

*Order Sheet*

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

2<sup>nd</sup> Civil Appeal No.64 of 2023

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DATE	ORDER WITH SIGNATURE OF JUDGE(S)
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1. For orders on CMA-2109/2023
2. For orders on CMA-2110/2023
3. For hearing of main case.

**20.11.2023**

Mr. S.M. Imran Alvi, advocate for appellant.

F.C. Suit No.592 of 2012 was filed before Senior Civil Judge-VIII, Hyderabad and the same was dismissed vide judgment dated 30.07.2022. An illustrative portion of the judgment is reproduced herein below:

“Thus, in the light of own admission of the plaintiff, a very sharp contradiction is obvious belying the claim of the plaintiffs as to co-ownership of the property/plot as neither plaintiff No.1, nor plaintiff No.2 was proved to be co-owner of the suit-property at the time of institution of the suit in the year 2012, which as per their own version, remained in the ownership of their mother, who expired on March 19, 2017. No explanation is available why this fact was also concealed at the time of institution of the suit, and why their mother was not impleaded as party in the suit, which shakes the credibility of the version of plaintiffs.”

Civil Appeal No.183 of 2022 was filed before 7<sup>th</sup> Additional District Judge, Hyderabad and the same was also dismissed vide judgment dated 16.03.2023. The operative part is reproduced herein below:

7. With due respect the suit was filed by the appellants without clear vision as they claimed declaration regarding government property whereas it is admitted position of law that under section 42 of Specific Relief Act a person has to show that he has valuable right which is tried to be injured or affected by the other side.

8. Admittedly, the appellants claimed that they are owner of House No.73/B but the learned trial court has rightly held that not a single document has been produced to show that they are owner of such property or having interest in the same. Neither it is proved as to from where they derived their title. With regard to inheritance, the learned trial court had clearly mentioned in the last paragraph of page No.13 of judgment that initially appellants disclosed that they derived their title after demise of their mother who acquired the same from their father and their father died in year, 2004. Interestingly, there is no such document even proving that their father had any title. Surprisingly, the copy of judgment submitted by the appellants in F.C Suit No. No.213 of 2009 reveals in the body of judgment that their father was lawful owner of the house. So, how this is possible when in year 2009 they have filed suit claiming that their father is lawful owner but in evidence they disclosed that their father died in the year 2004.

9. Even if we ignore this fact, it is admitted position that appellants had failed to show their valuable interest or right and same is elaborately discussed in the judgment. Nowhere any effort has been taken by the appellants to prove their legal entitlement which badly affect their case.

10. The learned trial court had shown grace that their matter was taken up as a matter of easement, however, it had rightly concluded that the pre-requisites for establishing easement rights such as enjoyment of any use of light or air for 20 years without any interruption and in the present case, there is no evidence led by the appellants that from when they were enjoying such right. The right if claimed as an easement has to be a legal right because if in violation of building rules, appellants had constructed their house, then they cannot claim that their illegal right should be protected and in the present case the R&Ps clearly show that not a single document has been produced to show that the appellants had any valid NOC or even any structural map of their house. Therefore, their easementary right is also not proved.

11. Most importantly, this suit is also not maintainable for a very simple reason that the encroachment is claimed against government land and thus, after promulgation of the Sindh Public Property (Removal Of Encroachment) Act, 2010, and specifically U/S 11(i) of Act, exclusive jurisdiction regarding encroachment on a public property i.e. government property lies with the special court created through the Act-2010 and it includes all criminal and civil litigations as well. That the matter of encroachment is subject of special court and learned trial court should have returned the plaint at the first instance but nevertheless the finding on the other points such as easement are proper and does not warrant any interference.

12. In the end, it is also important that the instant suit was filed in year, 2012 by the appellants and they admitted in evidence that from their father, the property was transferred to her mother and she died on 19.03.2017, thus, they not only did not disclose this fact in the plaint but admittedly they did not arrayed their mother as legal owner and have presented the plaint as attorney. So, this also shows that appellants have not approached this forum with clean hands.

13. Before parting with this judgment, let the copy of this judgment be sent to Secretary Local Government of Sindh, apprising him that despite of notices being issued against the respondents for illegal construction, his department i.e. HDA seems to be in collusion with encroachers since, they are

not willing to assist the court in matter for a very simple reason that they want to give benefit to the encroachers at the expense of public property. The point N.1 is answered in "negative"

Per learned counsel, the record / evidence was not appreciated by the respective forums in its proper perspective, hence, this appeal.

Heard and perused. Upon specific query, arising out of the conclusion recorded in the penultimate paragraph dealing with issue 1 in the trial court judgment, it was unequivocally admitted that the findings with respect to *locus standi* (specifically lack thereof) were accurate as upon institution of the suit neither plaintiff had any right / title with respect to the suit property. The subsequent *pari materia* observations in the appellate judgment were also not denied. The learned counsel also made no endeavor to dispel the findings with regard to the issue of easement and / or encroachment matters being within the specific domain to the tribunal per the 2010 Act. Under such circumstances, when the entire narrative was demonstrably borne from the record and not controverted by the appellant, no case was made out to entertain this second appeal.

A second appeal may only lie if a decision is demonstrated to be contrary to the law; a decision having been failed to determine some material issues; and / or a substantial error in the procedure is pointed out. It is categorically observed that none of the aforesaid ingredients have been identified by the learned counsel. In such regard it is also important to advert to section 101 of CPC, which provides that no appeal shall lie except on the grounds mentioned in the Section 100 of CPC. While this Court is cognizant of Order XLI Rule 31 CPC, yet at this stage no case has been set forthwith to entertain the present appeal in view of the reasoning stated above. As a consequence hereof, in *mutatis mutandis* application of Order XLI Rule 11 C.P.C, this appeal is hereby dismissed *in limine* along with pending application. The office is directed to communicate a copy hereof to the appellate court.

Judge

Ahmed/Pa,