

IN THE HIGH COURT OF SINDH AT KARACHI

HCA No. 236 of 2014

HCA No. 237 of 2014

Before: **Mr. Justice Irfan Saadat Khan**
Mr. Justice Fahim Ahmed Siddiqui

Feroz Ali Gaba. Appellant.

Versus

Fishermen's Cooperative
 Society Ltd. & others. Respondents

Date of hearing : **04.10.2019**
 Date of Judgment : _____

Appellant Feroz Ali Gaba through Mr. Sattar Muhammad Awan, advocate.

Respondent No.1 Fishermen's Cooperative Society Ltd. through
 Mr.Muhammad Jaffar Raza, advocate.

Respondent No. 2 through Ms. Rabia Khan advocate.

Syed Shabbir Ahmed Shah, Addl. A.G.

J U D G M E N T

FAHIM AHMED SIDDIQUI, J:- The appellant has filed applications under Order XXXIX Rules 1 & 2 in two civil suits of similar nature (Civil Suit Nos. 258/2014 and 641/2014) under the original jurisdiction of this Court. The learned Single Judge heard both the applications and decided them by the same order dated 11-09-2014. Since the appellant has challenged the impugned order in both the above referred High Court Appeals; we therefore, consider that this single order would suffice to dispose of both of them.

2. It reflects from the impugned order that the appellant has filed the above-mentioned civil suits for declaration, injunction, and damages by claiming himself to be the owner/proprietor of M/s. Son of the Sea. The said firm deals in the business of fish processing and export of frozen seafood. He has a sub-lessee of Plot No. K-II/A measuring 1149 square yards through a lease-deed. The purpose of the lease, as defined in the lease agreement, was to establish 'cold storage and freezing plant'. The appellant is in the business of seafood processing etc. since 1974 and has many other companies in the same trade. As per the terms and conditions

of the sub-lease, the lessor (i.e. respondent No. 2) was responsible to provide all utilities to the sub-lessee. The appellant received 'Final Notice' dated 26-08-2013 issued by the respondent No. 2, alleging therein that the appellant has encroached upon some additional land and has failed to comply with the instructions of 'the Board of Directors'. It was also alleged in the same notice that the appellant was required to establish and operate 'Flake Ice Plant' and 'Cold Storage Systematic Plant' functional adjacent to 'Auction Hall' and to ensure that the use of plot would be for the purposes mentioned in the sub-lease. It was further alleged in the same notice that the appellant was a defaulter in payment of an outstanding amount of Rs. 6,79,400/- towards ground rent for the year 2012-13. It was alleged by the appellant in both the suits that respondent No.1 was instrumental in the issuance of notices including the final notice, hence the suits were filed.

3. While pressing the instant appeals, Mr. Sattar Awan, counsel appearing for the appellant submits that by issuing show-cause notice, the respondents have created hindrance in the smooth running of the business of the appellant. According to him, the appellant is operating his business on the premises leased out to him for 25 years by the respondent No. 2. He further submits that initially the lease was granted for establishing cold storage, freezer and flake-ice plant. He submits that the flake-ice plant would only be viable if the fishermen had purchased the flake ice from the appellant. According to him, the respondents could not persuade fishermen for purchasing flake ice as water was not being supplied in required quantity to him; therefore, the appellant wrote a letter to the respondent No.2 for amendment in the lease agreement, which was amended in 2012. According to him, while disposing of the injunction applications, the learned Single Judge did not appreciate that the ingredients of an injunction were in the favour of the appellant. He denied that the appellant has encroached upon any additional area or he was doing any other thing except mentioned within the lease-deed. He submits that prima-facie he had a good case, while the balance of inconvenience was also in his favour and he would suffer irreparable loss if a restraining order was not granted. He further submits that the injunction order during the pendency of suit, was necessary otherwise the appellant apprehends his dislodging from the premises.

4. Mr. Jaffar Raza, counsel appearing for respondent No.1, while opposing the instant appeals prefers his submissions at length. He points out that neither the respondent No.1 is the lessor nor he was instrumental

in the issuance of the show-cause notice. He submits that the respondent No. 1 is the oldest cooperative society of Sindh, which was established for the benefit and to safeguard the interest of fishermen. He submits that the appellant has encroached upon some areas beyond their lease-agreement. According to him, the appellant has extended his facilities up to the 'Auction Hall', which was causing hindrances for fishermen to sell their catch in the 'Auction Hall'. He submits that even the roof of the auction hall and other facilities of the fishermen and the appellant had violated the conditions of lease-agreement. He further submits that as per the agreement, they were required to operate a plant of flake-ice and establish cold storage and freezing facilities for the fishermen so that they may keep their catch before placing the same for auction. According to him, as per the terms and conditions of the lease, they were not allowed to carry seafood processing within the premises but they were doing so. He submits that as per rules, no seafood processing facility can be established within the red zone, which itself was sufficient to refuse injunction to the appellant. He submits that if the plant of flake ice was not established and operated, the requirements of the European Union would not be fulfilled and resultantly the country would face an embargo of exporting seafood to the member countries of the European Union.

