

## IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 1151 of 2011

[Mrs. Hailey Vincent D'Abreo v. Province of Sindh and another]

Date of hearing : 13.10.2017

Date of Judgment : 27.10.2017

Plaintiffs : Mrs. Hailey Vincent D'Abreo and others, through M/s. Shahenshah Hussain and Syed Arshad Ali, Advocates.

Defendants : Province of Sindh and another, through Ms. Leela @ Kalapna Devi, Assistant Advocate General along with Ms. Farkhunda Mangi, State Counsel.

### Precedents cited

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Law under discussion: (1) Sindh Rented Premises Ordinance, 1979.

(2) Civil Procedure Code, 1908 (“CPC”).

(3) Transfer of Property Act, 1882 (“Property Law”).

(4) Qanun-e-Shahadat Order, 1984 (Evidence Law).

(5) Sindh Building Control Ordinance, 1979 (“SBCO”)

### JUDGMENT

**Muhammad Faisal Kamal Alam, J:** Present action at law has been brought by the Plaintiffs *primarily* for recovery of possession of the built up immoveable properties having the following descriptions\_

i. 325/1, measuring 1327 square yards,

ii. 356, measuring 4321 square yards.

2. Both aforementioned properties are situated in Garden East Quarters, Karachi (“**Suit Properties**”). Plaintiffs have prayed for the following relief(s)\_

- “i) *Possession of the immovable properties bearing No.325/1 & 356 situated in Garden East Quarter, Karachi, by evicting the school known as Jufelhurst School being run by defendant No.2.*
- ii) *Mesne profit / rent payable by the defendants at the rate of Rs.1,80,000/- p.m. with effect from 01.08.2008 till the vacation of the subject premises.*
- iii) *Permanent injunction restraining defendant No.2 from raising any construction on the subject premises.*
- iv) *Permanent injunction restraining defendant No.1 from occupying or taking possession of the subject premises or interfering with the rights of the plaintiffs in respect of the subject premises.*
- v) *Cost of the suit.*
- vi) *Any other relief which this Hon’ble Court may deem fit and proper in the circumstances of the case.”*

3. Summons were issued to the Defendants, but they opted to remain absent and did not contest the present case and consequently the Defendant No.1 was declared *ex parte* on 26.05.2016 and Defendant No.2 was debarred from filing Written Statement.

4. The controversy involved in the present proceeding is that the Suit Properties owned by Mrs. Julia Florence D’Abreo, who as a testator

executed a Will dated 16.05.1948 and by virtue of that her children named in the pleadings were the beneficiaries. Pleadings of the Plaintiffs have mentioned by way of background, the earlier contest between the children of above named owner, which ultimately culminated into a compromise decree dated 28.05.1993, which has been produced in evidence as Ex.PW-1/5 and is available from pages-95 to 111 of the evidence file. The legal effect of the compromise decree was that the Suit Properties finally came in the ownership of present Plaintiffs, who have filed the present suit through their attorney, namely, Sajjad Bashir son of Bashir Ahmed. The original General Power of Attorney executed by each of the Plaintiffs, who are residing abroad, have been produced in the evidence and the same are available from pages-11 to 85. All these General Power of Attorneys bear the seal of Pakistan Mission and so also the separate verifications issued by Secretary Board of Revenue Sindh by endorsing the fact that all these Power of Attorneys are genuine and were sent for verification to Pakistan Mission abroad through Ministry of Foreign Affairs, Government of Pakistan. The Original copy of the extract from Property Register of Garden East Quarters is also exhibited as PW-1/6 to evidence the fact that the Suit Properties stand in the name of present Plaintiffs as owners. It is necessary to mention here that on the Suit Properties there is a structure of Bungalow and two other buildings. Bungalow was once used by the Plaintiffs as their resident but since all the Plaintiffs are abroad, the structure of bungalow by the passage of time collapsed. It has been further averred in the plaint and reiterated in the evidence that a School under the name of 'Jufelhurst School' (the "**School**") was being run by the Plaintiffs in the other two buildings located at the Suit Properties.

5. Present controversy pertains to taking over of above School by the Defendants way back in 1972 under the Nationalization Program.

Eventually, the School Management was transferred to Defendant No.2-present Karachi Metropolitan Corporation (“KMC”), which was in occupation of the School Building for the past many decades and was paying meager rent of Rs.816/- per month, but the same was also stopped since August 1994. Consequently, present proceeding has been filed seeking eviction of the Defendants as tenants from the Suit Properties on the ground of default as well as the structure of the building has been declared dilapidated by the Sindh Building Control Authority, which is a regulatory authority of building activities in the Province of Sindh in terms of SBCO.

6. Although no Written Statements have been filed by the Defendants and the record shows that when the Plaintiffs’ witness PW-1 (above named attorney Sajjad Bashir) was examined in this Court, an opportunity to cross examine him was given to the learned counsel appearing on behalf of Defendant No.1 (Province of Sindh), but that opportunity was not availed on the plea that since KMC (Defendant No.2) is the concerned party, therefore, its counsel should lead evidence. Since on that day (15.09.2017), no one was present on behalf of KMC, therefore, their side to cross examine the PW-1 was closed and matter was directed to be fixed for final arguments.

