

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.883 of 2015

[Dr. Abdul Malik v. K.M.C & others]

Date of Hearing : 31.08.2021
Plaintiff : Mr. Yahya Iqbal, Advocate.
Defendants : *Nemo.*

JUDGMENT

Zulfiqar Ahmad Khan, J:-*Lis* at hand arises from an alleged apathy of the defendants by not handing over possession of commercial plot No.SB-37, measuring 416.67 sq. yards block-9, Scheme No.36, Gulistan-e-Johar, Karachi (“subject plot”). It is alleged by the plaintiff in his plaint that he purchased the subject plot through an auction conducted by the KDA on 29.06.1986 and having paid the entire price, the KDA issued an allotment order dated 09.12.1986 to the plaintiff, later on possession order was also issued by KDA to the plaintiff on 24.11.1988 upon payment of entire dues. It is alleged by the plaintiff that the defendant KDA having received the auction price of the subject plot, failed to hand over vacant and peaceful possession thereof, however, owing to the less developmental work in the said Block where the subject plot was situated, the said plot was encroached upon sometime in the year 1995. It is further alleged by the plaintiff that from 1995 till 2012 he battled against such encroachers by addressing several communications to the law enforcement agencies including defendants but could not get any result as he remained out of possession of the subject plot hitherto despite paying the entire auction price, hence the plaintiff filed the present *lis* with the following prayers:-

“i). Declaration that the defendant No.1 having received the cost of plot and development charges of the commercial plot No.SB-37, Block 9, Gulistan-e-Johar, Karachi measuring 416.67 sq. yards and pending execution of the lease, (i) is responsible to carry out the development work in Block 9, Gulistan-e-Jauhar including laying of internal roads, supply of water and sewerage system and other amenities e.g parks and parking sites development etc. in accordance with master plan of KDA Scheme No.36 (ii) to deliver and maintain peaceful and vacant possession of the allotted plots to enable the plaintiff to raise construction thereon; and (iii) to pay the amount of Rs.50,000,000/- (Rupees Five Crores Only) as damages for repeated construction of boundary walls, heavy payments to security agencies and private chowkidars, litigation, harassment and mental torture caused to the plaintiff and his family etc. in addition to inflation rate 16% from the date of the claim till realization.

ii). Declaration that the defendants having the control of law enforcement agencies are responsible for the security of life and property of the citizens including the plaintiff's life and property i.e. commercial plot No.SB-37, Block 9, Gulistan-e-Johar, Karachi measuring 416.67 sq. yards, which is his legal and rightful property. The defendants are bound to remove the encroachments from the entire commercial area including the plaintiff's plot and land earmarked for amenities which is the government land and restore the original shape of the commercial area as per Master Plan of KDA Scheme No.36 and as such responsibility cannot be shifted to law abiding unarmed citizens under any pretext. It may be mentioned that the sale/purchase of the plots by KDA/owners has occurred on the basis of the Master Plan of KDA Scheme No.36.

iv. Declaration that the plaintiff is not liable to pay any NUF (Non-Utilization Fee) in respect of the said plot No.SB-37 under the present circumstances.

v. Mandatory Injunction directing the defendants to remove the encroachments from the above said commercial area including the plaintiff's plot i.e. commercial pot No.SB-37 of Block 9 Gulistan-e-Jauhar, KDA Scheme No36, Karachi alongwith amenities as per the Master Plan of KDA and thereafter to execute lease in favour of the plaintiff.

vi To de-regularize Bakhtawar Goth, remove the encroachments and restore the vicinity of this commercial area as per Master Plan of Scheme No.36, KDA.

vii. Alternatively to direct the Defendants to allot commercial Plot to the Plaintiff in a fully developed scheme/area of KMC/KDA having equal market value and acceptable to the plaintiff and in addition to pay damages of Rs.50 million in addition to inflation rate 16%. From the date of the claim till realization to the plaintiff for financial lossess and mental torture and harassment caused to the plaintiff and his family etc. OR

viii. Failing allotment of even the alternate plot (i) to pay compensation of at the rate of Rs.400,000/- per square yard to the plaintiff being located as the best and prime location of the entire commercial area, being a corner, main road plot with a wide front of 75 feet, making an amount of Rs.166,668,000/- (rupees sixteen Crores Sixty Six Lacs Sixty Eight Thousand only) and (ii) to pay the amount of Rs.50,000,000/- (rupees five crores only) for repeated construction of boundary walls, heavy payments to security agencies and private chowkidars, litigation, harassment and mental torture caused to the plaintiff and his family etc. in addition to inflation rate 16% from the date of the claim till realization.

