

**ORDER SHEET
HIGH COURT OF SINDH, KARACHI**

Suit No.2389 of 2014

Date	Order with signature of Judge
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Al-Tamash Medical SocietyPlaintiff

Versus

Dr.Anwar Ye Bin Ju & othersDefendants

Dates of hearing:

**9.10.2015, 15.10.2015, 29.10.2015, 15.08.2016
and 25.11.2016.**

Khawaja Shams-ul-Islam, Mr.Imran Taj and Mr.Khalid Iqbal Advocates for the Plaintiff.

M/s.Arshad M.Tayebaly and Muhammad Shahzad Ashraf Advocates for the Defendant Nos.1 and 2.

Mr.Muhammad Yousuf, Advocate for the Defendant Nos.8, 9 and 10.

Syed Iftikharul Hasan and Mr.Ghulam Mohiuddin, Advocates for KMC.

Ms.Nasreen Setho, State Counsel and Mr.Abdul Jabbar Qureshi, A.A.G.

Muhammad Ali Mazhar, J: This is a suit for declaration, directions, cancellation and injunction. The declaration is beseeched in view of restrictive Clause No.20 of the Lease Deed of Amenity Plot No. ST-2, that the defendant No.1 was not entitled to sell the plot to Defendant No. 2; the sale deed executed by the defendant No.1 in favour of

defendant No.2 is against the law hence it is liable to be cancelled. The plaintiff has also entreated for the directions against the defendant No. 3 to resume the suit plot and allot the same to the plaintiff society for expansion of their hospital. Permanent injunction has been sought for restraining the defendants from raising any construction on the plot in question.

2. The trivia and or minutiae of interlocutory applications filed vice versa are as under:-

(1) CMA No.16156/2014. The plaintiff has filed this application under Order 39 Rule 1 & 2 CPC for suspension of the operation of the lease deed and sale deed as well as the demolition permission and approval of building plan with further prayer that defendant Nos.1, 2 and 4 be restrained from creating third party interest as well as raising any construction on the plot in question.

(2) CMA No.1031/2015. The defendant No.1 has filed this application under Order 7 Rule 11 CPC for rejection of the plaint on the premise that plaint does not disclose any cause of action and the plaintiff is stranger to the suit property. The suit is also barred under Section 42 of the Specific Relief Act.

(3) CMA No.17996/2015. The plaintiff has moved this application under Order 39 Rule 2 (3) CPC read with Article 204 of the Constitution and Section 4,5 & 6 of the Contempt of Court Ordinance, 2003 that despite status quo order dated 3.12.2014, the Contemnor No.2 in connivance with Contemnor No.1 fraudulently got the restoration of revised proposed building plan of the suit property.

(4) CMA No.17997/2015. This is an application of the plaintiff under Section 94 read with Section 151 CPC moved to suspend revised proposed building plan allegedly issued in gross violation and disobedience of the order dated 3.12.2014.

(5) CMA No.18253/2015. This application has been filed by Defendant No.8 under Section 151 CPC for the reason that the above suit was partly heard, so this suit for hearing of interlocutory applications may be fixed before the same bench being a part heard matter.

(6) CMA No.18326/2015. The defendant No.8 has moved this application under Section 151 CPC for converting this suit into fast track on the ground that the defendant No.8 is aged about 60 years and in view of notification issued by the hon'ble Chief Justice this case may be fixed on weekly basis.

(7) CMA No.18327/2015. The Defendant No.8 has moved this application under Order 39 Rule 4 CPC to evacuate the status quo order dated 3.12.2014.

(8) CMA No.18660/2015 The defendant No.3 (K.M.C) has moved this application under Order 7 Rule 11 CPC for rejection of plaint with the plea that plaintiff has no cause of action against the defendant No.3.

3. The transient features of this law suit are that the plaintiff is a Society registered under the Societies Registration Act. An amenity Plot No.ST-2/B, Block-3, Clifton Karachi was allotted to the plaintiff for constructing medical and dental complex as well as medical and dental college known as "Al-Tamash Institute of Dental Medicine" established in 2001. The plaintiff paid huge consideration to KDA for buying the said plot. An amenity Plot No.St-2 which is adjacent to plaintiff's plot was allotted to defendant No.1 who was rendering services in the field of Acupuncture and Physiotherapy. The bone of contention is Clause 20 of the lease deed executed in favour of the defendant No.1 which reads as under:-

"20. The lessee will not sell, transfer or assign his rights in respect of demised premises in any manner. The plot premises should not be used for any purpose other than which it has been allotted. No commercialization of any portion/part of the allotted plot shall be allowed by the Lessor. The facilities and services provided would not be restricted to any single community."

4. The plaintiff has shown much dismay and disquiet that regardless of unyielding caution against the sale of the plot in the indenture of lease, the defendant No.1 has

sold out the plot vide conveyance deed dated 28.6.2013 to the defendant No.2. The plaintiff has avowed that the defendant No.1 has committed violation of lease so he lost the title. The plaintiff has also asserted right of easement for allotment of plot in question to them after its cancellation for the reason that they desperately need extra land to make some expansion in their present set up.

