

IN THE HIGH COURT OF SINDH AT KARACHI

**Present:**

**Mr. Justice Muhammad Shafi Siddiqui**

**Mr. Justice Jawad Akbar Sarwana**

**High Court Appeal No.278 of 2023**

Welfare Association Ali's Luxury Apartment and another

Versus

Mr. Shakeel Ahmed and another

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***Date of hearing: 14.11.2023***

Rizwan Ahmed Siddiqui, Advocate for the Appellant.

Mr. Muhammad Vawda, Advocate for Respondent No.1.

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**J U D G M E N T**

**Muhammad Shafi Siddiqui, J.-** We have heard learned counsels for the parties and perused the material available on record in response to impugned order dated 17.07.2023.

2. Respondent No.1 filed a suit [Suit No.1128/2022] for declaration, permanent & mandatory injunction and damages in respect of office No.6, measuring 2800 square feet on the ground floor of the building namely Ali's Luxury Apartment and all easementary rights attached to it.

3. Appellant/defendant, being a Welfare Association of Ali's Luxury Apartment, contested the suit as defendant No.1 and objected that in the original plan this ground floor was in fact the car parking and the latest plan now appended with the plaint is only a completion plan/revised plan and is claimed to have been approved after construction of the building, which is contrary to the building regulations. It is claimed that the members of the association being sub-lessee of different units of the building have been deprived of the parking space of which they are otherwise entitled whether any part of it was subleased to them or not. The premises was inspected by

the Nazir and on 18.01.2023 the Nazir submitted his interim report in terms of para-2 and 3 as under:-

2. *I have the honour to submit that in compliance of foregoing orders, notices were issued to the parties and matter was fixed on various dates and lastly on 16.01.2023 and in this connection, a Letter dated 09.01.2023 along with annexures and completion plan as Annexure "A" of the DHA has been received wherein the Addl: Director, Transfer & Record Dte, PDOHA, Karachi has stated that as per Approved Completion Plan dated 07.10.2016 and sub-lease sketch duly endorsed by MEO & Sub-Registrar-I, location of Office No.6 falls at Ground Floor which is being utilized as car parking. Moreover, car parking space is situated at basement floor as per approved completion plan.*

3. *As per Letter dated 17.01.2023 alongwith annexures and completion plan as Annexure "B" of the Cantonment Board Clifton, Karachi has also been received wherein the Survey Department has stated that the completion building plan of subject property/project was approved vide Letter No.CBC/BC/A-3-A, National Highway/ 1126, dated 07.10.1986 by his department, in therein plaintiff office No.06, measuring 2800 square feet on Ground Floor was also approved in the said completion building plan and technical staff physically checked the site and found that office is wrongly used as car parking space, which is duly marked in the copy of completion building plan and he has also enclosed copy of completion certificate and completion building plan as Annexure "C". Now matter is fixed on 25.01.2023 for compliance.*

4. On the strength of the Nazir's earlier report dated 03.09.2022 and based on the revised/ completion plan submitted and relied upon by the respondent No.1/ plaintiff, the injunction order was passed. On 25.11.2022 following order was passed by the learned single Judge:-

*It is stated that Written Statement is filed in the Branch; same should be filed in Court and properly paged and flagged. If it is found that Plaintiff was wrongly dispossessed, then not only possession shall be restored, but contempt proceedings will also be initiated against the delinquent persons including President/Defendant No.2, who is present in person today.*

*To come up on 16.12.2022. Interim order passed earlier to continue till the next date of hearing.*

5. Earlier to above order, an interim order was passed on 04.08.2022 whereby the defendants in the suit being appellants of this appeal were restrained to create hurdles or obstruction to the access of the plaintiff in the subject premises/office and were further restrained to cause any interference in the possession of the subject office till the next date of hearing.

6. In pursuance of two CMAs filed by respondent No.1/ plaintiff fixed on 25.11.2022 that is CMA No.11337/2022 under Order-39 Rules 1 & 2 read with Sections 151 & 94 CPC and CMA No.14510/2022 under Order-40 Rule-1 read with Sections 94 & 151 CPC an order, as referred above para-4, was passed that if it is found that the plaintiff was wrongly dispossessed, then only possession shall be restored. On 16.12.2022 the following order was passed:-

*Learned counsel for Plaintiffs has shown urgency that an office space is used as parking space vide order dated 25.11.2022. If the concerned Authorities, including DHA and Cantonment Board Clifton have confirmed that office space of Plaintiff is wrongly used as car parking space by defendants, then learned Nazir after going through the undisputed official record will take appropriate action in the light of earlier Order of 25.11.2022. Learned counsel for Defendant No.1 and 2 wants to file objections. Same can be filed in the office.*

*To be fixed in the second week of January, 2023. Interim order passed earlier to continue till the next date of hearing.*

7. It is perhaps in pursuance of the said order that 2<sup>nd</sup> inspection was carried out and based on order of 16.12.2022 and the interim Nazir's report, the impugned order was passed and the possession was handed over by the Nazir of this Court to the Respondent No.1/ plaintiff, as found to be appropriate.

8. While the appellants have challenged the order of 17<sup>th</sup> July, 2023, which only confirms that the possession was rightly found to be handed over to respondent No.1/plaintiff, there was no challenge

to the orders of the learned single Judge which include 25.11.2022 and 16.12.2022. It was observed in these orders that if the respondent No.1 being plaintiff of the suit found to have been dispossessed, the possession shall be restored. While the above two orders were complied by the Nazir, an application [CMA No.4473/2023] under Order-XXXIX Rules 2(3), (6), (7) and (9) read with Section 151 CPC was filed by the defendants No.1 and 2 (appellants in this appeal) wherein it was prayed that the Nazir be directed to take possession of the disputed property, that is ground floor, from the respondent No.1/plaintiff and hand over to the defendants/appellants till the judgment and decree in the suit is passed. The said application was dismissed vide impugned order dated 17.07.2023.

9. The possession or the handing over of possession by Nazir to respondent No.1/ plaintiff is based on the material available on record and this possession without any doubt is subject to the outcome of the proceedings, as apparently a contempt application of the respondent No.1 being plaintiff in the suit is also pending. Last but not least the application under Order XXXIX Rules 1 & 2 CPC, which was taken up by the trial court on the first date of hearing of suit No.1128/2022 (injunction application), is yet to be decided. These applications pending hearing are to be taken to their logical end as this arrangement of possession is only tentative and interim.

10. The first inspection was carried out by the Nazir on the basis of an order dated 04.08.2022 and the report of 03.09.2022 was taken on record on 05.09.2022 which shows that the possession was with Mr. Khalid (Respondent No.2), President of Welfare Association of Ali's Luxury Apartment.

11. Since contempt application is pending, therefore, this possession is only tentative and would also be subject to the contempt proceedings and in case the contempt application is not pressed, the learned single Judge may opt to reconsider the fate of possession.

12. We have perused the impugned order and prima facie the completion plan shows that the ground floor is not a car parking but office and shops have been shown in the completion plan. While this would require a trial as to whether this revised/completion plan was issued by the authority concerned in accordance with law, the possession of the ground floor cannot be made a rolling stone, though its status would still be subject to outcome of the pending proceedings.

13. Though we do not interfere in the order whereby the application of the appellants was dismissed which calls for taking over possession yet again by the Nazir, however, we deem it appropriate to observe that the possession of the respondent No.1/ plaintiff is only in pursuance of interim order passed and that in this regard status-quo be maintained by both the parties.

14. The instant High Court Appeal is disposed of in the above terms.

Dated:-20.11.2023

JUDGE

JUDGE

Ayaz Gul