

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 620 of 1994

[Ismail Memorial Trust Vs. Karachi Co-operative Housing Societies Union Limited and 2 others]

Date of hearing : 06.05.2019

Date of decision : 06.05.2019

Plaintiff
(*Ismail Memorial Trust*) : Through M/s. Yawar Farooqui and Irfan Ahmed Memon, Advocates.

Defendant No.1
(*Karachi Co-operative Housing Societies Union Limited*) : Through M/s. Arif Bilal and Seema Yaseen, Advocates

Defendants No.2 and 3
(*Karachi Metropolitan Corporation and Nazim -e-Aala*) : Through Mr. Muhammad Shaban Solangi, Advocate.

Case law cited by the Plaintiff's counsel

2008 YLR page-233 [Karachi]
(Muhammad Saleem Asar and others vs. Karachi Building Control Authority and others)-**Asar Case**

Case law relied upon by counsel for Defendant No.1

Case law relied upon by counsel for Defendants No.2 and 3

Other Precedents:

- i) 2005 SCMR page-142
(A.Razzak Adamjee and another vs. Messrs Datari Construction Company (Pvt) Limited and another)-**Adamjee Case.**

- ii) 2017 YLR page-1816 [Sindh]
(Abdul Haq vs. Thakumal and 4 others)-
Abdul Haq case.
- iii) 2011 SCMR page-1023
(Amir Jamal and others vs. Malik Zahoor-ul-Haq
and others)-**Amir Jamal case.**

- Law under discussion:**
- (1). Specific Relief Act, 1877.
 - (2) The Code of Civil Procedure, 1908
[CPC]
 - (3). Limitation Act, 1908.
[Limitation Law]
 - (4) The Karachi Building and Town
Planning Regulations, 2002.
[Regulations]

JUDGMENT

Muhammad Faisal Kamal Alam, J: The present action at law has been filed by Plaintiff, which is a registered Trust as per the Declaration of Trust (*Exhibit-5/2*) against the Defendants. The Plaintiff contains the following prayer clause_

“The Plaintiffs, therefore, pray for Judgment and Decree for: -

- (a) A declaration that the Plaintiff is owner / Lessee of Plot of land bearing No.SNPA, 23-D more particularly described in the Sub-Lease dated 05.07.1980 and is entitled to raise construction thereon and the defendants are trespassers and not entitled to intermeddle with the said plot.***
- (b) For physical and peaceful vacant possession of the Plot of land bearing No.SNPA 23-D from which Plot of land to the Plaintiffs and the Plaintiffs Trust has been illegally and forcibly dispossessed.***
- (c) Permanent injunction restraining the defendants their agents, employees and workmen from transferring, selling, alienating, disposing of and damaging of the Plot No.SNPA 23-D which is the property of the Plaintiffs’ Trust by virtue***

of the said registered Sub-Lease, to any other person or persons till the disposal of suit.

(d) That other and further relief or reliefs, which this Hon'ble Court may deem fit and expedient in the circumstances of the case.

(e) Costs of the suit.”

2. Upon service of summon, the Defendants contested the claim of Plaintiff.

3. Vide order dated 13.08.1995, Issues filed by the Plaintiff were adopted as Court Issues, which are reproduced herein under_

“1. Whether the suit is maintainable?

2. Whether the suit is time barred?

3. Whether the Plaintiffs are owners/lessees of the premises in suit by virtue of a registered Sub-Lease dated 06.07.1980?

4. Whether the Defendants have illegally taken over possession of the premises in suit from the Plaintiffs on 01.10.1991?

5. Whether the Plaintiffs have acquired the premises in suit for the purpose of construction of a hospital?

6. Whether the Plaintiffs have served a legal notice dated 26.10.1991 upon the Defendants?

7. Whether the Plaintiffs are entitled to take vacant and peaceful possession of the premises in suit from the Defendants?