5. At some stage, three interveners Dr.Saadia Rasul Virk, Dr.Mumtaz Ahmed Mahar and Dr.Javaid Haider Rizvi filed C.M.A No.1030/2015 under Order 1 Rule 10 CPC for impleading them as party in the suit. Quite the reverse, the plaintiff had also moved C.M.A No.4125/2015 under Order 6 Rule 17 and Order 1, Rule 10 read with Section 151 CPC for impleading Dr.Saadia Rasul Virk and Dr.Mumtaz Ahmed Mahar. Both the applications were allowed on 16.9.2015. Consequently, the plaintiff filed amended plaint and impleaded three aforesaid interveners as defendant Nos.8 to 10.

6. The defendant Nos.1 and 2 filed counter affidavit with the plea that the plaintiff is stranger to the property. The defendant No.1 constructed Chinese Acupuncture Centre on the suit property and practiced till 2012. He desired to enhance the centre to advance health care facility with wider spectrum, therefore, his attorney requested the defendant No.4 for the permission to construct state of the art facilities hospital and demolish the old structure. Since defendant No.1 was not financially sound therefore, in order to raise the funds, he decided to rent out the subject property to the defendant No.10 vide tenancy agreement dated 7.4.2013 but he could not achieve the desired results therefore, the defendant Nos.1 and 2, 8

and 9 entered into a joint venture and decided to establish liver transplant unit and general hospital in the larger public interest. In order to achieve the aforesaid objective, a conveyance deed was executed in favour of defendant Nos.8 and 9. Despite sale, they have no intention to change the use of land. The plaintiff wants to blackmail the defendant Nos.1 and 2 to obtain property in question and even before filing this suit the plaintiff's representative approached the defendant Nos.1 and 2 for acquiring the suit property. The plaintiff is lessee of plot No.ST-2/B Block-3, Clifton Karachi which was allotted to them as amenity plot for construction of hospital but major portion of the plot is being used for residence of the family members/office bearers of the plaintiff and also as private dental college campus which is evident from the Nazir's reports dated 13.1.2014 and 22.1.2015 filed in C.P.No.D-6629 of 2014.

7. The defendant No.3 in its counter affidavit stated that the plaintiff is using the amenity plot as bungalow for residence over 2/3rd of their plot and on the remaining portion using it as dental health science teaching facility and small dental clinic. The plaintiff has itself violated the terms and conditions of the lease particularly Clause 20 of the lease deed and changed the usage. It is further stated that despite sale of the amenity plot, at least the private defendants have not changed its use to any commercial or residential purpose. It is further averred that the plaintiff has no legal right or title or legal character to sue hence plaint is liable to be rejected.

8. The defendant No.4 in their counter affidavit stated that the owner submitted application for demolition permission which was granted on 10.4.2013. The matter

was also forwarded to Town Planning Section SBCA for their NOC, which was accorded to. There was no violation of law and regulation on the part of defendant No.1 and the subsequent owners.

9. The defendant Nos.8 and 9 have not filed any counter affidavit to the injunction application but they have filed application under Order 39 Rule 4 CPC for the vacation of status quo order dated 3.12.2014. They reiterated that defendant No.1 is original lessee of the suit property who desired to expand his Chinese Acupuncture Centre into a hospital but since he was not financially strong, therefore, he required financial assistance and also approached to the defendant No.9 to establish liver transplant unit and general hospital. The defendant Nos.8 and 9 acquired the plot by virtue of a conveyance deed for the purpose of hospital and they have no intention to change the land use.

10. The learned AAG submitted his written submission that there is no cause of action against the defendant Nos.6 and 7, however, he pointed out breach of the terms and conditions of indenture of lease dated 17.8.1992. At the same time, he asserted that the plaintiff has no right to seek declaration and or cancelation of registered sale deed. He referred to the judgment authored by me in the case of **Ilyas Ahmed v. Muhammad Munir** reported in **PLD 2012 Sindh 92**.

11. The learned counsel for the plaintiff with the aforesaid backdrop argued that plaintiff Society has constructed a state of art medical and dental complex as well as medical and dental college which was founded in 2001. The adjacent plot No.ST-2, measuring 1000 Sq.

Yds., was allotted to Defendant No.1. The existing structure standing on the suit plot No.ST-2 was partly demolished and preparations were underway to construct a multi-storeyed building, therefore, the plaintiff Society made enquiries and came to know that the defendant No.1 in gross violation of the terms and conditions, more particularly the condition No.20 of lease deed dated 17.8.1992 has executed a sale deed on 28.6.2013 in favour of defendant No.2 whereas the defendant No.6 by misusing his official status and authority as Sub-Registrar for corrupt motives registered the sale deed on 28.6.2013 in favour of defendant No.2. It was further averred that during pendency of the suit, the plaintiff came to know that the defendant No.2 has sold out the plot to the defendants No. 8 & 9 vide conveyance deed dated 9.9.2014. The Sindh Disposal of Urban Land Ordinance, 2002 specifically provides that amenity plots shall only be disposed of for the purpose the plot is reserved through a public auction at a price not less than the market price and no plot shall be converted for any other purpose except with prior approval of the prescribed authority. The lease specifically placed a clog on the transfer of the property thus the sale deed cannot be treated lawful under the provisions of Section 23 & Section 56 of Contract Act 1872. The Transfer of Property Act specifically provides that amenities could not be leased, sub-leased, sold or transferred to any person for personal gains. He further contended that the defendant No.5 being a public functionary was bound to deal with the public property strictly in accordance with the parameters laid down by the law. The plaintiff has approached this court as whistle blower and need not be personally aggrieved in the strict sense. On the contrary, he argued that plaintiff has easement rights on the plot

in question so after the cancellation of the lease deed and two sale deeds, the plot in question be allotted to the plaintiff. The learned counsel cited following judicial precedents:

(1) 2010 CLC 1879 (Muhammad Sabir v. Maj. (Rtd.) Muhammad Khalid Naeem Cheema and others). Order VII, Rule 11. Rejection of plaint. Contents of plaint could only be looked into for such purpose. Court could reject plaint, when allegations made therein, if assumed as proved to be correct would not entitle plaintiff to get relief.

