

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
SUIT NO. 2678 / 2017

DATE	ORDER WITH SIGNATURE OF JUDGE
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- 1) For hearing of CMA No. 17829/2017.
- 2) For hearing of CMA No. 724/2018.
- 3) For orders on CMA No. 3359/2018.
- 4) For orders on CMA No. 3360/2018.

26.03.2018.

Mr. Muhammad Ali Lakhani Advocate for Plaintiff.
Mr. Khawaja Shamsul Islam Advocate for Intervener.
Mr. Naveedul Haq Advocate holding brief for
Mr. Ishrat Alvi Advocate for Intervener.
Ms. Nasreen Sehto Advocate for SBCA.
Ms. Rehmatun Nisa Advocate for KDA.

On 26.02.2018 following order was passed and today learned Counsel for the Plaintiff has made his submission to this effect:-

“Counsel for the Plaintiffs in both the Suits has filed Counter Affidavits to respective applications, copies whereof has been supplied to the Counsel for the Intervenor, whereas, learned Counsel for the Intervenor submits that after filing Suit No. 2543/2017, and having failed to get any interim relief, subsequently Suit No. 2678/2017 has been filed in respect of same cause and restraining orders have been obtained, which according to the learned Counsel are against the directions of Hon’ble Supreme Court regarding Marriage Hall being run in the City.

On perusal of the plaint and prayer clause in both Suits it appears that, though differently worded, the ultimate relief being sought in both Suits is almost identical and or same i.e. “*the entitlement of the plaintiff to use the Suit plot for Commercial purposes*”. Sine Counsel submits that Mr. Lakhani will proceed with this matter, who is not in attendance, to come up on 05.03.2018, when Counsel for the plaintiff shall come prepared as to how the second Suit (2678/2017) is maintainable and can be entertained in view of Order II Rule 2 CPC.

Adjourned to 5.3.2018. Interim order, passed in Suit No. 2678/2017, to continue till the next date of hearing.”

Learned Counsel submits that prior to this, Suit No. 2543/2017 was filed wherein, notices were issued to the Defendants including Sindh Building Control Authority (SBCA) and they filed their comments

which are available at Page 229 onwards and according to the learned Counsel, since it has come on record that the Plaintiff's application for change of land use is pending; but has not been processed, therefore, this has given new cause of action and instant Suit has been filed. Per learned Counsel, this is a Suit for Declaration, Mandatory and Permanent Injunction and let alone a Suit for Injunction could have been filed subsequently, and is maintainable for the reason that upon filing of comments a new cause of action has accrued. Learned Counsel further submits that the provisions of Order II Rule 2 CPC shall not apply in this case as at the time of filing of Suit No. 2543/2017 the said cause of action was not available. In support he has relied upon **1990 SCMR 751 (Muhammad Tahir V. Abdul Latif & 5 others), PLD 1995 Karachi 416 (Muhammad Zaki & another V. Muhammad Taqi), 2008 YLR 2277 (Gul Sher and 5 others V. Province of Punjab through EDOR Toba Tek Singh and 8 others), 2011 CLC 319 (Mahboob Ahmed (deceased) through L.Rs. V. Mst. Feroza Begum and others), 2013 YLR 1888 (Muhammad Azam Khan and another V. Fazal ur Rehman and 16 others), 1994 SCMR 826 (Jewan and 7 others V. Federation of Pakistan and 2 others), and order dated 6.3.2018 passed in Suit No. 1413/2016.**

I have heard the learned Counsel on the question of maintainability of instant Suit and perused the record. It appears that the same Plaintiff had earlier filed Suit No. 2543/2017 on 11.12.2017 primarily being aggrieved by the notice issued by SBCA pursuant to certain directions of the Hon'ble Supreme Court in CrI.O.P No. 7-K/2017 and CrI.O.P. No. 11-K/2016 and the main contention of the learned Counsel for the Plaintiff at the time of filing of such Suit was to the effect that SBCA is misconstruing the orders of the Hon'ble

Supreme Court inasmuch as the same are not applicable to the case of the Plaintiff. In Suit No.2543/2017 on 11.12.2017 notice was issued to the Defendants and no restraining orders were passed. Now it is the case of the Plaintiff that in that Suit certain comments were filed and through those comments it reflects that the application of the Plaintiff regarding change of land use appears to be pending and this has given a fresh cause of action; hence, instant Suit has been filed. It would be advantageous to refer to the prayer made in both the Suits which reads as under:-

"Suit No. 2543/2017.

