

Order Sheet
IN THE HIGH COURT OF SINDH, KARACHI

Suit No.1711 of 2020 a/w
Suit No. Nil of 2020

Date	Order with signature of Judge
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Suit No.1711/2020

Fazal Mehmood Vs. Province of Sindh & Others.

1. For non-prosecution of order on CMA No. 14915/202
2. For hearing of CMA No. 11187/2020.
3. For hearing of CMA No. 6865/2020.
4. For hearing of CMA No. 6471/2020.
5. For hearing of CMA No. 10838/2020.
6. For hearing of CMA No. 8513/2020.
7. For orders on Nazir's report dated 29.09.2020.
8. For orders on Nazir's report dated 09.07.2021.

Suit No. Nil of 2020

Jawed Iqbal Vs. Fazal Mahmood

1. For orders on office objection at Flag A
2. For hearing of CMA No. 2965/2020.
3. For hearing of CMA No. 10059/2020.
4. For hearing of CMA No. 6291/2020.

Date of Hg: 31.08.2021, 08.09.2021, 15.09.2021,
21.09.2021 and 05.10.2021.

Mr. Abdullah Azzam Naqvi, advocate for the Plaintiff in Suit No.1711 of 2020 and Defendant No.1 in suit No. Nil of 2020.
Mr. Khawaja Shams-ul-Islam, advocate for Defendants No.9&10.
M/s. Yahya Iqbal & Asif Khawaja, advocates for Plaintiff in Suit No. Nil of 2020.
Mr. Mahmood Yousufi, advocate for KDA.
Mr. Sartaj Malgani, advocate for SBCA a/w Maqsood Qureshi, Assistant Director, SBCA.
Ms. Saima Imdad Mangi, AAG a/w. Habib ur Rehman Solangi, Deputy Director, SEPA
Mr. Tauqeer Ahmed, advocate for KMC.
Mr. Muhammad Mushtaq, advocate for SSGC.

ARSHAD HUSSIN KHAN, J.- This common order will dispose of three Applications viz: (1) Application under Order XXXIX Rules 1 & 2, filed by the Plaintiff in Suit No. 1711/2020 [CMA No. 6471/2020], (2) Application under Section 39 Rule 4 R/w section 151 CPC filed by Defendant No. 9 and 10 in Suit No. 1711/2020,[CMA No.6865/2021], and (3) Application under Section XXXIX Rules 1 and 2 R/w Section 151, CPC, filed by the Plaintiffs in Suit No Nil of 2020,[CMA No.2965/2020].

2. Concisely, the facts essential for disposal of the above applications are that initially on 28.02.2020, Ghani Builders [Defendant No. 9 and 10 in Suit No.1711/2020] filed Suit No. Nil of 2020, inter alia, against Mr. Fazal Mahmood [Plaintiff in Suit No. 1711/2020] for Declaration and Permanent Injunction in respect of their property viz. Plot No.D-9, Block-B, measuring 1009.89 Sq.Yds., North Nazimabad, Karachi [subject property]. It has been stated that the said Builders [Plaintiffs] after becoming the owner of the subject property subsequent to commercialization obtained all necessary approvals from the concerned authorities and in the year 2019 announced building project namely 'Khadeeja Towers' on the subject property upon which various portions of the project have been booked by numerous individuals. However, when Fazal Mehmood and other residents of the area started creating hindrances, the Builders approached to this Court seeking restraint orders against them, along with the Suit, the Plaintiffs also filed CMA No. 2965 of 2020 upon which this Court on 28.02.2020 while passing ad-interim orders directed Defendants No. 1 to 3 to maintain status quo. Upon notice of the case, Mr. Fazal Mehmood [Defendant No.1 in Suit No. Nil of 2020] on 11.08.2020 filed Suit No. 1711 of 2020, inter alia, against Defendants No. 9 and 10 [Plaintiffs in Suit No. Nil of 2020] for Deceleration, Cancellation and Injunction in respect of the subject property. It is stated that commercialization of the subject property has been done in complete derogation of the existing laws, regulations and in complete disregard of the Honourable Supreme Court's notice over commercialization of the main road itself. Further the Builders [Defendants 9 and 10] have announced a high rise commercial-cum-residential building project on the subject property, which has an adverse effect on the Plaintiff's residence, inasmuch as the excavation poses an imminent threat to the wall caving in. Even otherwise, the Plaintiff and other residents of the entire vicinity are already faced with the problems of low gas pressure, low voltage in electricity supply, water shortage and a bad sewerage system. Along with the Suit an application CMA No. 6471/2020 was filed whereupon this Court passed ad-interim order restraining the Defendants-Ghani builders from raising construction. Upon notice of the application, the Builders [Defendant No.9 and