8. What should the Decree be?”

4. The controversy in the present matter revolves around the allotment of an amenity Plot having description SNPA 23-D,

admeasuring 2369 Square Yards-*(Suit Plot)*, situated in Defendant No.1 *(Karachi Cooperative Housing Societies Union Limited; “Society”)* and its subsequent repossession by Defendants No.2 and 3, viz. Karachi Metropolitan Corporation (*KMC*).

5. M/s. Yawar Farooqui and Irfan Ahmed Memon, Advocates, representing the Plaintiff has argued that the entire action of Defendants is collusive and contrary to law as the Plaintiff after allotment of an amenity Plot, was also given the registered ownership (*99 years*) Sub-Lease, which is an undisputed document. It is further submitted that no complaint was ever lodged against the Plaintiff about any misuse of the property in question.

6. M/s. Arif Bilal and Seema Yaseen, Advocates for Defendant No.1 has contested the stance of Plaintiff to the extent of allegations against Defendant No.1 (Society) but has not disputed the entire procedure of allotment of suit property in favour of Plaintiff, whereas, Mr. Muhammad Shaban Solangi, Advocate, representing the Defendants No.2 and 3, has vehemently controverted the arguments of Plaintiff's side. Per learned counsel for Karachi Metropolitan Corporation (KMC), once the suit plot along with other plots were handed over to the Defendant-KMC for development of Parks then the same cannot be utilized for construction of Hospital.

7. Heard arguments and record perused.

8. Abdul Rahim Vohra (P.W-1) on behalf of Plaintiff, Abdul Rehman (D.W-1) and Najamuzzaman (D.W-2) on behalf of Defendants examined themselves as witnesses and were cross-examined.

9. Findings on the issues are as follows:

ISSUE NO.1	:	Affirmative.
ISSUE NO.2	:	Affirmative.
ISSUE NO.3	:	Affirmative.
ISSUE NO.4	:	Affirmative.
ISSUE NO.5	:	As under.
ISSUE NO.6.	:	Affirmative.
ISSUE NO.7.	:	Affirmative.
ISSUE NO.8.	:	Suit decreed in terms of Prayer Clauses (a), (b) and (c).

ISSUES NO.1, 2 AND 6.

10. These Issues are interlinked and, therefore, they are decided together.

11. The impugned action of taking over the possession of the suit plot was done on 01.10.1991. The record shows that Plaintiff's witness has also served the legal notice dated 26.10.1991 (*Exhibit P-8*), in which, the Plaintiff has agitated the issue with Defendants No.2 and 3, so also with the Mayor of Karachi. Thereafter, it is argued by learned counsel for Plaintiff, that certain attempts were made for resolving the matter amicably, and in failure to do so, the present proceeding was filed.

12. In terms of Articles 120 and 142 of the Limitation Law prescribed for bringing an action of the nature (declaration and possession) is mentioned as 6 and 12 years, respectively. The cause of action was accrued on 19.10.1991, subsequently the legal notice as mentioned above was addressed on 26.10.1991 and the present suit is filed on 27.09.1994. Still the Plaintiff is out of possession, hence, in view of Section 23 of the Limitation Law the wrong done is of continuous nature; thus, the present action at law is maintainable and is

not barred by time. **Hence, Issues No.1, 2 and 6 are answered in Affirmative, Negative and Affirmative, respectively.**

ISSUES NO.3, 4 AND 7.

