

IN THE HIGH COURT OF SINDH, KARACHI

Civil Revision Application No. 172 of 2012

Shaheen Residence Welfare Association.....Applicants.

V e r s u s

Athesham Haider and four others.....Respondents.

J U D G M E N T

Date of hearing : 26th March, 2018.
Date of Judgment : 27th June, 2018
Appellant. : Syed Sabir Ali, advocate
Respondents : Mr. Kaleem-ul-Hassan Siddiqui,
advocate.

>>>>>>>> <<<<<<<<<<<

Kausar Sultana Hussain, J:- This Civil Revision under Section 115 of the Code of Civil Procedure, 1908 has been directed against the judgment and decree dated 12.7.2012, passed by Additional District Judge-IIIrd, Karachi (West), whereby Civil Appeal No. 171 of 2011 was dismissed and the judgment dated 10.8.2011 followed by decree dated 12.8.2011 passed by Senior Civil Judge-IVth, Karachi (West) in Civil Suit No. 199 of 2007 was maintained.

2. The concise germane facts forming back ground to institute instant Civil Revision are that the appellant filed Civil Suit No. 199 of 2007 against the respondents for declaration, permanent injunction and accounts. It was alleged by the appellant that on 02.09.2011, an election of the Union was held and Shaheen Welfare Association being elected Union Worked up to May, 2002, on 2.6.2002 the dispute amongst the office bearers arose and Amjad Hussain (Vice President) who is an employee of Police Department has made a group with the name so called working Committee made the respondent No. 3 as an incharge of the Committee and posting himself as President started receiving monthly maintenance Rs. 150/- from Flats (404 in number) and shops (58 in number) up to June, 2005. It was also alleged that

the so called working Committee respondent No. 4 including incharge respondent No. 3 committed forgery as they never maintained the account of income and expenses and also failed to get the accounts audited. It was also alleged that the said so called working Committee illegally and without information to the residents of the Flats, even without calling General Body Meeting or Election, on 4.7.2005 posted incharge, who is respondent No. 1 working in water and Sewerage Board so also posted working member viz; respondent No. 3 an employee in Welfare Department, Government of Sindh and they are illegally receiving monthly maintenance of each Flat at the rate of Rs. 100/- and Rs. 50/- on account of Electric charges, however, they are not using the same in proper manner resulted in disconnection of Electric Meter due to outstanding bills of Rs. 4,00,000/-. The appellant prayed for the following relief (s).

- i. To declare that the plaintiff is the only and legal representative of society of the residents of surjani Heights K.D.A Flats, F.L. 7, & 8 Sector 5/E, Surjani Town, Karachi.
- ii. To declare that the defendant No. 1-4 has no right to collect any amount i..e maintenance or Electric charge from the residents of Surjani Heights K.D.A Flat Surjani Town Karachi and is not entitle to collect monthly maintenance and to do all acts.
- iii. To grant permanent Injunction restraining the defendant No. 1-4 from collecting the maintenance amount and Electric charge from residents of Surjani Heights K.D.A Flats from the month of February, 2007.
- iv. To direct the defendant No. 1 to submit the accounts from 02.06.2001 to till date.
- v. Cost of the suit is born by the defendant No. 1-4 and by any other relief/ relieves by the trial Court in favour of plaintiff and against the defendant No. 1 deem fit and proper.

3. The respondents No. 1 to 4 did not contest the matter, however, respondent No. 5, viz; City District Government, Karachi

(Defunct KDA) filed its written statement asserting that answering respondent has no concern or involvement in the matter of Union Election or day to day maintenance or collection of maintenance charges, as such, suit filed is not maintainable under the law and also plaint is hit by Section 42 and 56 of the Specific Relief Act, so also under Section 196 of Sindh Local Government Act.

4. The trial court after framing as many as 6 issues, recorded only evidence of the appellant's representative Muhammad Asif Khan and its two witnesses namely Sharfuddin and Muhammad Junaid Khan, as the respondents neither cross-examine the said witnesses of the appellant, nor led their own evidence, dismissed the suit, vide judgment dated 10.8.2011 followed by Decree dated 12.8.2011. Being aggrieved, the appellant filed Civil Appeal before Additional District Judge-III, Karachi West, vide judgment/decree dated 12.7.2012. The appellant being not satisfied with the said judgment/decree has filed Revision Application in hand.

5. The learned counsel for appellant while highlighting the brief history of the case, has argued that both the Courts below did not consider the fact that the entire claim of the appellant gone unchallenged and un-rebutted, nonetheless travelled contrary to law and evidence and dismissing the suit. He has further argued that learned appellate court did not consider the fact that trial court appointed a Senior Advocate Sabir Ali, as a Receiver, who categorically reported that listed persons are collecting the maintenance amount from the residents illegally. He has further argued that learned appellate court committed serious illegality and failed to determine all material issues involved in the matter.