10] filed application [CMA No. 6865/2021] for vacation of ad-interim orders. Counter and rejoinders affidavits to the above applications have been filed and exchanged between the parties.

3. Learned counsel for Mr. Fazal Mehmood [Plaintiff in Suit No.1711/2020] during his arguments on the abovementioned applications has contended that the Honourable Supreme Court while granting Leave to Appeal filed by his client in respect of Plot No.D-10, adjacent to the subject property, has questioned the commercialization of the main road. It is contended that till such time the Honourable Supreme Court gives determination on the commercialization of main road on which the subject property is situated, the construction of the subject project should be restrained. It is further contended that the commercialization of the subject property and issuance of building plans and permits have been done in derogation of the applicable laws and procedures. It is also contended that the Environmental Protection Act [EPA] mandate that for the construction of certain projects details whereof are mentioned in the Schedule need to have the Environmental Impact Assessment [EIA] and/or otherwise Initial Environmental Assessment [IEA] before necessary approvals could be accorded to it. It is further contended that no EIA or IEA has been conducted before the official Defendants approved and allowed the construction of the Project. Even, "No Objections" accorded by the Utilities Providers [Defendants 6 to 9 in suit 1711 of 2020] are in violation of their general duties. It is also contended that the building plan approved by Defendant-SBCA is in collusion with the Builders. Learned counsel while referring to various provisions of the Building Control Ordinance and the Town Planning Regulations has contended that SBCA while granting approval have violated the provisions of the building byelaws. Further contended that his client's right to privacy and other easementary rights, as guaranteed under Articles 9, 14 and 24 of the Constitution of Pakistan, will be permanently breached and violated in the event if the Project, which is a high-rise building, is allowed to be constructed. Insofar as application [CMA No.2965/2020] filed by the Builders is concerned, learned counsel submits that the very suit [No. Nil of 2020] of the

Builders is not maintainable as his client never asserted any interest or title over the subject property [Plot No.D-9, Block-B, KDA, Scheme No.2, North Nazimabad, Karachi], as such the Application is also misconceived. Further, at no point in time, his client or any one on his behalf has ever attempted or intended to dispossess and/or made any attempt to extort money from them or try to take possession of the subject property. No detail of any instance or incident has been mentioned in the Complaint of Suit No. Nil /2020, which may indicate that his client attempted to take possession of the subject property. It is also contended that essentially the suit of the Builder is merely a suit for injunction, based on apprehension and imaginary assertions having no cause of action against Fazal Mehmood as such the same is liable to be dismissed along with listed application. Learned counsel lastly contended that he has set up a prima facie case and the balance of inconvenience also lies in favour of his client for grant of injunction and he will be gravely prejudiced and shall be suffered irreparable harm unless his application is granted.

