

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Suit No.1052 of 2000

Date Order with signature of Judge

For arguments.

11.12.2017

Mr. Abdul Haleem Siddiqui, Advocate for the plaintiff
Mr. Sameer Ghazzanfer, Advocate for defendant No.2.

NAZAR AKBAR, J. The plaintiff/UBL is the owner of plots No.G-14, G-15 and G-24 Kahkashan, Scheme No.5, on main Khayaban-e-Iqbal Clifton, Karachi and defendant No.1 was allowed to run a plant nursery by defendant No.3/District Municipal Corporation, South, Karachi on green belt portion of Khayaban-e-Iqbal under license dated **30.6.2000** for initial period of three years. However, as alleged by the plaintiff, defendant No.1 under the cover of license encroached upon the footpath touching the boundary wall of the plots on Khayaban-e-Iqbal. It is also alleged that such encroachment has even blocked entrance into the said plots. Therefore, being aggrieved, the plaintiff to restrain defendant No.1 from developing a commercial nursery on the footpath adjacent to the boundary wall of the said plots, filed the instant suit seeking declaration and injunction in the following terms:-

- (a) *Decree the license issued by the defendant No.2 in favour of the defendant No.1 in respect of road in front of the plaintiff properties bearing No.G-14, G-15 and G-24, Scheme No.5, Clifton, Karachi being against the law and/or without lawful authority and are void and same may be cancelled.*
- (b) *Permanently restrained the defendant or any other person claiming through or under them from dealing with the road for any purposes other than road.*
- (c) *Any other order, direction which this Hon'ble Court deems fit in the circumstances of the case may also be granted.*
- (d) *Cost of the suit may be awarded.*

2. The defendants filed their written statement in which they claimed that the license was issued in accordance with law. However, as the defendants have disputed that they have encroached upon any area or piece of land blocking the entrance to the plots of the plaintiff, the defendant by order dated **8.8.2000** were directed not to create impediment in front of the premises of the plaintiff. The Nazir of this Court was also appointed as Commissioner for inspection of the location of Nursery. He submitted his report dated **6.10.2000** which is on record.

3. On **01.4.20002** this Court from pleading of the parties framed the following issues:-

1. *Whether the license for temporary use of green belt as plant nursery issued by the Director Parks and Recreation District Municipal Corporation in favour of defendant No.1 is lawful and defendant No.1 is entitled to use green belt in accordance with the terms and conditions of the license?*
2. *Whether the defendant No.1 has encroached upon any property or any portion of the plaintiff's property by virtue of license issued to him for using green belt for planting nursery?*
3. *Whether the defendant No.1 has encroached any road for establishing plant nursery?*
4. *What should be the decree?*

5. The plaintiff examined Syed Moazzam Raza Rivzi, as sole witness and he was cross-examined by the counsel for the defendants. Defendant No.1 did not lead evidence. Defendant No.2 was examined through Muhammad Shakir Zaki. He was cross-examined by the counsel for the plaintiff.

6. I have perused the record and heard learned counsel for the plaintiff and defendant No.2. My findings on the above issues are as follows:-

7. Learned counsel for the plaintiff has contended that the defendants have not come in the witness box to rebut the claim of the plaintiff that they have been running plant nursery on the footpath which is touching their boundary wall. The footpath cannot be termed as green belt for which the license was issued to defendant No.1. He has drawn my attention toward the license. The relevant portion of license Ex:P/ 12 is reproduced below:-

Now, therefore it has been decided to allow the licensee to use the green belt portion at Khayaban-e-Iqbal near Traffic Police Chowki/ Clifton Nursery Clifton DMC (S) (as per plan annexed), for plant nursery purely on temporary basis for an initial period of three years extendable for a subsequent term of three years up to a total period of six years subject to formal application from licensee and approval of the licensor.

8. Learned counsel for defendant No.2/KMC does not dispute the fact that the photographs with the report of the Nazir show that the entire footpath adjacent to the boundary wall of the plaintiffs' plots has been attempted to be converted into a plant nursery by defendant No.1 under the cover of the license. The license was initially for three years and it has not been extended nor defendant No.1 has come forward to claim that the license is still in existence or that it was lawful for the defendant No.1 to use footpath as a green belt portion mentioned in the license. Learned counsel for defendant No.1 though claimed that the license was issued by the DMC, South, Karachi and he has nothing to do with defendant No.3 he, however, concedes that the area shown in the photographs was always footpath and not the green belt. Be that as it may, the representative of defendant No.2/KMC on **27.6.2007** in his cross-examination has conceded in reply to a question from the plaintiff that "*I am with the enforcement department and I have nothing to do but if the matter relates to the encroachment on footpath then our department (will) take action against the encroachment*". This evidence clearly suggests that

the grievance of the plaintiff that the footpath around their undisputed plots has been used by defendant No.1 or attempted to be used by him for running plant nursery and it was supposed to be the duty of KMC to remove the plant nursery from the footpaths.

9. In view of the above evidence, even if the license was lawful the attempt has been made to encroach upon the footpath adjacent to the boundary wall of the plaintiff's plots. The record does not show that plant nursery was on any green belt. Therefore, all the three issues are decided in favour of the plaintiff.

10. To a query that how the plaintiff claims any rights on the footpath, the plaintiff's counsel has contended that the footpaths are part and parcel of the property of the plaintiff under easement rights because according to him footpath is right of way to the plaintiff's plots for the plaintiff and its customers. I don't want to discuss here what is or is not an easement right. Whatever name we may give it, the plaintiff by virtue of undisputed owner of these plots has claimed a "right" on the footpath attached to these plots to remove defendant No.1, the plaintiff is supposed to have some corresponding "responsibility" too when the plaintiff has asserted his right to restrain the defendants from permanently using the said footpath in a fashion that may offend any comfort of the plaintiff, therefore, in my humble view to maintain these footpaths, the corresponding responsibility is also on the shoulders of the plaintiff. Generally, it may not be. But when a litigant asserts anything as of "right" in Court of Law he impliedly accepts some corresponding responsibility. Learned counsel for the plaintiff candidly concedes that it is civic duty of every citizen to maintain the environment neat and clean at least around their own immovable properties. The plaintiff/UBL, therefore, to save at least the footpaths touching the boundary wall of

the plots in question are under a civic duty to maintain the footpaths around these plots by always keeping the boundary walls well-constructed properly painted and also the footpaths neatly developed by solid flooring material. The plaintiff should keep watchman for their plots who should instantly report any wear & tear of the boundary walls and footpaths for it timely repair to the plaintiff, if needed. The photograph annexure D/6, and other photographs annexed with the Nazir report the plaintiffs have failed to discharge their civic duty to maintain even boundary walls and totally neglected the case of his own path around the plots. Therefore, while I am inclined to decree the suit as prayed in terms of the prayer clause 'C', whereby the plaintiff has prayed for any other order/ direction this Hon'ble Court deems fit in the circumstances of the case, I hereby direct the plaintiff to ensure that the boundary walls and footpath around the plots No.G-14, G-15 and G-24 Kahkashan, Scheme No.5, Clifton, Karachi should be maintained by the plaintiff (UBL) from their own resources. The boundary walls and footpaths should be restored a neat and clean look to a reasonable civic standards within three months and submit report with photographs through MIT-II, High Court of Sindh, Karachi for perusal by this Court in chamber. In case it is not done by the plaintiffs, then the defendants will be within their rights to use the footpath around these plots the way they like.

11. The suit stands disposed of in the above terms.

JUDGE