

IN THE HIGH COURT OF SINDH AT KARACHI

C.P.No.D-760 to 767 of 2011 (8 petitions)

Zaheer Ahmed (and 7 others in connected petitions)

Versus

Trustees of Port of Karachi & another

BEFORE:

Mr. Justice Mushir Alam, CJ

Mr. Justice Mohammad Shafi Siddiqui

Date of Hearing: 28.11.2012

Through Mr. Muhammad Imran Advocate

No.1: Through M/s Muhammad Sarfraz Sulehri, Khaleeq Ahmed and Muhammad Rashid

J U D G M E N T

Muhammad Shafi Siddiqui, J.- These eight constitutional petitions have been filed by the alleged licensees/occupants of the premises managed and controlled by the respondent. Since the common question of law and almost similar facts are involved, therefore, we prefer to dispose of all these petitions by a common order/judgment and findings.

2. The brief facts culminated in filing these petitions are that the petitioners are licensees/occupants of the premises such as:

- (i) In C.P. No. 760/2011 the petitioner claims to be the occupant of Shop No.18 adjacent to KPT Stadium, Agha Khan Road, Karachi,
- (ii) In C.P. No. 761/2011 the petitioner claims to be the occupant of Shop No.17 adjacent to KPT Stadium, Agha Khan Road, Karachi,
- (iii) In C.P. No. 762/2011 the petitioner claims to be the occupant of Shop No.23 adjacent to KPT Stadium, Agha Khan Road, Karachi,
- (iv) In C.P. No. 763/2011 the petitioner claims to be the occupant of Shop No.15-A adjacent to KPT Stadium, Agha Khan Road, Karachi,
- (v) In C.P. No. 764/2011 the petitioner claims to be the occupant of Shop No.21 adjacent to KPT Stadium, Agha Khan Road, Karachi,
- (vi) In C.P. No. 765/2011 the petitioner claims to be the occupant of Shop No.16, adjacent to KPT Stadium, Agha Khan Road, Karachi,

(vii) In C.P. No. 766/2011 the petitioner claims to be the occupant of Shop No.22 adjacent to KPT Stadium, Agha Khan Road, Karachi,

(viii) In C.P. No. 767/2011 the petitioner claims to be the occupant of Shop No.24 adjacent to KPT Stadium, Agha Khan Road, Karachi.

3. The petitioners were issued show cause notices for violation of the terms and conditions of the licence agreement and undertaking which include the default, unauthorized subletting of premises, change of use/purpose for which it was let out and various other grounds were pleaded. Since the show cause notice was not responded to nor the premises was restored to its original purpose, a final show cause notice was issued by KPT to vacate the premises in question and to pay up to date dues, on account of continuous violations and breaches. Instead of handing over possession in pursuance of the final show cause notice, the occupants filed suits before this Court which were disposed of on 18.5.2009 with directions that the KPT will not dispossess the plaintiffs from the premises/shops but will initiate legal proceedings against the plaintiff under the Port Authority Lands and Buildings (Recovery of Possession) Ordinance, 1962 (hereinafter referred to as Ordinance IX of 1962) and for obtaining possession of the shops/premises from the occupants/petitioners or anyone else claiming through or under them. Pursuant to this the

complainant/respondent issued notices for settlement but the petitioners failed to respond and kept silent. Subsequently the respondent approached the Civil Judge/Judicial Magistrate by filing complaint under section 3(3) of the Port Authority Lands and Buildings (Recovery of Possession) Ordinance, 1962 with the prayer of ejectment of occupants/petitioners. The said Magistrate is considered as Authorized Officer under the Ordinance ibid and is empowered to deal with the subject issue. The said complaints were contested by the petitioners who were either licensee or claimed occupation under section 4(1)(a) of the Port Authority Lands and Buildings (Recovery of Possession) Ordinance, 1962 and claimed entitlement to continue on the same terms and conditions.

4. In case of C.P. No. 760/2011 the respondent claimed that the petitioner violated the terms and conditions inasmuch instead of shop as he was found running business of transport namely M/s. Sindh Goods Transport Company and M/s A-1 Goods Transport Company besides committing default.

5. In case of C.P. No. 761/2011 the Petitioner instead of shop found running business of transport namely M/s .Sitara Sindh Goods Transport Company and M/s. Pak Memon Goods Transport Company besides committing default.

6. In case of C.P. No. 762/2011 the Petitioner instead of was found running business of transport namely M/s. Azad Hakim Goddos Transport Company besides committing default.

7. In case of C.P. No. 763/2011 the Petitioner instead of was found running business of transport namely M/s Karachi Sukkur Goods Transport Company and M/s. Karachi Goods Transport Company besides committing default.

8. In case of C.P. No. 764/2011 the Petitioner instead of was found running business of transport and he took plea that all twenty five shops are running same business of transport.