4. Learned counsel for the Builders in his arguments has contended that Fazal Mehmood has approached this Court with unclean hands seeking negative declaration, which cannot be granted in terms of Section 42 of the Specific Relief Act. It is contended that his suit No. 1711 of 2020 is liable to be dismissed as the mandatory provisions of Sections 42, 52 and 54 of the Specific Relief Act are not attracted to his case to invoke the jurisdiction of this Court. It is also contended that the said Fazal Mehmood is a habitual litigant who has filed a number of frivolous and uncalled for cases just to blackmail his neighbours as well as other owners of commercial properties. It is also contended that leave granting order dated 30.08.2019 passed by the Honourable Supreme Court of Pakistan in CPLA Nos.106-K & 107-K of 2015, on the basis of which Fazal Mehmood obtained ad-interim order in the present case, is not at all applicable to the present case on various counts; firstly, it is now well settled that leave granting is nothing but the petitioner has secured the right to file appeal, secondly this order was passed in Fazal Mehmood's another case in respect of another property as

such the same, which is in the nature of order *in personam*, cannot be enforced/applied in the present case being order *in rem*. Besides, the leave granting order does not prohibit other property owners to raise their construction after obtaining approval from the concerned authorities. Insofar as commercialization of the property is concerned, a larger Bench of the Honourable Supreme Court of Pakistan has already approved the conversion of commercial properties on a declared road way back in the year 2003 and that conversion by the then CDGK now KMC and KDA has become a past and closed transaction. It is also contended that the Builders have got all the approvals strictly in accordance with law. Insofar as the permission from the Environmental Protection Agency is concerned, though the builders had applied earlier, however, the same was granted after approval of the Building Plans. Nonetheless, the builders have started raising construction after the time, stipulated for grant of approval or rejection of the application for Environmental Impact Assessment (EIA), has expired deeming it has been approved. It is contended that Section 17 of SEPA is directory in nature as no consequence flows if the same is not followed in letter and spirit and obtains permission from the SBCA thereafter moves to obtain approval from SEPA. It is also contended that the decision on EIA was accorded after complying with all requisite formalities including public hearing for which notices were issued to general public through publications in the leading Newspapers. It is also contended that at the time of conversion of the suit property into commercial one, notices were also issued to general public through newspapers, however, neither at the time of conversion nor at the time of public hearing, conducted by the SEPA for EIA, the Plaintiff [Fazal Mehmood] ever raised objection, which conduct clearly shows his acquiescence and waiver, and as such he is estopped from raising any objection in respect thereof at this belated stage when the Builders after investment of huge amount have already announced the project and third party interest has been created in the shape of booking of apartment/shops by different individuals. Insofar as the easementary right is concerned, it is contended that for the purposes of establishing easementary right there are conditions mentioned in the Law of Easements, which is lacking in the present case. Even

otherwise, breach of easementary rights can be proved through evidence. It is also contended that the Plaintiff [Fazal Mehmood] is not the owner of Plot D-32, Block-B, North Nazimabad, Karachi, and in this regard civil suit against his own siblings is pending adjudication before this Court as such he cannot agitate easementary right without becoming owner of his property. It is also contended that all the plots, adjacent to Fazal Mehmood's plot abutting to the main Sher Shah Suri Road, which is a 320 Sq. Ft. wide commercial road, have already been converted into commercial where commercial and business activities are going on since decades as such the area cannot be claimed as residential one and the Builders cannot be restrained from raising construction in accordance with the Approved Building Plan on the pretext that it is a commercial project. It is further contended that the official Defendants have performed their duties within the parameters of law and they after satisfying themselves granted the requisite permissions. Lastly, it is contended that Fazal Mehmood has no prima facie arguable case and neither the balance of convenience nor inconvenience lies in his favour, on the contrary, the balance of inconvenience lies in favour of the Builders and unless their applications are allowed and application of Fazal Mehmood is dismissed, the Builders shall be seriously prejudiced and shall be suffered irreparable loss and injury. Learned counsel for the builders in support of their contentions have relied upon the cases of *Pir Bakhsh presented by his legal heirs And Others v. The Chairman, Allotment Committee and others* [PLD 1987 Supreme Court 145], *Jawad Mir Muhammadi and others v. Haroon Mirza and others* [PLD 2007 SC 472], *Pakistan Medical And Dental Council v. Muhammad Fahad Malik* [2018 SCMR 1956], *Zaheer Ahmed Chaudhry v. City District Government, Karachi, through Nazim-e-Aala and 13 others* [2006 YLR 2537], *Nighat Jamal v. Province of Sindh and others* [2010 YLR 2624], *Salim Godil and others v. Province of Sindh through Secretary and others* [2014 CLD 222], *Messrs Moulana Muhammad Ali Jauhar Memorial Cooperative Housing Society Ltd through Honorary Secretary v. City District Government, Karachi, through the District Coordination Officer and 5 others* [2009 MLD 602], *Standard Chartered Bank Limited through constituted attorney v.*

