

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 879 of 1979
(New Suit No.51 of 2003)

Present:
Mr. Justice Nazar Akbar

Plaintiffs: Anjum Rehmat and another through
Mr. Khalid Latif, Advocate.

Defendants: Nemo.

Official Assignee: Through Mr. Mansoor-ul-Arfin, Advocate.

Date of hearing: 04.11.2013

For hearing of CMA No8818/2009 (u/s 144 CPC)

ORDER

NAZAR AKBAR, J. Through this order I intend to dispose of an application filed by the official assignee under Section 144 CPC (CMA No.8818 of 2009) with the following prayers:-

“It is, therefore, prayed that this Hon’ble Court may be pleased to direct the Nazir to take possession of the property from the Plaintiffs and hand over the same to the Official Assignee and also direct the plaintiffs to pay minimum of Rs.100,000/= per month for use and occupation, from the date they obtained possession through this Hon’ble Court till the delivery of possession, failing which, the Hon’ble Court may be pleased to permit the Official Assignee to take suitable legal action against the Plaintiffs for recovery of the entire amount.”

2. The main contention of learned Official Assignee is that the plaintiffs are occupying the premises in question pursuant to the judgment and decree dated 23.01.1989 which was set aside by the Hon’ble Supreme Court of Pakistan as far back on 2.2.1993. The background of the case is that the plaintiffs filed this suit on 17.10.1979 against the sole defendant (Rtd.) Squadron Leader Shaikh Ghulam Sadiq. The suit was decreed in favour of plaintiff by judgment dated 23.1.1989. Operative part of the judgment is as follows:

“In view of the conclusion and findings arrived at by me, this suit is decreed. The defendant is directed to hand over vacant possession of the property in suit and is further directed to

execute a sale deed in favour of the plaintiffs in terms of the contract, on the plaintiffs tendering Rs.10,50,000.00 and necessary expenses for execution and registration of sale deed within two months from today. If the defendant fails to execute the sale deed the plaintiff should deposit the requisite amount with the Nazir of this Court within three months from today and apply for the execution of the decree for execution of sale deed.”

3. The defendant/judgment debtor did prefer an appeal bearing HCA No.239/1989. However pending the appeal on 26.2.1989 the plaintiffs/decreed holders pursuant to the above judgment filed Execution Application bearing No.21/1989 and on failure of defendant, the Nazir of this Court on 27.4.1989 executed and registered Sale Deed of the suit property in favour of plaintiffs/decreed holders. Copy whereof is available at page No.243 of the court file. At the bottom of page 2 of the Sale Deed, it has been mentioned that the plaintiffs/decreed holders “*instituted Suit No.879 of 1979 Anjum Rehmat and another v. Sqn. Ldr. Ghulam Sadiq in the Hon’ble High Court of Sindh for Specific Performance of the aforesaid agreement of sale dated 29.7.1979*”.

4. Thus it is an admitted position that the plaintiffs have acquired the possession of the property through the Nazir of this Court on execution of a sale deed in their favour on 27.4.1989 pending HCA No.389 of 1989 which was later on dismissed on 12.12.1989. However, the Hon’ble Supreme Court of Pakistan by the judgment dated 02.02.1993 in Civil Appeal No.897-K of 1990 set aside the decree and remanded the suit in the following terms:-

“... Accordingly, it is fair and just that this appeal be allowed and the case remanded to the High Court on its original side to be consolidated with the pending suit as well as in other suit which may or might have been filed regarding the same property. In addition to others, Siraj alleged third purchaser, shall also be impleaded in both the suits. Earlier two purchasers undoubtedly shall also be arraigned as parties in each other suit. This appeal with the above order, accordingly is allowed. There shall be no order as to costs.”

