

HIGH COURT OF SINDH AT KARACHI

C. P. No.D-1198 of 2010

Present:

**Mr. Justice Nadeem Akhtar,
Mr. Justice Muhammad Iqbal Kalhro.**

Date of hearing : 25.11.2014

Petitioner, Abid Ali, through Mr. Muhammad Sadiq Hidayatullah, Advocate.

Respondent No.1, M/s. Bazar-e-Faisal Builders & Developers, through Mr. Mahmood Ahmed Khan, Advocate.

None for respondents No.2 & 3.

JUDGMENT

MUHAMMAD IQBAL KALHORO, J: The petitioner by way of the instant constitutional petition has challenged two judgments, one dated 30.4.2004 passed by the 1st Senior Civil Judge/ Rent Controller Karachi Central in Suit No.781/2003 filed by the respondent No.1 and the other one dated 08.01.2010, passed by the learned IInd Additional Sessions Judge Karachi Central in Civil Revision No.47/2007 filed by the petitioner.

2. The facts to the point are that the plaintiff /respondent No.1 (hereinafter called as “respondent”) filed a suit No.781/2003 for restoration of possession under Section 9 of Specific Relief Act, 1877 against the defendant /petitioner (hereinafter referred as “the petitioner”) before the Court of IV-Senior Civil Judge, Karachi Central, contending therein to be the owner/builder of the project namely Bazar-e-Faisal apartments situated at BS-27, Federal B Area, Karimabad Chowrangi, Karachi. The petitioner purchased a flat No.A-306 on 3rd floor in the said apartment and was put in its possession on 7.2.2002 by the respondent. The adjacent flat No.A-305 was booked by Mr. Zafar Hussain who failed to pay the installments of the same, resultantly with his consent its booking was cancelled, which, thereafter, remained vacant and was locked by

the respondent. His employees along with the interested parties to purchase the said flat used to visit it. In the last week of February 2003, when the employees of respondent visited the flat No.A-305 along with a party, they found a different lock installed there, hence they asked the petitioner living in the adjacent flat about it, but he threatened them instead with dire consequences as he somewhere in March 2003 by breaking the intervening wall between his flat No.A-306 and flat No.A-305 had illegally occupied the same. The petitioner thereafter filed the suit No.329/2003 for permanent injunction before the learned IXth Civil Judge Karachi Central showing the flat No.A-305 to be the part of flat No.A-306. Similar construction was carried out at 2nd floor, where flat No.206, just below the petitioner's flat, was leased out to Mst. Balqees and flat No.A-205 was leased out to Mst. Farhat Naz. With such facts the following prayers were made:

- “a) Direct the defendant and any other person on his behalf to handover the vacant, peaceful possession of the Flat No.A-305, 3rd Floor, Bazar-e-Faisal Apartment, Karimabad Chowrangi F.B. Area Karachi to the plaintiff.*
- b) Cost of the suit.*
- c) Any other relief or reliefs which this Hon'ble Court may deem fit and proper under the circumstances of the case”.*

3. The petitioner filed his written statement raising preliminary objections therein that the suit was barred by limitation, was undervalued to avoid the payment of the court fee, was signed by the incompetent person, was barred by section 42 of the Specific Relief Act and the respondent had no cause of action. Fact of the suit were also controverted by the petitioner by pleading that he had originally booked flats No.101, 102, 204, 205 block-B, consisting two rooms apartments by paying Rs.8000/- for each, on different dates but the respondent failed to hand over possession of the said flats within the agreed period, hence the dispute in respect of the flats arose between them and was settled by the KDA authorities on 01.08.2001, whereby in lieu of four flats, flat No.306-A situated on 3rd Floor, Block-A, Bazar-e-Faisal Karimabad Chowrangi measuring about 800 Sq. feet was allotted in favour of the petitioner against the sale price of Rs.3,73,000/., excluding documentation charges. The payment

of Rs.7, 64,400/- already paid against the price of above stated four flats was adjusted and balances of Rs.8, 600/- was paid by the petitioner on 31.12.2001. After taking possession, he asked the respondent to get the lease registered in his favour and in the month of July 2002 the respondent took his signature on the special power of attorney for the purpose of execution of sub-lease deed, but kept some portion thereof blank with mala fide intention and ulterior motives, which was filled later on,. Despite his demand to have a copy of special power of attorney, the same was not given to him. The respondent being annoyed with the petitioner due to the above stated settlement got down to dispossess him from the lawful possession of the flat, and to achieve that he had sent his employees but their attempt was thwarted due to intervention of neighbors. He had already filed a suit for permanent injunction, which was pending and he was in lawful occupation of the said flat, the possession thereof was handed him over by a letter dated 07.02.2002.