Karachi Municipal Corporation through Administrator and 9 others [2015 YLR 1303], *Sajid Plastic Factory through Sole Proprietor v. MSC Bahamas through Master / Chief Officer and 9 others* [PLD 2020 Sindh 568], *Mrs. Zarina Iqbal v. Haji Jaffar & Six Others* [SBLR 2021 Sindh 782], *Messrs Sing Fuels Pvt Ltd through Duly Authorized Attorney v. M.V. Yasa Ayesen and 4 others* [2020 CLD 70], *Selat Marine Services Co. Ltd through Authorised Attorney v. M.T. Bofros and 2 others* [PLD 2019 Sindh 533], *Spectre Consulting Limited through Attorney v. MT “Everrich” 6 through Master and others* [PLD 2018 Sindh 136], *Trustees of the Port of Karachi v. Karachi International Container Terminal Limited* [2010 CLC 1666], *M.V. Goloz Ex-MV Mustafa Bey through Chief Officer / Person Incharge v. Messrs PACMAR SHIPPING [Pvt] Ltd. through authorized person in Pakistan and another* [2010 CLD 660], *Amber Alibhai and 6 others v. Muhammad Ghulam Jan Muhammad and 10 others* [2016 MLD 1208], *A. Rzzak Adamjee and another v. Messrs Datari Construction Company (Pvt.) Limited and another* [2005 SCMR 142], *Zainab Garments (Pvt) Ltd through Chief Executive and others v. Federation of Pakistan through Secretary Ministry of Housing and Works, Islamabad and another* [PLD 2010 Karachi 374] and *Messrs Al-Munaf Corporation through Partner v. Sindh Industrial Trading Estate Ltd through Secretary and 4 others* [2009 CLC 950].

5. Learned AAG has filed copy of the decision on EIA and approval of SEPA along with other related documents through a statement, which has already been taken on the record. Learned AAG during his arguments on the aforementioned applications while referring to the documents annexed with the statement has contended that the Builders of the project filed application for Environment Impact Assessment [EIA] on 25.09.2021 and in conformity with regulations of SEPA, the study and documents were scrutinized, public notices were issued on 03.12.2020 in accordance with the regulations, thereafter, the Agency conducting public hearing at the site accorded the approval on 29.01.2021. It is also contended that the approval was accorded with the conditions enumerated in the

approval. Even otherwise, the officials of SEPA monitors the construction on regular basis to avoid any violation of the permission.

6. Learned counsel representing SBCA while referring to the documents, annexed with the statements filed on 28.09.2021 and 05.10.2021, has contended that codal formalities have been followed while giving different sanctions and approvals from the stage of demolishing permission up to the issuance of the approval of building plan. He further contended that there is no violation of building byelaws and the building plan has been approved in accordance with the law. He has further contended that it is not mandatory for the Builders to have EIA and/or IEA, as the case may be, prior to approval of building plan. It is also contended that construction of the building is being checked and monitored by the officers of SBCA on regular basis and further there are ample provisions provided in the Building Bylaws to deal with violation of the approved building plan, if found, during construction. Learned counsel has categorically stated that there is no bar of any kind from the Honourable Supreme Court for approval of building plan in respect the subject project.

