

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui

Second Appeal No. 205 of 2019

Ms. Qaiser Jehan Begum

Versus

Sindh Building Control Authority & others

Date of Hearing: 22.04.2021

Appellant: Through Mr. Saadat Yar Khan Advocate.

Respondent No.3: Through Mr. Zeeshan Khan Advocate

Respondent No.5: Through Mr. Tarik Ali Advocate

Respondent No.6: Through Mr. Faraz Akhtar holding brief for Mr. Waleed Rehan Khanzada Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Brief facts for the purpose of deciding this Second Appeal are that the plaintiff/appellant being owner/resident of Plot No.D-78, Block-4, Gulshan-e-Iqbal, Karachi filed a suit bearing No.1383 of 2019 for declaration, mandatory injunction, compensation and damages in respect of a construction being raised at the adjacent plot No.D-77, Block-4, Gulshan-e-Iqbal, Karachi, by respondent No.3. While the suit was pending, application under order XXXIX rule 1 & 2 CPC was heard by learned XI-Senior Civil Judge Karachi East and while observing that the appellant was not entitled for any interim injunction, took the cognizance and rejected the plaint under order VII rule 11 CPC which order was maintained by the appellate Court. Consequently, this second appeal under section 100 CPC has been filed.

2. The appellant in the memo of plaint pleaded that respondent No.3 was carrying on construction in violation of lease covenant as

granted by respondent No.2 and in violation of statutory provisions of Sindh Building Control Authority and even contrary to approved plan, building bylaws and regulations. These are 1000 sq. yards plots adjacent to each other and it is pleaded that independent units were constructed in violation of the plan, rules, bylaws and regulations and the ordinance 1979 itself. There was a challenge to the plan itself that it was contrary to the regulations applicable.

3. Appellant pleaded in the plaint that even compulsory open spaces have not been maintained, deep trenches were dug up alongside the perimeter wall of the appellant with a view to raise columns and RCC structure/pillars adjacent to the wall. This being the case of the appellant, the plaint under order VII rule 11 CPC on the touchstone of Section 42 of Specific Relief Act, that appellant has no locus standi as far as adjacent plot is concerned, was rejected.

4. I have heard the learned counsel and perused material available on record.

5. The primary consideration for rejection of plaint in terms of impugned order/judgment was that in terms of Section 42 of Specific Relief Act the appellant has not established her locus standi in respect of Plot No.D-77, i.e. plot of the respondent No.3 which is adjacent to appellant's plot, having no interest therein of the appellant. The trial Court apparently is of the view that there is no cause of action to institute suit in respect of adjacent plot as the appellant being plaintiff of the suit had no locus standi in respect of said plot in question. Trial Court expound in its order that the cause of action was not available for initiating the proceedings (as suit being not maintainable) and ended up in rejection of plaint. The trial Court observed as under:-

“Therefore, power to reject, under this rule, must be exercised only if the court, presuming the averments to be true, comes to the conclusion that even if all allegations,

made therein are proved, it can grant the relief to the plaintiff or not. In case it is not satisfied that on such presumption or on proving the allegations, relief can not be allowed, it shall reject the plaint by invoking provisions of rule 11 of order VII CPC.”

6. I am not in agreement with such analysis as reached by the trial Court and as concurred by the appellate Court as at the most if averments/contents of plaint do not prove to be correct it may ultimately lead to dismissal of suit which at times is possible only after recording evidence. However at times when such conclusion could be reached without recording evidence, it could only be dismissed, at least after framing of issues. However, for the purposes of present controversy involved in this second appeal, the trial Court perhaps was of the view that the appellant had to establish an independent right over the adjacent plot of the respondent/defendant i.e. Plot No.D-77 whereas it is not requirement of Section 42 of Specific Relief Act.

7. Section 42 of Specific Relief Act reads as under:-

“42. Discretion of Court as to declaration of status or right. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.”

(Underlining is for emphasis)

8. Thus, the appellant/plaintiff sought a declaration to the extent of her property which she is enjoying as an owner and if any right out of a property, as enjoyed by the plaintiff/appellant is being infringed the provisions of Section 42 of Specific Relief Act would come into action for her safeguards. Section 42 provides that a person entitled to any legal character or to a right as to any property may institute a suit.

9. Title of the property comprises of a number of rights and if any of the rights arising out of the title is being infringed or threatened then an

aggrieved person acquires right to institute suit in terms of Section 42 of the Specific Relief Act for a declaration by instituting a suit against any person denying or interested to deny the title to such character or right to such property and the Court may in its discretion make therein a declaration that he/she (plaintiff) is so entitled.

10. The appellant who filed the suit had prayed that the respondent/defendant No.3 in connivance with the officials of Sindh Building Control Authority has got the plans approved in violation of building bylaws, regulations etc. and that has threatened the right of appellant which she was enjoying in respect of her property and hence it is wrongly construed by the trial Court as well as appellate Court that there is no threat to any legal right of the plaintiff/appellant in respect of her plot in question. The trial Court was of a wrong view that the appellant/plaintiff had to establish right in respect of property of the respondent/defendant and since she had no right over the adjacent property of the respondent, therefore, she had no cause of action.

11. Thus, the provisions of Section 42 were misconstrued by Courts below. A plaint could only be rejected under order VII rule 11 CPC if it is barred by law. None of the provisions of law was cited by respondent's counsel and/or find mention in the orders/judgment of two Courts below whereby a plaint of the suit of the appellant could be rejected under order VII rule 11 CPC. The appellant had a cause of action on account of a threat to her property in view of alleged unlawful and illegal construction being raised on the adjacent plot.

12. In view of above, instant Second Appeal is allowed and order dated 26.07.2019 passed by XI-Senior Civil Judge Karachi East and judgment dated 21.10.2019 passed by IV-Additional District Judge Karachi East respectively are set aside with directions to trial Court to decide the suit on merit in accordance with law without any delay. Since

concept of Section 42 of Specific Relief Act was misconstrued while deciding injunction application in respect of the property of the respondent No.3 i.e. plot No.D-77, Block-4, Gulshan-e-Iqbal, Karachi, injunction application shall be deemed to be pending and be decided at the earliest by the trial Court.

13. Above are the reasons of short order dated 22.04.2021.

Dated: 30.04.2021

Judge