13. The unrebutted evidence shows that initially the Allotment Order was given on 02.07.1980 (*Exhibit-5/1*) to Plaintiff, specifically for construction of a Hospital in Defendant No.1 Society. Certificate of Possession dated 02.07.1980 (*Exhibit-5/2*) has been produced by Plaintiff along with Site Plan (*Exhibit-5/3*). The receipt dated 02.07.1980 from Defendant No.1 in respect of costs of the land has been produced as **Exhibit-5/4**; the above documents have not been disputed. The Plaintiff witness has also produced the most important document, which is a registered Sub-Lease dated 05.07.1980 (**Exhibit-5/6**) entered into between Defendant No.1 and Plaintiff in respect of the suit property, allowing the former (Plaintiff) to be entitled for such rights and interest as mentioned in the Sub-Lease for a period of 99 years. The effective date of commencement of lease period as mentioned in the said Sub-Lease is 01.01.1954. Learned counsel has also referred to Exhibit-5/7, which is a registered Declaration of Trust of Plaintiff; Clause-1 whereof specifies the Aims and Objects of the Trust, including, to construct a Hospital and Laboratory. The Plaintiff's sole witness has disputed in his cross-examination the suggestion on behalf of Defendant No.2 that the suit property was earlier transferred in favour of Defendants No.2 and 3 (*KMC*) and the suit property was ever earmarked for Park. Defendants have neither cross-examined the Plaintiff's witness nor have disputed the authenticity of the material documents as mentioned hereinabove with regard to the allotment and Sub-Leasing the suit property in favour of Plaintiff.

14. The witness of Defendant No.1 (*DW-1-Abdul Rehman*) in his cross-examination has accepted the factum of allotment of suit plot and completing of other formalities and execution of aforementioned Sub-Lease, in favour of Plaintiff. The said witness has admitted the fact that **Exhibit-6/1** was not filed with the Written Statement of said Defendant No.1 (*Society*). This document dated 10.04.1974 (**Exhibit-6/1**) is only document, on which the Defendants are basing their claims that certain amenity plots were handed over to Defendant No.2 (**KMC**) for development of Parks. The said witness of Defendant's society has also acknowledged that no proceeding has taken place in respect of cancellation of suit plot. It is further acknowledged by the said witness that no Park has been developed, rather on a portion of the suit plot a workshop has been constructed.

15. In his cross-examination, the DW-2 (*Najamuzzaman*), who was the then Deputy District Officer (Land Management) of Defendants, has admitted that the suit property is an amenity plot and the same has never been cancelled. He has further acknowledged in his cross-examination that no documentary evidence has been filed along with the Written Statement or the Affidavit-in-Evidence (of said Defendant-KMC), which shows the ownership of KMC in respect of the said plot, while further admitting that no objection / notice inviting the public objections were given prior to conversion of said plot into Park. In the same breath, he has also voluntarily stated that it was not a requirement as the suit plot by birth is an amenity plot and it does not require any further conversion. He has further acknowledged the documents relating to the suit property, which have been mentioned hereinabove, about the ownership of Plaintiff.

16. Appraisal of the evidence shows that till date the ownership of Plaintiff in respect of the suit property is intact and the plot in question though not in possession of Plaintiff is still lying vacant. All the Defendants and their Legal Team have failed to point out any plausible documentary evidence to substantiate their arguments that before taking possession of the suit plot by Defendant-KMC, a due process was followed and / or any Park thereafter was developed. The learned counsel for Defendants on one hand though accept the Exhibit-6/1, in which, number of amenity plots were handed over to KMC way back in the year 1974 are mentioned, but on the other hand, it is not disputed that even the remaining area of Plot No.SNPA 23, which falls outside the area of suit plot, have not been developed into a Park. No Notification or amended Layout Plan has been filed in the evidence to show that the suit plot when transferred to Defendant-KMC, was subsequently also vested in the latter (*Defendants No.2 and 3*).

17. The reported **Asar case** (*ibid*) relied upon by the Legal Team of Plaintiff is relevant. The sole issue in the said reported case was conversion of an amenity Plot earmarked for Park into another amenity purposes, for construction of a Hospital. While highlighting the necessity of an amenity Plot and exhaustively dealing with the above issue, this Court (*in the above case*) came to the conclusion as mentioned in the said reported case is that conversion of one amenity use into another from Park to Hospital is permissible, *inter alia*, because conversion was done before the statutory provision prohibiting such conversion were promulgated. In the same reported case, it is also observed that the amenity plots are being controlled by the local body or the concerned Co-operative Society.

