

## IN THE HIGH COURT OF SINDH AT KARACHI

**PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR**

**SUIT NO.289/2000**

Plaintiff : Khalid Majeed.  
through Mr. Ghazain Magsi, advocate.

Defendants : Idrees Asghar and others,  
Nemo present.

Date of hearing : 11.05.2016.

Date of announcement : 11.05.2016.

### JUDGMENT

By virtue of this judgment I intend to dispose of this suit filed by the plaintiff for Possession, Mesne Profit, Damages, cancellation of documents and permanent injunction.

2. Succinctly, brief facts of the suit are that plaintiff is an owner of flats No.304 and 305, 3<sup>rd</sup> floor, plot No.ST-6, Sea Breeze Plaza, Shahrah-e-Faisal, Karachi; that defendants No.1, 2 and 3 inter-se brothers and sister, are trespassers/unauthorized occupants; defendant No.3 assisted defendants No.1 and 2 to illegally occupy the aforesaid flats by using his influence. Defendant No.4 is a builder from whom the plaintiff purchased the flats; defendant No.5 purchased subject flats alongwith some other flats from defendant No.4 and paid the sale consideration. Although, as per defendant No.5 all the sale consideration was paid to the builder/defendant No.4, but defendant No.4 claimed further amount and filed Suit No.780/1987 before

this Court against the defendant No.5; however, the compromise application (CMA No.5831/1994), filed by the parties in that suit, was allowed vide order dated 05.12.1994 and a consent decree dated 05.12.1994 was drawn according to which Flats No.304 and 305 were transferred to the plaintiff with possession vide possession letter dated 14.11.1994 hence plaintiff is lawful owner of the subject properties. It is stated that plaintiff was permanently settled at Hyderabad and on 18.01.1999 when he visited the flats, found some labourers with building material there who were trying to raise construction in the flats; on enquiry he was informed that renovation is being done on direction of defendant No.3 who, when contacted, told the plaintiff that he is a major in Army and would kill the plaintiff if any resistance is made; defendant No.3 came with *ghunda* elements and threatened the plaintiff for dire consequences for which the plaintiff immediately reported to police but concerned SHO refused to lodge FIR; plaintiff moved a written complaint to SP Saddar *too* who marked it to DSP concerned and several statements were recorded; on 23.1.1999 plaintiff also moved an application u/s 145 Cr.P.C to Sub-Divisional Magistrate, Karachi South; the S.H.O. submitted the report in favour of the plaintiff intimated to the Court of S.D.M. that there was a trespassing into the properties of the plaintiff, learned S.D.M. issued notices to the defendant No.3. From written statement (*reply*), filed before the S.D.M. by defendants, it transpired that defendants No.1 and 2 moved application u/s 12(2) CPC in Suit No.780/1987 on the basis of false and fake documents and obtained *exparte* status quo order against their dispossession, as such proceedings before S.D.M were stopped. On query, it was transpired that JM No.8/1999 and 7/1999 were respectively filed by defendants No.1 and 2 without joining the

plaintiff as party although they were aware that plaintiff is lawful owner of subject flats, thus he filed counter affidavits to these JMs. Since January 1999, defendants No.1, 2 and 3 are utilizing the properties illegally and unauthorizedly by trespassing the same without paying any mesne profits; plaintiff has been deprived of his valuable properties due to trespassing by defendants No.1,2 and 3 and as such his valuable rights had been snatched illegally and forcibly under the shadow of uniform; plaintiff is entitled to mesne profits of his properties @ Rs.30,000/- per month from defendant No.1 in respect of flat No.304, 3<sup>rd</sup> floor, plot No.ST-6, Sea Breeze Plaza, Shahrah-e-Faisal, Karachi and Rs.30,000/- per month from the defendant No.2 in respect of flat No.305, of the said building from the month of January, 1999 till handing over the peaceful vacant possession of the flats; plaintiff has suffered mental torture and loss of his business due to running from pillar to the post, approaching one office to another for getting his right and contesting malicious proceedings, besides suffering huge business loss as such he is entitled to a decree amounting to Rs.50,00,000/- from defendants No.1, 2 and 3 jointly and severally as they are brother and sister and trespassed into the properties of the plaintiff with collusion of each other; plaintiff is also entitled to possession of subject flats. Cause of action accrued firstly on 18.01.1999 when he came to know about trespassing, secondly on 22.01.1999 when he reported the matter to the police and S.S.P Saddar, thirdly when he moved an application under Section 145 Cr.P.C; on 23.01.1999, and finally on 01.05.1999 when the objections were filed in J.Ms and continues till the decree and possession of the properties as well as realization of the decretal amount, plaintiff prayed :-

