

## IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 786 of 2011

Muhammad Mansoor  
Versus  
Muhammad Rashid

Plaintiff  
(*Muhammad Mansoor*) : Through Mr. Tanveer Ahmed,  
Advocate

Defendant  
(*Muhammad Rashid*) : Nemo for Defendant.

Date of hearing : 20.02.2019

Date of Judgment : 20.02.2019

Law under discussion: (1). Code of Civil Procedure, 1908 (**CPC**).  
(2). Qanoon-e-Shahadat Order, 1984.  
(**Evidence Law**).  
(3). Registration Act, 1908.

### JUDGMENT

**Muhammad Faisal Kamal Alam, J:** The present action at law has been instituted by the Plaintiff against the Defendant in respect of an immovable built up property, viz. House No.D-37, measuring 555.56 Square Yards, Block-H, KDA Scheme No.2, North Nazimabad, Karachi, (*the ‘subject property’*), with the following prayer clause\_

*“It is, therefore, prayed that this Hon’ble Court may be pleased to pass the Judgment and Decree in favour of Plaintiff against the Defendant as under\_*

*(a) Decree the suit of Plaintiff for partition of the suit property, viz. double storied Bungalow constructed on Plot bearing No.D-37, measuring 555.56 square yards, in Block “H”, situated in K.D.A Scheme No.2, North Nazimabad, Karachi, specifying the area of*

*the Plaintiff, which comes to 447.53 square yards of the total area according to Mutation Letter, dated 03.12.2010 and physical possession of the partitioned area with title documents hereof be handed over to the Plaintiff through Official Assignee/Nazir.*

- (b) Restraining the Defendant from removing the articles of the Plaintiff as disclosed in para-15 and the articles belonging to the deceased mother as mentioned in para-16 till the disposal of the case, in alternative if articles are intentionally removed by the Defendant and found missing value of such may be awarded to the Plaintiff.*
- (c) Permanent injunction restraining the Defendant, his agent, employees, workmen from transferring, selling, alienating, damaging and mortgaging the aforesaid subject property of this case.*
- (d) Directing the Defendant to pay mesne profits to the Plaintiff @ Rs.35,000/- per month for ground floor, and @ Rs.35,000/- of first floor since 29.11.2010 as the Defendant is enjoying with the suit property of the Plaintiff, which constructed ground plus one, and each portion of which can easily fetch rent as mentioned above, total become Rs.70,000/- of two portions. As rent of the similar property in same locality is about Rs.35,000/-, therefore, Plaintiff is entitled to claim mesne profit Rs.3,50,000/- being arrears of five months since December, 2010, and future mesne profit with enhancement of 10% till disposal of this suit.*
- (e) Directing the Defendant to pay Rs.15,00,000/- to the Plaintiff as damages/compensation for civil wrong done, illegal acts and omissions of the Defendant, which are against the constitutional rights of the Plaintiff; due to which the Plaintiff not only seriously suffered mental torture, agony, perplexity but he also faced monetary losses, thus entitled to claim compensation of Rs.15,00,000/- from the Defendant.*
- (f) Cost of the suit may be granted.*
- (g) Any other relief which this Hon'ble Court deem fit and proper under circumstances of this case."*

2. Summons / Notices were issued to the Defendant, but he opted to remain absent despite service of notice and did not contest the matter, eventually on 20.05.2013 vide Court order he was directed to be proceeded *ex-parte*.

3. Despite giving numerous opportunities, the Defendant did not turn up and on 29.01.2019 the evidence of Plaintiff was recorded and on that date too, the Defendant's side was not present, therefore, the cross-examination was marked as "*Nil*".

4. Mr. Tanveer Ahmed, the learned counsel representing the Plaintiff, has argued the matter at length and emphasized that despite relinquishment of respective shares by the legal heirs of deceased father, namely, S.M. Nizamuddin in favour of Plaintiff, he is unable to use and enjoy the subject property because the Defendant is occupying the Ground Floor and is continuously created nuisance for Plaintiff. It is further argued that in the intervening period, the Plaintiff and his mother had to be shifted to some other premises on account of unabated harassment caused by the Defendant and ultimately the Plaintiff had to invoke the jurisdiction of the concerned Court under the Illegal Dispossession Act, 2005, for getting back the possession.

5. Arguments heard and record perused.

6. Though the matter has proceeded *ex-parte* but still it is necessary to consider the claim of Plaintiff and relief sought, in the light of available record and provisions of law.

7. The Court has to consider the following\_

(i). Whether the Suit is maintainable?

(ii). What relief the Plaintiff is entitled to?

8. Learned counsel for Plaintiff has referred to the various documents, which were produced and exhibited by the Plaintiff in support of his claim by leading the evidence.