7. Despite the fact that in the present case Defendants did not lead evidence, yet Court is saddled with an obligation to apply its judicial mind to the facts of the case while handing down the decision.

**Points for determination:**

- i) Can eviction be sought through the Sindh Rented Premises Ordinance, 1979 (“SRPO”)?

- ii) Whether the Defendants and Defendant No.1 committed default and Plaintiffs are entitled to receive arrears of rent besides mesne profits?
- iii) What should the decree be?

8. To a specific query, Mr. Shahenshah Hussain assisted by Syed Arshad Ali, learned counsel for the Plaintiffs, has referred to Section 3 of the SRPO and argued that in terms of subsection (2) of Section 3, the Provincial Government has power and authority to exclude any class of premises or all premises in any area from operation of all or any of the provisions of the SRPO. Learned counsel next argued by referring to a Notification dated 29.07.1980 bearing No.VIII(3)SOJ/75; the said **Notification** is available in present record, by virtue of which, *inter alia*, Colleges and Schools taken over under Martial Law Regulation 118 of 1972, from the purview of SRPO. Thus, it was argued that the applicable law in the present case would not be SRPO but the Property Law. It was next argued by making reference to various notices issued by Sindh Building Control Authority (“SBCA”) including Public Notice with the caption “WARNING” that the building structure of the above named School is in dilapidated condition and the same was declared as dangerous with the directions that the building should be vacated at once. The Public Notice with regard to various dangerous buildings of Karachi City including subject building of School and the subsequent notices of 27.11.2009 and 22.02.2011 have been exhibited as PW-1/7 and PW-1/9. To further augment his arguments, learned counsel for the Plaintiffs has referred to another piece of evidence, which is Exhibit No.PW-1/8, a detailed report published in daily ‘Dawn’ newspaper in its issue of 18.02.2016, in which the Principal of above named School has stated, *inter alia*, that even roof of laboratory and another room collapsed, but luckily no

injury was caused to the students. Photographs published in newspaper clearly show that structure of building is in a very poor state.

9. All the above pleadings and documents have till date gone unchallenged and without any objections from the Defendants. My finding on the first point is that after going through the provisions of SRPO and Property Law as well as above mentioned Notification, which is an un-rebutted official document, I am of the view that the present suit and proceeding is maintainable against the Defendants, as SRPO does not apply to the Government buildings, which have been taken out of the purview of SRPO by the aforesaid Notification.

10. Plaintiffs have specifically pleaded and led evidence in support of their claim, which evidence has gone unrebutted, that since August, 1994, Defendant No.2 (KMC) has committed default in payment of monthly rent of Rs.816/- and besides this, it has been further specifically pleaded, which was reiterated in the evidence of PW-1, that the Defendants are liable to pay arrears of utility bills and a sum of Rs.1,80,000/- (Rupees One Lac Eighty Thousand only) per month towards mesne profit of the Suit Properties, in view of the undisputed fact that properties in question is located in a prime location of Karachi City.

11. With regard to the first contention about the default, it is a settled rule, that if the landlord (present Plaintiff) makes a Statement on oath about the default, then onus shifts from Plaintiff, in instant case the landlord, on to the tenant / Defendant No.2. Latter (Defendant No.2) is to disprove the claim of the Plaintiff. Since neither Defendants despite providing the opportunity cross-examined the Plaintiff's witness nor led their side of the evidence, therefore, the Defendants and particularly Defendant No.2 (KMC) failed to discharge this onus and consequently default is proved. I

am inclined to agree that the Defendants and particularly Defendant No.2 has committed willful default by not paying the rent from August, 1994 and thus the latter is liable to pay the rentals at the rate of Rs.816/- from August, 1994 till date, which comes to Rs.2,17,056/- (Rupees Two Lacs Seventeen Thousand and Fifty Six only).

12. However, with regard to the plea of default in paying utility bills and mesne profit, the Plaintiffs have not led any evidence. No utility bills are produced in the evidence as proof. Similarly, no independent evidence is brought on record that property in the similar area with same structure is fetching an income or a rent of Rs.1,80,000/- (Rupees One Lac Eighty Thousand only) per month, nor any inquiry in terms of Order XX, Rule 12 of CPC was ordered by passing a preliminary decree, therefore, in absence of a conclusive evidence, the payer on the point of mesne profit at the rate of Rs.1,80,000/- (Rupees One Lac Eighty Thousand only) is discarded.

13. Suit of the Plaintiff is decreed in the following terms:-

- i. Defendants shall forthwith handover the possession of the Suit Properties, that is, 325/1, measuring 1327 square yards and 356, measuring 4321 square yards.
- ii. Defendant No.2 shall pay the above amount of Rs.2,17,056/- (Rupees Two Lacs Seventeen Thousand and Fifty Six only), as arrears of rentals together with ten percent (10%) markup from the date of institution of present suit till realization of the amount.

14. Parties to bear their own costs.

**JUDGE**

**Dated: 27.10.2017.**