

JUDGMENT SHEET  
**IN THE HIGH COURT OF SINDH,**  
CIRCUIT COURT, HYDERABAD.  
R.A.No.104 of 1998

<b>DATE</b>	<b>JUDGMENT WITH SIGNATURE OF JUDGE</b>
Applicants	Mushtauqe Ali and others through Mr. Shoukat Ali Jaffri Advocate.
Respondents	None present for the respondents
Date of hearing:	28.08.2014.
Date of Judgment	.09.2014.

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**NAZAR AKBAR J:-** This Civil Revision Application is directed against the Judgment and Decree dated 15.04.1998 and 24.04.1998 passed by learned VIth Additional District Judge Hyderabad, whereby Civil Appeal No.33 of 1997 filed by the applicants was dismissed and order of rejection of the plaint U/O VII Rule 11 CPC in F.C. Suit No.284/1992 passed by learned IInd Senior Civil Judge, Hyderabad was maintained.

2. Brief facts leading to this Revision Application are that the applicants filed F.C. Suit No.284/1992 for Declaration and permanent injunction against the respondents claiming themselves to be owners and occupants of houses bearing No. C.S.No.2566/G to 2572/G Ward G, Phuleli Par, Hyderabad, situated at Islam Nagar Phuleli Bazar Hyderabad. The houses of the applicants/ plaintiffs are surrounded by compound wall and doors of their houses open towards the passage bearing C.S.No.2573 measuring 361 Sq. Yds which is shown in City Survey Record as Trust Property and the same was used as street by the applicants. The houses of defendants No. 3 and 4 bearing No. C.S.No.G/2702/9-4 and G/2702/11 are on the same passage in Islam Nagar Phuleli Bazar, Hyderabad. This passage is

shown as private street also in the record of Settlement Department as well as Evacuee Trust Board. The case of the applicants was that the father of respondents No.3 and 4 died and their houses were transferred to the legal heirs, who constructed new building without obtaining prior permission of the authority and opened door and windows towards the private passage bearing plot No. C.S.No.G/2573 and demolished the existing wall. Subsequently, the Director Building Control Hyderabad malafidely approved a building plan for construction on the plots of respondents/ defendants No.3 and 4. According to the applicants, earlier there was no entrance to the respondents' houses from the private street and it was exclusively used by the applicants, therefore, the defendants No.3 and 4 had no right to open new door and windows in front of the house of the applicants. The applicants further pleaded that originally the respondents were using the door of their houses towards the garden of Islam Nagar and back side of their houses and not in front of the house of the applicants and, therefore, on their complaint, the Assistant Director, Building Control Department HDA on **26.03.1990** restrained the respondent No.4 from opening the doors, windows and ventilators towards the private C.S.No.G/2573 meant for C.S.No.G/2566 to 2572 but in spite of such directions, respondents are trying to open windows and constructed gallery towards private passage of the applicants, which infringes the right of easement and privacy of the applicants/plaintiffs. In the meanwhile, Building Control Authority directed the Respondents / defendants to get the construction plan approved and issued notice dated 03.05.1990 under Building Control Ordinance, 1975. The respondent No.2 without jurisdiction allowed the respondents No.3 and 4 to open windows and ventilators towards portion of C.S.No.G/2573 and the respondent No.3 also demolished some portion of parda wall. The applicants/plaintiffs filed an appeal under section 16 of the Sindh Building Control Authority, 1979 before the respondent No.1 which was also dismissed by order dated

5.7.1992, therefore, the applicants filed suit bearing No. 284 of 1992 with the following prayers:-

- a) To declare that C.S.No.G/2573 is a private passage meant for C.S.Nos.G/2566 to 2572 Ward G, Hyderabad and is being used as such by the occupants of these C.S.Nos. and further declare that the order dated 5.7.1992 of defendant No.1, being against record, is illegal and liable to be set-aside.
- b) To set aside the order dated 5.7.1992 passed by defendant No.1.
- c) To restrain the defendant No.3 and 4 through injunction not to demolish boundary wall and also not remove the malba material from the site;

3. The respondents contested the suit and filed their written statement wherein they denied the assertions of the applicants/ plaintiffs made in the plaint. The respondents also filed an application U/O VII Rule 11 CPC before the learned trial court, which was contested by the applicants/ plaintiffs. However, the learned trial court after hearing learned counsel for the parties allowed the application U/O VII Rule 11 CPC and rejected the plaint on the ground that the relief sought by the plaintiffs is barred under section 42 of Specific Relief Act, 1877, Provisions of Sindh Building Control Ordinance, 1979/82, Hyderabad Development Authority Act, 1976 and under Order VII Rule 19, 21 and 26 CPC declaring that the property bearing C.S. No.G/2573 is not a private passage but belongs to Bhai Shamdas Trustee and open for all public. Simultaneously application U/O VI Rule 17 CPC filed by the applicants was also rejected.