Secondly, it is a well-established principle that a registered instrument, in the present case, registered ownership lease (Exhibit-5/6), can only be cancelled, *inter alia*, through a proper procedure and not otherwise. Two reported decisions of **Amir Jamal** and **Abdul Haq** (*supra*), the first one by the Hon'ble Supreme Court and the second by learned Division Bench of this Court, are relevant and the rule laid down therein is attracted to the facts of the present case.

18. In my considered view, the present case is on somewhat better footing, because, till date, no conversion of suit plot from Hospital to Park has taken place.

In addition to the above discussion, one of the significant undisputed aspects of the present case is the registered ownership Sub-Lease (Exhibit-5/6). The commencement date (as already stated in the preceding paragraphs) of the lease period as mentioned in the Sub-Lease is 01.01.1954, therefore, even for the sake of arguments, as argued by Defendants No.2 and 3 (KMC) that the suit plot was transferred to KMC, is wholly incorrect and a misconceived defence, because when Defendant No.1 validly transferred the suit plot through the above registered instrument in favour of Plaintiff, the same cannot be transferred by virtue of the above document-Exhibit 6/1, in 1974 for the simple reason, that the Defendant No.1 cannot transfer a plot belonging to some other person / Plaintiff (in the present case), to Defendant-KMC without resorting to the requirement mentioned in the Clause-3 of the said Sub-Lease. **I decide Issues No.3, 4 and 7 accordingly and in Affirmative but against the Defendants**, that the Plaintiffs still are the owners / sub-lessees of the suit plot and were illegally dispossessed therefrom by the Defendants and they are entitled to repossession of the same.

ISSUES NO.5 AND 8.

19. The suit property was specifically acquired for construction of Hospital in Defendant No.1 Society. There is no denial of this fact either in the pleadings or in the evidence. In terms of the Karachi Building and Town Planning Regulations, 2002, (*the said Regulations*), amenity has been defined in Clause 2-7, which is produced herein under: -

“2-7. “Amenity Plot” means a plot allocated exclusively for the purpose of amenity uses as define in Chapter 19 of these Regulations, such as Government uses in 19-2.2.1, Health and Welfare uses in 19-2.2.2, Education uses in 19-2.2.3, Assembly Uses in 19-2.2.4, Religious uses in 19-2.2.5, Parks and Play grounds in 19-2.2.7, Burial grounds in 19-2.2.8, Transportation right-of-way in 19-2.2.9, Parking in 19-2.2.10 and Recreational Areas in 19-2.2.12”.

20. If the above definition Clause is read with Chapter-19 of the said Regulations, the Hospital falls under the Regulations 19.2.2.2 under Health and Welfare uses, which is one of the component of definition Clause of amenity Plot (Clause 2-7). The Hon'ble Apex Court in its decision handed down in *Adamjee case (supra)*, has also explained, *inter alia*, that ‘hospitals’ fall within the category of amenity plots, as envisaged in Article 52-A of the Karachi Development Authority (KDA) Order, 1957. Till date, no complaint is lodged against the Plaintiff for any misuse of the purpose for which the suit property was sub-leased by Defendant No.1. Even today, Legal Team of Plaintiff has given an undertaking that they will build the Hospital for the general welfare of the residents of Defendant No.1 Society. It is also a matter of common knowledge that health care is an issue of concern nowadays and if a Hospital, within the remit of Defendant No.1, is built and operated for the general benefit of the residents, then it will also cater

the health issues of public at large. Hence, **Issues No.5 is answered accordingly. With regard to Issue No.8, in view of the above discussion**, the suit is decreed in terms of Prayer Clauses **(a), (b)** and **(c)**. However, parties are left to bear their own costs.

Dated: _____

JUDGE

M.Javid.PA