

## IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 57 of 1995

**BEFORE:****Mr. Justice Arshad Hussain Khan.***Aziz ur Rehman vs. Rashid Ahmed and Other*

-----

Plaintiff: Aziz-ur-Rehman

Defendants: Rashid Ahmed and others

Date of hearing: 17.10.2017

**JUDGMENT**

**ARSHAD HUSSAIN KHAN, J.** The present suit was filed on 23.01.1995 against the defendants for Declaration, Permanent Injunction, Damages and Removal of encroachment with the following prayer:-

- a) *Declaring that the Plaintiff is entitled to raise construction over his Plot No.F-4/1, Dehli Colony No.3, Bazar Area, Clifton Cantonment, Karachi, and the interference by the Defendants into the construction work of Plaintiff is illegal and unlawful.*
- b) *Declaring that the encroachment over the Street (running between the Plaintiff's plot and those of Defendant Nos.1 & 2) by the Defendant Nos.1 & 2 is illegal and unlawful, and is liable to be removed.*
- c) *Restraining the Defendants by a perpetual injunction from interfering into the construction work of Plaintiff on his subject plot.*
- d) *Directing the Defendant No.10 to remove the encroachment committed by the Defendant Nos.1 & 2 over the width of the Street running between the plot of the Plaintiff.*
- e) *Directing the Defendants above named to jointly/ severally pay Rs.60,00,000/= Damages / Compensation to the Plaintiff on account of the losses / mental torture / perplexities caused to the Plaintiff due to their dishonest, illegal and malicious / malafide acts and omissions, per description in the Memo of Plaintiff.*
- f) *Passing any other Order/s deemed just fit and proper under the circumstances of the case.*

2. The facts leading to the filing of the present case as averred in the plaint are that the plaintiff is exclusive and undisputed owner of Plot bearing Survey No.F-4/1, situated at Dehli Colony No.3, Bazar Area, Karachi, by virtue of a registered Sale Deed. At the time of taking over the possession of the subject plot, certain unauthorized area was also delivered to plaintiff by the previous owner, however, subsequently, the said unauthorized area was regularized by Clifton Cantonment Board (defendant No.10), through an amending deed. The plaintiff, thereafter, applied for approval of a construction plan to defendant No.10 which approval was subsequently granted. However, when the plaintiff started raising construction on the above said plot, defendant Nos.1 and 2, the husband and wife, residing just in front of plaintiff's plot, in a building erected over two adjacent plots being Plot Nos.F-7/8 & F-7/8-A, Delhi Colony No.3, South, Karachi, hindered / obstructed the said construction on the plea that the construction was being raised without approved plan and further due to said construction existed 20 feet wide street in between the plots of the plaintiff and defendant Nos.1 and 2, was going to be closed. The son of defendant Nos. 1 and 2, namely Noor Ahmed (defendant No.3, in the present case) instituted a civil Suit No.273/1993 for Declaration and Permanent Injunction against the plaintiff and obtained an ad-interim injunction from the learned IVth Senior Civil Judge South Karachi against the construction work started by the plaintiff at the suit plot. The plaintiff also filed Suit No. bearing No. 276/1993 against the said Noor Muhammad before the same court, i.e. learned IVth Senior Civil Judge, South Karachi. The learned Civil Judge appointed a Commissioner for the site inspection before passing final order upon the applications for interim injunction in the said two suits. Through the said inspection report it was transpired that 6½ feet (from the width of alleged 20 feet wide street) had been encroached upon by the defendant Nos.1 and 2 above named in absolute/violation of the described boundaries of their respective plots. Thus, the learned IVth Senior Civil Judge, South Karachi disposed of the injunction applications in the said two Suit Nos.273/1993 and 276/1993 by a common order dated 16.5.1993, dismissing the injunction application of defendant No.3 (in his Suit No.273/1993) and granted the injunction in favour of plaintiff in Suit No.276/1993, permitting the plaintiff to carry out plaintiff's

