

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1213 of 2000

[Syed Zainuddin v. M/s. Continental Limited and others]

Dates of hearing : 19.09.2019 and 01.10.2019.
Plaintiff : Syed Zainuddin, through Mr. Imran Ahmed, Advocate.
Defendants No.1 to 3 : Nemo.

J U D G M E N T

Muhammad Faisal Kamal Alam, J: Plaintiff has filed the present lis in respect of various shops and encroachment of common passage (purportedly) in a multistorey building. Plaint contains the following prayer clause_

- “a) *To declare that the Plaintiff is entitle to use and enjoy 10’ wide corridor / passage situated on eastern side of Shops No.C.B.1, C.B.2, & C.B. 3, situated on Plot No. FL.1, Block-16, Gulshan-e-Iqbal, Karachi, and is also to the facility of Toilet/Kitchen, which has been constructed by the side of Shop no. C.B. 25, being essential amenity which facility was being enjoyed by the Plaintiff since the acquisition of the shops;*
- b) *To declare that Defendant no. 1, is not entitled to execute any document allowing the Defendants no. 2 and 3 to occupy 10’ wide Corridor situated on the eastern side of Plaintiff’s shops and that the Defendants no. 2 and 3, are not entitled to occupy 10’ wide corridor/common passage and/or raise any construction on the corridor/passage;*
- b-1) *To declare that the Defendant no. 1, was not entitled to execute and get registered the alleged sub-lease dt. 3.2.2001, purported tenement C.B. 1/A, of Book I dated 3.2.2000, and the same is liable to be canceled & demolished;*
- b-2) *To declare sub-lease dated 3.2.2000, in respect of amalgamated Shop C.B.29 Ground Floor bearing registered No.535 of Book I dated 17.11.90, is liable to be cancelled and demolished;*
- b-3) *To declare that sub lease dated 3.2.2000 in respect of shop no. C.B. 7 of Book I Additional and the same is liable to be cancelled and demolished.*

- c) *Permanently restrain Defendant no. 1, their servants, agents allowing the Defendants no. 2 and 3 to occupy/raise construction on the 10' wide common passage/corridor situated on the eastern side of Plaintiff's shops and/or doing or causing to be done anything blocking the corridor/passage and/or putting corridor/passage into any other shop;*
- d) *Issue Mandatory Injunction directing Defendant no. 1, to remove wall constructed on the corridor/passage blocking the entrance to the Toilet/Kitchen and restore the amenity as were enjoyed by the Plaintiff;*
- e) *Award damages to the tune of Rs. 10,00,000/- suffered by the Plaintiff on account of conversion of undisposed off/vacant shops into workshop/office and blocking 10' wide corridor/passage and for the mental torture;*
- f) *Cost of the suit; and*
- g) *Any other further and better relief which this Hon'ble Court may deem fit and proper under the circumstances of this case."*

2. As per averments of plaint, Plaintiffs has acquired three shops bearing No. C.B.-1, C.B.-2 and C.B.-3, adjacent to each other through registered instrument; these shops abut on ten feet wide corridor / a common passage, on the ground floor of a multistorey building constructed at Plot No. FL-1, Block-16, KDA Scheme – 24, Gulshan-e-Iqbal, Karachi. This multistorey building ("**Said Building**") was constructed by Defendant No.1 (Continental Limited) after getting requisite approvals from the concerned authority, viz. Karachi Building Control Authority ("**KBCA**"), which now is Sindh Building Control Authority ("**SBCA**"). Grievance of Plaintiff is that with the passage of time, Defendant No.1 has illegally created additional shops in the common passage / corridor of the Said Building, which grievance was aggravated when even common amenities such as toilet and kitchen were altered to the utmost disadvantage of the lawful sub-lessees / occupants of different shops situated on the ground floor, which includes present Plaintiff, who has also averred grievances against Defendants No.2 and 3 (who are his real brothers) in respect of the

above shops No. C.B.-1, 2 and 3. It is stated that following three shops have been illegally created and subleased by Defendant No.1_

- i. Alleged shop No. C.B.-1/A, to which Defendants No.2 and 3 are falsely laying their claim.
- ii. Alleged shop No. C.B.-7, leased out to Defendants No.2 and 3.
- iii. Alleged shop No. C.B.-29, to which Defendants No.2 and 3 are claiming their entitlement.

