

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO.1575/2010

Plaintiff : Muhammad Ashfaq Arain,
Through Mr. Muhammad Qutubuzzaman,
advocate.

Defendant : Muhammad Ishaque Arain,

Date of hearing : 17.10.2014.

J U D G M E N T

NAZAR AKBAR, J. Plaintiff has filed this suit for declaration, possession and damages against his brother. Plaintiff case is that he is owner of house Plot No.1-D/50-1, Landhi Township, Karachi measuring 80 sq.yds by virtue of a registered lease in his favour and he raised construction on the plot from the loan he obtained from Housing Building Finance Corporation (HBFC) It is averred in the plaint that the defendant is residing in half portion of the house and is running business of cable network from roof of the said house since **6.8.1996** and earned enormous amount as reflected in his bank account No.10-100-6416-8, with Allied Bank Landhi Branch Karachi. The Defendant according to the Plaintiff has illegally occupied half portion of the plaintiff's house and despite several request to remove cable network from the roof and also handover possession of half of the house to plaintiff. It is averred in the plaint that the Defendant has not only failed to do the needful but he has even filed a bogus **civil Suit NO.814/2010** before Court of Senior Civil Judge East Karachi claiming that the suit property is inherited

property. The Plaintiff on **25.5.1985** sent first legal notice to the defendant and last notice on **01.10.2010** after 25 years on receiving summons/notice of Civil Suit No.814/2010 filed by the Defendant against the Plaintiff. In this background plaintiff has filed the instant suit claiming that he is mentally disturbed due to cable network of defendant as well as defendant's failure to do any needful. The Plaintiff has sought the following relief(s).

- a) Declaring that the Plaintiff is title owner of the suit Plot No.1-D/50-1, Landhi Township, Karachi. This lease deed was registered No.1205, page No.177 to 178, Volume No.67, Book No.1st Additional Karachi, dated 09.7.1984 and he constructed the said plot from his own income.
- b) Restraining the Defendant and his servants, agents, subordinates, respective and person(s) acting on his behalf not to create any hindrance or disturbance in the life of Plaintiff.
- c) To direct the Defendant to handover the possession of half portion to the Plaintiff of the plot No.1-D/50-1, Landhi Township, Karachi. This lease deed was registered before sub-registrar T-Division VIII, Karachi, registration No.1205, Page N.177 to 178, Volume No.67, Book No.1st Additional Karachi, dated 09.7.1984.
- d) Be order to pay Rs.1,50,000,000/- [rupees fifteen millions only] as compensation for damages, losses, mental torture and disgrace caused by the Defendant. Further be directed to pay compensation Rs.10,000/- per day from the 1st June 2007 to till disposal of the suit.
- e) Grant permanent injunction against the Defendant not to create any third party interest against the above mention / subject property.
- f) Any other relief which under the circumstances of the case this Hon'ble court may deem fit and property.
- g) Cost of the suit.

2. On **12.03.2012** the defendant was ordered to be proceeded exparte and thereafter plaintiff filed exparte proof and his examination in chief was recorded.

3. I have heard counsel for plaintiff and thoroughly perused the record as this case has proceeded exparte against the Defendant whose address and the address of the Plaintiff is one and the same. There is every likelihood that the Defendant has been kept out of the proceeding by manipulation in the service of summons on the Defendant. It is interesting to note that when the defendant filed suit before the Court of Sr. Civil Judge showing same address of the Plaintiff, he was served. However when the plaintiff filed the instant suit showing the same address of defendant, the notice is not served on the Defendant and he has been declared exparte. The smartness of Plaintiff to intercept post / letter addressed to the Defendant since he resides in the same house can be appreciated from annexure 'F' to the plaint. It is a private and personal letter addressed to the Defendant by his banker regarding details of his account, it was intercepted or deliberately received by Plaintiff by taking advantage of the fact that he also resides in the same house.

4. The plaintiff has filed this suit with ulterior motive to keep the defendant out of Court and obtain exparte judgment. To achieve his ulterior motive the Plaintiff and his counsel did not mind to misguide or deliberately persuade the Additional Registrar (O.S.) High Court in getting service held good on the Defendant without following the requirement of service provided in **Rules 128 to 147 of Sindh Chief Court Rules** and **Rule 147** is to the effect that the power of the Additional Registrar (O.S) are the same which a Court of law possesses under **Order V Rules 19, 21 and 21-A of Civil Procedure Code, 1908**. There are only five diaries of Additional Registrar which are reproduced below:-

13.10.2010

For return of process on 13.1.2011.

A/R

13.1.2011

Summons issued to the Defendant returned unserved as he was not present.

Repeat through bailiff & TCS for 17.3.2011.

