ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

R.A No.230 / 1994

Date Order with signature of Judge

Present: Mr. Justice Nazar Akbar

Applicant No.1 : **Tahir Ali Quettawalla**
through Mr. Shahzad Nizam, advocate.

Applicant No.2 : **Hasnain**
through Mr. Shahzad Nizam, advocate.

Respondent No.1 : **Syed Muhammad Shafi**
Mst. Zahida Tahir, niece of Respondent No.1 present.

Respondent No.2 : **Ali Muhammad**
through (absent)

Respondent No.3 : **Ghulam Nabi**
through (absent)

Date of hearing : **27.09.2016**

Decided on : **19.10.2016**

JUDGMENT

NAZAR AKBAR,J:- This revision is directed against the judgment dated **13.04.1994** whereby by VIth Addl. District Judge, (South) Karachi, Civil Appeal **No.72 of 1989**, filed by the applicant was dismissed and the judgment & decree dated **07.02.1989** in Suit **No.1576/1985** (old **Suit No.726/1973**) passed by IXth Civil Judge, (South) Karachi, in favour of the Respondent was maintained. The applicants have preferred this revision application against the concurrent findings of facts.

2. Briefly, the facts of the case are that the Respondent are owners / occupants and / or residents of several tenements in residential building known as Premachand building situated on Plot No.RC.8/14 at Ranchore Road, Karachi for the last more than 20

years. The adjoining Plot No.R.C. 8/15 is owned by applicant No.1. On or about **10.11.1972** he started raising construction on his plot and hurriedly raised walls, pillars, pacca floor and stair case alongwith the wall of the building of respondents and completely prevented and obstructed the light and air of the building of the Respondents through windows, ventilators, door balcony and the passage, at the back side of the building raised by the applicant thus rendering tenement of respondent unfit for comfortable living. There is no other alternate arrangement for formal and reasonable amount of light air and ventilation in the tenement of the Respondents building. Beside the grievance of easement rights, the respondent categorically averred that the construction raised by the applicant is in contravention of the statutory building rules, provisions of mandatory requirement of Municipal Ordinance 1960 and the principles of Natural justice. The construction raised by Applicant No.1 is not in conformity with any alleged approved plan and therefore, the same cannot be allowed to stand in law to the detriment of the respondents. The Respondents tenements having regard to the locality and surrounding, have become unfit for comfortable dwelling according to the ordinary notion of mankind. The respondents have also suffered substantial damage by the obstruction of light, air and ventilation and they continue to suffer such damage even now. The respondent protested and objected against said construction by Applicant No.1 and even filed a suit No.1988 of 1972 for declaration and injunction restraining applicant No.1 from carrying on the construction in question alongwith the application for ad-interim injunction. However, interim relief was not granted and the applicant hurriedly completed the aforesaid construction depriving respondent of necessities of life and easement

as aforesaid. The respondents preferred an appeal against the refusal of the injunction order pending the suit No.1988/1972. In the meanwhile applicants completed the construction, therefore, the respondents withdraw the appeal and filed suit for mandatory injunction and prayed for the following reliefs.

> a) Mandatory injunction directing the Defendants No.1, 2 and 3 to demolish their construction consisting of entire wall, the pillars, the stair case, and also pucca floor of his plot No.RC.8/15 alongwith the back side wall of the building of the pl-s situtated on RC.8/14 at Ranchore road, Karachi, in the area covering a distance of 8 feet from the back side wall of the aforesaid building of the Plaintiffs and also to restore and replace all the windows, ventilators, door and balcony for enjoyment of the light air and ventilators hereto before enjoyed by the Plaintiffs.
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> b) Further damage at the rate of Rs.500/- per month from the date of the suit upto the day of obstruction to Plaintiffs right for light, stair and amenities as prayed herein above is removed.
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> c) Cost of the suit throughout and.
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> d) Any other relief or reliefs which this Hon'ble Court may deem fit just and proper.

3. The Applicants filed written statement and took preliminary objection, that the suit is not maintainable and is hit by the provisions of section 10 and 11 of CPC because the Plaintiffs have already filed a similar suit, bearing No.1988 of 1972 with regard to same subject matter and the relief claimed is substantially the same in this suit. Applicants alleged they have no knowledge of respondents and their occupation of premises known as Premchand building, situated on Plot No.R.C 8/14 Ranchore line Karachi, Respondents occupied various tenements of Premchand building at various times, but none of them is in possession for last more than 20 years. The allegations are malafide, and made with ulterior

motives. Applicants alleged that the windows, ventilators, balcony, door and open passage, appertaining to the back side wall of applicants building had been closed by bricks etc in 1965 when first floor of applicants building collapsed due to excessive rains, and the building of applicant No.1 was declared by KMC as dangerous, first floor was dismantled on Notice U/s.79 of Municipal Administration Ordinance 10 of 1960 dated 7.9.1967. The Respondents filed a suit No.1988/1972 when the construction was being raised for declaration, injunction and the site was inspected and ad-interim injunction was vacated on 22.1.1973. The order of refusal of injunction was challenged in appeal being Misc. Appeal No.28/73 and it was withdrawn by respondents on 23.8.73 as such construction had not been hurriedly completed as alleged. The applicants denied respondents have any right of easement with regard to ventilators, windows, doors balconies and open passage. The Respondents completed construction of the building in **July 1973** and denied that such construction has caused any damage to the Respondents.