DECLARE:

- i. That Plot No. 55, situated in Kokan Muslim Cooperative Housing Society, located on Alamgir Road, Karachi, is a "Commercial Plot" for having complied with all (regulatory and statutory) requirements;
- ii. That the plaintiffs (and / or persons acting under them, through them and / or on their behalves) are entitled (at law) to use and occupy Plot No. 55, situated in Kokan Muslim Cooperative Housing Society, located on Alamgir Road, Karachi for commercial purposes; including (but not limited to) the purpose of a "Marriage / Wedding Hall";
- iii. (As a consequence thereof) that the actions of the Defendant No. 1 (and / or persons acting under it, through it and / or on its behalf) are illegal, unlawful, excessive, without jurisdiction, and ultra vires "building regulations";

GRANT:

- iv. A mandatory injunction directing the Defendant No. 1 (and / or person acting under it, through it and / or on its behalf) to issue a "formal order" confirming the status of Plot No. 55, situated in Kokan Muslim Cooperative Housing Society, located on Alamgir Road, Karachi, as "Commercial";
- v. A mandatory injunction directing the Defendants No. 2 & 3 (and / or persons acting under them, through them and / or on their behalf) to issue an amended "Deed of Conveyance" identifying Plot No. 55, situated in Kokan Muslim Cooperative Housing Society, located on Alamgir Road, Karachi, as "Commercial";
- vi. A permanent injunction restraining the Defendants (and / or person acting under it, through it and / or on its behalf) from taking any action(s) adverse to the rights of the Plaintiffs, including (but not limited

to) sufferance of sealing and / or demolition upon (the structure erect on) Plot No. 55, situated in Kokan Muslim Cooperative Housing Society, located on Alamgir Road, Karachi, as “Commercial”;

“Suit No. 2678/2017.

DECLARE:

- i. That the Plaintiffs are entailed to the benefits of the due process of law as also the application (and enforcement) of the Karachi Building and Town Planning Regulations of 2002 and the “Policy for regularization of Marriage Halls” as against Plot No. 55, situated in Kokan Muslim Cooperative Housing Society, located on Alamgir Road, Karachi;
- ii. That in the absence of a due determination by the Defendants No. 1 & 2 (and / or persons acting under them, through them and / or on their behalves) in the matter of “Land Use” of Plot No. 55, situated in Kokan Muslim Cooperative Housing Society, located on Alamgir Road, Karachi, no adverse action(s) can be enforced against the interest of the Plaintiffs;

GRANT:

- iii. A mandatory injunction directing the Defendants No. 2 & 3 (and / or persons acting under them, through them and / or on their behalves) to afford a hearing to the plaintiffs on the representation filed as on 18.12.2017;
- iv. A mandatory injunction directing the Defendants No. 1 & 2 (and / or persons acting under them, through them and / or on their behalves) to conduct proceedings in the matter of the plaintiff’s representation in accordance with the law, including (but not limited to) the Sindh Building Control Ordinance of 1979, the Karachi Building and Town Planning Regulations of 2002 and the “Policy for regularization of marriage Halls”;
- v. A permanent injunction restraining the Defendants (and / or person acting under it, through it and / or on its behalf) from taking any action(s) adverse to the rights of the Plaintiffs, including (but not limited to) sufferance of sealing and / or demolition upon (the structure erect on) Plot No. 55, situated in Kokan Muslim Cooperative Housing Society, located on Alamgir Road, Karachi;”

Perusal of the aforesaid prayer clause(s) clearly reflects that in pith and substance there is no difference as such in both the prayers. It is worth mentioning that when Suit No. 2543/2017 was filed only notice was ordered and no restraining orders were passed. However, in Suit No. 2678/2017 through order dated 26.1.22017 restraining orders

were passed by directing the parties to maintain status quo. Though in the plaint in Suit No. 2678/2017 there is disclosure of the earlier Suit in Para 14 thereof, and it has been stated that the earlier proceedings are though similar in facts, but in principle, they are distinct and different in nature. However, in my view, merely stating so does not make them distinct and different. The main cause, which was and is, that SBCA has issued notices in respect of the Suit property which is being used by the Plaintiff as a "Marriage Hall" for which no permission and or conversion is available with them. It is Plaintiff's own case that some application for change of land use was made, and is pending. This fact and cause was also a matter of record when first Suit being No.2543/2017 was filed. They may have applied for that and the proceedings may be pending, but it is not conceivable, as to how, within a span of 15 days upon mere filing of comments by SBCA, a fresh cause of action has accrued, particularly when in the 1st Suit no restraining orders were passed on the first date and only notice was ordered, whereas, in the 2nd Suit, an Ex-parte interim order has been obtained. The cause remains the same as the Plaintiff claims to be entitled for using the Plot in question as a "Marriage Hall", for a number of reasons, which are not relevant at present, but all such reasons were also available when 1st Suit (2543/2017) was filed, whereas, admittedly factual matrix is same as stated in Para 14 of the plaint.

Even otherwise, if there was any cause which according to the Plaintiff has arisen on filing of comments, it was supplementary to the proceedings already pending and at best, the Plaintiff could have made an application for amendment of the pleadings; but in any manner, this does not permit filing a fresh Suit. More so even without first withdrawing the earlier Suit with a permission to file a fresh Suit,

whereas, even as of today no such request for withdrawal of the earlier Suit has been made. In the circumstances, I am of the view that there was no fresh cause of action to file a fresh Suit as the earlier Suit which is pending is on the same cause of action and therefore, the subsequent Suit would be deemed to be hit by Order II Rule 2 CPC.

In view of such position and for the above facts and circumstances, instant Suit is not maintainable and is accordingly dismissed along with CMA 17829/2017 listed at Serial No.1, whereas, applications at Serial No. 2 to 4 have become infructuous and are dismissed accordingly.

J U D G E

ARSHAD/