ix. Cost of the suit; and

x. Any other and/or better relief which this Hon'ble Court may deem fit to grant under the present circumstances

2. Having admitted the lis at hand, notices were issued to the defendants and in response to the Court's notice, the defendant No.2 filed its written statement, where, in the introduction part, the said defendant raised objection as to the maintainability of the action at law at hand stating that the suit was barred under the provisions of Specific Relief Act as well as having no cause of action, but in the later part of the written statement it admitted to the claim of the plaintiff to the extent that the plaintiff purchased the subject plot

and having received the entire consideration of the subject plot, allotment order as well as possession order was also issued to the plot. It is further admitted by KDA in its written statement that the entire Block where the subject plot situated was occupied by the landgrabbers illegally in the name of New Bakhtawar Goth. KDA went on to admit further that it could not take any action to remove the encroachment as well as the illegal construction, however, while concluding the written statement, beseeched that the plaintiff's grievances be redressed.

3. Record shows that on 16.10.2017, issues were framed and on the same day matter was referred to the learned Commissioner for recording of evidence. The issues settled by this court are as under:-

- “1. Whether the plaintiff is the owner of the suit property?
2. Whether the suit property of the plaintiff is encroached?
3. Whether the plaintiff is entitled for damages because of the negligence of the defendant?
4. Whether it was the responsibility of the defendants to remove the encroachments on the suit property as well as other plots in the commercial area of blot 9, to develop as per Master Plan and to hand over to the respective owners including plaintiff?
5. What should the decree be?”

4. Mr. Yahya Iqbal, Advocated the case of the plaintiff set forth on record that the plaintiff is deprived of his valuable property rights despite paying the entire consideration which right is constitutionally protected vide Article 24 of the Constitution, 1973. Having reiterated the contents of the pleadings, the learned counsel contended that

defendant/KDA has admitted to the claim of the plaintiff in their written statement but the plaintiff is being dragged since 1986 and even till date he is empty-handed despite paying entire amount claimed by the defendant/KDA. His next stance was that KDA in their written notion also went on to admit that the landgrabbers as well as encroachers encroached upon entire Block-9 and erected illegal Bakhtawar Goth which be removed. While concluding his submissions, he vociferously argued that the present action at law ought to have been decreed upon admission of the defendants as early as 2015 as mandated under Order XII Rule 6 CPC.

5. Despite ample opportunities to the defendants' counsel to argue the matter but no one turned up, however, defendant/KDA did not deny the claim of the plaintiff to the extent of allotment of subject plot; payment of entire occupancy value by the plaintiff of the subject plot to the KDA and possession order issued by the defendant as well as encroachment upon the subject plot.

6. Heard the arguments and examined the evidence. **Issue No.1** germane to the ownership of the subject plot and onus to prove this issue is on the plaintiff. In order strengthen and validate his claim, plaintiff produced overwhelming documentary evidence during his examination-in-chief in the following sequence:-

Sketch of Block-9, Gulistan-e-Jauhar, Karachi as Ex. A.

Auction program issued by KDA as Exh. PW-1/2

Allotment letter dated 13.11.1986 as Exh. PW-1/3

Allotment Order dated 09.12.1986 as Exh. PW-1/4

Acknowledgement receipt alongwith site plan of the subject plot as Exh. PW-1/5 to PW-1/7.

Paid Challans as Exh. PW-1/8 to PW-1/13

Receipt as Exh. PW-1/14

News clippings showing the encroachment at the subject plot at Exh. PW-1/15 to PW-1/19.

Contract for Security dated 03.06.1998 as annexure B.

Letter dated 08.02.1999 as Exh. PW-1/20.

Order dated 24.08.2000 passed in C.P. No.D-1440/1998 as Exh. PW-1/21.

Letter dated 07.07.2005 addressed to Worthy Chief Minister, Sindh as Exh. PW-1/22.

Letters addressed by Police Officials for the removal of encroachment as annexure C to E.

Agreement for Guard Services dated 05.08.2005 as Exh. PW-1/23 & PW-1/24. And such other documents exhibited by the plaintiff during course of his examination in chief and the said documents have been exhibited as Exh.PW-1/23 to PW-1/46.

