

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO.1144/2010

PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR

Plaintiffs : Owais Ahmed Rafi & another,
Through Mr. Kashif Paracha, advocate.

Defendants : Noor Muhammad Brohi and others,
Through Mr. S. Abid Hussain Shirazi advocate
for Security Company,
Mr. Khalid Hussain Shaikh advocate for SBCA
Mr. Iqbal Khurram advocate for MDA.

Date of hearing : 07.05.2015.

Date of announcement : 26.05.2015.

ORDER

This order will dispose of applications under section 151 CPC filed by the plaintiffs being CMA Nos.14840/2014 and 5756/2015. Through application Under Section 151 CPC (CMA No.14840/2014) the plaintiffs have prayed that:

“.....recall the order dated 24.9.2014 through which an application filed by an applicant namely M/s Black Star Security Consultant (Pvt) Ltd. bearing CMA No.12059 and Nazir Reference are disposed off without notice to the plaintiff and plaintiff is directed to make payment of Rs.640,000/- (Rupees Six Lac Forty thousands only)...”

While through separate application U/s 151 CPC (CMA No.5756/2015), the plaintiff prayed that:

“..and direct the Security Company to repair the damage done to the site office and the subject property or alternatively, pay Rs.15,00,000/- so that the site office can be repaired’

2. A brief back ground of the instant suit is that the plaintiffs filed the suit for Declaration & Perpetual injunction with following prayers:-

- a) A declaration that the plaintiff No.1 is the lawful and bonafide owner of the suit property and that the defendant no.1 to 4, has no right, title, interest, share in the same;
- b) A perpetual injunction restraining the defendant No.1 to 4 from claiming to be owner to any extent in the suit property and further a prohibitory injunction restraining the defendant No.1 to 4, their agents, attorneys, representatives, assigns etc. from dispossessing, encroaching upon plaintiff's land or threatening to disturb the launching of the Mateen Dream Paradise 'Project by any means;
- c) A prohibitory injunction restraining the defendants No.5& 6 namely Malir Development Authority (MDA) and Karachi Building Control Authority (KBCA) from acting in any manner prejudicial to the launching of the project of Mateen Dream Paradise and the interest of plaintiffs;
- d) A direction to the defendant No.7& 8 Town Police Officer (TPO) Gaddap Town, Karachi and SHO Gulshan-e-Maymar to provide security to the plaintiffs from harassment, threats and illegal and unlawful activities interfering in their lawful business by the defendants and their land mafia group;
- e) Any other or addition relief (s) as this Hon'ble Court may deem fit and proper in the circumstances of the case;
- f) Cost of the suit;

The plaintiffs claim to be registered partnership firm dealing in a business of purchase of lands /estates, developing and constructing commercial and residential projects. Plaintiffs entered into an

indenture with of Lease in relation to Flat Site bearing plot No.FL-17, area 5832.75 Sq. yards out of 80 acres of land of M/s Safari Associates situated at Sector No.1 & 3 hence became owner of said land and took possession of same in November, 2007; allotment was issued and land was mutated in name of plaintiff in Form No.7. The predecessor in interest of plaintiffs i.e M/s Safari Associates purchased a land measuring 80 acres and 12.13 acres situated in Sector No.T and S-1 of Scheme No.45DehTaiser bearing Survey Nos.37,36, 29/2, 32, 34, 35 of DehTaiserTappoSongal, Gaddap Town, Karachi from M/s Karachi Timber Merchants Co-operative Society; after purchase of said 80 acres , the Maleer Development Authority (MDA) issued approved layout plan and on strength of such approved Layout plan and ownership of plaintiffs, the KBCA approved the building plan so also permission for construction of a temporary site office at suit property which the plaintiff did construct and the boundary wall on the suit property. The plaintiffs also entered into a contract with Metropolitan Management Services (Pvt) Ltd. for the protection and preservation of the suit property from encroachers / land mafia group. It is further case of plaintiffs that in month of September, 2008 a Civil suit bearing No.1353/2008 “Muhammad Anwar v. Captain (R) Talat&Ors) was filed for Declaration and Permanent Injunction wherein an order was passed and property was attached, which the plaintiffs challenged by filing an appeal before High Court bearing No.38 of 2008 (Ovais Ahmed Rafi & Others vs. Muhammad Anwar & others). However, later in such proceedings, it came to surface that subject matter in that suit (1353/2008) falls in a Goth namely TharoMengal and property (subject matter of this suit) of plaintiffs was not subject matter in that suit hence appeal of appellants was dismissed being infructuous as plaintiffs. Plaintiffs