construction and restraining defendant No.3 and others from interfering into such construction work. The said orders were subsequently challenged in two Civil Misc. Appeal Nos.33 and 34 of 1993 respectively before the learned Vth Additional District Judge, South Karachi. However, said appeals were dismissed vide order dated 30.01.1994. As soon as the plaintiff started construction again, after dismissal of the appeals the defendant No.3 filed another Suit No.478/1993 before the IVth Senior Civil Judge, South Karachi for Cancellation of the Lease of the plaintiff. The learned IVth Senior Civil Judge South Karachi, while hearing the injunction application in the said suit, vide order dated 30.05.1993 dismissed the application for interim injunction in the favour of plaintiff. The defendant No.3 impugned the said order in Civil Misc. Appeal No.42/1993 which appeal was also dismissed by learned Vth Additional District Judge South Karachi dismissed Civil Misc. After the dismissal of the above said appeals defendant No.3 did not prefer further appeals and the decisions of the trial court have attained finality. Thereafter, defendants No.1 and 2 filed a suit bearing No.283/1994 for permanent injunction against the plaintiff before the IVth Senior Civil Judge, South Karachi, in respect of the same subject matter which has been determined in the previous suits. The learned trial Judge after hearing the parties dismissed the said suit and defendants No.1 and 2 did not prefer any appeal against dismissal of the said suit. It is also stated that when the plaintiff, after dismissal of suit again started the construction, the defendants No.1, 3 to 9 along with certain functionaries of the defendant No.10 tried to forcibly stop plaintiff's construction work. They humiliated, abused, scolded and attempted to assault the plaintiff and his labour deployed at the site. On or about 23.12.1994 the S.H.O. Frere police station, sent a police mobile party at the site of construction and the construction work was coercively stopped. The claim of the plaintiff in the present is that he has erected a building in the year 1993 with an investment of Rs.5,00,000/- shall require more than approximately Rs.15,00,000/= today, (at that time) due to increase in the prices of material and cost of labour, and such inflation shall keep on increasing with the passage of time. Further, the material valuing Rs.2,00,000/- including the preparatory cost paid to various sectors on account of labour etc.) in January/February, 1993 was

entirely wasted due to stoppage of construction work under the injunction order obtained by built-in structure became dilapidated and the plaintiff had to start afresh. The plaintiff once again in the year 1994 invested about Rs.5,00,000/-and the construction has been forcibly stopped again. The plaintiff is living on rent and the monthly rental also constitute recurring losses. It is also the claim of the plaintiff that due to the illegal acts of the defendants he suffered serious monetary/material losses and also severe mental torture, defamation, and humiliation which amount to actionable wrongs. The plaintiff assessed actual losses to the tune of Rs.10,00,000/= including the cost of litigation incurred previous to this suit. The plaintiff has also claimed Rs.50,00,000/= on account of wrongs of defamation / mental torture caused to plaintiff.

3. Upon service of notice of the present case, only defendant Nos.3(a) to 3(g), 4 and 6 to 9 and 11 filed their written statements, whereas defendants No. 1,2 and 5 were declared *exparte* and defendant No.10 was debarred from filing written statement. The record reveals that during pendency of the present proceedings Defendants No.1, 2 and 3 expired and their legal heirs were brought on record. Defendant Nos. 3(a) to 3(g), 4 and 6 to 9 denied the allegations in their written statements. In the written statement, defendant Nos.3(a) to 3(g) and 4 while raising the legal objection in respect of maintainability of the suit and denied the allegations levelled in the plaint. It is averred that the plan and the title documents of Plot No.F-7/8 and F-7/8-A, Dehli colony No.3 are lawful and legal. The plaintiff's requests for granting extra land measuring 16.50 sq. yds., was rejected by the Bazar Committee through Resolution No.6 dated 22.11.1989. The said resolution was subsequently confirmed by Cantonment Board through its Resolution No.13 dated 26.11.1989. It is also averred that the defendants No.1 and 2 raised construction on their plot in the year 1949 which construction was subsequently regularized by defendant No.10 in accordance with their rules and regulations. It is also averred that government functionary rendered their duties in accordance with law and the defendants never acted in collusion with the government functionary. The plaintiff has not suffered any losses as alleged in the plaint on account of wrongs of defamation and mental torture.

4. In the written statement filed on behalf of defendant No.11, it has been averred that the allegations leveled in the plaint against the said defendant are false. It has also been stated that on receipt of an application from defendant No.3 in which he reported that the plaintiff despite stay operating against him is constructing house in contravention of the orders of the court. This application was marked to S.I.Bashir Ahmed for enquiry who proceeded on the spot but there was no construction work, hence he returned back without any action. Neither any labour nor the plaintiff was arrested and no construction work was stopped by him. No relation of the plaintiff came to show the documents at the police station.