(2) 2015 YLR 550 [Sindh] (Naseem-Ul-Haq through Attorney and another v. Raes Aftab Ali Lashari through Guardian ad-litem and 5 others). Object of Section 42 of Specific Relief Act 1877. Any man's legal character is generally taken as the same thing as a man's status. Words "right as to any property" are to be understood in a wider sense than "right to property" and words "interested to deny" denotes that defendant is interested in denying right of plaintiff or his legal character. Denial of right constitute a cause of action to maintain an action under Section 42 of Specific Relief Act, 1877. Relief of declaration is a discretionary relief and can be granted in the case where substantial injury is established and in absence of denial of right no relief of declaration can be granted. Provision of Section 42 of Specific Relief Act, 1877, is not exhaustive of circumstances in which declaration is to be given. Declaration can be given even in the circumstances not covered by Section 42 of Specific Relief Act, 1877, in which case general provision of law gives declaration sought.

(3) 2004 CLC 1029 (Arif Majeed Malik and others v. Board of Governors Karachi, Grammar School). Grant of relief under Section 42 of Specific Relief Act, 1877. One reason for the divergence of judicial opinion is that when Specific Relief Act, 1877, was enacted, concept of rights which could be enforced through Courts was largely confined to 'status' as understood in feudal social context or rights pertaining to property in laissez-faire economy. With the development of jurisprudence over more than a century, a large number of other rights which did not relate to status of an individual or deal with tangible property came to be recognized by law and some of them were in the form of guaranteed fundamental rights. Principle, "wherever there is a right there must be a remedy to enforce it", persuaded Courts not to remain bound within the technicalities of Section 42 of Specific Relief Act, 1877, for granting relief.

(4) 2006 YLR 185 (Karachi Stock Exchange through Attorney and another v. Muhammad Ashaqeen and 6 others). Conversion of public/amenity plot into residential/commercial plot. Said plot was granted/leased out to the respondent through a resolution of the Municipal Corporation approved by the Mayor as well as the Provincial Government under Section 45(4) of Sindh Local Government Ordinance, 1979, but in violation of the provisions of Section 45(5) (ii) of the Said Ordinance. Grant after conversion of the plot, and its approval had been made without taking into consideration of certain rules and regulations, particularly, that an amenity plot could not be converted into a residential or commercial plot and furthermore, a plot measuring more than 40 sq. yards could not be granted except through public auction. Even if the appellants had failed to get the said plot transferred in their favour, it did not mean that they were estopped from challenging its grant in favour of the respondent in case it was illegal and void being a violation of the laws dealing with the use and conversion of amenity plots.

(5) 2007 MLD 1880 (Naseem Ali Khan v. K. D. A. and others. Article 52-A of Karachi Development Authority Order, 1957, explicitly required that an amenity plot could not be converted into any other purpose without inviting public objections. Chief Minister had no authority whatsoever to allot plots under different schemes of the Authority.

(6) 2016 SCMR 101 (Province of Sindh through Chief Secretary and 8 others v. Syed Kabir Bokhari). Allotment of amenity plot/land for commercial use was directly in conflict with Art.52-A of the Karachi Development Authority Order, 1957 which specifically provided for procedure for seeking of conversion of amenity plot for other use. Admittedly, in the present case, there was no order by the competent authority to sanction the use of amenity land for commercial purposes.

(7) 2013 CLD 1263 (Najamuddin Zia and another v. Mst.Asma Qamar and others). The rejection of the plaint on technical ground amounts to deprive a person from his legitimate right of availing legal remedy in undoing the wrong done in respect of such right. This is a settled principle of law that in case of substantial question of facts or law the provisions of Order VII, Rule 11, C. P. C. cannot be invoked rather the proper course for the court in such cases is to frame issues on such questions and decide the same on merits in the light of evidence. Reference can be made to the judgment reported in 2011 CLC 88 (Mst. Bano alias Gul Bano and others v. Begum Dilshad Alam and others).