- a.* To a decree for possession of the flats No.304 and 305, 3<sup>rd</sup> floor, plot No.ST-6 Sea Breeze Plaza, Shahrah-e-Faisal, Karachi.
- b.* To a decree for a sum of Rs.5 million for damages caused to the plaintiff.
- c.* To a decree for mesne profits @ Rs.30,000/- for each flat totaling of Rs.60,000/- for both flats from the month of January, 1999 till realization of the possession of the flats subject matter in the above Suit.
- d.* To a decree for cancellation of forge documents annexed and exhibited in the evidence of the defendants No.1 and 2 recorded in J.M No.7 and J.M. No.8/99 and other documents pertaining to the aforesaid flats in possession of the defendants.
- e.* To a decree for injunction restraining them from alienating, in-cumbering, parting with possession, transferring or handing over possession of the suit property in any manner permanently.
- f.* To permanently restrained the defendants No.1, 2 and 3 from transferring, parting with and handing over possession or encumbering, mortgaging in any manner from the flats No.304 and 305, 3<sup>rd</sup> floor, plot No.ST-6, Sea Breeze Plaza, Shahrah-e-Faisal, Karachi.
- g.* Cost of the proceedings.

3. Plaintiff filed affidavit-in-exparte proof reiterating same contentions as raised in the plaint.

4. At the outset learned counsel for the plaintiff contends that by compromise judgment passed in suit No.780/1987 plaintiff was handed over

the possession of the subject matter Flats No.304 and 305. Thereafter, in the year 1999 plaintiff was dispossessed by the defendants No.1, 2 & 3; defendants No.1 and 2 filed J.Ms against judgment passed in suit No.780/1987. Both the J.Ms were dismissed. Since filing of instant suit defendant failed to cause their appearance and they were debarred from filing of written statement; accordingly plaintiff has filed affidavit in exparte proof as well examined himself. He further contended that albeit proposed issues were filed but same were not framed.

5. Heard and have also *carefully* examined all the available material.

6. I am conscious of the fact in exparte matter ipso facto contents of that plaint cannot be admitted and Court is required to examine all the documents while passing decree in favour of plaintiff *but* the plaintiff continues under legal obligation to prove his / her case regardless of proceedings being *ex-parte*.

7. The perusal of the record shows that plaintiff has filed statement with which the consent decree, passed in above referred suit, has been placed on record; he has also submitted possession letters issued by the Sea Breeze Project as well transfer letter, pay order of bank draft in favour of Sea Breeze Project amounting to Rs.1,50,000/; had appended his application before the S.D.M. so as to prove / establish his entitlement for the relief (s), claimed.

I am conscious of the legal position that a lawful judgment and decree, passed by a *competent* court of law, is binding not only upon parties thereto (*lis*) but also upon others. Since, it is not a disputed position that the plaintiff acquired title and possession under a decree of the Court, therefore, for *ease*, the decree dated 05.12.1994 passed in Suit No.780/1987 is reproduced as under: -

*"The plaintiff prays for judgment and decree against the defendant as under:-*

- i. That the defendant be directed to pay a sum of Rs.10,17,533/- to the plaintiff and take over possession of the apartment Nos. 301, 302, 303, 304, 305 and 306 in the building situated on ST-6, Shahrah-e-Faisal, Karachi along with occurring maintenance charges, interests and other charges as per agreement and in the alternative the Nazir of this Hon'ble Court be directed to dispose of the said apartments and to pay decretal amount.*
- ii. Costs of this suit;*
- iii. Any other relief this Hon'ble Court may deem proper in the circumstances of the case.*

*The suit coming up on this 5<sup>th</sup> day of December, 1994 for orders before Mr. Justice G.H Malik in the presence of Mr. Obaid-ur-Rehman, Advocate for the plaintiff along with Muzaffar Ahmed, Manager of plaintiff and Mr. Ikram Ahmed Ansari, Advocate for the defendant, they having filed compromise application under order 23 rule 3 C.P.C, duly signed by the Managing Director of the plaintiff as well as by Muzaffar Ahmed, the Manager of the plaintiff who says that he is duly authorized to sign the application, Mr. Abdul Quddoos on behalf of the defendants company and by Abdul Aziz Khalid Majeed and Ali Khan Soomro and their respective advocates, learned counsel for the defendants states that he has express authority to compromise the suit, it is hereby ordered that the compromise appearing to be in order and is hereby accepted and the suit is decreed in terms of the said compromise as under: -*

- 1. That as submitted in the pleadings of the parties the defendants had agreed to purchase from the plaintiffs six Apartments, bearing Apartment Nos. 301 to 306, with six servant quarters including the terraces in front of each of the above apartments situate on 3<sup>rd</sup> floor of building known as Sea Breeze Plaza, built and constructed on plot No.ST-6, Shahrah-e-Faisal, Karachi (Hereinafter for the sake of brevity referred to as the said Apartments) for the total*

sale consideration of Rs.16,50,000/- (Rupees Sixteen Lacs Fifty Thousand only) on the terms and conditions embodied in the agreement of sale dated 19.01.1982 of the above named parties.