5. On pleadings of the parties followings consent issues were settled by this Court vide order dated 07.09.1998:

1. *Whether the plaintiff's construction plan (at annexure "D") was approved by the defendant No.10?*
2. *Whether the defendant No.1 and 2 in order to obstruct the process of construction on plaintiff's plot (which was in accordance with approved plan) malafidely and instituted Suit No.273/1993 on the basis of fraudulent grounds that plaintiff has allegedly encroached common street and the other defendants No.2,4,5,6,7,8 and 9 shared their illegal design and caused hindrance/obstruction in the process of construction?*
3. *Whether the defendants have jointly and severally instituted various other incompetent proceedings mentioned in the plaint to deprive the plaintiff to exercise his lawful right and forced him to suffer incurring material and monetary losses as detailed, besides being suffered severe mental torture, defamation, perplexities and humiliation?*
4. *Whether the plaintiff has fulfilled all/each requisite legal formalities to raise construction on his property and due to illegal malafide obstruction caused by the defendants. He is entitled to complete the construction per approved plan?*
5. *Whether the encroachment made by the defendant No.1 and 2 on 20 feet wide street is liable to be removed or not?*
6. *Whether the defendants are bound to pay actual losses/damages/compensation to the plaintiff for description of the plaint?*
7. *Whether the plaintiff is entitled to the relief claimed?*

6. From the record, it appears that only the plaintiff in support of his stance led evidence and produced documents, and he was also

cross-examined by advocate for the defendants. Whereas none of the defendants appeared in the witness box to substantiate their stance in the case. Resultantly, side of the defendants to lead evidence was closed and the matter was directed to be placed for arguments.

7. On 17.10.2017, this matter was taken up when neither on behalf of plaintiff nor the defendants` side appeared. Since this is an old matter pertaining to the year 1995, therefore, keeping in view the orders dated 29.03.2017 and 18.04.2017 respectively, passed by this Court in the matter, the judgment was reserved in this case.

8. I have perused the material / evidence available on record and the applicable laws on the subject. My findings on the issues are as under:-

**ISSUE NO.1 AND 4:** Since these issues are connected with each other, therefore, same are taken up together. The claim of the Plaintiff in the present suit is that he is the owner in possession of the suit property and after duly accorded approval of the building plan from the concerned authority, he started raising construction but the defendants No. 1 to 3 hindered the said construction and filed frivolous cases against the plaintiff on the plea that the plaintiff commenced the construction work without approval of the building plan and that too on the encroached land. In this regard, the Plaintiff has led his evidence through affidavit-in-evidence [Exh.1/3] and along with the said affidavit he produced various documents, which include registered sale deed, executed between earlier owner of the suit property and the plaintiff, registered amended deed in respect of additional land, executed by the Clifton Cantonment Board in favour of the Plaintiff, site plan and approved building plan in respect of the suit property, copies of the orders passed by the learned IVth Senior Civil Judge, Karachi South, on the injunction applications filed by the plaintiffs and defendant No.3 in their respective suits whereby the learned court keeping in view the inspection report, carried out pursuant to the directions, granted injunctive relief in favour of the plaintiff as the construction at the suit property was as per approved plan. The said order of Senior Civil Judge was subsequently upheld by the learned Vth Additional District Judge, Karachi South.

Furthermore, in pursuance of the directions of this Court contained in the order dated 22.2. 2007, the engineer of defendant No.10 (Clifton Cantonment Board) inspected the site and submitted his report through statement dated 06.3.2007, which was taken on record on 02.10.2007. None of the parties filed objection to this report. For the sake of ready reference the report of defendant No.10 is reproduced as under:-

“BRIEF HISTORY OF PLOT NO. F-7/8, DELHI COLONY BAZAR AREA CLIFTON CANTONMENT

Property No. F-7/8 was leased out in the name of Mr. Rashid Ahmed measuring 186.11 Sq.yds on 22/02/1977 vide lease deed Registered No. 1205 dated 28.02.1977 the lessee gifted on area measuring 80.00Sq.yds to his wife which was transferred to Mst. Hamida Begum vide letter No. F-7/8/DC/767, dated 28/02/1982 the portion was leased out in the name of Mst. Hameeda Begum on 01/12/1988. The lease has been expired on 09/01/1999, which has not been renewed as yet. The building plan was approved vide letter No. F-7/8/DC/1462, dated 7/09/1989 Ground +1<sup>st</sup> only but at site building was constructed Ground+2<sup>nd</sup> and 19.80 Sq.yds also involved encroachment. After the death of Mr. Rashid Ahmed 106.11 Sq.yds out of 186.11 total area was transferred Mst. Khadija Begum, D/o Mr. Rashid Ahmed all the legal heirs withdraw from their shares in favour of Mst. Khadija Begum which was mutated and lease was renewed on 31.05.2000 and building plan was approved vide letter No. CBC/Lands/F-7-8-A/DC/5680, dated 13/12/2000 upto Ground +1<sup>st</sup> and she had constructed 2<sup>nd</sup> Floor, notice U/S185 was served on 10/05/2001 and the encroachment measuring 21.75 Sq.Yds also involved.”