3. With these background facts, Plaintiff has specifically sought relief of cancellation of sub-leases of the aforementioned purported shops and damages of Rupees One Million.

4. The claim of Plaintiff was rebutted by Defendant No.1 – Builder in its Written Statement, but in Paragraph-10 whereof, it is not disputed that corridor in question has been converted into Shop No. C.B.-1/A, on the alleged ground, that all the owners of shops gave their no objection. It is further admitted (in Paragraph-10) that lease of this purported shop No.C.B.-1/A was given to Defendants No.2 and 3. The Defendant No.1 in Paragraphs-3 and 13 has not disputed the description as given by Plaintiff in his plaint about the ground floor in the Said Building, so also the ownership of Plaintiff in respect of another shop No.C.B.-11.

5. The private Defendants No.2 and 3 though have generally denied the averments of plaint, in their Written Statements, but in Paragraphs-9, 12 and 16 whereof, these Defendants have not disputed the fact that additional shops were created either by amalgamating other shops or converting the common passage / corridor in the Said Building. Defendants No.2 and 3 also adopted the same reasoning of Defendant No.1 that since the common passage / corridor was not in the use of any of the owners / occupants of shops, therefore, with the consensus of all, the said common passage / corridor was utilized for creation of disputed shops.

6. On 10.10.2007, following consent issues were framed_

1. *Whether shops No. CB-1, 2 and 3 were acquired by the plaintiff or by joint efforts of the defendants No. 2 & 3, father of the parties and brother Syed Allauddin?*
2. *Whether the Plaintiff's shop No.CA-11 is in block 'A' of the building Hassan Centre for away from the shops acquired by the defendants Nos.2 & 3?*
3. *Whether the alleged passage/corridor is in fact shop No.CB-1/A and has been sub-leased to the defendant Nos. 2 & 3 on 03.02.2000?*
4. *Whether shop Nos.28, 30, 31, 32 and 33 have been amalgamated and known as shop No.29, sub-leased to the defendants No.2 & 3 by the defendant No.1 on 03.02.2000?*
5. *Whether shop No.CB-7 has also been sub-leased to the defendants No.2 and 3 by the defendant No.1 on 03.02.2000?*
6. *Whether any portion of the passage/corridor has been illegally blocked and included in any of the above shops? Whether the aforesaid sub-leases are illegal liable to be cancelled?*
7. *Whether the plaintiff and defendants No.2 & 3 gave no objection to the blocking of corridor?*
8. *Whether the proposed plan could be amended before completion plan of the building?*
9. *Whether the plaintiff has suffered any loss and to what extent?*
10. *Whether the plaintiff has filed this suit with ulterior motives?*
11. *To what relief, if any, is the plaintiff entitled?*
12. *Whether the defendant has violated the order passed by this Court for maintaining status quo?*
13. *Whether the defendant has illegally blocked the passage to the shops in question?*
14. *Whether the blockage of the passage has been created by the defendants in collusion with the builders i.e. defendant No.1?*

7. Arguments heard and record perused.

8. Vide a Court order dated 26.09.2000, Nazir was appointed Commissioner to carryout site inspection and submit a Report, which was presented on 04.10.2012, (available at page-279 of the main Court file) and was taken on record by the order of 19.02.2001. No objection to this Report

has been filed. The gist of this Report is that corridor / passage on the ground floor of the Said Building has been altered, narrowed down and blocked from different places, including where the above shops No.C.B.-1, C.B.-2 and C.B.-3 are located. This Nazir Report was also produced in the evidence by Plaintiff as Exhibit 9/21.

