

IN THE HIGH COURT OF SINDH, KARACHI

(Appellate Jurisdiction)

Present:

Mr. Justice Aqeel Ahmed Abbasi

Mr. Justice Aziz-ur-Rehman

High Court Appeal No. 413 of 2017

Vaqar Ahson.....Appellant

Versus

Zulfiqar Mohammad & another.....Respondents

Appellant: through Mr. Mayhar Kazi, advocate

Respondent No.1: through Mr. Muhammad Haseeb Jamali, advocate.

Date of Hearing: 08.03.2018.

Date of Judgment: 19.07.2018

J U D G M E N T

AQEEL AHMEED ABBASI, J.: Instant High Court Appeal has been filed against an order passed by the learned Single Judge on 12.10.2017 in Suit No.941/2013, whereby, application under Order 39 Rule 1 & 2 CPC r/w Section 151 CPC [CMA No. 8049/2013] filed by the appellant and application under Section 151 CPC [CMA No. 17110/2016] filed by the respondent No.1 have been disposed through impugned order, with the prayer to set-aside the impugned order dated 12.10.2017.

2. Briefly, the facts of the case are that appellant alongwith respondent No.1, namely, Mst. Rehana Ahson [since deceased], now through legal heirs have filed a suit for declaration and

permanent injunction against respondent No.1, in respect of property bearing No.F-1/B & F-1/B-1, Bath Island Road, Block No.7 Clifton 5, Karachi [*subject property*], which according to the appellant, was purchased by his late father i.e. Ahson Mohammad a plot admeasuring 1200 square yards, in order to build a house for family. However, the subject property was got divided into two equal portions by late Ahson Mohammad. The first portion admeasuring 600 square yards was leased out in favour of the appellant, whereas, the other remaining second portion also admeasuring 600 square yards was leased out in favour of respondent No.1. The appellant claims to be in a possession since very inception of purchase of subject property alongwith his parents and his family, whereas, respondent No.1 migrated from Pakistan to complete his fellowship at John Hopkins University, USA, while surrendering his right/claim upon 2nd portion of subject property i.e. F-1/B-1 and also took money from his late father Ahson Mohammad in lieu of his right in the subject property to setup a clinic in the USA to complete his migration requirements. According to the averments in the plaint, all the expenses for construction of the entire house built on the aforesaid plot were borne by his late father and the appellant, who is not only maintaining the entire subject property but also pay tax as well as all the utility charges. According to appellant, the subject property was designed as one unit, whereas, second portion is only the

extension of main house with an intention to reduce the higher rate of property tax and utility charges, whereas, it was already known to everyone that respondent No.1 has no right or entitlement over the second portion of the subject property as he has already received the entire amount in lieu of such property and has remained in USA throughout all these years and has never resided in the subject property. However, according to the appellant, respondent No.1 suddenly returned from the USA and has started to claim the second portion of the subject property with an intention to sellout the same and wanted to physically divide the subject property by constructing a wall between the two portions. It has been further stated that the first portion of the subject property will undergo major reconstruction in order to make it habitable, whereas, appellant and his mother will have to go out from the house till reconstruction is done, whereas, the major portion of the construction which has already raised on the subject property, will have to be demolished to provide access to the second portion of subject property.

3. Under the aforesaid circumstances, appellant filed a suit i.e. Suit No.941/2013 for declaration and permanent injunction, with the prayer, to declare that appellant is the owner and title holder, which includes both the first and second portions of the subject property, as mentioned hereinabove, whereas, it has been further prayed that respondent No.1 may be restrained

from selling or in any manner causing and damaging the subject property or either of the two portions therein.