12. The learned counsel for the defendant No. 1, 2, 8, 9 and 10 argued that the plot number of the suit property is ST-2 whereas the number of the plaintiff's plot is ST-2B. The date of execution of lease of the plaintiff is 26.09.1992 and the date of execution of lease of defendant No.1 is 17.08.1992. Clause 20 which is a restrictive clause is common to both the leases. The perusal of prayer clauses do show that clause (a) and (b) are coached in a negative sense and the plaintiff on its own showing has failed to seek any positive declaration in its favour. Section 42 of the Specific Relief Act, 1877 can only be invoked if any right, title and interest of the plaintiff in any property is denied. The prayer clauses (c) and (d) are related to cancellation of documents. Section 39 of the Specific Relief Act enables any person apprehending that a written instrument which is void or voidable and if left outstanding may cause him serious injury. The case of the plaintiff does not fulfil the above requirements. In this case there is no infringement or any threatened injury therefore the plaint is liable to be rejected. In response to the injunction application, they argued that so long as defendants are adhering to the covenants of lease and are willing to construct the hospital, they cannot be restrained from using their own plot for the purpose it was leased. The violation of covenant of lease if any can only be challenged by the lessor and not the strangers. The injunction cannot be granted when the conduct of the plaintiff has been such as to disentitle him to the assistance of the court. The plaintiff was allotted amenity plot for construction of a hospital only which they are using as residence and also as a Dental Clinic which fact is evident from Nazir Report submitted in Constitutional Petition No.D-6629 of 2014.

It was further argued that the plaintiff itself is a wrongdoer and has violated the restrictive covenants of lease (Clause 20) by not establishing and constructing a hospital even after expiry of 23 years of execution of lease. It was further contended that there is a distinction between an individual's interest and the interest of public at large. It is a well settled principle of law that the individual interest yield to the national and public interest and the project of public interest must prevail. The learned counsel concluded that if this court does not deem proper to reject the plaint at this stage and feels some triable issues then the injunction application may be dismissed and the answering defendants may be allowed to raise the construction and build hospital in the larger public interest at their sole risk and peril. It was further contended that the plaintiff in fact without any legal character wants the plot in question by hook and crook which is obvious from the substance of the plaint where unconvincing plea of easement has been nurtured. The learned counsel referred to following judicial precedents:

(1) 2007 SCMR 1446 (Atta Muhammad vs. Maula Bakhsh and others). Specific Relief Act Section 42. The courts should also keep in mind that relief of declaration is discretionary and a plaintiff who seeks discretionary relief must come to the court with clean hands.

(2) 2010 CLC 14 (Abdullah and others v. Muhammad Haroon and others). No duty was cast up on the plaintiffs/respondents, to take the pain of filing a suit at huge expenses just to protect the government land. The question of fraud was brought to the notice of the relevant authorities. No grievance was caused to the respondents/plaintiffs by the order of the Member, Board of Revenue. Only the Government could have challenged the said order.

(3) 1995 CLC 1012 (Barkat Ali and another v. Mst. Fatima Bai and 2 others). In the case of R. G.

Sehwani Cooperative Housing Society Ltd., v. Haji Ahmed and others (PLD 1983 Kar. 11), while interpreting Section 105 of the Transfer of Property Act, it has been laid down that contravention of restrictive covenants of lease can be enforced only by the lessor and not the third parties. In view of the above legal position the submission of the learned counsel for the plaintiffs that the said defendants be restrained from raising construction on any area beyond one-fourth of the area of the plot in question is prima facie without any substance.

(4) PLD 2012 Sindh 92 (Ilyas Ahmed v. Muhammad Munir and 10 others). Any person entitled to any legal character or to any right to property can institute a suit for declaratory relief in respect of his title to such legal character or right to property. The expression, legal character has been understood as synonymous with the expression status. Section 42 of the Specific Relief Act applies only to a case where a person files a suit claiming entitlement to any legal character or any right to property which entitlement is denied by the defendants or in denying which the defendants are interested. Section 42 would be attracted to a case in which the plaintiff approaches the court for the safeguard of his right to legal character or property but where right to his own legal character or property is not involved the suit is not maintainable.

(5) PLD 1978 Lahore 113 (Abdur Rahman Mobashir and 3 others v. Syed Amir Ali Shah Bokhari and 4 others). Specific Relief Act. No declaration, held, can issue outside provisions of Section 42 and court's power to make declaratory decrees limited to instances mentioned in the section.

(6) 1987 CLC 2416 (Chairman, Municipal Committee, Taxila v. Mohammad Jan and 4 others). Civil Procedure Code. A case standing in need of evidence having to be led for being established, cannot be considered a proper subject for issuing temporary injunction. Obligation of person desirous of having temporary injunction issued in his favour is to make out a prima facie case, in absence whereof a court cannot be deemed possessed of the power to issue it.

(7) 1984 CLC 340 (Naseer Ahmed v. Hafiz Muhammad Ahmed and others). Transfer of Property Act. Section 105. Breach of restrictive covenant in respect of leases of urban lands could be resisted by lessor alone and not by other lessees unless there was tangible evidence that their rights as lessee will be infringed.

(8) 2006 CLC 1736 (Mrs. Shahnaz and others v. Hamid Ali Mirza). We are of the view that when ostensible title has been transferred in favour of the appellants, who are also in possession of the

disputed plot, it may not be altogether fair to deny them the benefit of its possession till such time that the matter is finally resolved and the respondent's claim is established. The defendant "vendee has absolute right to enjoy his possession of the area in dispute for so long as the decree for pre-emption is not passed against him and is not executed.

(9) PLD 1983 Karachi 11 (R.G. Sehwani Co-Operative Housing Society Ltd. v. Haji Ahmad and others). Transfer of Property Act. Section 105. Lease can be enforced only by a party to such agreement. Building agreement providing for allotments of plots by Society to its members and such members having to continue to be liable for performance of several stipulations until grant of lease to society, lease deed providing for cancellation of lease in discretion of lessor in case of contravention of provisions of lease, such covenants, of lease, held, cannot be enforced by plaintiffs.

