

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
CP.NO.S-757 of 2020

Date _____ Order with signature of Judge _____

1. For hearing of CMA No. 4687 of 2020
2. For orders on office objection.
3. For hearing of CMA No. 3923/2020
4. For hearing of main case.

10th December 2020

Mr. Dildar M.S. Shaikh, advocate for petitioners.
Mr. Khawaja Shams ul Islam, advocate for Respondent No. 1.
Mr. Afaq Yousuf, advocate for Respondents No. 4(e) to 4(f).

Heard learned counsel for the respective parties.

2. Case of the present petitioners is that they filed rent case in 1985, which was allowed and respondent No.1 was not party to that proceedings, however, respondents No. 2 and 3 challenged that order by filing of FRA No. 408 of 1998 before this Court and that FRA was allowed vide order dated 28.11.2000, accordingly eviction application was dismissed. It would be conducive to refer paragraph No.8 of that FRA, which is reproduced as under:-

“8. In the circumstances of this case, as mentioned above, the dispute could only be decided by a civil court. Moreover, the appellants claim that the plot in dispute is a part of Plot No. H-5 Sindh Industrial and Trading Estate, Karachi. In respect of that plot, documents were also produced before the Rent Controller. The Respondent No.1, in his rent case he has given its measurement and description of the adjoining properties. Thus, identification of the property in dispute is also in question. This again can be decided by a civil court only and not by the Rent Controller.”

3. It is further matter of fact that during pendency of referred rent case, an application was preferred and on that application executing court handed over the possession to the present petitioners through bailiff, subsequently, an application filed by respondent No. 1, before the executing court, to correct the illegality as application was allowed in a disposed of execution application, which was corrected by issuing directions to the petitioners to restore the possession which order has been challenged through instant petition.

4. Before making any comments onto merits of the case, it would be conducive to refer the *impugned* order dated 06.1.2020, relevant paragraph No.6 reads as under:

“6. Now it has to be seen that the intervener/objector is entitle for restoration of possession. Bailiff report dated 11.3.2019 clearly show that the bailiff sought the possession of the property from the intervener/objector and then handed over the same to the applicant. It has been already mentioned that the very proceeding of the subject execution application were *void-abinitio* due to none existence of the ejectment order/judgment infield. Incase of *Falak Sher reported in 2007 SCMR 818* it has been laid down by the Honourable Supreme Court of Pakistan that when the basic order is without lawful authority then super structure shall have to fall on the ground automatically. The possession of the case premises has been handed over to the applicant by the bailiff of the court during the proceeding of this execution application which were *void-abinitio* and corum-non-judice. It is fundamental principle of law that no one should be prejudice by the act of the court. It has been also held by the Honourable Supreme Court of Pakistan in above referred case that provision of CPC are not applicable in rent proceeding in stricto senso , however, rent controller in exercise of the description is entitle to follow the equitable principle of CPC. Further the principle incorporated in section 144 CPC being equitable principle can be invoked in ejectment cases. Learned counsel for applicant on one hand admitted that the execution application filed by the applicant was not maintainable but at the same time he has raised the contention that the intervener/objector is not entitle for restoration of possession as he was holding the same without the title and by encroaching the property of the applicant. Such contentions of the learned counsel have no force for the reason that this court has only to see that from whom the possession was sought on the basis of void order. It was intervener/objector from whom the bailiff sought the possession. Question regarding the title of the property or that the intervener/objector was in lawful possession cannot be agitated before this forum in present scenario.”

The perusal of the *impugned* order, *prima facie*, makes it clear that same was passed on *two* settled principles of law '*award of benefit to a person in violation of law would not attract principle of locus poententia* (2011 SCMR 408) and that '*no one shall suffer from an act / error of court*' . What floats on surface is the fact that the basic order, sought to be executed, on appeal (FRA) was not only set-aside but eviction application was dismissed. Though, Section 47 CPC provides determination with regard to disputes including demarcation but that execution application was not alive and in FRA already parties were set at liberty to pursue their remedy in civil court. Admittedly, present petitioners and respondent No.4 have filed civil suits on the plea that respondent No. 1 has occupied their property illegally hence learned lower court rightly held that things should be restored to its *earlier* position as they were.

5. I have perused impugned order, which is splendid and speaks that earlier that application was not maintainable and wrongly possession was handed over to the present petitioners, hence, directions were issued to restore the possession from whom it was obtained, which are in accordance with law. However, while handing over possession executing court shall ensure that the possession is to be given as per legal character. Accordingly, instant petition is dismissed alongwith pending applications.

J U D G E

Sajid