7. I have heard the arguments, perused the record and the case law cited by the learned counsel for the parties.

Since the question of the maintainability of Suit No. 1711 of 2020 is strongly pressed, therefore, it would be in all fairness to decide this issue first.

The Plaintiff-Fazal Mehmood through his suit primarily has called in question the commercialization of the subject property, which was a residential plot, approval of building plan and further the construction of a multi-storied building at the plot in question, if allowed, would cause adverse ecological and environmental hazards, besides it will cause infringement of privacy and esementry rights.

8. Insofar as, the legal character of Mr. Fazal Mehmood for bringing this type of proceedings, is concerned, since admittedly the suit for Administration in respect of the assets left by his deceased father, amongst siblings, is pending adjudication before this Court,

as such to give any observation or comments in this case would might prejudice the case of any of the parties in the said proceedings. Moreover, since the right of Fazal Mehmood on Plot No. D-32, Block-B, North Nazimabad, Karachi, as being one of the legal heirs of his father, appears not a disputed one as such under the law he being one of the joint owners of the said property acquires easmentary rights for the beneficial enjoyment of such property. Furthermore, it is well-settled principle that “*wherever there is a right there must be a remedy to enforce it*” which persuades the Courts not to remain bound within the technicalities of Section 42 for the purposes of granting relief. Reliance in this regard can be placed upon the case of Arif Majeed Malik and others v. Board of Governors Karachi Grammar School [2004 CLC 1029], wherein dilating upon the scope and applicability of Section 42 of the Specific Relief Act, 1877, inter alia, learned Division Bench of this Court has held as under:

“18. We have given our anxious consideration to the question involved after having noticed that both view, as to section 42 being exhaustive or otherwise have been taken by superior Courts in the subcontinent. Possibly one reason for divergence of judicial opinion appears to be that when the Specific Relief Act was enacted in 1877 the concept of rights which could be enforced through Courts was largely confined to "status" as understood in a feudal social context or rights pertaining to property in a laissez-faire economy. With the development of jurisprudence over more than a century a large number of other rights which did not strictly speaking, relate to status of an individual or deal with tangible property came to be recognized by law and some of them in the form of guaranteed fundamental rights. The right of privacy, to carry on the business of one's choice, access to public information and a large body of social and cultural rights neither relate to status in the traditional sense nor tangible property. Keeping in view the well-settled principle that wherever there is a right there must always be a remedy to enforce it persuaded Courts not to remain bound within the technicalities of section 42 for the purposes of granting relief.”

Besides above, the Plaintiff [Fazal Mehmood] through present proceeding in a way is also seeking relief that official Defendants should perform their functions within the statutory limits, because violation thereof is bound to result in violating the rights of easement and other amenities of the neighborhood. In the circumstances, I am of the view that the present suit is maintainable.

9. Insofar as the change of use and status of land from residential into commercial and construction of a multi storied

building on the subject property is concerned, from the record it appears that firstly, the subject property is situated on the main Sher Shah Suri road, which is 320 feet wide road, and is declared commercial road since 2003. Further there are various other multi-storied buildings and other commercial projects existed on the said road since decades. Secondly, the Builders after acquiring ownership right of the subject plot applied for the change of land use from residential to commercial, which was allowed in the year 2016, apparently by adopting codal formalities and as such prima facie the Builders are within their right to utilize the plot in question for their commercial endeavors. Thus, a multi-storied project, duly approved by the Regulator of the Building viz, Sindh Building Control Authority, after completing the codal formalities, if otherwise fulfils relevant provisions of Regulations 2002, is not impermissible on the plot in question.

