

ORDER SHEET
HIGH COURT OF SINDH, KARACHI

Suit No.558 of 2018

Date	Order with signature of Judge
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Present

Mr. Justice Muhammad Ali Mazhar

Abdul Majid & others.....Plaintiffs

Versus

Mrs.Nida Irfan & others.....Defendants

Date of hearing 05.04.2018

M/s. Muhammad Nouman Jamali and Abdur Razzaq,
Advocates for Plaintiffs

Mr.Ovais Ali Shah, Advocate for Defendant No.1.

Mr.Khalid Hussain Shaikh, Advocate for SBCA.

Muhammad Ali Mazhar, J: This suit has been brought by the plaintiffs for declaration, permanent injunction and damages. Essentially, the plaintiffs have implored the declaration that the defendant No.1 is constructing eight town houses on Plot No.121, Block 7/8, K.M.C.H.S. in violation of Sindh Building Control Ordinance, 1979 and Karachi Building & Town Planning Regulations, 2002.

2. On 16.03.2018, Mr. M. Nouman Jamali, Advocate appeared for the plaintiffs when three applications were fixed for orders i.e. **CMA No.4146/2018** (urgent application), **CMA No.4147/2018** under Order 39 Rules 1 & 2 CPC for restraining the construction activity and **CMA No.4148/2018** under Order 18 Rule 18 CPC for carrying out an inspection to find out whether the

construction is being raised in accordance with the approved building plan or not? After jotting down the contentions, notice on injunction application was issued. So far as the inspection application was concerned, the relevant portion of the order is reproduced as under:

“.....Learned counsel has also moved an application under Order XVIII Rule 18 C.P.C. (CMA No.4148/2018) for inspection. Nazir is appointed commissioner to inspect the said property and disclose the factum of construction on the next date. The inspection shall be carried out by the Nazir in presence of representatives of the plaintiffs and defendants. Nazir’s fee shall be Rs.25000/- (rupees twenty five thousand only) which will be paid by the plaintiffs in advance. Let this matter be fixed on 29.03.2018 when the suit No. 2534/2017 filed by the defendant No.1 is also fixed. CMA No. 4148/2018 is disposed of.”

3. On notice, Mr. Ovais Ali Shah, Advocate filed vakalatnama for the defendant No.1. On his urgent motion (CMA No.4686/2018), the matter was fixed in court on 27.03.2018. Along with urgent motion, he moved CMA No.4687/2018 under Section 151 CPC for suspension of inspection order. The next CMA No.4688/2018 was moved by him under Order 47 Rule 1 r/w Section 114 CPC for review of the order dated 16.03.2018 on the premise that the same plaintiffs have already filed two inspection applications in Suit No.2534/2017 alongwith the application under Order 1 Rule 10 CPC (CMA No.936/2018) for impleading them as defendants. Though the factum of pending Suit No.2534/2017 was disclosed alongwith pending application of Order 1 Rule 10 CPC in this suit but they have concealed two inspection applications for the same property in Suit No.2534/2017. It was further averred that the order of inspection was obtained by concealment and suppression of facts. On review application, notice was issued to the plaintiffs and in the meanwhile the Nazir was directed to defer the inspection. The counsel

for the plaintiffs was also directed to explain as to why he failed to make proper disclosure.

4. Mr. Nouman Jamali Advocate submitted his explanation. It was contended by him that the defendant No.1 collusively filed Suit No.2534/2017 against S.B.C.A. and Province of Sindh only. They deliberately not made party to the plaintiffs. However he admitted the pendency of application under Order 1 Rule 10 CPC along with the inspection applications. He further argued that unless application under Order 1 Rule 10 CPC is allowed, no orders on other applications could have been passed by this court, therefore, the plaintiffs have filed their own suit for the enforcement of easement rights. He further argued that the inspection was ordered to be carried out subject to the notice hence no prejudice could have caused to the defendants because at the time of inspection, they may well be associated by the Nazir. However, he said nothing in his explanation with regard to non-disclosure of two pending applications for inspection in Suit No.2534/2017. The learned counsel concluded with fallback argument that **“non-disclosure is not deliberate nor with bad intention”**.