“BRIEF HISTORY OF PLOT NO. F-4/1, DELHI COLONY BAZAR AREA CLIFTON CANTONMENT:

Property No.F-4/1 Delhi Colony No.3 leased out in the name of Mr. Zikrur Rehman measuring 60.00 Sq.yds in 1975 vide lease deed Registration No.453, dated 06/02/1975, then lessee applied for additional land measuring 27.00 Sq.yds, which was allotted vide CBR No.13, dated 04/11/1975 and Registered on 08/06/1976 vide Registered No. 3592 dated 10/06/1976. Mr. Zikrur Rehman sold out the property to Mr. Aziz-ur-Rehman on 14/03/1987. Which was transferred in his name. Mr. Aziz-ur-Rehman again applied for additional land measuring 45 Sq.yds same was allotted to Mr. Aziz-ur-Rehman on 03/02/1992. Building plan was approved vide letter No. F-4/1/DC/92/1205 dated 16/11/1992 consisting Ground + 1<sup>st</sup> Floor and revised building plan submitted in this office on 09/07/2004 which was approved vide CBR No.44 dated 17/09/2004 but the lessee did not paid challan No.F-4/1/DC/7039 dated 16/10/2004 issue from this office and which is pending in file.”

[Emphasis supplied]

It is imperative for the sake of ready reference that the cross examination of the plaintiff may be reproduced herein under :-

*Recalled and re-affirmed*

*Cross-Examination to Mr. Mazhar Ali B. Chohan Advocate for Defendant No.4-7.*

“The original sale deed in respect of Plot No.F-4/1 comprised of 87 sq. yards. Along with said plot of 87 sq. yds., as unauthorized land of 45 sq. yds. was also handed over to me by the Vendor Zikirur Rehman. Zikirur Rehman, the Vendor, is not related to me. The unauthorized portion of the land in my possession was sold to me by the owner of the land viz. Cantonment Board. It is incorrect to suggest that the remaining land was purchased by me from the Cantonment Board in collusion with their officers. The approved plan for the construction was submitted in the cantonment board by me for the entire plot of 132 sq. yards. The plan was duly approved by the cantonment board. It is incorrect to suggest that the plan was not approved by the cantonment board. It is incorrect to suggest that Ex.8-1 is a forged document. It is incorrect to suggest that the construction plan was not approved. Voluntarily says that it was duly approved and the original approved copy is in my possession. The plan was approved in the year 1993. I do not know as to whether Clifton cantonment board had given a time-frame to complete the construction. I do not know as to whether cantonment board had given two years time for completion of construction. It is incorrect to suggest that I had given an application seeking extension of time to construct the building. I do not know whether such extension was granted to me as I was involved in litigation. It is incorrect to suggest that the construction was not delayed because of the interference of the defendants No.1 to 9. It is correct to suggest that I have not produced any documentary evidence to show that I am living in a rented premises. It is correct to suggest that only defendants No.1, 2 and 3 had filed cases against me.”

[Emphasis supplied]

*Recalled and re-affirmed*

*Cross-examination of plaintiff Azizur Rehman to Mr. Muhammad Zahid Khan advocate for the defendant No.1 to 3*

“It is correct to suggest that I have not produced original documents relating to the suit property in court. Vol. says that original documents are available with me. It is correct to suggest that I have also not produced amended deed dated 03.02.1992 in court. Vol. says that this document is also available with me in original. It is correct to suggest that the defendant Nos.1 to 3 have died during pendency of this case. It is correct to suggest that the defendant No.10 was to accord permission of construction to me. Vol. says that they have already passed building plan. I do not know whether the defendant No.10 cancelled my building plan on 16.11.1994. It is correct to suggest that I filed Suit No.273/1993 in the Court of IV Senior Civil Judge Karachi South relating to same subject matter of this suit. Vol. says that Noor Ahmed had filed Suit No.276/1993 in the same court which is also related to the same subject matter. It is correct to suggest that I have filed Suit Nos.311 to 317 of 1993 for damages against the defendant No.1 in the court of IV Senior Civil Judge Karachi South. It is incorrect to suggest that the defendant No.10 refused my request for grant of extra land measuring 16.50 sq. yds., on 22.11.1989. It is incorrect to suggest that Noor Ahmed never filed any case against me. Vol. says that Noor Ahmed had filed following suits against me:- 478/1993, 42/1993, 33/1993, 34/1993, 283/1994, 478/1993, 6/1995 and 28/1995.