4. The points, the parties were at variance, were given the shape of following issues by the learned trial Court:

- “1. *Whether the suit of the plaintiff is not maintainable?*
2. *Whether the plaintiff has no cause of action to file the present suit?*
3. *Whether the suit is under valued?*
4. *Whether the defendant has illegally occupied the suit property by break opening the lock of the same?*
5. *What should the decree be?”*

5. The parties led their evidence in support of their respective claims. The learned trial court after examining the evidence so adduced decreed the suit vide judgment stated above and decree dated 23.5.2007. Against which the petitioner filed the previously mentioned Civil Revision which was dismissed vide impugned order. Feeling aggrieved by the said order, the petitioner has preferred the instant petition.

6. Mr. Sadiq Hidayatullah advocate for the petitioner contended that the suit filed by the company secretary Azam Hussain was incompetent as he was

authorized by Muhammad Akram, who was not the proprietor of the project but was himself sub attorney. According to him, Ms. Shabana Begum was the actual proprietor of the project as per sub lease deed executed in favour of petitioner in respect of flat No.A-306 dated 15.7.2002, who never gave any authority to Azam Hussain to institute the suit, which therefore was not maintainable. He also emphasized that if the company was not registered, it could not file the suit on its name and such suit would be barred under Section 69 of Partnership Act, 1932. He further contended that Azam Hussain who instituted the suit in the capacity of the company secretary was in fact the attorney of the petitioner in terms of sub lease deed regarding flat No.A-306 executed in his favour by sub attorney Muhammad Akram, therefore the suit filed by Azam Hussain against the petitioner (being his attorney) was not maintainable. Regarding the findings of both the Courts below on the legal point about maintainability of the suit, he contended that the same were vague and evasive and the evidence which had come on record was not properly appreciated. The learned counsel in support of his arguments relied upon PLD 1968 Karachi 196, 1986 CLC 242 and 1994 MLD 274 and lastly prayed for setting aside the impugned judgments.

7. Refuting him, Mr. M. A. Khan advocate contended that the suit was filed under section 9 of the Specific Relief Act therefore the question of title would not arise as any person dispossessed of the immovable property without his consent could file the suit to recover the possession thereof; power of attorney authorizing Azam Hussain to represent Muhammad Akram Khan before the Courts in all the suits etc. was filed along with the plaint but the same was not objected to by the petitioner at the time of its production in evidence. According to him, Azam Hussain holding special power of attorney given to him by the petitioner had executed lease deed on his behalf in respect of flat No.A-306, such power was for the specific purpose and had ceased to exist upon the execution of lease; the authority of Azam Hussain to file the suit against the petitioner had nothing to do with his acting as his attorney for the

purpose of registration of the lease deed in respect of his flat, as such the same was without any defect. He further argued that Muhammad Akram Khan was the principal of Azam Hussain and he filed the suit on his behalf under his authorization as such was required to prove his case to the extent of pleadings set out by him in the plaint and not the defence taken by the petitioner. He further argued that an application under Section 7 Rule 11 CPC was filed by the petitioner on the same grounds for rejecting the plaint, however it was dismissed on merits and no appeal to that order thereafter was filed. Per learned counsel the petitioner did not challenge the locus standi of the respondent to file the suit in his written statement nor did he ever assert that section 8 of Specific Relief Act was applicable on the facts of the case. According to him, the petitioner occupied the subject flat after breaking the mid-wall of the adjacent flat as such primarily he was to prove his possession of the suit flat. He lastly argued that the technicalities could not be allowed to come in the way of justice and the scope of Constitutional Petition was limited wherein only gross violation of law could be taken into account and corrected. He also did not forget to argue that the petitioner himself had filed the suit against Muhammad Akram Khan as Director of the company thereby admitting his authority. He in support of his arguments relied upon PLD 1987 Karachi 180.

8. In rebuttal, learned counsel for the petitioner contended that suit was filed by respondent in the capacity of owner of the property, which was not the fact. According to him, there was no flat having No. A.305 and no evidence in that regard was produced by respondent; the plaint did not show when the petitioner took the possession of the suit flat.