7. It is considered pertinent to record here that the testimony of the plaintiff was not put to the test of cross-examination by the learned counsel for the defendants though ample opportunities were accorded by the learned Commissioner mandated with recording evidence, however, with the passage of time, the learned Commissioner submitted his report enumerating the fact that the defendant never come to cross-examine the plaintiff. In order to meet the mandate of Article 10-A of the Constitution, 1973, the learned Commissioner was directed vide order dated 12.02.2019 to afford another opportunity to the defendant avail the right of cross-examination. Again the learned Commissioner reported to the Court that the defendants is not turning up either for the cross-examination

of the plaintiff or recording their evidence, whereafter, office was directed to fix the matter for final arguments vide order dated 29.08.2019.

8. Record further reveals that the testimony of the Plaintiff under the affidavit-in-evidence, 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, is to be deemed to have been admitted. It is also a settled position of law that if a crucial and vital fact deposed in the examination-in-chief is not subjected to cross-examination, it shall be deemed to have been admitted¹.

9. Upon scanning the written notation submitted by the defendant /KDA it unfurls that the defendant/KDA not only admitted to the claim of the plaintiff with regards purchasing of the subject plot but also encroachment of the subject lot by the landgrabbers and in this respect para-1, 12, 13 & 14 are very relevant, however, KDA never turned up or ventured into the witness box to lead any evidence. 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

¹ Per Mr. Justice Mian Saqib Nisar in the case of Farzand Ali v. Khuda Bukhsh (PLD 2015 S.C. 187) & M/s. Akbar Brothers v. M Khalil Dar (PLD 2007 Lahore 385).

Court 604) and Muhammad Noor Alam v. Zair Hussain and 3 others (1988 MLD 1122).

10. The defendant/KDA in para-1 of its written notion admitted that the plaintiff purchased the subject plot through an auction proceedings conducted by it and upon payment of entire auctioned price of the subject plot, allotment as well as possession order was issued in favour of the plaintiff. It would be pertinent to reproduce the relevant excerpt of the para-1 of the written statement which is delineated hereunder:-

“1. That the contents of para 1 of the plaint of the instant suit is respectfully replied that, Admitted that the original purchaser of a commercial plot bearing No. SB-37, measuring 416.67 sq. yds situated in block-9, KDA Scheme 36, Gulistan-e-Johar, Karachi sold through open public auction held on 29.06.1986. The plaintiff has paid the entire price of the plot and he has issued documents of title of the said plot as stated in the plaint. All the commercial plots in this commercial area of Block-9 were disposed off through open public auction by the defunct KDA now KMC. The peaceful possession was handed over to the respective successful bidders accordingly.”

[emphasis added]

11. It is gleaned from appraisal of the foregoing that the plaintiff purchased the subject plot and upon payment of entire consideration, the allotment order as well as possession order (Exh. PW-1/3, Exh. PW-1/4 & Exh. PW-1/5 available in evidence file at page 39 to 43) were issued in favour of the plaintiff which unequivocally proves the entitlement of the plaintiff over the subject plot. 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 subject plot relied upon documents, genuineness whereof have not been disputed by the defendant, hence presumption of truth is attached to them, until and unless it was rebutted through a strong and cogent evidence, but 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. I am thus of view that the plaintiff has established his rights over the subject plot. It is settled principle that right in immovable property itself is a right in rem and in this case clearly a right in rem in respect of the plot has passed to the allottee i.e. plaintiff². Furthermore, a right in rem corresponds to a duty imposed upon persons in general while a right in personam corresponds to a duty imposed upon determinate persons. Apart from above, Rights in *Rem* or *Jus in Rem* means every person entering into a contract has rights in rem. This is right available to him or her against the entire world as it protects a person's property from the entire world, whereas, right in *Personam* or *Jus in Personam* is the opposite of right in *rem*. Right in *personam* gives the person rights against one person or party to the contract. Since the defendant never negated the allotment of said plot to the plaintiff, plaintiff deposited entire occupancy value

² Per. Muhammad Haleem & Z.A. Channa.JJ in the case of Haji Noor Muhammad & others v. KDA & others (PLD 1975 Karachi 373)

of the said plot thus the plaintiff is entitled for the possession of the said plot and issuance of allotment order by them in favour of the plaintiff. It is settled principle that admitted documents and admitted facts do not need to be proved. In the case of **Muhammad Bachal v. Muhammad Arif Memon (2019 YLR 1040 rel. at page 1643-1644) (authored by me)**, I have held the similar principle. Furthermore, it is a golden principle of Qanun-e-Shahadat Order, 1984 as mandated vide Article 113 that facts admitted need not to be proved. For the ease of reference, Article 113 of the Qanun-e-Shahadat Order, 1984 is reproduced as under:-

“113. Facts admitted need not be proved. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they redeemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.”