9. In case of C.P. No. 765/2011 the Petitioner instead of was found running business of transport namely M/s .Quetta Chiltan Goods Transport Company and M/s. Karachi Thal Goods Transport Company besides committing default.

10. In case of C.P. No. 761/2011 the Petitioner instead of was found running business of transport namely M/s .Sitara Sindh Goods Transport Company and M/s. Pak Memon Goods Transport Company besides committing default

11. It was observed in the order of Judicial Magistrate-III (Authorized Officer under the Ordinance *ibid*) that the petitioners have defaulted in payment of KPT dues for which notices were issued and no receipts of the payment of the amount has been shown by the petitioners. It is further observed that no receipts of the payment of the amount regarding license fee have been shown by the petitioners. It is the case of the petitioners that all those who were found in independent possession of the premises were entitled for regularization of possession on the ground of possessory rights of occupancy under the powers vested under section 4(1)(a) of the Port Authority Lands and Buildings (Recovery of Possession) Ordinance, 1962. However ejection was issued consequently as the Civil Judge and Judicial Magistrate held that neither the dues were proved to have been paid nor they were found carrying the business for which they were provided.

12. Aggrieved with the order of the Judicial Magistrate, the petitioners filed Cr. Revision/Appeal before the learned District Judge, West, Karachi. The Revision also met the same fate after all of them being converted into appeal as claimed to have

been provided under Ordinance, 1962 *ibid*. It was held by the appellate Court that the appellants/petitioners violated the terms and conditions and as such were liable for ejection/dispossession.

13. We have heard the learned counsel for the parties and perused the record.

14. It appears that the petitioners or their predecessors occupied the shops/premises and have signed the tender forms for the respective premises. It is available in the said undertaking/form that the petitioners being fully conversant with the conditions of the tender and license offered monthly license fee for the purposes of “offices, PCO, photocopier machines, stationary, hotels, tea-shops etc”. It was specifically provided in the undertaking/terms of agreement that the warehouse, godowns are not allowed in the subject premises and any type of dangerous or hazardous goods are also not permitted to be stored in the said shops. With this undertaking/form the petitioners filed their reply before learned III-Judicial Magistrate Karachi West wherein they have not at all denied the execution of the tender forms and the contents that the petitioners were only licensee and were allowed to occupy subject premises for the purposes of offices, PCO, photocopier machines, stationary, hotels, tea-shops etc. and that the warehouse and godowns were not allowed. There is also no denial that all of them are carrying on transport business.

These replies/comments are available on record which also confirm that no receipts whatsoever regarding payment of license fee or rent, as alleged, was attached or claimed to have been attached along with this reply. Thus, it is a simple, open and shut case on account of the admission on the part of the petitioners as far as the running of transport business is concerned in pursuance whereof the petitioners are booking commercial cargos and are dumping goods at or around the shops in question and secondly failure on the part of the petitioners to prove the payment of the license fee or rent, as alleged. With this concurrent findings of the two courts below on the two points i.e. default in payment of license fee and misuse of the premises, no interference is required nor any discretion could be exercised under section 4(1)(a) of the Ordinance *ibid*.

15. In addition to the above findings on merits, it also appears from the record that the petitioners preferred a Criminal Revision before the District & Sessions Judge, Karachi (West) whereas in terms of Section 5 of the Ordinance *ibid* an appeal is a prescribed efficacious remedy for an order passed under subsection (1) of Section 4 of the Ordinance, 1962. It appears that the learned District & Sessions Judge very wisely converted the said revision applications into appeal but was found barred by time and no explanation whatsoever was provided either before the learned District & Sessions

Judge or before this Court and consequently for this reason the appeal was dismissed by the appellate Court below in addition to the findings on merits

16. No illegality, irregularity or jurisdictional errors are pointed out by the learned Counsel for the petitioner to enable us to interfere in the findings of the two Courts below. Nothing has been pin pointed effectively in the impugned judgment/orders which could compel us to disagree with the findings of the two Courts below. It appears that no material piece on record went unnoticed and every document has been scanned in its true perspective and findings could never be termed as perverse or arbitrary and as such both the orders are immuned from further scrutiny.

17. Since the petitioners have availed all efficacious remedy that have been provided under the law, therefore, no interference is required.

18. Above are the reasons for the short order announced on 28.11.2012 whereby the petitions were dismissed.

Dated:

Judge

Chief Justice

an appropriate remedy against the orders of the Civil Judge/ Judicial Magistrate, however, the petitioners preferred a Criminal Revision impugning the order of the Civil Judge/Judicial Magistrate which was rightly converted into an appeal. The period that has been assigned in filing an appeal, as prescribed by section 4 of the Ordinance, 1962, provides 15 days time and it was discovered on the conversion of the aforesaid Revision into an Appeal that the appeal was barred by five days and no explanation

was provided by the learned counsel either before appellate Court or before this Court. Hence, since the appeal was barred by time and no explanation is provided, therefore, no interference is required by this Court. The appeal was rightly dismissed.

