

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 2458 of 2018

Plaintiffs : Khawaja Ahad Rahman and others, through Mr. Haider Waheed, Advocate.

Defendant No. 1 : Province of Sindh, through Ms. Saima Imdad, AAG.

Defendant No. 2 : Sindh Building Control Authority, through Mr. Khurram Ghayaz, Advocate.

Defendants Nos. 7 to 9 : Mrs. Nafisa, Miss Qurat-Ul-Ain and Miss Sana Hussain, through Mr. Abdul Ghaffar Khan, Advocate

Defendant No. 10 : M/s. Elan, through Mr. Waleed Khanzada, Advocate.

Dates of hearing : 09.12.2019

ORDER

YOUSUF ALI SAYEED, J – The Plaintiffs claim to reside in the vicinity of House No. 24, Old Clifton, K.D.A Scheme No. 5, Karachi (the “**Subject Property**”) and have collectively brought this action assailing premises within the confines of the Subject Property being put to commercial use as outlets of clothing boutiques operating under the trade/brand names “Elan” and “Strata”, with the main ground of challenge being that the area in which the Subject Property is situated is residential in nature with the underlying leases of the plots in that vicinity being oriented accordingly, and as the entire area is zoned for residential purposes, no commercial activity can even otherwise be carried on under such circumstances.

2. Towards that end, the Plaintiffs have by way of final relief elicited a declaration as to the residential character of the Subject Property and a permanent injunction to restrain the Defendants from using the same for a commercial purpose, with interim relief having been sought in such terms through an Application under Order 39, Rules 1 and 2 CPC, bearing CMA No. 18778/18, whereby it has been prayed that the Defendants, their agents, assigns, servants, and/or any person on their behalf be restrained from operating a multi-branded fashion studio and/or any other allied activities of commercial nature on the Subject Property during the pendency of the Suit.

3. Upon being served with notice of the proceedings, the Defendants Nos. 7 to 9, who are apparently the owners of the Subject Property, as well as the Defendant No.10, M/s. Elan Facon (Private) Limited, entered appearance through counsel and filed their respective Counter-Affidavits resisting the Application, however no representation was forthcoming of behalf of the proprietor of M/s. Strata, which had apparently not yet commenced its operations at the Subject Property by 02.01.2019, being the date that the Application first came up in Court, when a restraining Order was made against the opening of that boutique or the commencement of any new commercial activity at the Subject Property, if in violation of the lease terms, and the Defendant No.2, being the Sindh Building Control Authority (the "**SBCA**") as well as the Defendant No. 3, being the Karachi Metropolitan Corporation (the "**KMC**") were also put on notice to file their replies and report as to whether the Subject property was being misused, with a Report dated 27.09.2019 being submitted thereafter on behalf of the SBCA under the signature of the Assistant Director, Saddar Town-II (the "**SBCA Report**").

4. Proceeding with the Application, learned counsel for the Plaintiffs emphasized that they were all residents of the area, which had been residential since inception and none of the plots in the vicinity had as yet been commercialized and/or permitted to be used for commercial purposes, and the Subject Plot did not even qualify in that regard as per the prevailing Policy governing the change of land use. It was pointed that the Subject Property had been put to commercial use in the past, when in the year 2010 the owner thereof had rented out the same to an individual for commercial use, prompting the Plaintiff No.5 to institute Suit No. 983 of 2010 before this Court, wherein the SBCA had filed its written statement to the effect that the Subject Property is strictly a residential property/area, where no commercial activity can be undertaken, the road upon which the subject property is located is not commercial and it would be against the existing building rules and regulations if the Subject Property was used for a commercial purpose; with that Suit then being disposed of on the undertaking of the tenant that no commercial activity would be carried out thereon.

5. It was submitted that a consistent stance had then been taken in the instant Suit, with the relevant excerpts from the SBCA Report reading as follows:

“2. That suit property situated in residential area and commercial activities are prohibited in residential area therefore SBCA being statutory body in pursuance of order of Honourable Supreme Court of Pakistan passed in CP No. 815-K of 2016 and order of Honorable High Court of Sindh passed in suit No. 168 of 2015, issued show cause notice dated 15.02.2019 to the owner / occupants with directions to restore the subject property for original designated use and stop commercial activities (copy of show cause notice annexure-B).

3. That owner of subject property also violated the lease condition therefore KMC, being a leaser also responsible to perform its mandatory obligation as per rules & regulations.”

6. It was pointed out that the Honourable Supreme Court of Pakistan had also taken certain initiatives to curb the illegal change of land use and/or wrongful use of a property in Karachi in contravention of its underlying nature, and referred to the Order made by the Apex Court on 22.01.2019 in Civil Petition No. 815-K/2017, wherein it was inter alia observed and mandated that:

“There seem to be an epidemic in the city of marriage halls, shopping malls, petrol pumps/CNG stations and the houses are being allowed to be converted for these purposes. Besides, encroachments upon and change the use of amenity plots like playgrounds, parks and meant for other amenities. Henceforth, that is from today there is a complete ban on Master Plan Department of SBCA or any other authority of the City Government or Government of Sindh of allowing change in the use of land. No such change of use of land shall be permitted. Conversion of residential houses and amenity plots meant for parks, playgrounds and other amenities, there conversion shall not be allowed for commercial use that of marriage halls, markets, shopping malls, apartments, marquees, petrol pumps/CNG stations etc. This complete ban in cessation of conversion of residential plots, amenity plots like that of parks, play grounds and other amenities shall apply all across Karachi City including cantonment areas, SBCA nor any other authority shall approve any conversion including pending ones. All conversion allowed by these authorities shall be reviewed and all efforts shall be made to ensure that the land which was originally provided in the Master Plan of City of Karachi is restored to that status.”