9. We heard the learned counsel as above, perused the record and considered the case law cited at bar.

10. As regards the contention of the advocate for the petitioner that company secretary Azam Hussain was not competent to file the suit on behalf of the company and since it was unregistered, he could not institute the suit on

its name in view of embargo provided under section 69 of the Partnership Act, 1932, it may be observed that impediment envisaged under section *ibid* will be attracted only when the plaintiff institutes the suit to enforce a right arising out of a contract against either the firm or any past or present member of it or against any third party. The recital of said law would bear enough testimony to such view, which for ready reference is reproduced herein below and if any case is required for reference, the case of Abdul Reman Vs. Parvez Ahmed Butt and 2 others (1983 CLC 1740) can be cited:

69. Effect of non-registration:*(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.*

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect:-

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of dissolved firm, or any right or power to realise the property of a dissolved firm or

(b) the powers of an official assignee, receiver or Court under the Insolvency Karachi Division Act, 1909, or the Provincial Insolvency Act, 1920, to realise the Property of an insolvent partner.

(4) This section shall not apply -

(a) to firms or to partners in firms which have no place of business in Pakistan, or whose places of business in Pakistan are situated in areas to which, by notification under section 56, this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887, or to any proceeding in execution or other proceeding incidental to arising from any such suit or claim.

11. The facts of the case in hand are quite different and the provision of law which has been invoked by the respondent for the redressal of grievance has a specific connotation which deals with a particular situation coming about only when a person is dispossessed of immovable property without his consent

and otherwise than due course of law. The controversy does not revolve around a right arising from a contract to be enforced by the respondent through the suit against the petitioner. But the respondent came in the Court against the wrong of the petitioner who had allegedly dispossessed it from the suit property. The objection of the learned counsel for the petitioner regarding authority of Azam Hussain to file the suit also appears to be misplaced as in cross-examination no serious objection is raised by the petitioner to the production of power of attorney at Ex.P/1 and the letter of authority at Ex.P/2 duly authorizing Azam Hussain to file the suit etc. in respect of the suit property. The only concern shown, and which is apparent from the trail and trend of cross-examination, was that the power of attorney (Ex. P/1) was not executed in his favour at the time of institution of the suit and it was a forged document. Regarding letter of the authority, the objection raised was that it was not written on the letterhead of the respondent company and that the company was not registered one. The palpable predicament identified by the leaned counsel for petitioner about Azam Hussain acting as attorney in the sublease-deed executed by Muhammad Akram Khan in favour of the petitioner gets unfolded by the special power of attorney dated 03.07.2002, available at page No.131 of the Court's file, whereby the petitioner himself had appointed and nominated him to be his attorney to execute a sublease-deed between him and the respondent on his behalf. The arrangement appears to have been mutually agreed upon and implemented by the parties for their own convenience for a specific purpose which however does not tend to undermine the status of Azam Hussain to act attorney of his principal in the proceedings filed through him to recover the possession of immovable property taken illegally by the petitioner. In presence of such instrument (special power of attorney), the surprise of learned counsel for the petitioner over Azam Hussain acting as attorney of the petitioner in the sublease-deed about flat No. A306 and yet filing the suit against him; and in the wake whereof his objection to the maintainability of the suit is not well founded. On the contrary, it shows the active involvement of Azam Hussain in the affairs of the company. The petitioner filed the suit for permanent

injunction against the company /respondent through Muhammad Akram Khan, accepting meaning thereby his authority to be at the helm of company's affairs in the capacity of its proprietor. Hence, the petitioner cannot validly challenge afterwards his authority to appoint Azam Hussain to represent him in the suit filed against him, as under the law a person is estopped to say a thing at a particular point of time which has been acted upon and then deny it subsequently. We, therefore, do not find any ambiguity to conclude that the authority of Muhammad Akram was absolute viz-a-viz the company/respondent and he validly permitted Azam Hussain to file the suit against the petitioner on behalf of the company. To further strengthen such view, the examination of the sub-lease deed in respect of flat No.A-306 executed in favour of the petitioner, available at page No.31 of the Court's file would not be out of place. It tends to depict proprietor Ms. Shabana Begum wife of Sohail Afridi as lessee (which expression shall where-ever the context so admits shall mean and include its successor in interest executor, administrator, attorney and assigns). She has nominated and constituted Mr. Mohammad Aslam Shah Khan as Attorney through General Power of Attorney Regd. No.03, Page No.129 to 132, Volume No.219 of Book IV Addl. dated 02.01.1993. Said Mohammad Aslam Shah has nominated Mohammad Akram Khan as sub-attorney vide General Power of Sub-Attorney Regd. No.994, Pages 146 to 149, Volume No.438 of Book-IV Addl. dated 20.05.1999. Whose competency to assign power to Azam Hussain to represent him in the present proceedings has been called into question by the petitioner. In presence of such unambiguous authority dually conveyed to Mohammad Akram Khan, the contention of the learned counsel that Ms. Shabana Begum, being the actual owner of the project /company since had not authorized Azam Hussain to institute the suit was not maintainable against the petitioner, cannot be subscribed to.