5. Quite the reverse, Mr. Ovais Ali Shah, Advocate appearing for the defendant No.1 maintained that the plaintiffs have deliberately concealed the pendency of two inspection applications to obtain the ex-parte inspection order. On 08.03.2018, the plaintiffs insisted that the inspection order may be passed but the court was of the view that let S.B.C.A. file their comments to this application. They moved fresh CMA No.3379/2018 for the purposes of inspection with same wordings and when this application was fixed for orders on 05.03.2018 with

urgent motion, the court issued notice for 08.03.2018 and also called upon Deputy Director, SBCA, Jamshed Town, Karachi to appear in person on the next date. Despite all these events, the plaintiffs in their fresh suit obtained the inspection order on concealment and suppression of facts. He prayed for the review of the inspection order.

6. Heard the arguments. The chronology of the events set forth by the learned counsel vice versa reflects unambiguously that the plaintiffs on 22.01.2018 moved their application under Order 1 Rule 10 CPC for impleading them as defendants which is pending adjudication. It is also the fact that the same intervenors filed two applications with same wordings i.e. CMA No.937/2018 and CMA No.3379/2018 for the purposes of inspection on the allegation that the construction is being raised in violation of the approved building plan and on these applications the court has already issued notices which are also pending. Meanwhile, the plaintiffs filed their independent Suit No.558/2018 on 15.03.2018 along with CMA No.4148/2018 under Order 18 Rule 18 CPC for the purposes of inspection. Nevertheless, I have noted that the factum of pending application for impleading them as party in Suit No.558/2018 has been unveiled but no disclosure has been made that the similar plaintiffs filed two inspection applications one after the other. The learned counsel for the plaintiffs averred with much emphasis that unless application under Order 1 Rule 10 CPC is allowed, the court may not entertain other ancillary or incidental applications. In my view neither it is correct exposition and explication of law nor there is any hard and fast rule or practice but it all

depends on the facts and circumstances of each and every case independently and separately. The learned counsel for the plaintiffs argued that the non-disclosure of the pending inspection applications had no adverse effect. He referred to the case of **Murad Bux vs. Kareem Bux and others reported in 2016 SCMR 2042**. This case pertained to the election of Sindh Local Government. The apex court held that where the explanation of a candidate contesting the election was plausible with regard to non-disclosure of any fact in the affidavit, he could not be denied the right to contest the elections. However, if the candidate had willfully made a false and or incorrect statement in the affidavit, the (Election) Tribunal would not travel deeper into the explanation, once it was established that the disclosure of such material particulars would have exposed him to disqualification. He further referred to the case of **Syed Ali Gohar Shah vs. Province of Sindh and others reported in 2004 CLC 1875**. It was held that court could not appoint Local Commissioner for inspection without notice to opposite party except in cases where the issuance of notice could frustrate the purpose of appointment of Commissioner, but the Commissioner had to execute the Commission with notice to opposite party. The purpose of citing this dictum laid down by the learned Division Bench of this court is to show that though the inspection order was passed ex-parte by the court but in the order it was clearly mentioned that the Nazir shall carry out the inspection in presence of representatives of the plaintiffs and defendants.

7. In contrast, the counsel for the defendant No.1 cited the case of **Mst. Salma Jawaid & others vs. S. M.**

Arshad & others reported in PLD 1983 Karachi 303 in which the court held that party concerned is responsible for bringing necessary facts about previous litigation to notice of the court. Claimant of relief not disclosing previous, connected, related or relevant proceedings and orders, non-disclosure not satisfactorily explained, claimant, held, as a matter of general principle cannot be granted interim relief. It was further held that it is necessary for the plaintiff to make disclosure in the present suit about the earlier suit so as to place the entire picture before the court. If this had been done and it had been disclosed in the present suit that *ad interim* order had not been granted on C.M.A. No.3502/81 in Suit No.630/81.

