

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 2256 of 2018

[Humayun Sattar versus Faizan Elahi & another]

Plaintiff : Humayun Sattar through M/s. Moin Azhar Siddiqui & Ali Ahmed Turabi, Advocates.

Defendant 1 : Faizan Elahi through Mr. Khawaja Shoaib Mansoor, Advocate.

Defendant 2 : Nemo

Date of hearing : 22-01-2020

Date of order : 09-03-2020

O R D E R

Adnan Iqbal Chaudhry J. - These are two adjacent bungalows on Plot No. 56/II and Plot No. 56/I at 20th Street, Khayaban-e-Badban, DHA Phase V, Karachi, with a common dividing wall. The structure of both bungalows is 'monolithic' and 'coalesce', which words, as explained by the Plaintiff's counsel, mean that both bungalows were constructed as twins supported by common beams that run perpendicular to and across the dividing wall of the two bungalows.

2. The structure of the bungalows is old. The Defendant No.1 purchased bungalow No. 56/I in April, 2018 and obtained a permit from the Cantonment Board Clifton (CBC - Defendant No.2) to demolish the same so as to construct a new one. The Plaintiff resides at the adjacent bungalow on Plot No.56/II. His grievance is that the Defendant No.1 had commenced demolition without taking measures to ensure that the demolition does not damage the Plaintiff's adjacent bungalow. The Plaintiff made a complaint to the CBC. Vide notice dated 08-10-2018, the CBC directed the Defendant No.1 to stop the demolition, with the further direction to engage a structural engineer on the approved panel of the CBC, who should then submit a report to demonstrate that the demolition will not compromise the structural stability of the Plaintiff's bungalow.

3. By way of this suit, the Plaintiff prays *inter alia* for a permanent injunction to restrain the Defendant No.1 from demolishing and constructing on Plot No. 56/I in such manner that is dangerous to the Plaintiff's adjacent bungalow; and for damages for the loss already caused. By CMA No. 17187/2018, the Plaintiff prays for a temporary injunction to restrain the Defendants "*from raising any construction, digging, whatsoever, in place of bungalow No. 56/I which is dangerous, destructive, ruinous and deleterious to the bungalow No. 56/II.....*". On 05-12-2018 an interim order was passed restraining the Defendant No.1 from further demolition.

4. Per the Defendant No.1, the demolition had not caused any damage to the Plaintiff's bungalow; that before commencing demolition he had assured the Plaintiff that in the event of any damage to the Plaintiff's bungalow, the Defendant No.1 will repair the same at his expense; that he had engaged Khalid & Associates, a structural engineer on the approved panel of the CBC, to advise on and to supervise the demolition; that the demolition was proceeding as per such advice and supervision when the Plaintiff filed this suit and obtained an interim order to restrain further demolition; and resultantly, the CBC recalled the demolition permit. It is the case of the Defendant No.1 that he had taken a loan to purchase Plot No. 56/I, which loan he intended to repay by selling his present residence after he moved to the new construction on Plot No. 56/I, and therefore, the restraint on demolition has put him to an added expense of mark-up on the loan due to delay in its repayment. Vide CMA No. 788/2019 the Defendant No.1 prays that the interim restraining order be vacated and the CBC (Defendant No.2) be directed to reissue a demolition permit to the Defendant No.1 which had been recalled due to the interim order.

5. On 15-03-2019 this Court ordered the Nazir to inspect the site with the assistance of a structural engineer approved by the CBC. The Nazir associated Khalid & Associates as structural engineer who

had already been appointed at the site by the Defendant No.1 and who submitted a report dated 20-03-2019 setting-out the manner in which the bungalow on Plot No.56/I can be demolished without damaging the Plaintiff's adjacent bungalow. However, the Plaintiff objected to that report. On 02-09-2019, both learned counsel agreed to the appointment of another structural engineer to opine on the matter. The Defendant No.1 agreed to bear the cost. The terms of reference for the structural engineer was as follows:

- “(a) Whether the common structure of the two bungalows can be severed along their separating wall without compromising the structural stability of the bungalow on Plot No.56/II so as to enable a demolition of the bungalow on Plot No.56/I, and if so by what means, mechanism, precautions and method ?
- (b) If the structure is severable as aforesaid, what repairs would be necessitated to the structure on Plot No.56/II?
- (c) Any other opinion that the Engineer deems relevant.”