5. The record shows that after the remand an application under Order I Rule 10(2) CPC bearing CMA No.11832 of 1993 (available at Page-119 of file) was filed to implead the persons mentioned in Supreme Court's order. This application was allowed on 16.10.1994 and on 06.11.1994, an amended plaint was filed and Sheikh Muhammad Rafiq Akhtar son of Sh. Ghulam Hussain, Riaz son of Abdul Karim and A. Rehman Dada Bhoy son of A. Jabbar Dada Bhoy were impleaded as defendants Nos.2 to 4. After three years of impleading the defendants and filing of amended plaint, the same counsel for the plaintiff filed another application this time under Order VI Rule 17 CPC being CMA No.9129/1997 (available at Page-171 of part-II of Court file), which was allowed by order dated 23.09.1998 in the following terms:

“Amendment in the plaint is sought on the ground that as directed by Hon'ble Supreme Court defendant Nos.3 and 4 who were alleged to have acquired subsequent interest in the disputed property were arrayed as party to this Suit. The above defendants in their written statement have divulged that they acquired the same property through registered instruments and the plaintiff seeks amend in the plaint to incorporate the relief of cancellation of Sale Deed. The application is granted. Let written statement be filed within two (2) weeks.”

6. On 17.10.1998 the plaintiff filed the amended plaint by adding Para 16-A to the original plaint, the said paragraph is reproduced as follows:

“16-A The alleged Sale Deed dated 27.01.1987 of the suit property in favour of the Defendant No.3 and the alleged Sale Deed dated 18.07.1987 in favour of the Defendant No.4 are not legal and valid and are liable to be cancelled.”

7. The amended plaint reproduced herein above clearly indicates that the property in question stood in the name of defendant No.4 prior to 27.04.1989 when the property was taken over by the Nazir of this Court pursuant to the orders in Execution No.21/1999 and a Sale Deed was executed in favour of the plaintiffs. The record also

shows that the plaintiffs have deposited a sum of Rs.10,50,000/- in Court at the time of taking over possession and execution of Sale Deed in their favour.

8. The recital of the facts narrated above was result of scrutiny of the Court record pursuant to the application for restitution of the property acquired by the plaintiff in execution of the decree earlier passed in this suit, which was ultimately set aside by the Hon'ble Supreme Court on 02.02.1993 and the case was remanded. Therefore, a close scrutiny of section 144 of the Code of Civil Procedure is required, which is reproduced herein below:

“144. Application for restitution. – (1) Where and in so far as a decree is varied or reversed the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub section (1).

9. The close analysis of section 144 CPC take us to the inescapable position that the parties should be placed in a position which they would have been occupied but for such decree, meaning thereby that the property/benefits of decree must be restored to the position as it was on the date of passing of the decree, which has been subsequently set aside/reversed. The subsection (1) of this section has two parts, in the first part, the duty of Court is mandatory to place the parties in the position which they would have occupied prior to execution of decree and in the second part; the duty of the Court is directory to pass order consequential on such variation or reversal of decree. Such order as logical consequence of restitution may include refund of cost, payment of interest even

damages, and compensation and mesne profits by the beneficiary of the decree for the period he enjoyed the property or any other benefit but for the decree.

10. The facts narrated above leave no room for the Court except to ensure that the property should be restored to the Nazir of this Court through whom, the plaintiff had acquired possession of suit property pursuant to the order in Execution No.21/1999. There is no dispute that the decree stands reversed by the Hon'ble Supreme Court vide order dated 02.02.1993 and this is the Court of first instance which has passed the decree. Therefore, in the first instance the plaintiffs should be placed in the position which they had occupied prior to the decree in this Suit. The counsel for the plaintiff has also not opposed to the proposition that the property should be handed over to the Nazir of this Court from whom the possession was obtained by the plaintiffs. He has opposed that part of the prayer whereby the Official Assignee has sought the possession of the suit property under section 144 CPC.