4. During pendency of the suit, appellant filed an application under order 39 Rule 1 & 2 CPC r/s Section 151 CPC [CMA No.8049/2013] with the prayer that respondent No.1 or his agents or assignees shall be restrained from dispossession of / selling or in any manner causing any damage to the subject property i.e. F-1/B, Bath Island Road, Clifton, Block 7, Karachi or any portion thereof, whereas, respondent No.1 filed an application under Section 151 CPC [CMA No.17110/2016] with the prayer to allow the respondent to construct a boundary wall on the subject property and thereafter, be allowed to put up get on the second portion admeasuring 600 square yards. It has been further prayed in the application that directions may be issued to the appellant to remove/demolish any illegal construction, if carried out over the respondent's plot, so as to enable him to make full use of his property.

5. Learned Single Judge, through impugned order, has disposed of both the listed applications, whereby, injunction application filed by the appellant has been allowed with the directions that no third party interest will be created in respect of the subject property, whereas, the application filed on behalf of respondent No.1, has also been granted, whereby, he is

allowed to raise boundary wall on the portion between the first portion of the subject property and on that area only, which is mentioned in the 99 years' lease of the subject property. The appellant has expressed his grievance only to the extent of grant of application filed by respondent No.1, whereby, he has been allowed to raise a boundary wall on the subject property in the above terms.

6. Learned counsel for the appellant has vehemently argued that the impugned order passed by the learned Single Judge on the application filed on behalf of respondent No.1, is erroneous in fact and law for the reason that unless the claim of the appellant in respect of the entire property as its owner, is decided by recording of evidence, any relief, whereby, respondent No.1 has been allowed to raise a boundary wall on the subject property, which is admittedly in exclusive possession of the appellant and his Mother since its purchase throughout all these years', would adversely affect the claim of the appellant in the suit. According to learned counsel for the appellant, the respondent No.1 has not filed any suit or proceedings before any Court/Forum with regard to his title or possession in respect of the subject property, therefore, any relief granted to respondent No.1 in the suit, filed by the appellant is otherwise erroneous in facts and law. It has been further argued by the learned counsel that the relief granted to respondent No.1 on an application under Section 151 CPC is in

the nature of an injunction in favour of respondent No.1, however, while granting such relief to respondent No.1, learned Single Judge has not taken into consideration the three ingredients to be considered at the time of granting such relief i.e. prima facie case, balance of inconvenience and irreparable loss and injury to the parties'. It has been further contended by the learned counsel for the appellant that the subject property, which was purchased by the father of the appellant and respondent No.1, was measuring 1200 square yards, whereafter, construction has been raised thereon in such a manner that it cannot be physically divided into two equal portions, therefore, erecting a wall in the subject property would cause serious damage to the construction already raised thereon by the appellant and therefore, will cause injury and financial loss to the appellant as his family. Per learned counsel, relief granted to the respondent No.1 is in the nature of allowing partition as well as possession of the subject property to respondent No.1, however, without recording any evidence to this effect. It has been prayed by the learned counsel for the appellant that the impugned order passed by the learned Single Judge, whereby, respondent No.1 has been allowed to raise construction on the subject property may be set-aside and the learned Single Judge may be directed to finally decide the suit, after recording evidence of both the parties' at an early date.

7. Conversely, learned counsel for respondent No.1 has supported the impugned order passed by the learned Single Judge, as according to learned counsel, a reasonable and balanced order has been passed by the learned Single Judge, whereby, the application filed by the appellant for grant of injunction has already been allowed, according to which, respondent No.1 has been restrained from selling out or creating any third party interest in respect of the 2nd portion of the subject property i.e. F-1/B-1, Bath Island Block-7 Clifton, Karachi (600 Sq. Yds.), whereas, application filed on behalf of respondent No.1 with a request to allow respondent No.1 to raise the boundary wall between two portions of the subject property, has also been granted through impugned order, according to which, respondent No.1 has been allowed to raise boundary wall to secure the 2nd portion of the subject plot, which is admittedly leased out in favour of respondent No.1. It has been further contended by the learned counsel for respondent No.1 that the subject property is already divided into two equal portions of 600 square yards each, whereas, first portion stands in the name of appellant and the second portion stands in the name of respondent No.1, whereas, there has been no dispute in this regard between the parties' prior to filing a above suit by the appellant. However, appellant having enjoyed his possession of both the portions during all these years', when the respondent No.1 was residing in USA, now intends to usurp