7. It was argued that the Subject Property was being wrongly put to commercial use, which could not be condoned, and that the private Defendants who were engaged in such activity were accordingly liable to be restrained from doing so while the official Defendants ought to in turn be directed to properly perform their functions in letter and spirit so as to ensure that no further violations were allowed to take place.

8. By contrast, learned counsel appearing on behalf of the Defendants Nos. 7 to 9 submitted that where any restriction as to the use of an immovable property was to be imposed, it ought to be specifically stated in the form of a restrictive covenant, whereas in the instant case there was no such provision contained in the underlying lease of the Subject Property. He argued that the right of a citizen to enjoy the use of his or her property was safeguarded under the Constitution and could not be restricted unreasonably and in the event of an ambiguity with respect to a restriction on such rights, the same ought to be resolved in favour of the person whose rights were sought to be curtailed. Furthermore, attention was drawn to the copy of a letter dated 17.03.2017 purportedly issued by the KMC, as filed along with the Counter-Affidavit of the Defendants Nos. 7 to 9, opining that the Subject Property could be used for 'residential cum commercial' and according its no objection to that extent. It was argued that the letter dated 17.03.2017 conclusively established that the Subject Property was not being used in violation of law and there was no restriction whatsoever on its use for the retail outlet of a clothing boutique.

9. Learned counsel for the Defendant No.10 echoed the arguments advanced on behalf of the Defendants Nos. 7 to 9 and also denied that retail operations at the Subject Property were the cause of a nuisance to the Plaintiffs, whether generally or to the Plaintiffs in particular, whose places of residence were averred to not be in immediate proximity. It was further argued that the area surrounding the Subject Property was not purely residential, it being submitted that various schools were also operating on the same road on which the Subject Property was situated.

10. Having considered the arguments advanced at the bar, it merits consideration that the SBCA Report is quite categorical in stating that the area is residential whereas the Subject Property is wrongly being employed for a commercial purpose, and is accompanied by certain photographs showing the frontage of the Subject Property as well as a Show Cause Notice dated 15.02.2019 issued by the SBCA in relation to its use by the Defendant No.10. Although no exterior signage is visible in those photographs and no discernible change in the external façade appears to have been made so as to give the Subject Property a different look from that of a residential structure, and one of the contentions raised as per the Counter-Affidavit the Defendant No.10 is that no real retail operations are carried on at the Subject Property and the business conducted there is of a bespoke nature and is carried on by appointment, hence does not cause any nuisance, it has to be seen that whilst the plaint alludes to the aspect of nuisance, the arguments advanced on behalf of the Application under reference are not on that footing and are predicated on the residential character of the area by virtue of the leases of the particular properties and its zoning, with it being contended that such factors preclude commercial use.

11. On that note, whilst it was argued on behalf of the Defendants Nos. 7 to 9 as well as the Defendant No.10 that the Subject Plot was originally Plot No. 29, which has later been changed to Plot No 24 after issuance of the lease, and a copy of the lease purportedly issued in relation to Plot No. 29 has been filed along with their respective Counter-Affidavits, such an exposition is completely absent from their pleadings. Furthermore, the extract from the Land Register also filed by the Respondents Nos. 7 to 9 along with their Counter-Affidavit

reflects the size of Plot No. 24 to be 2400 square yards whereas the copy of the lease of Plot No. 29 shows its size to be 2224 square yards, thus creating doubt as to the veracity of the contention as to the reassignment of plot numbers and whether the copy of the lease document brought forward by them would be applicable. Needless to say, this conflict and the applicability of the particular lease document would fall to conclusively be resolved at the final stage. Be that as it may, even if the argument advanced on behalf of those Respondents on the strength of what purports to be the lease of Plot No. 29 is considered, their construct is that in the absence of a restrictive covenant curtailing the purpose for which a property may be utilised, the same can be put to a commercial use. However, such a construct does not address the zoning of the area, with the only contentions raised on that basis being that (a) the surrounding area is not purely residential in character as other properties in the vicinity are being used for non-residential purposes, and (b) that in the absence of a restrictive covenant the SBCA has no jurisdiction to hold that the Subject Property is a residential property. This is a ground that can scarcely be accepted, as zoning regulations and restrictive covenants are entirely different things, and covenants or other lease terms cannot override the validity of zoning regulations enacted by a public body to serve the public interest. As such, whilst in those cases where the zoning regulations applicable to an area generally permit the use of properties for a given purpose which the lease of a particular property happens to forbid, the covenant marking the lease would prevail, whereas where the zoning regulation is more restrictive than the lease, the regulation would prevail. Even the letter dated 17.03.2017 said to have been issued by the KMC does not alter the equation, for as per its terms the same merely relies upon the absence of a restriction in the lease itself to merely state that "The use of the property for in house business

is not contrary to the terms and conditions of the lease”. Even if the term “in house business” is recognised for the sake of argument as constituting a separate category of commercial activity and the operation of a boutique is deemed to fall within the ambit thereof, the letter at best signifies the acceptance of such usage by the KMC from the standpoint of the lease but does not derogate from the right of the zoning authority to take exception to commercial usage in contravention of prevailing regulations.

12. That being so and keeping in view that the SBCA, which administers the Master Plan, has already apparently taken cognizance of the matter from a zoning standpoint through the Show Cause Notice, CMA No. 18778/18 is hereby disposed of by confirming the interim Order made on 02.01.2019 in the same terms, while leaving the SBCA to further pursue and implement the matter of the zoning regulations as regards the usage of the Subject Property by or for purposes of the Defendant No.10, in accordance with law.

JUDGE

Karachi
Dated _____