4. The applicants assailed the rejection of plaint before learned appellate Court in Civil Appeal No.35/1997 which was contested by the respondents and after hearing the counsel for the parties, learned VIth Additional District judge,

Hyderabad dismissed the appeal by judgment dated 13.4.1998 and maintained the order of the learned trial court. This revision is directed against the concurrent findings of courts below.

5. I have heard learned counsel for the applicant and perused the record.

6. Learned counsel for the applicants has repeatedly contended that City Survey No.G/2573 is the private passage and since the same is being used by the residence of City Survey No.G/2566 to G/2572 Ward G, Phuleli Par, Hyderabad, it should be declare a private passage meant for applicants and also the order of Director General, Building Control, HDA granting permission to respondents No.3 and 4 to open doors and windows in their houses bearing C.S. No.G/2702/9-4 and G/2702/11, Islam Nagar Phuleli Bazar, Hyderabad Sindh be declared as illegal, void abinitio against the record.

7. Perusal of impugned orders of Courts below suggest that the declaration sought by the plaintiffs were not in respect of the property belong to them. It is pertinent to mention here that Suit No.284 of 1992 was filed by as many as (8) plaintiffs claiming exclusive right of passage on C.S.No.G/2573 measuring 361 sq. yards to the exclusion of respondents No.3 and 4. The private respondents also own two different adjoining houses to the same City Survey number. However, on rejection of the plaint, out of eight plaintiffs, five of them have not preferred any appeal against the order of rejection of their plaint and only plaintiffs No.1,7 and 8 have preferred Ist. Appeal under section 96 of Civil Procedure Code,1908 which was also dismissed by the impugned judgment dated 13.4.1998. The learned counsel for the applicants has not been able to show from the record / plaint that how they claimed C.S. No.G/2573 is the private passage and meant for them alone despite the fact that city survey record clearly shows that it is the property of Evacuee Trust Board. The appellate Court has referred to annexure-J to the written

statement filed by the official respondents No.1 and 2 in the trial Court which shows that C.S. No.G/2573 is the evacuee trust property and in terms of section 3 of Evacuee Trust Property (Management and Disposal) Act, 1975 it is the property of the Board, therefore, the claim of the plaintiffs that it is private property exclusive for the use of applicants is not borne from the official record. The applicants claim that they exclusively used the same, but without any express and written permission of the Evacue Trust Board, therefore, the claim of applicant cannot be entertained by the Civil Courts, as neither they have a right in the said city survey number nor their right is being denied by anyone to give rise to a cause of action to them to seek declaration in terms of section 42 of Specific Relief Act, 1877. The plaintiffs own claim in the plaint is contrary to the requirement of section 42 of Specific Relief Act, 1877 to bring a suit for declaration and injunction. Admittedly, the plaintiffs have not shown from any title document in respect of C.S.No.G/2573 that they have any legal right as to the said city survey number and their legal right/entitlement has been infringed by the official respondents or the private Respondents. The learned counsel for applicants has also failed to show from the record that how the order of the respondent No.1 permitting addition and alteration in the property of respondents No.3 and 4 i.e. on plot No.C.S. No.G/2702/9-4 and G/2702/11 can be treated as denial of the use of the city survey No.G/2573 to the plaintiffs and further how the provisions of section 42 of Specific Relief Act, 1877 can be invoked for declaration that an order in respect of the property which does not belong to the plaintiffs is illegal or void abinitio. I repeatedly asked if the order in Appeal No. 4 of 1991 passed by respondent No.1 is against the Building Control Ordinance, 1979 or against the Hyderabad Development Authority Act, the learned counsel may please refer to the said Act or Building Control Rules, but unfortunately the learned counsel has

not referred to any provisions of law to contest the legality, proprietary and correctness of the order.

8. In view of above legal position, the suit was obviously not maintainable, therefore, this revision application fails and I do not find any justification to interfere with the impugned orders of Courts below.

JUDGE

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