Above are the reasons for the short order announced on 28.11.2012 whereby the petitions were dismissed.

As far as the procedure prescribed by Ordinance IX of 1962 is concerned, we observe that Section 3 provides method and mechanism of eviction of the lessees and unauthorized occupants from the land. On expiry or on breach of any covenant or in pursuance of a condition in the agreement imposing obligation on the lessee to give up possession in the event of such default or breach or building being required for the purpose of Port authorities. Section 4 of the Ordinance IX of 1962 provides further method upon receipt of complaint under section 3 by authorized officer who obliged to issue notice to the person against whom the complaint has been made calling upon

him to show-cause as to why he should not be evicted from the land/premises/building occupied by him. In terms of Section 4 of Ordinance IX of 1962 the authorized officer was empowered either to permit such person to continue in occupation of the land as may be specified, or direct such person to vacate and deliver to the Port Authorities vacant possession of the subject premises after removal of the structure within the specified period. In this case the final notice was issued by the authorized officer on _____ which is required to be challenged in terms of Section 5 of the ibid law which has not been done. Thus, it contemplates that the final notice of the authorized officer was conceded to and not responded as no appeal has been preferred by the petitioners against such notice. For the convenience we may reproduce Section 3, 4 and 5 of Ordinance IX of 1962 as under:-

“3. Eviction of out-going lessees and unauthorized occupants from land.- (1) *If, on the expiry, whether before or after the commencement of the Ordinance, of the period of any lease in respect of any land or building of which a Port Authority is the lessor, or on the determination of such lease on the ground of breach of any covenant or in pursuance of a condition in the lease imposing any obligation on the lessee to give up possession of the demised land or building in the event of such land or building being required for the purposes of a Port Authority, then, notwithstanding anything contained in any other law for the time being in force or in any contract, such Port Authority may, by notice in writing, require such lessee to vacate and deliver vacant possession of such land or building, and to remove structures, if any, erected or built thereon by him, within such time as may be specified in the notice.*

(2) *If the Port Authority is satisfied, after making such enquiry as it may think fit, that a person is in unauthorized occupant of any land or building, it may, by notice in writing, require such person to vacate such land or building, and deliver vacant possession thereof to it, and to remove structures, if any, erected or built thereon by him, within such time as may be specified in the notice.*

(3) *If any person to whom a notice is issued under subsection (1) or subsection (2)—*

(a) *Fails to comply with the notice, the Port Authority shall make a complaint in writing to that effect to the Authorized Officer; or*

(b) *Vacates the land or building, but does not remove the structures thereon, the Port Authority may take possession of such land or building and demolish such structures.*

4. *Proceedings before Authorized Officer.—(1) Upon receipt of complaint under section 3, the Authorized Officer shall forthwith issue notice to the person against whom the complaint has been made calling upon him to show cause why he should not be evicted from the land or building occupied by him, and after giving such person an opportunity of being heard, and if necessary, after making such further enquiry as he may think fit, the Authorized Officer, shall, by an order in writing, either—*

(a) *Permit such person to continue in occupation of the land or building, subject to such conditions as may be specified in the order; or*

(b) *Direct such person to vacate and deliver to the Port Authority vacant possession of the land or building, and to remove structures, if any, erected or built thereon by him, within the period specified in the order.*

(2) *If any person fails to comply with a direction under clause (b) of subsection (1), the Authorized Officer may, notwithstanding anything contained in any other law for the time being in force, but subject to any order of District Magistrate under section 5, enter upon the land or building to which the direction relates, and evict such person by such force as he may consider necessary, and demolish any or all of the said structures.*

(3) *No person shall be evicted under subsection (2) between sunset and sunrise.*

5. *Appeal.—(1) Any person aggrieved by an order under sub-section (1) of section 4 may, within fifteen days from the date of such order, appeal, in such manner and on payment of such fee as may be prescribed, to the District Magistrate, who may, pending the disposal of such appeal, make such orders as he thinks fit.*

(2) *The decision of the District Magistrate on an appeal under sub-section (1) shall be final and shall not be called in question in any Court or by any authority.”*

Thus, the defence of the petitioners came to an end when the final notice of ejection was resisted or objected in terms of filing appeal under section 5(1) of the Ordinance IX of 1962.

From the perusal of this procedure it reveals that passing of an order by a Civil Judge/Judicial Magistrate is only a formality and it was in fact the jurisdiction meant for the licensee/occupant to have objected to the decision of the authorized officer which was not responded to.

The provisions of appeal are not meant for the District and Sessions Judge. In fact it is prescribed for the occupant/licensee to have filed an appeal within 15 days of the date of the final notice of ejection. With this we observe that though the mechanically the procedure has not been followed but substantial justice has been done and in fact two forums below have provided the hearing to the petitioners/occupants which is not the mandate of Ordinance IX of 1962.