6. By order dated 26-09-2019, the nomination of the structural engineer for the aforesaid purposes was referred to the Cantonment Executive Officer who nominated Syed Muzzafar Hussain of Top Engineering, who then submitted a report dated 12-12-2019 setting-out the manner in which the bungalow on Plot No.56/I can be demolished without damaging the Plaintiff's adjacent bungalow. But, the Plaintiff has taken issue to that report as well.

7. Mr. Moin Azhar Siddiqui, learned counsel for the Plaintiff submitted that the demolition had commenced contrary to Bye-laws 4, 58, 60 and 61 of the Cantonment Board Clifton, [Karachi] Building Bye-laws, 2007, and had damaged the Plaintiff's bungalow. While explaining his objections to the report of Top Engineering, learned counsel submitted that the said report contemplates demolition also of the dividing wall of the bungalows which is a load-bearing wall; that if the dividing wall is demolished, not only will the privacy of the Plaintiff's home be infringed, the beams will lose support thereby compromising the structural stability of the Plaintiff's bungalow.

8. Mr. Khawaja Shoaib Mansoor, learned counsel for the Defendant No.1 submitted that the demolition had commenced after a permit from the CBC; that a structural engineer had been engaged by Defendant No.1 for such purpose; that the Plaintiff is misreading the report of Top Engineering, which report does not envisage demolition of the dividing wall of the bungalows; that the report of the structural engineer states that no damage had been caused to the Plaintiff's bungalow by the demolition so far; and that the Defendant No.1 had complied with the Building Bye-laws and will continue to do so. The order dated 26-09-2019 also records that the Defendant No.1 had offered to furnish security to allay the apprehensions of the Plaintiff, but the offer was refused by the Plaintiff.

9. Heard the learned counsel and perused the record.

Learned counsel for the Plaintiff had contended that the negligent demolition carried out by the Defendant No.1 thus far had resulted in cracks in the Plaintiff's bungalow. On the other hand, the reports of both structural engineers, Khalid & Associates and Top Engineering, opine that most of the cracks in the Plaintiff's bungalow are cracks due to old construction and seepage over the years. Therefore, the contention that the demolition already carried out had damaged the Plaintiff's bungalow, or that such demolition did not adhere to the safeguards provided under the Building Bye-laws, are contentions that will have to be proved by the Plaintiff by way of evidence.

10. The right asserted by the Plaintiff is in the nature of an easement under section 4 of the Easements Act, 1882, with the Plaintiff's bungalow being the dominant heritage and the adjacent bungalow under demolition belonging to the Defendant No.1 being the servient heritage. Though learned counsel had not adverted to the Easements Act, under Illustration (a) of section 7 of the Easements Act, an easement can be a restriction to "the exclusive

right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force.” However, section 22 of the Easements Act also requires that the dominant owner must exercise his right in the mode which is least onerous to the servient owner.

11. The easement that is asserted by the Plaintiff is in the maintenance of the beams that are a common structure for both the bungalows, running across the dividing wall of the bungalows and which serve to support the structure both on the dominant heritage and the servient heritage. However, the injunction sought by the Plaintiff is not that the Defendant No.1 can never sever the supporting beams at the servient heritage, but that the Defendant No.1 should not sever the beams in such manner and by such method that may damage the dominant heritage. That much was fairly stated by Mr. Moin Azhar Siddiqi at the outset when he submitted that the Plaintiff was here only to ensure that the demolition does not damage his bungalow and not to prevent the Defendant No.1 from using his property.