9. Plaintiff and Defendants No.2 and 3 led the evidence. Plaintiff examined his employee Mr. Muhammad Iqbal as P. W.-1 and himself as P.W.- 2; whereas, on behalf of Defendants No.2 and 3, only Defendant No.3 (Syed Bahauddin) led the evidence as D.W.-1. Defendant No.1 (Builder) did not lead any evidence, however, Mr. Walidad Khan, Advocate, for Defendant No. 1 did cross-examine the Plaintiff.

ISSUE NO. 1:

10. With regard to the status of three shops, viz. C.B.-1, 2 and 3, another Suit No.1117 of 1999 between the present Plaintiff and his brothers including the present Defendants No.2 and 3, has been decided and Mr. Imran Ahmed, learned counsel for Plaintiff, under his Statement dated 01.10.2019, produced the certified copy of the Judgment. This Court in its judgment dated 02.10.2018, in the above Suit, has determined / decided that the above named three shops belonged to the present Plaintiff and subject to certain adjustment of price, the present Plaintiff is entitled to acquire the said shops. Hence, the Issue No.1 in the present suit is also decided on the same terms as mentioned in the judgment passed in above Suit No.1117 of 1999.

ISSUES NO. 2 AND 3:

11. Issue No.2 is irrelevant, considering the point of law involved in the proceeding and pleadings of Plaintiff and Defendants.

12. Defendant No.1 (Builder) in its paragraph-10 of the Written Statement has also admitted this fact about closure of corridor and its conversion into shop No. C.B.-1/A. Although, no evidence is led by Defendant No.1 and it is a settled rule that pleadings (plaint and written statement) cannot be treated as piece of evidence unless Plaintiff or Defendant (as the case may be) lead evidence in support or in defence of their respective claim. However, there is an exception to this established rule, which is, where there is an admission of any fact in the Written Statement, then the same can be considered by the Court in spite of the fact that Defendant has not led the evidence. Such an admission is covered under Article 30 of the Qanoon-e-Shahadat Order, 1984 and Order 12, Rule 6 of the Civil Procedure Code (1908), relating to pronouncement of judgment or order on admission.

Defendant No.3 in his cross-examination has also admitted that Shop No. C.B.-1/A has been built in the passage of 10 feet and leased out to said Defendant No. 3 by Defendant No. 1 on 03.02.2000. Thus, it is a proven fact that a portion of the common corridor was illegally utilized in creating shop No.C.B.-1/A. It does not make any difference if a sub-lease has been executed for this illegally created shop C.B.-1/A; because an illegality per se cannot be regularized or legalised by way of any registered instrument, which in the circumstances is liable to be cancelled. This Issue No. 3 is answered in affirmative.

ISSUES NO.4, 5, 6 AND 7:

13. The Nazir Report has mentioned the fact about common passage, as discussed in the foregoing paragraphs. No objection is filed to this Inspection Report, which is exhibited in evidence as Exhibit 9/1. Although, site inspection report itself is not a conclusive evidence, but if the same is not objected to and site inspection report is taken on record and

subsequently exhibited in the evidence and is not subject to cross-examination, then such a site inspection report does bear a positive evidential value. Plaintiff's evidence about his assertion that corridor / common passage of the building was illegally encroached upon, occupied and leased out by Defendant No.1 to Defendants No.2 and 3, could not be contradicted in his cross-examination. He has specifically denied the suggestion and stated that a passage in front and back side of the shops C.B.-1 to 3, has been illegally occupied by the Defendants No.2 and 3 and shops C.B.-1-A and C.B.-3-A were constructed in the passage / corridor. He has specifically stated in his cross-examination that Defendant No.1 has committed a fraud by constructing shop in the place of common passage and also sold out portion of amenity, which was for kitchen and toilet.