He has further argued that both the courts below ought not to have denied the relief to the party merely on the basis of technicalities or minor contradictions arising in the evidence of the parties.

6. Conversely, the learned counsel for respondent No. 1 and 6 have vehemently opposed the contentions so raised by the appellant's counsel and supported the findings of the learned appellate as well as trial court. He has submitted that Muhammad Jamil, who filed aforesaid suit did not step into witness box, as such, the contents of plaint having no legal footing. He has further pointed out that Muhammad Jamil representing appellant in evidence as a General Secretary did not produce any authority letter of Association. He has further argued that nothing was produced before the learned trial court in proof that Muhammad Jamil is president of the Association or Muhammad Asif Khan is General Secretary, even did not produce bye laws or Rules and Regulations of the Association, as such, the learned trial court lawfully observed that the suit is barred under section 42 of the Specific Relief Act. He has further argued that none of the witness examined by the appellant produced a single document to show that the respondents No. 1-4 ever received any maintenance amount, electricity charges in respect of stairs and water pumping machine. He has stressed upon the fact that had the respondent No. 1-4 used to receive alleged charges, the residents must have obtained the receipts thereto, but nothing has been brought on record in this regard. He has further argued that the appellant also failed, to prove factual controversy, as such, suit of the appellant was rightly dismissed by the learned trial court, so is done by the first appellate court, required no interference.

7. I have heard the learned counsel for the parties at length and perused the record. It appears that both the courts below concurrently held that the Muhammad Jamil, who being President of Shaheen Welfare Association (Registered) filed aforesaid suit has failed to establish his legal character or status to seek declaration claimed for. On examination of record, it is revealed that in prayer clause-(i) of the plaint, he sought declaration to the extent that he is the only and legal representative of Society of the residents Surjani Heights K.D.A Flats, FL.7 & 8, Sector 5-E, Surjani Town, Karachi, whereas the said Jamil Ahmed did not enter into witness box, even neither with the plaint nor any witness examined before the trial court produced a single document to show that the said Jamil Ahmed is the elected President of the Association. In absence of any proof, no declaration could be granted as per section 42 of the Specific Relief Act, which is a discretionary relief concerning legal character and rights. Likewise, it is also noted that in prayer clause (iv) the appellant sought direction for the respondent No. 1 to submit accounts from 2.6.2001 till date. It is quite strange to note that suit was filed by the appellant in the year 2007 and remained silent for years together about alleged mismanagement at the hands of the respondent No. 1 and after about 6 years seeking accounts detail from the year 2001, which itself creates doubts in the claim of the appellant. Nevertheless, per certificate of Registration of Societies produced in evidence, it appears that Shaheen Residents Welfare Association was registered on 28th December, 2006, thus the claim of Jamil Ahmed (alleged President) becomes more cloudy owing to the reason that when the Association was registered in December, 2006, how could be acted as President for the past period and

under what capacity he could ask for directing the respondent No. 1 for the alleged accounts details before the date of registration of the said Association. It may be observed here that a registered Association has to act as per its bye-laws and management of the Association is regulated by an elected members. All the three witnesses examined by the appellant before the trial court failed to produce any document relating to the elected members of the said Association as well as bye-laws of the Association.

8. Curtly, the said Jamil Ahmed, who instituted the suit on behalf of the appellant Association did not step into witness box to examine himself on Oath, even the representative/general secretary of Association Muhammad Asif Khan did not produce any authority letter of Association or proof as to his status of General Secretary of the Association, what to speak of legality of his evidence, even in the list of witnesses available on record, the name of said Muhammad Asif Khan has not been provided. In the above state of affairs, the learned trial court rightly passed the impugned judgment/decree as the relief (s) sought in the plaint is/or discretionary in nature as provide under Section 42 of Specific Relief Act. It is settled law that appellate court would not substitute its own discretion for that of trial judge except where the discretion was exercised arbitrary, perversely, contrary to legal principles. Reliance is placed to the case of Exhhardt Company Marine GMBH West Germany and another Versus Muhammad Hanif (PLD 1986 Karachi 138). In the attending circumstances, the learned trial court as well as learned appellate court rightly observed that the appellant failed to establish legal character for the purpose of seeking declaration. Since the finding of the learned trial court found with substance and per law, therefore,

the learned appellate court left with no option but to concur with the same. No lawful ground brought before the first appellate court to upset the findings of the learned trial court.

9. For the reasons recorded above, instant Civil Revision Application merits no consideration, stands dismissed accordingly.

J U D G E

Faheem/PA