13. The learned counsel for the defendant No.3 (K.M.C) in support of his application moved under Order 7 Rule 11 C.P.C argued that the plaintiff has no cause of action against them. Only lessor has right to object against the violation of lease if any. The private defendants have no intention to change the use of land which is basic condition of lease.

14. The learned A.A.G and State Counsel both relied upon and referred to their synopsis filed on 3.12.2015.

15. Heard the arguments. First I would like to take up **CMA Nos.1031 and 18660 of 2015** filed under Order 7 Rule 11 C.P.C by the defendant No.1 and defendant No.3 (KMC). The defendant No.1 raised the plea that the plaint does not disclose any cause of action and the plaintiff is stranger to the property henceforth the suit is barred under Section 42 of the Specific Relief Act. The plaintiff has flunked to put on view any legal character therefore the plaint is liable to be rejected. Whereas KMC in its application has also pleaded that plaintiff has no cause of

action against them. The bone of contention in the matter is transfer of an Amenity Plot No.ST-2 adjacent to plaintiff's building. Massive emphasis made by the counsel for the plaintiff that bearing in mind clause 20 of the lease deed, it was vociferously preordained that the lessee will not sell, transfer, or assigned his rights in respect of demise premises and the plot should not be used for any other purpose. It was robustly argued that the defendant No.1 contravened and disregarded the express condition, therefore, he has lost title over the plot and on cancelation of the plot, the plaintiff's society has easement rights for allotment to live up to the need of extra land for broadening their substructure and set up. KMC in their counter affidavit robustly supplicated that in the lease of plaintiff also similar condition was ascribed but the plaintiff is luxuriating amenity plot as bungalow over substantial portion and small portion is being used for teaching facility with small dental clinic. Though the amenity plot was sold by the defendant No.1 to defendant No.2 and then to defendant Nos.8 and 9 but the fact remains that the use of plot is not changed to any commercial activity or residential purpose. The learned AAG also submitted his written submissions in which though he pointed out the breach of the terms and conditions of indenture of lease particularly in respect of clause 20, but at the same time it was further stated that the plaintiff has no right to seek declaration and cancellation of registered sale deed.

16. Learned counsel for the plaintiff dissuaded and fight against applications moved under Order 7 Rule 11 C.P.C. that neither this law suit is without cause of action nor it is barred under any law. In gross violation of lease deed the sale deed was executed in favour of defendant No.2

by the Sub-Registrar for some corrupt motives. Subsequently the defendant No.2 sold out the property to defendant Nos.8 and 9. The Sub-Registrar being a public functionary was bound to deal the issue of registration in accordance with law. The plaintiff has approached this court as a whistleblower to bring this illegality into notice of court. On the contrary, counsel for the defendant Nos.1, 2, 8, 9 and 10 took the plea that the plaintiff has no cause of action. The violation of lease if any can be challenged or called into question by the lessor alone and not by any stranger. The plaintiff has no legal character to challenge the title of the defendants. The defendant No.1, 2, 8 and 9 have avowed and self-confessed that they have entered into a joint venture for establishing hospital for liver transplantation in the larger public interest as this facility is not available everywhere in the province.

17. In the case of **Naseem-Ul-Haq** (supra) authored by me I have discussed Section 42 of the Specific Relief Act in detail. No doubt the provisions of Section 42 are not exhaustive and all-encompassing of virtues and ambiances in which declaration is to be given. Sometimes in the peculiar and distinctive circumstances of the case court may grant the declaration even not covered by Section 42 of the Specific Relief Act where in case general provision of law gives declaration sought. Legal character as used in Section 42 is equivalent to legal status and legal status is a legal right when it involves a peculiarity of the personality arising from anything unconnected with the nature of the act itself which the person of inherence can enforce against the person of incidence. Salmond pointed out in his book on Jurisprudence, rights of four distinct kinds: (1) rights (in the strict

sense); (2), liberties: (3) powers; and (4) immunities. The word 'right' is used in a wider sense in Section 42 of the Specific Relief Act. The distinction between the expression 'right as to any property' and the expression 'right to any property' is not very important.

18. It is sine qua non as to whether the plaintiff in facts and circumstances of the case should or should not grant declaration. Looking into down-to-earth and pragmatic perseverance in this forward-looking advance era, one should not stick to the rigidities and complexities or acid test of legal character but it needs some more generous comprehension to meet up all exigencies. Lord Cottonham said, in Taylor v. Salmon:

“It is the duty of a court of equity to adapt its practice and course of proceedings, as far as possible, to the existing state of society and to apply its jurisdiction to all those new cases, which from the progress daily made in the affairs of men, must continually arise and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy”. (1838) 4 Myln & Cr 134. (C M Row. Law of Injunctions, Eighth Edition.)

19. The dictum laid down in the case of **Arif Majeed Malik and others** (supra) unequivocally held that wherever there is a right there must be a remedy to enforce it. Persuaded courts not to remain bound within the technicalities of Section 42 of Specific Relief Act. The reason for the divergence of judicial opinion is that when Specific Relief Act, 1877 was enacted concept of rights which could be enforced through courts was largely confined to status as understood in feudal social context or rights pertaining to property in laissez-faire economy.