A/R

17.3.2011

Summons **not issued** to Defendant as cost not paid since 13.1.2011.

Plaint struck off U/R 128 SCCR (OS).

A/R

03.6.2011

Application U/R 129 SCCR (OS) has been allowed & summons issued to Defendant returned unserved as he was not present.

Repeat through bailiff & TCS for 14.10.2011.

A/R

14.10.2011

Summons issued to Defendant returned unserved as he was not present.

Repeat for 25.11.2011

A/R

25.11.2011

Summons issued to the Defendant through publication in daily 'Jang' Urdu, dated **30.10.2011** as well as other modes. Service is held good.

Fix in Court for exparte order on 12.12.2011.

Adjourned to 12.12.2012.

A/R

5. The analysis of Registrar diaries would reveal that the Plaintiff filed suit on **13.10.2010** and did not got the summons issued for **17.3.2011** when his plaint was struck off under Rule **128 of SCCR** (O.S). However, diaries dated **3.6.2011 & 14.10.2011** indicates that an application under **Rule 129 of SCCR** was allowed but summons

were returned unserved as and “defendant was not present”, and it was ordered to repeat notice for **25.11.2011**. However, Additional Registrar (O.S) despite his own diary repeatedly held that “Summons issued to defendant returned unserved as he was not present” but suddenly on **20.10.2011** he allowed an the application for substituted service through publication and observed that defendant has been served but he did not appear. There is no date of service on the defendant in the office note nor in the order of Additional Registrar on the application for service through publication. Even otherwise if the defendant had already been served personally through bailiff then why was it not mentioned in any of the diaries of Additional Registrar (O.S) right from **13.01.2011** to **14.10.2011**. The Plaintiff did not make any effort to get substituted service by way of pasting and through post. At least Additional Registrar’s diaries do not mention that “Acknowledgment Due” card or TCS report of delivery of summon was filed by the plaintiff. Therefore, the order of service held good through publication was definitely obtained by the plaintiff on misrepresentation against the law for service and in this context the conduct of the counsel for plaintiff in obtaining orders of service held good by the Additional Registrar (O.S) was one of the major factor and not free from employing some foul play. I am sure it was deliberate effort of plaintiff to misguide the Court in getting summons for publication. The Plaintiff counsel has not requested the Court to get the summons/notices of this case served on the defendant through the Court of Sr. Civil Judge seized of suit No.814/2010. Nor he has requested the Court for transfer of suit

No.814/2010 from lower Court in respect of the same property to this Court for avoiding conflicting orders.

6. The purpose of filing of this suit is reflected in para-7 of the plaint wherein the Plaintiff himself admitted that the Defendant has already filed **Suit No.814/2010** against the Plaintiff and other legal heirs claiming that the suit property is inherited property and the Plaintiff himself has annexed notice of Suit No.814/2010 pending before IInd Senior Civil Judge (East) Karachi. Notice annexed as annexure 'F' to the plaint shows that the Plaintiff was supposed to appear before the Court of Senior Civil Judge in that suit on **02.09.2010** and instead of appearing in that suit or may be after appearing in that suit on **10.10.2010** he has filed the present suit with a view to obtain a conflicting judgment from this Court in respect of the same property between the same parties or to influence the Court of Sr. Civil Judge East Karachi that he has filed a suit in High Court. To achieve such ulterior motive, the Plaintiff has deliberately over-valued the suit property and included a totally frivolous claim of damages which even he did not try to prove even at exparte trial. He has sought declaration of ownership in respect of suit property bearing Plot No.1-D/50-1, Landhi Township, Karachi, measuring 80 sq.yds and by no stretch of imagination that 80 sq.yds house in Landhi Karachi can be valued at Rs.50,00,000/- and even if it is so, the suit has been filed for recovery of just half portion of suit property against his own real brother meaning thereby that this is a suit for recovery of possession of only **40** sq.yds portion of suit property and therefore, the value of the suit property for the relief of possession, could be hardly **Rs.25,00,000/-** as per assessment of

plaintiff himself. Therefore, prayer clause A, B, C & E are outside the pecuniary jurisdiction of this Court. However, the Plaintiff has added prayer clause-D claiming Rs.1,50,00,000/- as compensation of damages, losses, mental torture caused by the Defendant as well as compensation @ **Rs.10,000/- per day** from **01.6.2007** for hardly 40 sq.yds portion till disposal of the suit only to bring the suit within the jurisdiction of High Court. Be that as it may, the plaintiff has not been able to establish his claim by cogent and convincing evidence.