2. That in order to amicably settle the matter the defendants have agreed to surrender to the plaintiffs one of the said Apartments, bearing Apartment No.303, with terrace in front thereof and one servant quarter. The defendants have further agreed to pay to the plaintiffs a sum of Rs.1,50,000/00 in addition to the surrender of the apartment No.303 as aforesaid at the time of signing of this compromise.

3. That on the execution of this compromise and its acceptance by this honourable Court the plaintiffs shall hand-over vacant and peaceful possession of Apartment Nos. 301, 302, 304, 305 and 306 with five servant quarters, and terraces, front lift-well/space used by both parties after bearing the expenses proportionately as per agreement dated 19.01.1982 on as is where is basis i.e. without fixation of the doors, windows and flooring not inhabitable condition. The plaintiffs shall have no objection if the electricity and water connection are taken directly from the existing or main electricity and water lines available in the building and the sui gas connection will be arranged directly from the Sui Gas company at their own expenses by the following three persons in the following manner: -

S.No.	Names of persons to whom respective Apartments are to be handed-over and thereafter leases are to be executed by Plaintiffs in their favour.	Apartment Nos. to be delivered to the named persons
01	Mr. Ali Khan Soomro Son Of Allah Bachayo Soomro	306
02	Mr. Abdul Aziz Shaikh son of Abdul Qayoom	301 & 302
03	<b>Mr. Khalid Majeed son of Abdul Majeed (present plaintiff)</b>	304 & 305

It is further agreed between the parties that no further construction/completion work of the said apartments will be carried out by the plaintiffs. It is also agreed that after the delivery of vacant and peaceful possession of the said five apartments including five servant quarters and terraces in the aforesaid manner, the plaintiffs shall execute in favour of above named, Mr. Ali Khan Soomro, Mr. Abdul Aziz Shaikh and Mr. Khalid Majeed (present plaintiff), and get the requisite leases/ sub-lease/ sale deeds registered with the concerned Registrar/ Sub-Registrar of Assurances, Karachi, within a period of ninety days of this compromise. The cost of stamp duty, registration charges and other allied expenses in that behalf will be paid and borne by the said three persons proportionately, in terms of agreement dated 19.01.1982.

4. That the amount of Rs.1,50,000/- referred to in paragraph No.2 above shall be paid to the plaintiffs by the aforesaid three persons and/or the defendant company at the time of execution and submission of this application before the Court. On the happening of such event the defendant Company shall surrender to the plaintiffs all rights, titles and interstates in respect of Apartment No.303 ceasing to have any right, title or interest in the said apartment No.303 along with one servant quarter and terrace in front thereof.

5. That all taxes, cases, charges levies, if any, payable in respect of the said five Apartments No.301, 302, 304, 305 and 306 upto the date of delivery of vacant possession thereof to the above named three persons shall be paid to the competent authorities by the plaintiffs and thereafter the same shall be paid by the said three persons. This package deal is free from all liabilities such as electric, gas, water charges etc. and no payment, other than mentioned in para 2 above, the plaintiffs will not be entitled to demand or recover from the said three persons and/or the defendants any extra payment. That the parties to bear their own costs."

8. Perusal of decree reproduced above, shows the manner in which the plaintiff Khalid Majeed was declared as *the owner* of flats No.304 and 305 and possession thereto. Defendants No.1 and 2 agitated on the plea that the same is purchased by them but they failed to substantiate their legal character. It is also suffice to say that application under Order 12(2) CPC was preferred by defendants No 1, 2 but same also declined by order dated 02.02.2010 hence it requires no debate to say that title and status of the said decree *even* has no cloud (s) which the defendant Nos.1 and 2 brought by making application U/s 12(2) of the Code.

9. The *unchallenged* claim of the plaintiff coupled with document(s) and material, brought on record by the plaintiff through evidence, are sufficient to believe that plaintiff has proved his case which *otherwise* is supported / backed by a *lawful* decree, holding field *till date* ; the status whereof is also a *sufficient* declaration / title.



10. Since, it is well settled principle of law that a claim of damages *even* in matter of malicious prosecution the burden remains on the plaintiff to prove the same. In the instant matter the plaintiff neither quantified the claimed damages nor brought any other evidence so as to substantiate his entitlement for damages under *malicious prosecution* hence relief to such extent is declined in view of the *dicta* laid down by the honourable Supreme Court in the case of Malik Gul Muhammad Awan (2013 SCMR 507), that:-

*“4. It is now a well established principle that the person claiming special damages has to prove each item of loss with reference to the evidence brought on record and for general damages as claimed by the petitioner relating to mental torture, agony, defamation and financial loss, those .....”.*

12. In view of the above discussion, there is no option except to believe the affidavit filed by the plaintiff in *exparte* proof. Accordingly instant suit is decreed as prayed, *except* relief for damages.

Sami.  
Imran/PA.

**J U D G E**