20. In the United States, both in the Federal and Uniform laws, the word 'right' alone is used, so that a party may obtain a declaration as to any legal rights which, of course, mean justiciable rights. **Ref: Cf. Ashwender v. Tennessee Valley Authority, 297 U.S. 288 at p. 325: L, Ed. 688 at p. 699.** In keeping with **Cf. 62 Harvard Law Review at pp. 875-76. (Ref: Anand & Iyer's, Commentary on Specific Relief Act. 11th Edition. Page 927),** the word 'right' has been interpreted to include 'liability' also, so that actions have been entertained against the Government and other public bodies to determine their liability, duty or power. Right also includes immunity, e.g. that a statute is not applicable to the plaintiff. Since the word 'right' is not confined to proprietary right, the courts have had no difficulty in making a declaration as to contractual right or a right to practice a profession or the like.

21. The plaintiff has also claimed easement. To warrant the interference of equity to protect an invasion of an easement, the easement should itself be certain and capable of being clearly ascertained and there should be clear desecration and defilement of the right but where the plaintiff asserted that he had an easement over the defendant's land and sought to restrain defendant from interfering with his use and the defendant disputed the said right, the court refused to interfere by injunction until such right was determined at law. According to **Gale on Easement 13th Edition, Page 6,** the following characteristics are essential to easement: (a) There must be a dominant and a servient tenement. (b) An easement must accommodate the dominant tenement. (c) Dominant and servient owners must be different persons. (d) A right over a land cannot amount to an easement,

unless it is capable of forming the subject-matter of a grant. In tandem, the plaintiff has also portrayed and depicted its role as whistleblower and approached this court to shield and protect the misuse of amenity plot by way of sale/transfer in violation of lease condition.

22. The term whistle-blower comes from the whistle a referee uses to indicate an illegal or foul play. US civic activist Ralph Nader is said to have coined the phrase, but he in fact put a positive spin on the term in the early 1970s to avoid the negative connotations found in other words such as "informers" and "snitches". A whistleblower is a person who exposes any kind of information or activity that is deemed illegal, unethical, or not correct within an organization that is either private or public. The information of alleged wrongdoing can be classified in many ways i.e. violation of company policy, rules, law, regulation and or threat to public interest, national security as well as fraud, and corruption. Those who become whistleblowers can choose to bring information or allegations to surface either internally or externally. Internally, a whistleblower can bring his accusations to the attention of other people within the accused organization. Externally, a whistleblower can bring allegations to light by contacting a third party outside of an accused organization. Whistleblowers can reach out to the media, government, law enforcement, or those who are concerned but also face stiff reprisal and retaliation from those who are accused or alleged of wrongdoing. Ref: <https://en.wikipedia.org/wiki/Whistleblower>.

23. The judgment authored by me in the case of **Ilyas Ahmed** (supra) is distinguishable to the facts and circumstances of the case. Astute survey of the

controversy divulges that it is essentially roaming around the sale of amenity plot twice. The plaintiff is discouraging the violation of lease while the private defendants No.1 and 2 including defendant Nos.8 and 9 are conversing that they intend to establish and construct a sophisticated state of the art liver transplant unit and general hospital through their joint venture. In the case of **Muhammad Sabir** (supra), private parties entered into an agreement for the sale of amenity plot without permission of the society. Later on the society communicated them that the amenity plot cannot be transferred or sold and the society has no concern with any private arrangement made by the parties. Basically, the application was moved on the premise that notice under Section 70 of the Cooperative Societies Act was not tendered to the Registrar Cooperative Societies, but I dismissed the application under Order 7 Rule 11 C.P.C. for the reasons that there is a likelihood of misuse of an amenity plot reserved in the scheme for the public interest therefore, the presence of society was otherwise necessary keeping aside the intricacies of Section 70 of Cooperative Societies Act. In the case of **Najamuddin Zia** (supra) decided by me also an application under Order 7 Rule 11 C.P.C. was filed. I held in this case that pleadings of the parties show off a substantial dispute which is mix question of law and facts and require evidence therefore the application for rejection of plaint was dismissed by me while giving reference of my another judgment reported in **2011 CLC 88 (Mst.Bano alias Gul Bano and others v. Begum Dilshad Alam and others)**.

24. It is renowned and eminent principle of law that in the case of substantial question of facts or law, the provisions of Order 7 Rule 11 C.P.C. cannot be invoked

rather than the proper course is to frame issues and decide the same on merits in the light of evidence. In the case in hand, innumerable complicated mix questions of law and facts are involved which cannot be decided summarily unless proper issues are framed and parties are allowed to lead evidence. The plaintiff has raised multiple questions not under parlance of Section 42 of Specific Relief Act, but violation of the lease clause and according to the contents of the plaint twice allowance of the sale of amenity plot in collusion with official defendants. Serious allegations have also been leveled against the Sub-Registrar of Properties, who allegedly hoodwink the restrictive clause in the lease and allowed the registration of conveyance deeds. In the nutshell, the plaintiff has beseeched and entreated its role as whistleblower to bring certain facts in the knowledge of this court, therefore, it is indispensable to delve into the issues raised and decide the controversy with proper opportunity to all stake holders in the suit rather than non-suiting the plaintiff on mere technicalities. At this stage it would be premature to grasp and catch on that the plaintiff has failed to come into sight without any cause of action or the plaint appears to have been barred by any law. Nevertheless the crucial practicality and expediency needs to be thresh out in the course of trial as to whether the plaintiff may challenge the violation of lease or this right is only vested in or possessed by the lessor alone putting side by side the role of the plaintiff as whistleblower. The pros and cons lead me to the conclusion that the plaintiff may maintain the suit and at this juncture, the plaint cannot be rejected.