12. That brings us to the question whether the common structure of the beams between the two bungalows can be severed along the dividing wall of the bungalows without compromising the structural stability of the Plaintiff’s bungalow. That specific question was referred to a structural engineer vide order dated 02-09-2019. Prior to that, the structural engineer Khalid & Associates had opined that :

“4. It also transpired from the inspection of aforesaid plots that the joint structure of 56/I and the building on the subject property was constructed in such a manner that all columns are located on the subject property on center line and as such will not have any bearing on the demolition of the building on Plot No. 56/I.

5.

6. In view of the aforesaid, the building on Plot No. 56/I can easily be demolished within a period of 3 days by using welding plant, cutter/grinder under the supervision of an Engineer. However, we suggest repairing all cracks on the building of the subject property prior to the demolition of the building on Plot No. 56/I. In this regard attached is a

drawing prepared by me according to which the building on Plot No. 56/I may be demolished”.

13. Pursuant to the order dated 02-09-2019, the report of the structural engineer Syed Muzaffar Hasan of Top Engineering is as follows:

“3. *My opinion:*

The Bungalow on Plot 56/I can be demolished along the separating wall (Center Line) without compromising the structural stability of the adjacent Bungalow on Plot 56/II provided the following precautions and mechanism is Followed.

4. *Precautions/Mechanism:*

a) *The columns, footings and wall at the center line should not be touched. These columns are essential structural part of house 56/II.*

b) *Prop the R.C.C. beam/slab which is connected to center line (see photograph-1) using steel scaffolding.*

c) *An initial cut shall be made at about 12 inches from center wall using electrically operated cutter. Cut the naked reinforcement also at about 12 inches from the center wall.*

d) *Remove the concrete using crow bars and hatches. Sledge hammer shall not be used.*

e) *Use of protective gear by all present at site shall be ensured.*

f) *Demolition work to be done under the supervision of an Engineer.*

5. *Repair Work:*

Mr. Faizan Elahi (owner of 56/I) should repair the center wall completely. All the exposed reinforcement should be covered with concrete in the form of 12 wide band. Any crack appearing due to demolition work is to be repaired.”

14. From the above reports submitted by professional structural engineers after a site inspection it is *prima facie* apparent that while the common beams of the bungalows run across the dividing wall between the bungalows, the load of those beams is on columns that are also along the dividing wall, and thus both structural engineers opined that those beams can be severed/cut along the dividing wall with electric cutters without compromising the structural stability of the Plaintiff’s bungalow. The Plaintiff’s objection to the report of the first structural engineer, Khalid & Associates, is essentially that his

opinion is biased having been made at the behest of the Defendant No.1 who had engaged him. But then the opinion of the second structural engineer, Top Engineering, is also to the effect the beams can be severed without compromising the structural stability of the Plaintiff's bungalow. The Plaintiff has not brought forth any expert opinion to the contrary. The contention of Mr. Moin Azhar Siddiqi that the report of Top Engineering contemplates a demolition of the dividing wall, is unfounded. That report categorically states that "*columns, footings and wall at the center line should not be touched*". Thus, the Plaintiff has not been able to demonstrate a *prima facie* case nor a case of irreparable harm for the grant of a temporary injunction. Partial demolition has already taken place, and till such time it is completed, the Defendant No.1 cannot raise fresh construction and use his property. In other words, the balance of convenience is also in favour of the Defendant No.1.

15. For the foregoing reasons, CMA No. 788/2019 moved by the Plaintiff is dismissed. As regards CMA No. 17187/2019 moved by the Defendant No.1, that is disposed of with the observation that subject to the requisite demolition permit by the CBC, the Defendant No.1 may recommence demolition on his Plot No.56/I under the supervision of a structural engineer on the approved panel of the CBC in accordance with the method provided in the report of Top Engineering. In doing so, the Defendant No.1 shall adhere to the Building Bye-laws.

JUDGE

KARACHI

DATED: 09-03-2020