9. The subject property was initially allotted and leased out to one Adam Khan vide an Indenture of Lease Deed dated 07.06.1967 by Karachi Development Authority (*KDA*). Original Indenture of Lease is produced in the evidence as Exhibit PW-11; where after, the said predecessor-in-interest of Plaintiff has sold the subject property to one Masudul Hassan Butt vide Deed of Conveyance dated 10.09.1985; original whereof was produced in evidence and exhibited PW-8; subsequently, the said owner sold the subject property to the mother of present Plaintiff, namely, Qamar Sultana vide a Conveyance Deed dated 30.10.1986 (*Exhibit PW-7*), available at page-181 of the evidence file. The said mother, who is now deceased, has gifted the subject property to her husband, that is, the deceased father of present Plaintiff vide Gift Deed dated 26.05.2005, original whereof is produced in the evidence as Exhibit-PW-6; at page-137 of the evidence file. The learned counsel for Plaintiff has referred to Transfer / Mutation Order of 30.01.2006 as Exhibit-P/W-5 in favour of deceased father of Plaintiff (late S.M. Nizamuddin) and after his death, the property in question came to vest in favour of legal heirs of deceased father, that is, present Plaintiff, his siblings and the mother. The competent Authority, viz. Karachi Development Authority (*KDA*) issued a fresh Transfer / Mutation Order dated 12.11.2008; original whereof was produced in evidence as Exhibit PW-4; available at page-133 of the evidence file. This Mutation Order contains the name of all the legal heirs including the Plaintiff and Defendant. Learned counsel has then referred to the two main documents, viz. Relinquishment Deed / Deed of Release dated 09.05.2009 and 02.02.2010, respectively. The said Deeds of Release are

produced in original during the evidence and have been exhibited as PW-2 and PW-2/A. Admittedly, both the documents are registered instruments, as required under Section 17 of the Registration Act, 1908. Learned counsel has submitted that by virtue of the above two documents, the Plaintiff at present is owner of 80.5 % (*percent*) of the suit property, whereas, the Defendant is only co-owner to the extent of remaining share, but the latter at present is holding / in occupation of more than his share (in the inheritance) in respect of the suit property.

10. It is an undisputed fact that the Plaintiff led the evidence and he was never cross-examined by the Defendant on any of the material part of his testimony, therefore, his entire deposition is to be accepted, which is supported by the registered instruments, viz. two Deeds of Release, 99 years Lease Deed in favour of the original owner and the two Conveyance Deeds, by virtue of which, the subject property eventually came to vest in the present Plaintiff. Original Mutation Orders issued by the competent authority, viz. KDA are also substantial evidence. The documents mentioned hereinabove are all public documents, therefore, the presumption of authenticity and genuineness as envisaged in the Articles 85 to 95 of the Evidence Law, are applicable and attracted to the above documents. The subject property consists of two Floors and after evaluating the testimony of Plaintiff it is not difficult to conclude that the Defendant in fact is holding more than his share in the property as he is in occupation of the entire Ground Floor, which constitutes half (50%) of the subject property, therefore, this wrong done to the Plaintiff is to be remedied in the present proceeding. Thus, the first point for consideration (*ibid*) is answered in affirmative, that the present suit is maintainable and the grievance of Plaintiff is a continuous one, so is the cause of action.

11. Adverting to the other two aspects of the case in which the Plaintiff has made a claim of damages to extent of Rupees 1.5 Million as mentioned in prayer clause (g) and mesne profits as mentioned in prayer (d). The Plaintiff has deposed that on account of illegal act of Defendant, he suffered mental torture and multiple losses as he has shifted to other premises and to get back the possession of his own property, he has been put through the mill of litigation. Learned counsel has referred to the report of the Area SHO, submitted before the Court of learned IIIrd Additional District Judge, Karachi Central, in a proceeding invoked by the Plaintiff under Section 7 of the Illegal Dispossession Act, 2005. As per Report of SHO, which has been exhibited as PW/12-A, the possession was handed over by the Defendant to Plaintiff through Police Force under the Court orders in the above proceeding (under Illegal Dispossession Act, 2005).

12. Broadly, damages are of two kinds; general and special. Special damages are awarded only when a party successfully proves actual losses suffered by him / her. In the present case, the Plaintiff has not produced convincing evidence with regard to their claim of rupees fifteen hundred thousand towards compensation and damages, which fall within the category of special damages. Notwithstanding this aspect of the case, the Superior Courts have held in number of decisions, *Abdul Majeed Khan v. Tawseen Abdul Haleem* [2012 C L D page-6], being one of the leading cases, that if circumstances so warrant, general damages can be awarded by invoking the rule of thumb; particularly where violation of legal rights exists. Plaintiff being a c-owner of the suit property is being deprived of his right to use and enjoy the same. The ownership right is a fundamental right under the Constitution of Islamic Republic of Pakistan, 1973, and its breach should be remedied forthwith.

Argument of learned counsel representing the Plaintiff has substance and is supported by the evidence brought on record.

13. In these circumstances, I am of the considered view that Plaintiff is also entitled for general damages to the tune of Rs.500,000/- (*Rupees Five Hundred Thousand only*); however, plea of mesne profits is disallowed. Point for consideration (ii) is answered accordingly.

14. The upshot of the above discussion is that towards the claim of damages, the Defendant is liable to pay a sum of Rupees Five Hundred Thousand Only. The present suit is decreed in the terms of Prayer Clauses (a), (b), (g) and (h), as conduct of the Defendant warrants that Plaintiff should be granted costs of the entire proceeding. Consequently, the Nazir of this Court will take further steps in getting the property partitioned and if it is not practically possible to partition the property in its present state then the Nazir will take steps to sell out the subject property through judicial sale in according with law. Nazir is further authorized to take assistance of any expert as well as Police aid if the Defendant creates any type of impediment. Nazir will settle his fee / charges as well as that of the expert (if appointed), in accordance with law and the entire costs of partition will be borne by the Plaintiff and Defendant both, in accordance with their share in the suit property.

15. If the learned counsel for the Plaintiff approaches the Office, the original documents produced in the evidence and exhibited may be returned by the learned Additional (OS) after keeping the clear legible copies of the same, bearing the same exhibit numbers.

**JUDGE**

**Dated 20.02.2019**

M.Javaid.PA