25. Now I would like to take up injunction application filed by the plaintiff with another application under

Section 94 read with 151 CPC for the suspension of revised proposed building plan and the application moved under Order 39 Rule 4 CPC by the defendant No.8 for vacating the status quo order dated 3.12.2014 (**CMA No.16156 of 2014, CMA No.17997 and 18327 of 2015**). At this point of time the counsel for the private defendants argued that due to interim orders they are not in a position to raise construction for establishing a liver transplant unit and general hospital required to be built in the larger public interest. While the plaintiff in its injunction application prayed for suspension of lease with further prayer that the defendants may be restrained from creating any third party interest as well as raising construction on the plot in question till disposal of the suit. The pivotal thrust of the defendants' arguments is that despite purchasing amenity plot, they have not changed the use of land and they want to establish a liver transplant unit and general hospital through joint venture in larger public interest. Whether they have formed a joint venture or not this question can only be decided at the trial of the suit where obviously they will have to produce convincing and believable evidence that despite sale or purchase of amenity plot, there is no defectiveness in the title in realism and actuality for the reason that the original lessee is part of consortium or joint venture. In my view, the court is under obligation to keep in mind the socio-economic needs of society and should be aware of its own obligation towards society, the problem of balancing the social interest and individual interest should yield to public interest. In addition to public convenience as relevant consideration for grant of interlocutory injunction, the court must also consider the effect of an injunction on the rights of third persons. In the case of

Abu Dhabi Medical Devices Co. L.L.C. v. Federation of Pakistan, reported in **SBLR 2010 (Sindh) 1313**, I have discussed the expression public importance and public interest in the following words:-

“The expression “public importance” is not capable of any précised definition. It can only be defined by process of judicial inclusion or exclusion. Each case has to be judged in the circumstances of the case as to whether the question of public importance is involved but it is settled that public importance must include a purpose or aim in which the general interest of the community as opposed to the particular interest of the individual directly or widely concern. Public Interest is very wide expression and embraces public security, public order and public morality. Expression Public Interest in common parlance means an act beneficial to general public and action taken in public interest necessarily means an action taken for public purpose”.

26. An injunction is an equitable relief based on well-known equitable principles. Since the relief is wholly equitable in nature, the party invoking the jurisdiction has to show that he himself was not at fault. The phrase prima facie case in its plain language signifies a triable case where some substantial question is to be investigated or some serious questions are to be tried and this phrase ‘prima facie’ need not to be confused with ‘prima facie title’. Before granting injunction the court is bound to consider probability of the plaintiff succeeding in the suit. All presumptions and ambiguities are taken against the party seeking to obtain temporary injunction. The balance of convenience and inconvenience being in favour of the defendant i.e. greater damage would arise to the defendant by granting the injunction in the event of its turning out afterwards to have been wrongly granted, than to the plaintiff from withholding it, in the event of the legal right proving to be in his favour, the injunction may not be granted. A party seeks the aid of the court by way of injunction must as a rule satisfy the court that

the interference is necessary to protect from the species of injury which the court calls irreparable before the legal right can be established on trial. In the technical sense with the question of granting or withholding preventive equitable aid, an injury is set to be irreparable either because no legal remedy furnishes full compensation or adequate redress or owing to the inherent ineffectiveness of such legal remedy. Ref: **(C.M Row Law of Injunctions, Eighth Edition)**.

27. In the case of **Karachi Stock Exchange** (supra), the conversion of public/amenity plot into residential/commercial plot was changed and the suit for declaration and injunction was filed. The plaintiff pleaded that amenity plot could not be converted into residential or commercial plot. The court held that even if the appellants failed to get the said plot transferred in their favour, it did not mean that they are estopped from challenging its grant in favour of the respondent, if it was granted in violation of the laws dealing with amenity plots. Similarly in the case of **Naseem Ali Khan** (supra) the court discussed Article 52-A of KDA Order 1957 which required that the amenity plot could not be converted into any other purpose without inviting public objections. While in the case of **Province of Sindh through Chief Secretary** (supra) the apex court held that allotment of amenity plot for commercial use is directly in conflict with Article 52-A of the Karachi Development Authority Order, 1957 which specifically provided for procedure of conversion of amenity plot for other use.

28. With all humility, the aforesaid dictums are distinguishable as on the face of it in the present case

there is no change or conversion of amenity plot to commercial or residential use but throughout the pleadings, nothing has been surfaced that the defendant Nos.1 and 2 or the defendant Nos.8 to 10 are endeavoring to convert the use of land from amenity to commercial or residential use. On the contrary they have vigorously articulated that they intend to build liver transplant unit and general hospital even they went on to argue that if this court is not inclined to reject the plaint due to some triable issues even then they may be allowed to raise construction at their own risk and peril which obviously means that if at any later stage the court comes to the conclusion that the restrictive clause of lease which put an embargo not to sell or transfer the plot has been contravened or violated then naturally the law will take its own course and party found at fault will have to face the adverse consequences. In the case of **Chairman Municipal Committee** (supra), court held that a case standing in need of evidence having to be led for being established, cannot be considered a proper subject for issuing temporary injunction.

