IN THE HIGH COURT OF SINDH AT KARACHI

H.C.A NO.88/2016

Present: Munib Akhtar & Yousuf Ali Sayeed, JJ

Appellant:	Abdul Waheed, through Mr. Mohammad Ehsan, Advocate.
Respondent No.1:	M. Naseer-ud-din, through Mr. Muhammad Saleem Ibrahim, Advocate.

Date of hearing: 01.02.2017 & 16.02.2017

Date of Judgment:

JUDGMENT

YOUSUF ALI SAYEED, J. This interlocutory High Court Appeal marks a further chapter in a protracted saga of litigation inter se the Appellant and Respondent No.1, who espouse competing claims to an immovable property, bearing Plot No.1, Row No.6, Sub-Block–A, Block No.11 (II-A-6/1), Nazimabad, Karachi, measuring 207 square yards (the "**Subject Property**").

2. The scope of the instant Appeal relates to possession of the Subject Property, in as much as the Appellant has assailed an Order passed by the learned single Judge in Suit No. 2502 of 2004 on 29.02.2016 (the "**Impugned Order**"), whereby the Nazir of this Court was directed to restore the possession of the plaintiff (i.e. the Respondent No.1 in the instant Appeal) over the Subject Property and remove such persons who were otherwise found in possession thereof.

3. In terms of the Impugned Order the Nazir had been permitted to seek police aid in order to break open the locks of the Subject Property and to maintain law and order whilst so doing. Furthermore, the SHO of the concerned police station had been directed to extend full cooperation at the time of handing over of possession and to provide protection to the Respondent No.1 thereafter.

4. In passing the Impugned Order, the learned single Judge appears primarily to have considered and acted on the basis of a report dated 06.02.2016, prepared by the Nazir pursuant to an earlier Order made in the Suit on 01.02.2016, directing that the Subject Property be inspected and that a report be submitted with regard to the factum of possession, along with an inventory of the goods and machinery found to be present thereat.

5. In this backdrop, the question that essentially arises for determination in these proceedings is whether there was sufficient material before the learned single Judge so as to reasonably warrant the Impugned Order, which, as per its terms, amounts to restoration of what the learned single Judge obviously regarded as the *status quo ante*.

6. For the purpose of the controversy at hand, the relevant averments asserted as fact by the Appellant, as discernible from the pleadings and arguments advanced at the bar, appear to be as follows:

   (a) The Subject Property was owned by Mst. Sabra Begum, the late wife of the Respondent No.1 and mother of the Respondents Nos. 2-B and 2-C respectively, and the adjacent property of the same size, bearing Plot No.2, Row No.6, Sub-Block –A, Block No.11 (II-A-6/1), Nazimabad, Karachi, (the "**Adjacent Property**") was owned by the Appellant. We may note that the Subject Property and Adjacent Property are attached houses, in as much as the residential structures thereon share a common party wall, which is an aspect that finds significant mention in the Nazir's report.

   (b) The Appellant and Mst. Sabra Begum agreed upon an arrangement to exchange their respective properties, and, as per the arrangement, separate Gift Deeds were contemporaneously executed by them on 31.12.2009.

(c) That pursuant to the exchange the Appellant is said to have been put in possession of the Subject Property, and his sons are said to have taken up residence on the first and second floors along with their families.

(d) That the ground floor of the Subject Property is said to have remained in possession of the Respondent No.1, with the consent of the Appellant, and the Respondent No.1 is said to have operated a small book binding factory at the premises in the capacity of a tenant.

(e) That the Respondent No.1 is said to have voluntarily handed over possession of the Subject Property to the Appellant and his claim of having been forcibly dispossessed is said to be baseless and false. A document titled 'Muahida Hawalgi Qabza', dated 03.12.2015 (the "**Muahida**"), is referred to accordingly.

7. Learned counsel for the Respondent No.1 controverts these contentions and submits that the Appellants claim to ownership and possession of the Subject Property are contested and the Respondent No.1 has asserted his own claims in that regard, including in Suit No. 2502 of 2014 from whence this Appeal emanates. He denies that the Respondent No.1 was a tenant of the Appellant. Furthermore, he disavows the Muahida and decries the same as a forgery whilst denying that possession of the Subject Property was handed over to the Appellant. Reiterating his contention of forcible dispossession of the Respondent No.1 at the hands of the Appellant between the night of 18th and 19th December 2015, learned counsel submits that in light of the ongoing legal battle inter se the Appellant and Respondent No.1, the assertion of the Appellant as to voluntary handover of possession of the Subject Property on 03.12.2015 beggars belief.