12. A glance over the provisions of Constitution in respect of holding of a property shows that Article 23 connotes that every citizen have a right to acquire, hold and dispose of property in any part of Pakistan and such right is one of the Fundamental Rights enshrined and guaranteed by the Constitution. Article 24 of the Constitution also recognizes right of a person to hold the property and ordains that no person shall be compulsorily deprived of the property and it applies to every person, natural or artificial. Furthermore, Article 24 of the Constitution, 1973 is not confined in its application to citizens only, it also applies to corporation and it is the indefeasible right of every citizen to practice a profession provided he fulfills the requirement

as to the standard prescribed by law and actions of the defendants of not handing over possession of the said plot is clearly against the said fundamental right. In view of these rationales and deliberations, the **Issue No.1 is answered in affirmative.**

13. In my considerate view, the Issue Nos. 2 to 4 are inextricably linked, based upon similar evidence and record, therefore, it would be advantageous to discuss the same simultaneously, in the same breath.

14. There are two aspects of the issues under discussion, (i). encroachment upon the subject property, its removal by the defendant/KDA & (ii) damages claimed by the plaintiff. So as to prove the first aspect, the plaintiff produced news clippings (Exh. PW-1/15 to Exh. PW-1/19 available at page 63 to 75 of evidence file), letter dated 07.07.2015 addressed by the plaintiff and other allottees to the Worthy Chief Minister, Sindh beseeching therein for removal of the encroachments (Exh. PW-1/22 available at page 127 of evidence file), letter addressed to City Nazim, CDGK dated 19.12.2008 praying for the removal of the encroachment (Exh. PW-1/28 available at page 187) and other letters addressed to the deferent law enforcement agencies making the same request, however, the same were not exhibited by the learned Commissioner reasoning that the same were only photocopies. I have already discussed supra that stance of the plaintiff remained unchallenged, not only so, defendant/KDA has even admitted that stance. It is considered expedient to reproduce the relevant paras of the written notion of the defendant/KDA

wherein it admitted the encroachment upon the plaintiff plot, which are delineated hereunder:-

“1.... In this case, the entire commercial area including roads, Parks, Parking sites and commercial plots of Block-9, KDA Scheme-36, including the plaintiff’s plots has been occupied by the land grabbers illegally and forcibly.

12. That the contents of para 15 & 16 of the plaint of the instant suit it is respectfully replied that **it is easy way of land grabbers with the collusion of the police to harass the original allottees and lodge FIR against the gentlemen families as well as real & genuine allottees, who surrendered their rights of the land, who went to graves the land illegally for their wishes and benefits.**

13. That the contents of para 17 of the plaint of the instant suit are admitted to the extent that the entire commercial area of the said block-9, KDA Scheme No.36, Gulistan-e-Johar, Karachi have been forcibly & illegally occupied by the land grabbers. **The land grabbers were affiliated with the sitting Government political party and have the support of the Ministry of Interior and Police department and they refused to help CDGK for removal of encroachment.**

15. It is gleaned from appraisal of the foregoing that the defendant /KDA admitted in the foregoing that land was grabbed by encroachers. Furthermore, KDA/defendant is responsible for the land management in the city as well as responsible for the removal of the encroachment, however, it is regrettable that it has failed to fulfill this obligation owing to which the plaintiff has been suffering in the advance age. The second aspect of issues under discussion is of the damages, the defendant/KDA in its written statement went on to state as under:-

“ In view of the above factual position, the owners of the plots have suffered financial losses as well as harassment. The citizen’s rights is badly

affected due to involvement of the political parties as they are supporting the land gabbers. The department is unable to take any action to redress their grievances of the plot owners, the public in general and the government functions are badly affected and unable them to perform their duties accordingly.

In view of the above facts, submissions, it is prayed on behalf of KDA that this Hon'ble Court may be pleased to redress the grievances of the plaintiff and grant relief in the manner as deem fit.

16. It is gleaned from appraisal of the foregoing that the defendant /KDA admitted that the plaintiff suffered owing to the (lack of) actions of the defendants as well as law enforcement agencies. The plaintiff in the present action at law prayed for the fixed amount of damages in the sum of Rs.50 million on account of sufferings and agonies faced by him on account of defendant/KDA. Akin to plaintiff, owing to the unlawful acts of the defendant/KDA, he remained out of property rights which are granted to him under Article 23 & 24 of the Constitution, 1973 and suffered loss of health, loss of valuable time, mental torture, mental agony/shock, physical pains and financial loss. It is fact that mental shock, agony and torture imply a state of mind. Such state of mind can be proved only by a positive assertion of one who experiences the same³.