4. The trial court from the pleadings of the parties settled the following issues:-

i. Whether the suit is barred by law on the principles of subjudiced and resjudicata?

ii. Whether the proper court fees has been affixed on the suit?

iii. Whether the Plaintiffs are entitled to claim right of easement against the disputed construction of the Defendants?

iv. Whether the disputed constructions of the Defendants are valid in law and in accordance with the legally approved plan, if not what are its effects?

v. Whether the predecessor in interest of the Defendants with malafide hurried through the disputed construction and transferred the subject property to the Defendants to defeat the process of the court and ends of justice in this case? If so, what are its effects?

vi. Whether the Plaintiffs are entitled for Mandatory injunction under the circumstances to enjoy the easement and bare necessities of light, air and ventilation in this case.

vii. Whether the Plaintiffs are entitled to claim damages from the Defendants? If so to what extent?

viii. What should the judgment and decree be in this case?

5. The suit was decreed and particularly issue No.4 was decided in affirmative that the construction raised by the applicant was not in accordance with legally approved building plan. The applicant preferred appeal which was dismissed by judgment dated **27.3.1994**. The applicant then filed this revision application around 22 years ago and except seeking adjournment nothing has been done. At least for the last three years or more, to be exact, from **20.2.2013** onward the applicant's counsel remained absent on most of the occasions. The diary dated 20.2.2013, 21.10.2014, 3.12.2014 and 5.8.2015 reflect that nobody appeared on behalf of applicants except on one or the two occasion in between. In the recent years Mr. Amel Kansi, advocate appeared for the applicants, then Mr. Muhammad Ali Talpure, advocate held brief and ultimately Mr. Shahzad Nizam, agreed to argue this revision application on behalf of the applicant. He has halfheartedly argued the case that the suit is hit by the law of resjudicata, however, he has not referred to any specific order/judgment to show that in any earlier suit the issue raised and decided by the Courts below had already been decided on merit. The earlier suit to which he referred was filed during the construction but interim injunction to stop raising illegal construction was not granted and mandatory injunction was even prayed for in the said suit. Admittedly the construction was completed when the respondent's appeal against the dismissal of an application for interim injunction to restrain the applicants from raising construction was pending.

Therefore, the suit has become infructuous and the respondent filed the present suit.

6. Learned counsel for the applicant when confronted with the two findings of fact based on evidence on issue No.4 that the construction in dispute raised by the applicant was not in accordance with legally approved building plan, he only referred to Ex.D/3 which is not approved building plan. He stated that the approved building plan was also annexed with it. However, the record has belied the argument of learned counsel. Approved building plan is neither on record nor it was filed with written statement before the trial court or in appeal or even before this Court during the last 22 years. Once the Respondents have stated on oath that the construction raised by the applicant on the plot adjoining to their plot was not in accordance with approved building plan and such construction has caused inconvenience to them as the applicants have raised wall against the wall of the Respondents buildings without leaving any open space in between the two buildings, their burden of proof was discharge. The Respondents have also produced several photographs in evidence showing that no space remained between the two buildings have gone unrebutted and the burdened shifted on the applicant to establish that the construction raised by them was in accordance with the approved building plan and also that they have left some open space between their own construction and building in which the Respondent lives. The applicant counsel was asked to read the finding of the trial court on issue No.4. It clearly says that no documents in the nature of approved building plan was even available with the KBCA and the witness appearing from the office of the KDA categorically stated that there is no record of even letter dated **01.3.1972** (Ex.D/3) in the office of the KBCA. The whole file of

the building raised by the applicant is missing from the official record. The loss of official record from the relevant office would lead only to the presumption that no such record was available in the said office. The beneficiary of loss of record is the applicant. In case of loss of record from the office of KDA, at least copy of the approved building plan was supposed to be available with the applicant and with their architect under whose supervision such a huge building was raised. The findings of trial court on the issue that the building was raised without approved building plan was confirmed by the appellate court. The appellate court has gone one step further by referring to the much relied letter dated **1.3.1972,** (Ex.D/3) from KMC whereby for raising construction the KMC has granted permission to the applicant. Applicant claims that it was approval of the building plan. The appellate court has reproduced the said document in the impugned judgment. Though building plan was not attached to Ex.D/3, however, it confirms that there was requirement of open space which has been violated. The construction was allowed only on 2/3 area of the plot and 1/3 area was to be left open. The same documents (Ex.2/3) also confirms that construction should be carried out under the supervision of license architect. It is next to impossible, that a license architect was not even provided with an approved building plan to supervise the construction. The failure of the applicants to keep even copy of the approved building plan with them and certificate of architect that the building has been raised in accordance with plan is more than enough to appreciate that the building has been raised illegally particularly to the extent by which the respondents are aggrieved and therefore, they had prayed for demolition of the illegal construction in violation of approved plan. In the given facts of the case the applicant should have respected the

basic needs of neighborhood instead of depriving them of their rights under the cover of prolonged litigation by raising illegal construction. The courts are under statutory obligation to ensure respect of law by all the citizen. Even if the magnitude of blockage of air and sunlight or any ventilation was minor, the building raised in violation of the building control laws cannot be allowed to remain on the ground. It would amounts to perpetuate the illegality and disrespect to the law of building control. The applicant after obtaining suspension of the impugned concurrent judgment have lived on illegal construction for 22 years is also indicative of the fact that applicants knew that they have no case.

In view of the above facts and discussion no case is made for interference in the concurrent finding of the two Court below. The applicants are directed to demolish required portion of the building as already ordered by the two courts below within 15 days at their own cost, otherwise, once the execution is filed the executing court should demolish the same within one month. The revision is dismissed and the judgment and decree of the two courts below are maintained.

JUDGE

Karachi
Dated:**19.10.2016**

SM