be supplied by the Decree Holder and deposit the key with the Nazir. The key may be delivered to the Decree Holder if nobody comes forward to claim the same from the Court within a month.
Execution application stands disposed off."

8. It is of utmost importance to observe that the person from whom the Defendant No.11 claims tenancy namely Fiaz Akhtar, (through one Sohail Akhtar) was Defendant No.6 in this Suit as well as in the Execution. It further appears that subsequently another Suit No.378/1988 was filed and the same was decreed vide Judgment Dated 27.04.1989. Again this Fiaz Akhtar was Defendant No.1 in these proceedings. It is a matter of record that these orders and judgments have attained finality and nothing has been controverted in this regard. Once again the land has been encroached and present Suit has been filed and now interestingly there is a tenant, who claims to be in possession on the basis of

Tenancy Agreement entered into with Sohail Akhtar and who has allegedly rented out the property, which according to his own stance is owned by Fiaz Akhtar. It further appears that the said Fiaz Akhtar came before this Court and filed CMA No.12458/2013 under Order 1 Rule 10 CPC and through Order dated 14.03.2016, the said application was dismissed and the order reads as under:-

“9) Application listed at Serial No. 9 (CMA No. 12458/2013) is an application under Order 1 Rule 10 CPC, filed on behalf of the applicant / intervener with the prayer to be impleaded as defendant in the instant matter on the basis of a Sale Deed dated 28.12.1983 which according to the applicant / intervener is in respect of Survey No. 157 (7-02 Acres) and 158 (7-32 Acres) situated in Deh Mehran Tappa Malir Taluak and District Karachi, which is also a subject matter of this Suit. Counsel for applicant / intervener submits that the applicant / intervener is a bonafide purchaser of this land from Mr. Muhammad Usman and Mst. Gulabi and therefore, he is a necessary party to these proceedings. He has also referred to Search Certificate dated 12.8.2008.

On the other hand, Counsel for plaintiff submits that the property in question is owned by the plaintiffs in Survey No. 157. She further submits that in the year 1986 the said property was also encroached upon by various defendants including the present applicant as well as their predecessor in interest and the Suit bearing No. 260/1986 has been decreed vide Judgment dated 5.3.1987 and Decree dated 27.5.1989 whereby, the Court has been pleased to hold that the plaintiffs are the real owners of the property bearing Survey No. 157 situated in Deh Mehran Tappa Malir Taluak and District Karachi and are entitled to possession, whereas, the Sale Deed between the defendants No. 2 & 3 and defendant No. 6 is collusive and fraudulent and is hereby cancelled. She submits that in the circumstances listed application does not merit any consideration and may be dismissed.

I have heard both the learned Counsel and perused the record including the judgment and decree as referred to hereinabove which reflects that the said defendant No.6 in that Suit is the present applicant / intervener, whereas, the defendants No. 2 & 3 are the parties from whom the defendant No. 6 has allegedly purchased the property in question on the basis of Sale deed. Since the applicant / intervener has filed this application on the basis of Sale Deed and claims interest in the property on such basis, which already stands cancelled by this Court, the applicant / intervener cannot claim any right of being arrayed as a defendant on the basis of such Sale deed which is no more in field as held by the Court. Though the Counsel for intervener has submitted that such judgment / decree is under challenge by way of an application under Section 12(2) CPC, however, since no orders have been passed in that matter, the judgment and decree remains in field, therefore in the circumstances, the application bearing (CMA No. 12458/2013) under Order 1 Rule 10 CPC is not maintainable and accordingly dismissed.”

9. Subsequently, Defendant No.11 also filed an application under Order 39 Rule 1 & 2 CPC and under Section 75 and both these applications were dismissed on 23.01.2017 in the following terms:-

“3&5. Both these applications have been filed by Defendant No.11 for restraining the Plaintiffs from interfering or disturbing the alleged lawful possession of Defendant No.11 and so also for inspection of his property. Learned Counsel for Defendant No.11 contends that he is a lawful tenant in respect of two acres of land granted to him by one Adnan Khan Hafeez, who acquired it from Fayyaz Akhtar through his attorney Sohail Akhtar and certain amount has been spent in construction of the property in question. Counsel for the Plaintiff has opposed this application and submits that Defendant No.11 is a trespasser and has no title in the said property, which belongs to the Plaintiff and therefore these applications be dismissed.