5. Syed Shabbir Shah, learned Additional Advocate General submits that the ground taken by the learned counsel for respondent No. 1, regarding the apprehension of depriving of export, requires consideration. According to him, such apprehension is rational as previously the country had already faced such a situation, and with great efforts, the European Union was convinced to allow imports of seafood from Pakistan. He however, he points out that in all correspondence and even in the impugned order, the previous lease agreement was discussed but the fact is that another lease-agreement was executed with different terms and conditions. In response to a query, he submits that the courts have to analyse and opine about the status of the previous lease-agreement as the subsequent lease-agreement was silent about the same.

6. Mr. Sattar Awan, learned counsel for the appellant in rebuttal, submits that the previous lease-agreement was revised and now its terms and conditions are not enforceable. He submits that in the new lease-agreement, there is no requirement of establishing and operating flake-ice plant. According to him, the appellant had established and operated a flake-ice plant and even he distributed the flake ice free of cost for persuading the fishermen to use it but they continued to adopt the primitive method of

preserving their catch. He forbids that the appellant is not responsible for the non-availability of flake ice but it is the respondent No.1, who did not perform his duty in this respect. He denies that the appellant has encroached upon any area and using 'Auction Hall' for his purposes. He submits that in this respect, Nazir may be appointed to carry out a thorough inspection regarding any such activity by the appellant. After consulting his client, the learned counsel for the appellant categorically states that the appellant will abide by the terms and conditions of the lease agreement and would not violate the same.

7. We have heard the arguments and have gone through the available record.

8. In the instant case, the appellant filed the pending suits after the issuance of the final show-cause notice. The appellant contends that he apprehends his dislodgement from the premises; therefore, he filed suits for protection of his rights. It was the reason that the appellant was seeking some injunctive order to restrain the respondents from dispossessing him from the premises, for which the appellant considers that he has a right to remain in possession until the end of the tenure of the lease. We are of the view that the leasehold right of a lessee was subject to the terms and conditions of the lease-deed and in case of any violation, the lessor has a right to intervene and take steps as required under the law. Nevertheless, since the civil suits filed by the appellant are pending before the learned Single Judge; therefore, we consider that it would not be appropriate to discuss any further about this aspect of the case. The learned Additional Advocate General has pointed out that after the execution of fresh lease-agreement, the status of the previous lease-agreement and continuity of its terms and conditions are required to be ascertained. In this respect, we are of the view that the same is to be considered during trial and not by the appellate jurisdiction of this Court, as it would amount to discuss the merits of the case, which would not be proper at this stage. However, we have observed that there are different lease-agreements i.e. previous and subsequent lease and addendum lease executed at different times. We have observed that this aspect has not been considered by the learned Single Judge in the impugned order. As far as, the dispute regarding encroachment allegedly extended up to the 'Auction Hall' and the rooftop is concerned, the same also requires detailed deliberation for which presently no material is available except some photographs filed by the respondent No. 1. The respondent No. 1 also alleged that the appellant is not fulfilling the requirements of the flak-

ice plant and availability of cold-storage and freezing facilities for the fishermen, which is also a requirement for export to member countries of European Union. We are having great concern about this aspect of the case. The export of seafood is not only a considerable source for foreign-exchange earning but it is the source of earning for all those who are engaged in the business of catching, processing, transporting and exporting the seafood.

9. So far as the allegation of using the premises by the appellant for the processing of seafood is concerned, the appellant has denied this aspect categorically. The learned counsel for the appellant has submitted that the appellant is using the premises in question for such purposes only, which have been mentioned in the lease-agreement. We consider that it would be appropriate that a detailed inspection should be carried out by the Nazir of this Court, who, after going through the lease-agreements and addendum-lease, etc will be able to furnish a proper and detailed report regarding encroachment, if any, beyond the lease document as well as the use of the premises unwarranted under the lease-agreement. We are, therefore, after setting aside the impugned order, remand the matter with the directions that the Nazir of this Court is appointed as a Commissioner to carry out the inspection by himself or some of his nominee in presence of the representative of the parties. During the inspection, special attention should be given to ascertain that if the appellant has encroached any area beyond his lease document and he is doing any business within or in any part of the 'Auction Hall' and whether any activities are being carried out by the appellant beyond his lease-agreement. The Nazir is also directed to ascertain that the facility of cold storage/freezer is made available by the appellant for the fishermen to keep their catch fresh before marketing the same. The Nazir is required to furnish his report within 15 days before the learned Single Judge and the Nazir's fee is fixed at Rs. 30,000/- (Rupees Thirty Thousands Only), and it is expected that the learned Single Judge would pass an order afresh in the light of Nazir's report.

10. With these observations, the instant appeals are dismissed alongwith all the listed and pending applications.

JUDGE

JUDGE