12. The Court under Section 9 of Specific Relief Act, 1877 can decide only the claim of possession and is not required to decide title, right or legal

character of claimant to the property. The fundamentals to be proved by the plaintiff in order to succeed in the suit would be (i) his possession of the immovable property (ii) his dispossession from the property without his consent (iii) that his dispossession or the possession of the defendant was otherwise than due course of law and that the dispossession took place within six months of the suit. The question of title is ancillary to the proceedings under section 9 of the Specific Relief Act, 1877 which (though not barred) cannot not be looked into for restoring the possession to the plaintiff, if he is able, otherwise, to prove the above well-entrenched ingredients to the satisfaction of the Court. The scheme under such provision of law appears to accord a right to the person to promptly have his possession of immovable property taken back in the face of his dispossession without his consent and otherwise than due course of law. Its object obviously is to discourage people from forcibly occupying the immovable property by taking the law in their hands and further is to safeguard the possession of a person to the immovable property, irrespective of his title. It provides for undoing the wrong with simple, effective and effectual remedy available to the party wronged without a lengthy hassle. With this object and scheme in the contrast, the technicalities in respect of the competency of Azam Hussain to file the suit on behalf of the company in the capacity of its secretary to have the possession of the suit property restored tend to fizzle out being irrelevant to the controversy dealt with here.

13. With regard to the merits of the case, the evidence adduced by the parties and documents relied upon by them show that the petitioner is the allottee of flat No.A-306 measuring about 625 sq. ft. situated on 3rd floor of the project. In his evidence, the petitioner however has claimed that in lieu of four flats in Block-D of the same project, which were not constructed within time, he was handed over flat No. A/306 measuring 800 sq. feet. His version regarding area of the flat to be 800 sq. feet is not supported either by any documentary evidence or by any oral account furnished by any witness. He has

failed to account for his possession of an area beyond 625 sq. feet mentioned in the sublease-deed of his flat. The petitioner's denial of existence of flat No.A-305 on the 3rd floor adjacent to his flat in his examination-in-chief is neutralized from his own admissions made during cross-examination to the effect that the 2nd floor of the building comprises 06 flats from A-201 to A-206 and the 3rd floor consists of flat No .A/301 to A/306, which by simple calculation would come to be 6 flats. More so the plea of denial regarding existence of flat No.A-305 taken up by the petitioner in his deposition does not conform to his written statement filed before the trial Court where in Para No.11 he states "*he has never dispossess plaintiffs from flat No.305, as such the plaintiffs are not entitled for any relief as prayed and the suit is not maintainable under section 9 of the Specific Relief Act, and liable to be dismissed with special cost*". In an application dated 05.03.2003 addressed to the Senior Superintendent of Police, Investigation Cell, Karachi, available at page No.35 of the Court's file, the petitioner wrote that some persons working in the plaintiff's (respondent) company had come to his flat where they hurled aspersions to his family and had broken a wall in his absence; and his counsel while cross-examining PW-2 namely Muhammad Majid had put him a suggestion that the suit was filed against the petitioner because he had made a complaint to KBCA against the demolition of the common wall by the plaintiff (respondent). The application and the suggestion referred above made by the petitioner confirm unequivocally the factum of demolition of common wall between the flats which occurred somewhere in March 2003, which is exactly the same time, the plaintiff (respondent) has alleged in the suit that the suit flat was occupied by the petitioner illegally. Findings of two the Courts below are in accordance with the evidence on the record and no prejudice seems to have been caused to the petitioner. The point in hand was properly clinched by the Courts below and the petitioner was not able to point out any illegality in appreciation of evidence either. Every aspect of the case has been dealt with in detail leaving no room for this Court to intervene under the constitutional jurisdiction having limited scope to examine the factual controversy between

the parties. To justify reversal of concurrent findings recorded against him, the petitioner has failed to identify any gross violation of law and/or misreading or non-reading of evidence by the Courts below to justify reversal of concurrent findings recorded against him.

14. The upshot of the above discussion would be to hold that the petitioner has failed to point out any material illegality or irregularity in the decisions made by the Courts below in the suit filed by the respondent warranting interference by this Court while exercising the constitutional jurisdiction. The instant petition is dismissed accordingly along with the pending application, with no order as to costs.

JUDGE

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