29. So far as the dictum laid down in the case of **Abdullah and Barkat Ali** (supra), the court in the first case held that no duty was cast upon the plaintiffs/respondents to take the pain of filing a suit at huge expenses just to protect the government land. The question of fraud was brought to the knowledge of authorities and only the Government could have challenged the order whereas in the second case while interpreting Section 105 of the Transfer of Property Act, the court held that contravention of restrictive covenants of lease can be enforced only by the lessor and not by the third party. While in the case of **Naseer Ahmed** (supra) it

was held that breach of restrictive covenant in respect of leases of urban lands could be resisted by lessor alone and not by other lessees. In the case of **R.G. Sehwan Cooperative Housing Society Ltd.** (supra) again Section 105 of the Transfer of Property Act was under discussion and the court was of the view that lease deed providing for cancellation of lease in discretion of lessor in case of contravention of provisions of lease, such covenants, of lease, held, cannot be enforced by plaintiffs. At this moment the case of **Shahnaz and others** (supra) is also quite relevant in which the court reached to the conclusion that ostensible title has been transferred in favour of the appellant who are also in possession of the disputed plot, it may not be altogether fair to deny them the benefit of its possession till such time the matter is finally resolved and the respondent's claim is established. In the same judgment, the case of **Muhammad Shafi v. Kaniz Zohra Bib (1983 CLC 2541)** has been referred to in which the court held that the defendant vendee has absolute right to enjoy the possession of the area in dispute for so long as the decree for pre-emption is not passed against him and its executed.

30. The title of the plot conveyed by defendant No.2 in favour of defendant Nos.8 and 9 is not denied and their possession is also not disputed. At this juncture I would like to quote my another judgment authored in the case of **Sayyid Yousaf Husain Shirazi v. Pakistan Defence Officers' Housing Authority** reported in **2010 MLD 1267**, in which the basic ingredients warrant examination while granting injunction have been discussed in detail in the following words:-

“Relief of injunction is discretionary and is to be granted by court according to sound legal principles and ex debito justitiae. Existence of prima facie case is to be judged or

made out on the basis of material/evidence on record at the time of hearing of injunction application and such evidence or material should be of the nature that by considering the same, Court should or ought to be of the view that plaintiff applying for injunction was in all probability likely to succeed in the suit by having a decision in his favour. The term “prima facie case” is not specifically defined in the Code of Civil Procedure. The Judge-made-law or the consensus is that in order to satisfy about the existence of prima facie case, the pleadings must contain facts constituting the existence of right of the plaintiff and its infringement at the hands of the opposite party. Balance of convenience means that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that would be caused to the defendants if the injunction is granted. It is for the plaintiffs to show that the inconvenience, caused to them would be greater than that which may be caused to the defendants. Irreparable loss would mean and imply such loss which is incapable of being calculated on the yardstick of money.

31. Taking into consideration the nitty-gritties and rudiments of this lawsuit, I have no disinclination in my mind to reckon that the plaintiff has failed to make out prima facie case and in fact the balance of convenience lies in favour of the private defendants. No question of sustaining any irreparable injury ascends to the plaintiff in the capacity and character of whistleblower. The defendant No. 1, 2, 8 and 9 in a joint venture have resolved and committed to establish hospital on the amenity plot so the basic condition for which the amenity plot was allotted does not seem to have been violated nor the use of land is being changed. The lessor has not initiated any action against the alleged violation of lease and another crucial factor is also significant to point out that if a later stage the suit is decreed and the lease of amenity plot is cancelled or any direction is issued to the lessor to take action against the alleged violation of lease that would not amount an outright transfer or allotment of the plot to the plaintiff as their vested or legitimate right but law will take its own course. All these

fundamental points at issue need to be threshed out during trial of the suit but at this stage no plausible justification is made out to continue the restraining order till final disposal of the suit.

32. In the wake of above discussion, the listed interlocutory applications are disposed of in the following terms:

1. Civil Misc. Application No.1031 and 18660 of 2015 filed under Order 7 Rule 11 C.P.C are dismissed.

2. Civil Misc. Application No.16156 of 2014 filed by the plaintiff under Order 39 Rule 1 & 2 C.P.C is also dismissed. Consequently, the injunctive order dated 3.12.2014 is vacated. The defendant No.1,2, 8 and 9 may raise the construction on the amenity plot in question at their own peril. Since interim orders have been vacated, therefore the Civil Misc. Application No.18327/2015 filed by the defendant No.8 under Order 39 Rule 4 C.P.C. and Civil Misc. Application No.17997/2015 filed by the plaintiff for suspending revised proposed plan are also disposed of accordingly.

3. Civil Misc. Application No. 17996/2015 (Contempt Application) filed by the plaintiff shall remain pending and will be taken up and decided with the main suit.

4. Civil Misc. Application No.18326/2015 moved for converting the suit into fast track filed by the defendant No.8 is dismissed as no proof of age is attached with the application to show that she deserves the benefit of Circular issued by the honourable Chief Justice. However this application may be repeated with better particulars for the consideration of the court.

5. Civil Misc. Application No.18253/2015 was filed by the defendant No.8. Since the pending applications have already been fixed and heard, therefore this application has become infructuous and needs no further orders.

Karachi:
Dated.16.12.2016

Judge