17. Plaintiff asserted that he paid the entire auction price of the subject plot in the year 1986 but the said amount remained stuck with the defendant/KDA for the last three decades and if the said sum would have been invested elsewhere, it would have provided huge returns but owing to the carelessness and apathy of the defendant/KDA, plaintiff has suffered and serious breach of trust has

³ Pakistan International Airlines Corporation v. Ali Raza Rizvi (1996 CLC 627)

been occasioned. Having gone through such an agony at the hands of defendant/KDA, the plaintiff rightly prays for the award of compensation/damages. It is not disputed that the defendant/KDA received substantial sums towards the said plot but, nonetheless, the plaintiff was kept away from his fundamental right to acquire property and that this right is constitutionally protected, therefore, in my humble view, the plaintiff is entitled for the damages/compensation. During course of arguments, learned counsel for the plaintiff vociferously contended that owing to the acts of the defendants of not handing over physical possession of the said plot despite receiving entire occupancy value of the said plot, the plaintiff suffered financial losses, mental torture and agony.

18. This Court has held in many cases that the damages can be classified into two kinds/types/sorts such as general damages and special damages. At the cost of repetitions, the difference between general damages and special damages is that the former is initially quantified by the person making the claim, while the latter is assessed by the court. Specific Relief Act 1950 provides that specific relief be given by taking possession of subject property and delivering it to a claimant or by ordering a party to do the very act which he was under an obligation to do or by preventing a party from doing what he was under an obligation not to do, and finally by determining and declaring the rights of parties otherwise than by an award of compensation and it matters little to the aggrieved person as to whether it is general or special damages. The plaintiff has claimed a fixed amount of damages in lieu of their sufferings which they suffered owing to the tortious acts of the defendant No.1 and left

themselves at the mercy of this Court so that the Court having seen the agony of trial faced by the plaintiff and acts of the defendants (in not handing over the physical possession of the said plot), award appropriate damages or compensation. It is a settled exposition of law that, the onus of proof for damages lies on the shoulder of claimant/plaintiff and without discharging such onus, damages cannot be granted straightaway more particularly even a fixed amount of damages cannot be granted, until and unless, the quantum of loss[es] or damages, actually suffered is proved through sufficient evidence. It is also an established position that damages no doubt are firstly to be pleaded and thereafter to be proved by leading reliable, trustworthy and cogent evidence as well as damages cannot be awarded on such expectation or on hearsay evidence. The Hon'ble Supreme Court in the case of Sufi Muhammad Ishaque v. The Metropolitan Corporation Lahore (PLD 1996 S.C 737) held that "*...the damages for mental torture, nervous shock etc, fall in the category of general damages for which no standard or method of proof can be laid down with precision. The claim of such nature is difficult to estimate. The Courts, therefore, in assessing such damages employ a guess work which can only meet the test of a reasonable assessment by a man of ordinary prudence....*". When I consider the submissions of plaintiff that in an epoch when the buyer is deprived from his valuable property rights at the fault of the defendant, I find it just to hold that the plaintiff is entitled to damages as claimed. **Issue Nos.2 to 4 are answered in in affirmation.**

19. **Issue No.5.** It is apparent from the record that block-9 of Gulistan-e-Johar, Karachi where the subject plot situates is under

acute encroachment where not only the hundreds of houses as well as shops are constructed, however, the plaintiff in his prayer clauses prayed for the alternate plot side by side damages of Rs.50 million (prayer clause vii). The Hon'ble Supreme Court in the case of **Dr. Faisal Masud v. Umer Rasool, Director General, Lahore Development Authority (2017 SCMR 287)** has been pleased to hold that in case of unavailability of allotted plot an alternate plot may be granted, therefore, keeping in view the said dictum of the Hon'ble Supreme Court, the defendant No.1 is directed to allot an alternate commercial plot to the plaintiff to be equal in size, equal in location as well as equal in market value in lieu of said plot and this allotment would satisfy the rule of fundamental right to property as enshrined by Article 23 of the Constitution of the Islamic Republic of Pakistan, 1973, therefore, suit at hand is decreed to the extent of prayer clause vii of the plaint, however, the defendants jointly and severally are also liable to pay a sum of Rs.50/- million (rupees fifty million only) to the Plaintiff towards damages and the above mentioned decretal amount shall carry a component of 06% mark-up from the date of decision in the suit till realization of the amount. However, parties are left to bear their own costs.

JUDGE

Karachi:
Dated:15.02.2023

Aadil Arab