8. It has also been pointed out by learned counsel for the Respondent No.1 that there has been apparent irregularity in compliance on the part of the Appellant with the provisions of Order XLIII, Rule III CPC, in as much as notice of this interlocutory appeal appears to have been issued to the Respondent No.1 at the Appellant's own address.

9. On this point, he has drawn our attention to his pending Application, bearing CMA No. 1051/16, and we have observed that in the Counter-Affidavit filed in response thereto the Appellant has sought to explain away the discrepancy in address as "a typographical error due to bona fide oversight". As such, the factum of error stands conceded and only the element of motive remains to be discerned. Learned counsel attributes this discrepancy to deliberate manipulation and submits that this process can scarcely be regarded as compliance with the mandate of the Order XLIII, Rule III. He submits that the Appeal merits dismissal on this ground alone.

10. Indeed, as held by a learned Division Bench of this Court in the case of Sindh Industrial Trading Estate Ltd v. Noorani Enterprises, 1996 CLC 570, "serious cases, where the appellate Court comes to the conclusion that the omission or avoidance is deliberate, calculated to extract an undue advantage by circumventing the requirement of law, may entail penalties of dismissal". Be that as it may, taking a lenient view we have proceeded to consider the matter on merit.

11. An impression sought to be raised during the course of arguments is that the Appellant was condemned unheard. From the initial Order of 17.03.2016, it is apparent that such an argument was most strongly advanced on that date, in as much as it appears to have been contended that the Appellant was never served with summons in the Suit and the Impugned Order was therefore made without notice and hence without any opportunity of hearing.

12. In this context it merits consideration that the preceding Orders in the Suit, including the aforementioned Order of 01.02.2016, were not filed with the Appeal and only came to the fore at a later stage, when placed on record by the Respondent No.1. Whilst the Order of 01.02.2016 specifically commands that the inspection be carried out the very same day without notice to the parties, it is evident that the same was passed in the presence of counsel for the Appellant and Respondent No.1, as well as the Appellant's son. In our opinion, as per a plain reading of the Impugned Order the apparent purpose of stipulating that the inspection be carried out without notice was quite obviously to emphasize the emergent need for the inspection to take place on the very same day.

13. As such, contrary to what has been asserted by the Appellant, it cannot be said that the Appellant had remained unserved and the Impugned Order had been made without notice or opportunity of hearing. In fact, from the Order of 01.02.2016 it is obvious that service had taken place, and we are unable to accept any submission to the contrary.

14. As to the further submission that notice ought to specifically have been given by the learned single Judge prior to making the Impugned Order, it evident from a plain reading thereof that prior opportunity for filing objections to the Nazir's report had been provided to the Appellant, but had not been availed. Furthermore, no reason whatsoever has even been advanced for the absence of the Appellant or his counsel on the date of hearing when the Impugned Order was made. As such, this argument is fallacious.

15. Another ground raised in support of the Appeal is that an Application under Order 7, Rule 11 had been filed by the Appellant in Suit No. 2502 of 2004, and the Plaint was liable to be rejected on the basis thereof. In this regard, we are of the opinion that the mere pendency of such an Application has no bearing on the matter at hand. Suffice it so say that we leave such Application to be decided on its own merits in the said Suit.

16. A further ground raised in the Appeal questions the Respondent No.1's ownership of the Subject Property. However, as noted herein above, the scope of this Appeal does not pertain to such a matter and is confined purely to the aspect of possession, which is the subject of the Nazir's report dated 06.02.2016 and the Impugned Order passed on the basis thereof. We are neither required nor would like to make any observation as regards the aspect of ownership, lest the same impact on the determination of this matter in the ensuing proceedings on the Original Side as well as the Courts below.

17. Turning to the content of the Nazir's report and the photos annexed therewith, from this material it appears that all four gates of the Subject Property (i.e. the gate on the main road, the gate to the rear, and the two gates towards the side street) were found by him to be padlocked from outside. As such, the inspection was carried out by accessing the Subject Property through the Adjacent Property of the Appellant, by going though what has been described as "the space of broken common wall". This broken wall is the common party wall between the Subject Property and Adjacent Property, as previously mentioned herein above. Furthermore, the Nazir has noted the existence of various printing machines on the ground floor of the Subject Property.