8. Without a doubt, it is divulging from the record that in this suit clear picture of Suit No.2534/2017 has not been make known by the plaintiffs. Mere bringing to light application moved under Order 1 Rule 10 CPC does not absolve the answerability why two previous inspection applications filed sequentially have not been disclosed. Even on one application I issued notice on 05.03.2018 in Suit No.2534/2017 and also called upon the Deputy Director, SBCA, Jamshed Town, Karachi to appear in person. It is clear that the purpose of calling the Deputy Director, SBCA was to ascertain whether the construction is being carried out in accordance with the approved building plan and if not then why the regulatory authority is not discharging their official functions and responsibilities. I also take notice of explanation but not find out any convincing or realistic *raison d'être* for non-disclosure but during argument the learned counsel for the plaintiffs self-confessed that

“non-disclosure is not deliberate nor with bad intention”. The act of concealment is extremely unfair, precarious and contemptuous. If on two pending inspection applications between the same parties in another pending suit no order for inspection was passed, this does not confer any privilege or license to move third application in fresh suit for the same purpose without disclosing earlier pending inspection applications. Since the counsel for the plaintiffs has acknowledged that non-disclosure was not deliberate nor it was with bad intention, therefore, taking a lenient view, I wind-up the matter with admonition to the plaintiffs’ counsel to be careful in future.

9. As a consequence, the order dated 16.03.2018 is recalled and **CMA No.4148/2018** is revived and resurrected to its original position. The **CMA Nos.4687/2018 & 4688/2018** moved for review and suspension of inspection order are disposed of accordingly.

10. After revival, I would like to take up CMA No.4148/2018. The counsel for the defendant No.1 has filed the counter affidavit to this application. The crux of inspection application filed by the plaintiffs is that the defendant No.1 is raising construction on Plot No.121, Block 7/8, Karachi Memon Cooperative Housing Society, Karachi in violation of approved building plan. In the supporting affidavit, it is further alleged that the defendant No.1 can only construct bungalow on the suit property but she is raising construction of eight town houses. The learned counsel for the plaintiff referred to building approval letter which shows the category of plot

as 'residential' with number of stories 'basement+ground +first floor'. He further pointed out page 71 which is a show cause notice issued by the S.B.C.A. to the owner/occupants of the same plot for demolition of unauthorized addition/alteration on the plot in question. The same show cause notice is Annexure 'F' in Suit No.2534/2017 filed by the defendant No.1 of this suit. The record reflects that when Suit No.2534/2017 was fixed for orders on injunction application on 08.12.2017, the learned judge while issuing notice, restrained the defendant No.1 from demolishing any construction that is in accordance with an approved building plan.

11. In the counter affidavit filed by the defendant No.1 to the inspection application in hand, the defendant No.1 asserted that the construction is entirely legal and compliant with all laws regulating such activity. It is further stated that the complaints being lodged by various individuals at the behest of the plaintiffs with mala fide intention. The counsel for the defendant No.1 vigorously argued that the defendant No.1 is raising construction in accordance with the approved building plan without any violation of compulsory open space.

12. Under Order 18 Rule 18 CPC, the court may at any stage of suit inspect any property. Though the inspection is not a substitute for evidence but the court for the purposes of understanding the controversy may order for inspection of any property or thing concerning which any question may arise. Apart from inspection, under this Rule, the court may also appoint a commission for local inspection under Order 26 Rules 9 and 10 CPC. The bone of contention between the plaintiffs and defendant No.1

is that the construction is not being raised in accordance with the approved building plan which was approved only for the residential purposes with particular stories but the defendant No.1 is raising eight town houses whereas the defendant No.1 pleaded no violation of any approved building plan or Regulations. In order to sift grain from the chaff, it is necessary in my considerate view that a local inspection should be carried out to unveil the present status of construction.

13. As a result of above discussion, the Nazir of this court is appointed commissioner to inspect the subject property and disclose the factum of construction. The inspection shall be carried out by the Nazir in presence of representatives of the plaintiffs and defendants. The Nazir's fee shall be Rs.25,000/- which will be paid by the plaintiffs in advance. The report shall come on the record within two weeks. The **CMA No.4148/2018** is disposed of accordingly.

Judge