the property of respondent No.1 and has filed a frivolous suit, seeking declaration and permanent injunction, which otherwise is misconceived and not maintainable, as according to learned counsel, the appellant has not filed any suit for cancellation of the lease of subject property which stands in the name of respondent No.1. It has been prayed by learned counsel that instant High Court Appeal being devoid of any merits may be dismissed, as the impugned order does not suffer from any error or illegality, whereas, the interest of both the parties' to the proceedings has been protected by the learned Single Judge through impugned order.

8. We have heard the learned counsel for the parties, perused the record of the case and the impugned order passed by the learned Single Judge, with their assistance. The precise grievance expressed through instant High Court Appeal by the appellant is only to the extent that the impugned order passed by the learned Single Judge, whereby, the application filed on behalf of the respondent No.1 under Section 151 CPC [CMA No. 17110/2016] has been granted, and respondent No.1 has been allowed to raise a boundary wall between "first portion" of the subject property and on that area only, which is mentioned in the 99 years' lease in respect of Plot No.F-1/B-1, Block 7, Clifton, Scheme No. 5, Karachi in the name of respondent No.1". The fact of the matter is that the appellant and respondent No.2 have filed a Suit No.941/2013 against

respondent No.1, seeking declaration and permanent injunction, with a prayer that it may be declared that appellant, namely, Vaqar Ahson s/o (late) Ahson Mohammad, is the owner and title holder of the subject property, which includes both the first and second portions' of the subject property as detailed in Para 6 of the plaint, whereas, it has been further prayed that respondent No.1 and any of his agents or assignees may be restrained from disposing of/selling or in any manner causing any damage to the property in question.

9. Written statement has been filed on behalf of respondent No.1, wherein, averments made by the appellant with regard to the ownership of the entire subject property has been denied and it has been stated that Plot No.F-1/B-1, Block 7, Clifton, Scheme 5, Bath Island, Karachi, admeasuring 600 square yards, is owned by respondent No.1, pursuant to a separate lease executed in his favour. However, it appears that continued possession of appellant on the entire subject property since its purchase on 31.08.1983, has not been disputed by respondent No.1, who had left for the USA several years' back and during all these years, the entire property remained in exclusive possession and also is being looked after by the appellant and his mother, whereas, respondent No.1 has not filed any suit, claiming his title or possession over the 2nd portion of the subject property, which still stands in his name, nor it has been alleged that the subject property is in illegal possession or

occupation by the appellant. Record shows that an application was filed on behalf of appellant under Order 18 Rule 18 CPC [CMA No.16299/2014] with the prayer to appoint the Nazir of this Court to inspect the subject property and to ascertain its current status, whereafter, respondent No.1 filed an application under Section 151 CPC [CMA No.17110/2016] with the prayer that respondent No.1 being a lawful owner of property bearing No.F-1/B-1, Bath Island, Clifton Block 7, Scheme 5, Karachi admeasuring 600 square yards, may be allowed to construct a boundary wall between property bearing No. F-1/B and F-1/B-1, Bath Island, Clifton Block 7, Scheme 5, Karachi [subject property] and thereafter, be allowed to put up a gate between Plot No.F-1/B-1, under the supervision of Nazir of this Court. It has been further prayed that the appellant may be directed to remove/demolish any illegal construction, if carried out over the plot of respondent No.1, to enable the respondent No.1 to make full use of his property. The appellant filed counter-affidavit to the said application, while opposing the request of respondent No.1 by raising preliminary objections, according to which, the said listed application was not maintainable, on the ground that relief sought through the said listed application is in the nature of mandatory injunction, which would permanently alter the subject property, which is the subject matter of the suit, whereas, unless evidence is recorded, the relief claimed in the Suit cannot be granted. It has been further objected that the