14. On the contrary, sole witness of Defendants (the above D.W.- 1) has deposed in his cross-examination that there was no corridor between shops C.B.-3 and C.B.-4, but in support of this assertion, he has not produced any subsequent approved building plan of the Said Building; whereas, in the approved building plan produced by Plaintiff, an open space is shown between shops C.B.-3 and C.B.-4, which is marked as '**Ent**' (apparently Entrance). Although, learned Advocate for Defendants (Mr. M. G. Dastagir) has raised objection to the production of the copy of the building plan, but he did not put any question to the witnesses of Plaintiff with regard to the authenticity of the above approved building plan, which has been marked as P-1/X/1. Secondly, the defence witness in his examination-in-chief has acknowledged the fact that other shops, viz. C.B.-29, C.B.-7 were also leased out to Defendant No. 3 and C.B.-29, in particular, includes shops No. C.B.-30, 31, 32 and 33.

15. The testimony of Defendant is not credible, in view of specific assertion of Plaintiff, which was not shaken in his cross-examination and

the above document (approved building plan). Thus, it is established that there was an open space / entrance in between shops C.B.-3 and 4, which has to be restored. Similarly, admission of Defendant himself about amalgamation of shops No. 30, 31, 32 and 33 into shop No.29, concludes the finding of Issue No. 4 in affirmative.

In view of admission of Defendant No.2 in his examination-in-chief about the shop No.C.B.-7, Issue No.5 is answered in Affirmative.

In view of the above discussion, Issue No.6 is replied in affirmative, that passage / corridor has been illegally blocked by the Defendants and if it is leased out then such act is void ab initio illegal by Defendant No.1.

Since it is a common stance of Defendants that use of corridor / common passage on the ground floor was changed for use of shops, after receiving no objection from various genuine sub-lessees and occupants of different shops on the ground floor, therefore, onus is on Defendants to produce no objection letters from different shop keepers. Neither any evidence is led by the Defendants in support of this claim nor any document is produced. The claim of Defendants about no objection has been disproved. Consequently, Issue No.7 is replied in negative.

ISSUES NO.8, 9 AND 10:

16. Learned Advocate for Plaintiff has referred to Karachi Building and Town Planning Regulations, 1979, because the present dispute relates to year 2000, when the current Karachi Building and Town Planning Regulations, 2002, were not promulgated.

17. In terms of Regulations 16 and 20 (Part – I, *ibid*), building should be completed as per the approved building plan and in case of violation, then KBCA (now SBCA) is authorized to take appropriate measures including removal and demolition of violation in a building. Similarly, under

Regulation 24, while submitting a completion plan, those deviations should be highlighted, which were against the original approved building plan. In view of the evidence, onus was on Defendant No.1 to produce duly approved completion plan by the concerned authority to show that the purported deviations as complained of have been regularised and the claim of Plaintiff is not tenable. But admittedly no such official document has been produced in the proceeding. Consequently, violations complained of were never considered by the concerned authority and hence they even exist today. Issue No.8 is answered accordingly.

18. Since no convincing evidence is led by Plaintiff in support of his claim of damages, thus the same cannot be awarded in these circumstances. Therefore, Issue No. 9 is answered in Negative.

19. In the present Suit violation of not only common amenities are involved but also that of Sindh Building Control Ordinance, 1979, in particular Section 6, *inter alia*, concerning additions and alterations and the above Karachi Building and Town Planning Regulations, 1979, thus, present *Lis* also has an ingredient of public interest and it cannot be said that it is filed with ulterior motives. Issue No.10 is answered in negative.

ISSUES NO. 11, 12, 13 and 14:

20. The upshot of the above is that common passage / corridor on the ground floor of the Said Building is to be used and enjoyed by all the lawful owners / occupants of respective shops on the ground floor of the Said Building. In the above terms, this suit is partly decreed and it is directed that Defendants shall forthwith restore the corridor / common passage on the ground floor of the Said Building along with toilet and kitchen as provided in the approved building plan. Since present case involves violation of building and town planning regulations, therefore, SBCA being regulator of *inter alia*, quality of construction and buildings

control, in terms of Sindh Building Control Ordinance, 1979, will ensure that the corridor / common passage and other amenities as provided in the approved building plan is restored to its original position forthwith.

21. Parties to bear their costs.

JUDGE

Karachi.

Dated: 06.07.2020.