18. The presence of this aperture in the common party wall, the outer locks on all the gates of the Subject Property, and the printing machinery found at the Subject Property, when viewed in juxtaposition, appear to have weighed heavily with the learned single Judge as lending credence to the case of the Respondent No.1 that during the pendency of the Suit he had been in possession of the Subject Property, where he was carrying on his printing business, until being forcibly dispossessed.

19. Having examined the Nazir's report and appraised the rival contentions of the contesting parties, we are of the opinion that there was sufficient material available before the learned single Judge to reasonably support the view taken by him on the aspect of possession, and, indeed, we can find no fault with this assessment, especially as from the Appellants own showing the Respondent No.1 was admittedly in possession up to 03.12.2015, being the date of the purported Muahida.

20. As the Appellants case principally rests on his claim of voluntary handover, said to be evinced by the Muahida, we have duly considered this aspect in further detail and noted the steps said to have been taken by the Respondent No.1 subsequent to the alleged date of dispossession as well as the existence of the Muahida coming to his knowledge, so as to assess the relative consistency of the rival contentions of the parties and gauge what weightage/credence can be attached to the Muahida at this stage of the proceedings.

21. In this regard, learned counsel for the Respondent No.1 has drawn our attention to various documents filed along with his written objections to the appeal and has sought to demonstrate that the Respondent No.1 promptly exercised various remedies assailing his dispossession, as well as disputing the validity of the Muahida on becoming aware of its existence.

22. A perusal of these documents shows that the Respondent No.1 was indeed running pillar to post subsequent to the Muahida and exploring every conceivable avenue in as much as a complaint was lodged with the SP, Liaquatabad on 21.12.2015 seeking registration of an FIR, and subsequently, in fairly quick succession, supplications were made before the Chief Secretary, the Chief Minister, the Inspector General of Police and the Director General Rangers, seeking their intervention. A statement was also filed in the Underlying Suit, whereby the Respondent sought to have possession restored to him.

23. As far as the Muahida is concerned, it is interesting to note that there was no mention thereof at any stage of the proceedings in the Underlying Suit prior to the Impugned Order being passed, nor does the same appear to have been brought to the attention of the Nazir, whose report is bereft of any reference to such a document. Furthermore, strangely the Muahida was not even mentioned in the Memo of Appeal of the instant proceedings or initially filed therewith, and it was only subsequently that a copy thereof was placed on record as part of the documents attached by the Respondent No.1 with his Objections to the Appeal, as presented on 22.03.2016. The first mention of the Muahida by the Appellant thus arose in his Counter-Affidavit to the Respondent No.1's objections.

24. From the aforementioned Objections of the Respondent No.1 as well, it appears that, as per his contention, the Muahida first came to his knowledge sometime towards the end of January 2015 during the course of proceedings in Suit No. 1401 of 2015 filed by the Appellant in the Court of the 1st Senior Civil Judge, Karachi, Central, following which further complaints appear to have been lodged with the SHO's of PS Nazimabad and PS Gulbahar wherein it was categorically stated that the Muahida was a fabricated document designed to serve the ulterior purpose of providing cover for the forcible dispossession, whereon his signature had been forged. Accordingly, the production of the Muahida in its original form was sought along with referral thereof to a handwriting expert for his assessment and opinion.

25. We are of the opinion that these measures appear to be consistent with the Respondent No.1's version as to forcible dispossession and it does not appear plausible that a voluntary handover, as pleaded by the Appellant, would be followed by such frenetic activity. The authenticity of the Muahida would, even otherwise, only be established following evidence. Suffice it to say that, for the time being, there appears to be sufficient material available on record to support the tentative assessment that the Respondent No.1 was in possession of the Subject Property on the relevant date, and did not give up that possession voluntarily to the Appellant as claimed by the latter.

26. It is well settled that the law generally respects possession and will not permit a person to become a judge in his own cause and take the law in his own hands so as to dispossess person in actual possession without recourse to a Court. As such, we are of the view that the Impugned Order mandating restoration of the *status quo ante* does not warrant any interference in terms of these proceedings. Needless to say, the rights of the parties ultimately remain to be finally adjudicated on merit in the Suit, uninfluenced either by the Impugned Order or this Order or anything said herein.

27. In view of the foregoing, the Appeal is dismissed along with all pending applications. The interim Order made on 17.03.2016 stands vacated accordingly. There is no order as to costs.

JUDGE

JUDGE

Karachi
Dated _____