relief sought in the said listed application tantamount to allow partition, and also to handover possession of the subject property to respondent No.1, which relief according to the objections filed on behalf of the appellant, can only be granted in a suit for partition and possession if filed by any aggrieved party, and that too by way of final relief, after recording of evidence. It has been further objected that relief of injunction, or removal of structure over subject property cannot, otherwise be granted on an interlocutory application filed on behalf of respondent No.1 in the suit of the appellant, whereas, no counter claim whatsoever has been filed on behalf of respondent No.1 in the aforesaid suit. Such objections raised on behalf of respondent No.1 to the application filed by the appellant (CMA No.17110/2016) appear to be reasonable, particularly when the respondent No.1 has not taken any steps whatsoever, for seeking declaration with regard to ownership or possession of the subject property, which is admittedly in continuous possession of the appellant since its purchase.

10. We are of the opinion that in cases, when there is some dispute with regard to title, ownership and possession of some immovable property, most appropriate relief, which can be granted on an interlocutory application is to direct the parties to maintain status-quo and not to create any third party interest in respect of the disputed property, which order appears to have already been passed by the learned Single Judge on the

injunction application filed on behalf of appellant being CMA No.8049/2013 through the impugned order. However, the order passed by the learned Single Judge on the application filed on behalf respondent No.1 under Section 151 CPC [CMA No.17110/2016] in a Suit filed by the appellant, prima facie does not contain valid reason, nor there seems any necessity to entertain such request made on behalf of respondent No.1, which seeks partition of the subject property and also possession of the same to the respondent No.1, however, without recording evidence in this regard. There is no cavil to the legal proposition that a party, who has title in respect of an immovable property, cannot be deprived its use and possession, unless it is prevented by sufficient cause or by an order of a competent Court of jurisdiction to the contrary. However, at the same time, it has to be examined as to whether a party, who is admittedly, in continuous possession of such immoveable property for the last more than thirty years, and also claims to be the actual owner, is also entitled to adduce evidence for the purposes of establishing his/her claim in respect of such property.

11. In the instant case, it has been noted that a dispute between two real brothers regarding real ownership of subject property is pending since 2013, however, neither any evidence has been recorded so far, nor there seems to have been any

effort by the parties or their learned counsel to settle the dispute amicably outside the Court.

12. In view of hereinabove facts and circumstances of the case, we are of the opinion that any interlocutory order at this stage on an application filed on behalf respondent No.1 under Section 151 CPC [CMA No.17110/2016], whereby, respondent No.1 has been allowed to construct a boundary wall upon disputed property was not warranted, as it does not meet the requirements of granting an injunction, and also amounts to granting a relief of partition and possession, however, without recording evidence. We are of the view that such order would not serve any useful purpose, on the contrary, it may result in further complications towards resolution of dispute between the parties.

13. Accordingly, the impugned order passed by the learned Single Judge, whereby, respondent No.1 has been allowed to raise a boundary wall on the portion between the 'First Portion' of the subject property and on that area only, which is mentioned in the 99 years lease (of the subject property), is hereby set-aside, whereas, the parties in the suit are directed to maintain status-quo in respect of title, possession and construction over subject property till final disposal of the suit. Whereas, both the parties' are directed to lead their evidence before the learned Single Judge or get the same recorded

through Commissioner, preferably, within a period of six months' from the date of this order, whereafter, suit may be finally decided within two months' from the date of conclusion of the evidence.

14. Needless to observe that disposal of instant High Court Appeal in the above terms, will not prevent the parties to make an effort to settle the dispute amicably by way of compromise, if possible, whereas, it is expected that the learned counsel for the parties' shall also make endeavor in this regard to avoid further litigation between the parties, who are real brothers' and of advanced age.

15. Instant High Court Appeal stands disposed of in the above terms alongwith listed application.

JUDGE

JUDGE