7. On merit, the plaintiff in his evidence of exparte proof has categorically stated that on **28th May 1985** he requested the Defendant for possession of half portion of house within three months. In the same affidavit he has stated that he applied for House Building Finance through Ex-PW-1/8 on **4.8.1985** that is to say three months after the request to his brother / Defendant to vacate the house which was not even in existence then. It shows that story of house building loan is doubtful as half portion of the suit property was already in possession of the Defendant and the other half was in possession of the plaintiff in **May 1985**. The grant of loan by HBFC on mortgage of plot is not proof of construction raised by the plaintiff by utilizing the loan amount. The suit property was fully constructed even before filing of an application for house building loan. The plaintiff has not filed any other proof of raising construction by him nor he has disclosed that how and when his brother unlawfully occupied half portion of the said house. Annexure "F" to plaint shows that the plaintiff beside the defendant has 6 more siblings. But he has not called anyone of them in support of his claim of ownership and raising construction on the plot from his own income. The

plaintiff has not even disclosed his source of income. The proof of ownership of plot is not enough to prove ownership of the building standing thereon as the other occupant is none other than his own brother who was in possession of fully constructed house even prior to filing an application for loan by the plaintiff. The defendant has never vacated the house, therefore House Building loan, if any, was utilized by the plaintiff for some other purpose or some other house but not for the house in question. Therefore, in absence of any evidence of raising construction on the suit plot by the plaintiff, the relief of declaration that plaintiff has constructed the house on the said plot from his own income, is not proved and consequently the plaintiff is not entitled to the relief of possession of half portion of suit property after the lapse of 25 years of legal notice dated **28.05.1994**. Not only that even prior to the instant suit the defendant has already filed his claim in the Court of Senior Civil Judge East, Karachi. It is pertinent to mention here that Plaintiff on **19.10.2012** has appeared in the witness box for recording of his deposition but he has not disclosed about fate of **Suit No.814/2010** in which he admits that he was one of the party and that the said suit is about ownership of the suit property. The quality of evidence to prove his entitlement to claim compensation, is that the plaintiff has not made a single statement in his evidence or even plaint explaining that how he suffered losses to the tune of Rs.1,50,00,000/- and what is the justification for claiming compensation of Rs.10,000/- per day from June 2007 till disposal of the suit for only half portion of suit property which comes to **40 sq.yds.** and situated in Landhi, District East, Karachi.

8. The inescapable conclusion of the above facts and discussion is that this suit is an attempt to abuse the process of this Court. It is totally frivolous and its frivolity can be summarized in the following observations:

- (1) The plaintiff took 25 years to approach the Court from **28.05.1985** when he requested for recovery of half portion of suit property.
- (2) The plaintiff remained silent when on **06.08.1998** the defendant started cable network on the rest of suit property.
- (3) The plaintiff has obtained exparte orders against the defendant in the present suit by manipulation. He filed an application for substituted service and managed to persuade the Additional Registrar (O.S) to allow service through publication on the ground that service of summons were effected on defendant though there was no record of service and it was contrary to the last diary dated **14.10.2011** of Additional Registrar (O.S) to the effect that summons returned unserved on the defendant.
- (4) The plaintiff withheld the best evidence available with him from his own real brother and sister other than the defendant to support his claim of raising construction from his own income.
- (5) This suit is an attempt to circumvent the consequence of **Suit No.814/2010** pending before the Court of Sr. Civil

Judge, East, against the plaintiff in respect of same property.

- (6) The Plaintiff appeared in witness box on **19.10.2012** but he suppressed the facts about the progress of suit No.814/2010 in which ownership of suit property is under dispute.
- (7) The issue of ownership is already adjudged before competent Court in a Suit prior in time and the plaintiff is contesting the said suit and yet he has attempted to obtain ex parte order on the same issue from this Court.
- (8) Knowingly well that the jurisdiction for recovery of possession of suit property is far less than the pecuniary jurisdiction of this Court and yet instead of filing a counter suit in the Court seized of **Suit No.814/2010** he brought his suit to High Court by adding a frivolous claim of damage which he did not even attempt to prove.

Consequently the Suit is dismissed with cost of Rs.50,000/=.

9. The Plaintiff has filed original documents in this case and he shall not be allowed to withdraw the original documents unless he deposits Rs.50,000/- with the Nazir of this Court within 20 days. Office is directed to handover original documents from evidence file to the Nazir of this Court alongwith copy of this order so that whenever the Plaintiff comes to withdraw documents, he should first comply with the order for payment of cost. Nazir should file his report of compliance before handing over original documents to the plaintiff.

10. The Additional Registrar (O.S) is directed to submit his written explanation to the Registrar High Court that how on **20.10.2011** he was persuaded to allow application for substituted service through publication on the ground “that defendant has already been served but he had not appeared” though his own diaries produced in para-4 above shows that until **14.10.2011**, the defendant was not served. The explanation to be furnished to the Registrar within 3 days.

J U D G E

IK/PA