I have heard both the learned Counsel and perused the record. Since admittedly, the application of Fayyaz Akhtar under Order 1 Rule 10 CPC stands dismissed from whom Adnan Hafeez Khan has purportedly derived title and through whom Defendant No.11 claims tenancy rights, therefore, apparently, listed applications cannot be granted in favour of Defendant No.11. The precise reason for dismissal of the interveners application was that the sale deed in favor of that applicant had already been set aside by this Court in an earlier Suit bearing No. 260/1986 which has attained finality. Even otherwise this Suit has been filed by the Plaintiffs for protection of his property rights and if Defendant No.11 has any independent cause of action against his landlord, except instant Suit, he can agitate the same in accordance with law. In the circumstance, both these applications being misconceived are hereby dismissed.”

10. Perusal of the aforesaid record very clearly reflects that insofar as the present Suit is concerned, the Plaintiffs' ownership has not been controverted in any manner and in fact there appears to be an attempt by various persons including Defendant No.11 to take possession of the part of the property unlawfully with no justification. In the earlier round of the proceedings, attempts were made by the persons, who were claiming the title of the property on the basis of some Sale Deeds, which were discarded by the Court and were cancelled and were held to be bogus and thereafter in Execution Proceedings possession was handed over. Then again a further attempt was made and second Suit was filed, which was

also decreed and none contested. Subsequently, after a considerable lapse of time once again there appears another person i.e. Defendant No.11, who claims possession on the basis of some Tenancy Agreement and interestingly it is with no one else but the same person(s), whose Sale Deed also stand cancelled, now shown to be as the Landlord. One fails to understand how and in what manner a person can rent out such property, which is not owned by him and for which the Sale Deed stands cancelled. In fact Defendant No.11 has only annexed a purported rent agreement and even failed to bring on record, the said Sale Deed. Even otherwise it has no material bearing on this case as the said Sale Deed no more exists.

11. Now the moot question before the Court is that whether in these facts and circumstances of the case, the Plaintiff be subjected to go through the rigors of leading evidence once again and seek justice for the property in question, for which, not only once but twice, decrees have been passed. It appears that to frustrate such decree and orders passed in Execution; time and again attempts have been made to take over possession, unlawfully, by the present Defendant No.11 as well as the previous owners. In fact the orders of the Court as discussed above have been defied, compelling the Court to order sealing of the Suit property. Would it be correct to permit the encroachers to stultify the Court process again and again and keep on asking the plaintiffs to prove their case through evidence once again and make the judicial decrees and seals redundant and superfluous? I believe no. The long arm of the law must take it on and throttle such litigative attitude of the encroachers if the confidence of the

Courts is to survive. The Court is also vested with Contempt powers and must exercise these powers to bring an end to such litigation and attempts of encroachment and not that ask people to prove their case through evidence in such situations. I am of the view that in each and every case a party must not be subjected to go through the tedious exercise of first coming up before the Court and then to lead its evidence and again and again justify its ownership. Once a decree has been passed and Execution stands satisfied then in my view no further evidence is to be led until and unless the Defendant, who is claiming possession, has any justification for that. A mere Tenancy Agreement filed through Written Statement does not suffice and for this purposes and to cut shot the controversy, the Defendant No.11 was summoned and was directed to be present for his examination under Order 10 CPC; but he has failed to do so. Finally, it appears that there is no issue left in this matter, which is to be adjudicated and Court is very much competent to pronounce Judgment and Decree in terms of Order 10 Rule 4(2) as well as Order 15 CPC, looking at the facts and circumstances of this case; hence, application(s) at Serial No.1 & 2 above are disposed of as through this order / judgment they have served their purpose, whereas, application at Serial No.3 is for inspection by defendant No.11, and is hereby dismissed. While allowing application at Serial No.4, the Suit is decreed as prayed, whereas, the Nazir, who was ordered to take over possession is directed to handover peaceful and vacant possession of the Suit Property to the Plaintiffs and or their authorized representative or attorney, as the case may be, and shall furnish his report accordingly. Before handing over such possession, Nazir is directed to place the articles as mentioned in his report dated 30.1.2018,

(belonging to Defendant No.11), on the Suit Property under lock and key until further orders.

12. Suit stands decreed as above.

J U D G E

Ayaz