11. The question that whether the liquidator be given the possession of suit property on restitution shall be answered after examining the circumstances in which the liquidator came into the picture. The liquidation proceedings had started in 1991 and the Liquidator was appointed on 13.05.1991 much after execution of the decree in favour of the plaintiff and, therefore, the relief sought by the Official Assignee under section 144 CPC appears to be outside the purview of section 144 CPC. The official assignee was not in the picture when the execution was ordered and the decree was set aside. It is pertinent to mention here that the Hon'ble Supreme Court when reversed the decree has not dismissed the suit. The Hon'ble Supreme Court has remanded the case to be decided afresh after impleading the parties who have somehow or the other acquired some interest in

the suit property. Therefore, on remand by setting aside of judgment and decree, the suit is revived along with pending applications, if not all, at least the application under Order XXXIX Rule 1&2 CPC and if there were any interim order pending the suit, the said orders are also revived. The record shows that this Court on 19.07.1980, on 19.07.1980 and even thereafter has passed interim orders such as:-

“he (defendant) will not dispose of the property till next date” and also that

“By consent earlier order of status-quo shall continue”.

12. The very fact that the defendant No.4 himself has never challenged the handing over of possession of property to the plaintiff is sufficient to appreciate the contention of learned counsel for the plaintiffs that no one was in physical possession of the suit property at the relevant time. The Nazir of this court on 27-04-1989 handed over possession of the suit property to the plaintiff in term of decree which was reversed in 1993. Therefore to claim possession on restitution in term of section 144 CPC the Liquidator first has to prove that he was dispossessed from the property in execution of decree.

13. In the above circumstances, in my humble view, the possession of the property in question cannot be handed over to the Official Assignee pending the suit as it would violate the status quo order which had already been passed on Plaintiff's CMA No. 3894/1979, whereby the parties were directed to maintain status-quo, and at that point of time the defendant No.4 was not even party to the suit nor his claim of bona fide owner was before the court. Therefore, it is ordered that the plaintiff should handover peaceful possession of suit property to the Nazir of this Court on or before 01.02.2014.

14. Now, having concluded that the plaintiffs have to return the possession of the suit premises back to the Nazir, I have to examine

the consequences of this restitution of property. The second part of the provisions of subsection (1) of Section 144 CPC requires the Court to pass orders for refund of cost, payment of interest, even damages and compensation and mesne profit consequential on such reversal of decree. The plaintiffs are in possession of the suit property for more than 24 years and 6 months under a decree which was reversed on 02.02.1993 by the orders of the Hon'able Supreme Court of Pakistan. Therefore, at least from the date of reversal of the decree till date the possession of the plaintiff was wrongful possession of suit property. The benefits enjoyed by the plaintiffs for the period of their wrongful possession are liable to be refunded in terms of section 144 CPC. The determination of such benefits is not possible without making an inquiry to this effect. The facts and circumstances leading to the conclusion of restitution of property and refund of the benefits enjoyed by the plaintiffs from the date of reversal of decree on 02.02.1993 to 01.02.2014 has made this order analogous to the decree for possession and mesne profit. The mandatory bar of institution of suit in subsection (2) of section 144 CPC for obtaining restitution or other relief under subsection (1) of section 144 PPC has rendered this order equivalent to a decree for possession and mesne profits. Therefore, while taking the advantage of the use of words "mesne profit" appearing in section 144 CPC, the Nazir, prior to the date specified in this order for taking over possession of the property from the plaintiff, should hold an inquiry in terms of Order XX Rule 12(1)(b) CPC to ascertain the mesne profit with effect from 03.02.1993 to 01.02.2014, the date on or before which the plaintiff should hand over peaceful possession of the property in question to the Nazir of this Court. In case of failure of the plaintiffs to reconstitute the property to the Nazir on or before 01.02.2014, the Nazir is authorized to seek the assistance of area police immediately after

01.02.2013 for execution of this order. The Nazir should also file a reference on concluding the inquiry regarding mesne profit payable by the plaintiffs within one month from the date of this order. His reference should be supported with all the documents and statements, if any, taken into consideration by the Nazir in the process of determining the mesne profit. The Official Assignee should also be on notice of the inquiry for determination of mesne profit. The Nazir of this Court has received a sum of Rs.10,50,000/- from the plaintiffs on 27.04.1989, he should also file a separate report regarding the said funds whether the same were invested or handed over to the lawful claimant(s), if any.

In the above terms, CMA No.8818/2009 is disposed of.

J U D G E

Karachi:

Dated: .12.2013