10. Insofar as the apprehension and stance regarding adverse environmental impact and town planning of the entire area is concerned, firstly it is a triable issue and, at this stage, cannot be decided, and secondly, to some extent it already stands answered by the Honourable Supreme Court in the case of *Jawad Mir Muhammadi and others v. Haroon Mirza and others* (PLD 2007 SC 472) wherein it is held inter alia, as under :

“25. As regards the deprivation of the rights to light, fresh air and clean environment, it is noted that infringement of such rights can be established only by producing satisfactory evidence and not merely on the statements in the pleadings of the affected party. There is no material on record to prove the allegation of the appellants relating to deprivation or violation of the above easementary rights by construction of the alleged illegal floors. It is their unfounded apprehension based on subjective and abstract consideration. The hardships, inconvenience, or discomfort likely to result by the building in question must be more than "mere delicacy of fastidiousness and more than producing sensitive personal discomfort or annoyance. Such annoyance or discomfort or inconvenience must be such which the law considers as substantial or material". The appellants have failed to prove infringement of their rights of privacy, light, fresh air and pollution free environment as there is no material to substantiate their infringement.

26. So far as the question of adverse affect due to extra burden on the utilities is concerned it is suffice to say that the respondent No.3/concerned Authorities are duty bound to provide adequate relief by providing necessary infrastructure for increasing water supply, electricity, gas and laying down sewerage lines of bigger

dimensions to meet the demand of extra burden and they can be activated to perform their duties. This appears to be appropriate and viable solution rather than if demolition of alleged unauthorized/illegal floor which have been regularized in accordance with law.”

11. Insofar as the permission of EIA and IEA prior to the approval of the building plan by SBCA is concerned, it would be appropriate to reproduce Section 17 of Sindh Environmental Protection Act, 2014 as under:

“17. (1) No proponent of a project shall commence construction or operation unless he filed with the Agency an initial environmental examination or environmental impact assessment and has obtained from the Agency approval in respect thereof.”

From perusal of the above, it appears that the permission of EIA & IEA is not mandatory in nature for approval of building plans by SBCA. However, this aspect is seriously disputed by Mr. Fazal Mehmood’s Counsel who also alleges that the permission was accorded in collusion and connivance with the official Defendants and as such the same could be decided after proper trial and issue in this regard at proper stage may be framed, thus the permission of IEA in respect of the project in question is subject to the final outcome of the present case.

12. Insofar as the violation of Building Bylaws while approving the Building Plan of the subject project is concerned, in view of categorical statement of the SBCA and the Builders’ counsel that the Building Plan has been approved strictly in accordance with law and no provision of Building Byelaws has been violated while approving the same, renders this issue also a triable, which cannot be decided at this stage.

13. Insofar as leave granting order is concerned, the Honourable Supreme Court in its very recent decision dated 27.04.2021, passed in Civil Appeal No. 1767 of 2019, titled as *Muhammad Asif Awan vs. Dawood Khan etc.* inter alia, held that an order granting and/or refusing leave is not a judgment, which decides a question of law and, therefore, it should not be followed necessarily and imperatively.

14. In the wake of above discussion, the listed interlocutory applications viz: **CMA No 6471/2020** and **CMA No. 6865/2021** filed in Suit No.1711 of 2020 as well as **CMA No. 2965/ 2020** filed in Suit No. Nil of 2020 are disposed of in the following terms:

- i. The Builders may continue with the construction of the subject project strictly in accordance with the approved building plan, however, the construction shall be subject to final outcome of the present proceedings. Needless to state that the official Defendants would be at liberty to take action against the Builders, if any violation is found during the construction.
- ii The Builders are restrained from creating any further third party interest till final disposal of the case.

It is clarified that the observations made above are tentative in nature and may not influence the final determination of the case.

Keeping in view the interest of the parties of present proceedings as well as those who have already booked Units in the said Project, it would be appropriate that these suits should be clubbed together and decided on merits after leading evidence on all the controverted questions as early as possible, therefore, all other pending applications are deferred, to be taken up at the time of final arguments. Office to assign number to the case of Ghani Builders. Both the suits are consolidated and Suit No.1711/2020 will be treated as a leading suit for further proceedings.

Karachi;
Dated:15.12.202.

JUDGE