It is correct to suggest that I never filed any criminal case against Noor Ahmed.”

[Emphasis supplied]

9. The record also reveals that the plaintiff in compliance of the directions of this Court, through a statement dated 14.2.2007 placed on record renewal of lease, site plan issued by Clifton Cantonment Board and approval of the building plan of the suit property. The record further reveals that the testimony of the Plaintiff's major part of the statement under the affidavit-in-evidence [**Exh. 1/3**], have not been subjected to cross-examination, hence, the same shall be deemed to have been admitted. It is by now a settled principle of law that any deposition made in the examination-in-chief, if not subjected to cross-examination, shall be deemed to have been admitted. Reliance can be placed on *M/s. AKBAR BROTHERS v. M KHALIL DAR (PLD 2007 Lahore 385)*

10. Adverting to the claim of the defendants as averred in their written statements that though the defendants raised objections in the written statement, however, they did not file any document in support of their stance. Furthermore, the defendants despite various opportunities have chosen not to appear in the witness box and to lead evidence in support of their stance in the case.

11. It is well-established principle of law that a written statement contains averments of a party, which are to be proved through cogent evidence. If a party does not produce any evidence to support the contents of its written statement, in absence of any admission on the part of a plaintiff, the averments contained in the written statement cannot be treated as evidence. Reliance in this regard can be placed on the cases of *FEDERATION OF PAKISTAN through Secretary Ministry of Defence and another V. JAFFAR KHAN and others (PLD 2010 Supreme Court 604)* and *MUHAMMAD NOOR ALAM v. ZAIR HUSSAIN and 3 others (1988 MLD 1122)*.

12. From perusal of the material available on record and the evidence, it is clear that in the instant matter the plaintiff's version is supported through his evidence while the defendants despite opportunities did not lead any evidence in the matter. The contentions

/assertions and the evidence led by the plaintiff are thus deemed to be admitted by the defendant. The general denials on the part of defendants in their written statements is of no evidentiary value and the plaintiff's version and stance has gone un-rebutted and unchallenged. Furthermore, the Plaintiff in support of his claim of ownership over the suit property relied upon documents, genuineness whereof have not been disputed by the defendant, hence presumption of truth is attached to them, until and unless they are rebutted through a strong and cogent evidence and the Defendant has failed to bring any such evidence on the record. Therefore, there is no reason, cause or justification to hold the said documents otherwise. Thus, I am of view that the plaintiff has established his rights over the suit property and is entitled to raise construction thereat in accordance with the building plan approved by the concerned authority. Both these issue are decided in favour of the Plaintiffs.

13. **ISSUES NO. 2, 3 AND 5:** These are connected issues and may conveniently be taken up together. The claim of the Plaintiff in the present suit is that he is the owner of the suit property and is entitled, within his rights, to raise construction in accordance of with the approved building plan, but Defendants 1, 2 and 3 in order to obstruct the process of construction on the suit property filed various frivolous court proceedings on the alleged grounds that the plaintiff has encroached common street. From the perusal of inspection report, which was carried out by the engineer of defendant No.10 (Clifton Cantonment Board), in pursuance of the directions of this Court, it appears that it is the defendants who have encroached upon the common street between the plaintiff's and defendants' property. Consequently, in absence of any objection on behalf of the defendants to the inspection report of the engineer of Defendant No.10, it is deemed to have been admitted by the parties. In view of the above fact and the findings of Issues No.1 and 4 in the preceding paras, the proceedings initiated by the defendants against the plaintiff appears to be frivolous. In the circumstances, these issues are answered accordingly.

14. **ISSUE NO.9:** Since the plaintiff has failed to lead any evidence to substantiate his stance in respect damages he suffered, this issue is answered in negative:

15. **ISSUE NO.10:** In terms of the findings on the above issues, the suit is decreed by holding that the Plaintiff has established his case being lawful owner of the suit property and is entitled to raise construction thereon in accordance with approved building plan after getting it renewed, if the same is expired and the Defendants are strictly restrained from interfering with the construction work at the suit property. As regards the encroachment, on the common street between the properties of the plaintiff and defendants, is concerned, defendant No.1 is directed to take appropriate measures to remove the encroachments as mentioned in the report of the engineer of Defendant No.10, strictly in accordance with law. Cost of the suit is allowed.

JUDGE

Karachi

Dated: 31.10.2017

*Jamil\**