further claimed that defendant Nos.1 to 4, belong to land mafia /land grabbers group and have already encroached on some of the Flat Sites and a Park shown in the approved Layout Plan by the defendant No.5 (MDA) in the near vicinity of the suit Property and the defendants along with their land mafia group have also encroached on the road adjacent to the Suit Property despite the orders of this Hon'ble Court passed in Suit No.1353 of 2008 thereby violating the easmentary and fundamental rights of the plaintiffs. It was further pleaded that due to the defendants illegal and unlawful activities surrounding / near the Suit Property, the Project has been stopped in order to avoid any irreparable loss which the defendants can cause to the project by encroaching upon Suit Property or by other illegal and unlawful means. The encroachment of other Flat sites and a Park by the encroachers clearly proves that the Defendants are just waiting for the launching of the Project so that the whole project can be destroyed by doing illegal and unlawful activities or by encroaching on the Suit Property. In the month of April, 2009 the plaintiffs constructed the site office and in the process of launching the project, the defendant No.1 to 4 threatened the plaintiffs of dire consequences in case their illegal and unlawful demands are not accepted by the plaintiffs. Thus, plaintiffs pleading apprehensions filed the instant suit.

3. Learned counsel for the plaintiffs has argued that the order dated 24.9.2014 was passed without providing any opportunity of hearing hence the same is against the principle of natural justice therefore, same be recalled. As regard other application regarding direction to Security Company to pay damages, it has been argued

that since property was in protection of security company therefore security company is liable to pay the damages.

4. Before commenting upon the merits of the CMA No.14840/2014 it would be relevant and proper to refer the operative part of the order dated 24.9.2014 which is:-

‘Order dated 16.8.2011 reflects that Nazir of this Court was directed to take over the possession of the subject plot of the land of the plaintiff and to post security guards on the subject property of the plaintiff at the cost of the plaintiff. The Plaintiff is directed to deposit initially a sum of Rs.1,00,000/- to the Nazir of this Court within a period of two weeks time. Nazir shall decide as to how many security guards are required to secure the land.

Further, it is mentioned in said order that:-

Since it is a matter of record that the deploying / posting of the guards was entirely at the cost of the plaintiffs, therefore, plaintiffs cannot avoid their such legal obligation and duty only by remaining absent or by not responding to the notice (s) of the office of Nazir of this Court which were meant to remind the plaintiffs of their such legal duty. Such liability would, at all times, be recoverable as land revenue.

However, perusal of above, it appears that Plaintiff not only failed to continue paying the amount for security of the subject matter nor came forward for recall of the basic order although **it was made very much clear for the plaintiffs that such deployment / posting of the guards was at the cost of the plaintiffs**. The record also spells that plaintiffs have been negligent towards their such obligation for a considerable period of about three (3) years. Situation, which compelled moving of the instant application and reference, is alarming and even has put the office of the Nazir of this Court and security company in an uncertain situation. The Security company cannot part from security of the subject matter nor the office of the Nazir of this Court can continue paying payment to the company from its own fund (pocket).

Even today, the plaintiffs and their counsel are not in attendance. The plaintiffs cannot earn undue advantages by remaining absent nor such absence could help them

in getting an exception from their obligations to pay required amount for security guards. However, to avoid any prejudice to interest of plaintiffs, earned under basic order, I feel it proper not to recall the same whereby Nazir was appointed for taking over the possession of the subject plot at the very request / application of the plaintiff.

From above, following facts are undisputed:-

- i) the deployment of Security guard was at request / move of the plaintiffs themselves;**
- ii) plaintiffs failed to pay the cost / charges for such security guards, deployed under order of the Court for protection of property of the plaintiffs;**

Thus, it is no more disputed that direction to plaintiffs to pay the outstanding and to continue paying future amount was *in fact* not an order creating any new liability or obligation but it was a direction to discharge liabilities which were / are shouldered by the plaintiffs themselves and were existing even at time of passing the order, sought to be reviewed/recalled. At this juncture, it would be conducive to have glance over the judgment of honourable Supreme Court, reported as 2014 PLD SC 585 wherein it was held that:

'24. The principle of **audialterampartem** or that no body should be condemned unheard is a time honored principle of natural justice. However, facts of each case have to be considered before delay can be condoned and this principle cannot be made an inflexible rule to give license to someone who knowing fully well that a lis is pending against him or that a judgment has been passed against him refused to appear and when the judgment is passed fails to challenge it in time'

From above, it should stand clear for all purposes that where an order, even if penal in nature, is the result of consequence of failure of one's own act / omission then the principle of *audi alteram partem* shall not be used in such eventuality; let me insist that the plea of '**opportunity of hearing**' may be available to a party when a penal

action is ordered or a new liability / obligation is created without his knowledge but it (this plea) shall not be available to a party where he/ they, as the case may, is/ are directed to discharge an already existing legal liability as was / is in the instant case because in such event the party cannot come forward with a plea of **'not having knowledge and notice'** which is required to be established mandatory before asking for application of principle of **'audi alteram partem'**. In short this maxim i.e *audi alteram partem* shall not prejudice to another known maxim **'As you make your bed, so you will sleep on it'** (one has to accept the consequences of one's actions, as any result is the logical consequence of preceding actions). Thus, I find no substance in the application i.e CMA No.14840/2014 and same is hereby dismissed.

5. Reverting to other application (CMA No. 5756/2015), it would suffice to say that claim of recovery of damages against security company cannot be legally entertained in the instant lis through an interlocutory application for following legal reasons:-

- i) the recovery of damages is an independent claim which has to be proved through independent suit;***
- ii) the plaintiffs cannot claim an order, having force of determining rights (decree as defined U/s 2(2) of the Code), in a suit not filed for such purpose;***
- iii) no order, having object of a decree, can be passed against a stranger (not sued as party for determination of such claim)***

It is a matter of record that instant suit (lis) is not filed against Security Company nor pleading, based on such pleading of plaintiffs,

contain any allegation against the Security Company therefore, I, without making any comments on claim of plaintiffs or liability of Security company, can safely say that instant application is entirely misconceived and is dismissed as such.

6. While scanning the available record, from the pleadings, I have found that as a matter of fact the plaintiffs appear to be not an **'issue'** with private defendants or with official defendants. To make my view point clear let's have a look at the stand of the defendants.

7. The defendant No.6 (KBCA) in written statement does not deny ownership and title documents of plaintiff while defendant no.5 (MDA) admitted claim and assertions of plaintiff, made with reference to defendant no.5. The obligations or rights, arising from such admitted documents, are not disputed in the instant lis which, however, shall have their own independent force subject to strict resort to law.

8. The defendant Nos.3 and 4 in their written statement with regard to subject matter stated as:

“Para-3. “Denied as the answering defendants are concerned with their own land detailed above. **They have no concern with the suit land** provided the grant does not affect the right and interest of the answering defendants.

“Para-11. “Denied as set up. It may be submitted that the plaintiff neither applied for joining as party to the suit or contested the same. The suit of the answering defendant is at final stage. The plaintiff has filed instant suit belatedly with malafide object to defeat the purpose of suit of the answering defendant. **Further, according to his own admission his land is different from that of the answering defendants, therefore, no cause of action to file instant suit did accrue to the plaintiff.** The plaint therefore merits to be dismissed under Order 7 Rule 11 CPC.

Worth to add here that the defendant No.3 Muhammad Anwar is the plaintiff in suit No. 1353/2008 “Muhammad Anwar v. Captain (R) Talat&Ors”. For such suit and property, involved therein, the plaintiffs specifically state in the para-9 of their plaint as:-

9. That, however, the Nazir conducted Survey on 16th June 2010 as per Order of this Hon’ble Court passed in Suit No.1353 of 2008 and it has been pointed out by the Assistant Mukhtiarkar and Survey Superintendent Karachi Tapedar that the suit property in Suit no.1353 of 2008 has wrongly been pointed out by the plaintiff in the said Suit and the plaintiff’s land / suit property in this suit is not a matter of dispute in the Suit No.1353 of 2010. It is also pointed out that the suit land mentioned in the Suit No.1353 of 2008 falls in a Goth namely TharoMengal Goth. **Thus, the plaintiff’s Property / suit property is not a subject matter of the said Suit.** Therefore, the High Court appeal filed by the plaintiff also became infructuous in view of the Nazir Report and plaintiffs cannot become a party to the said suit as it is not relevant to the Suit property of the plaintiff. (Underlining is for emphasis).

The above position makes it clear that title and claim of the plaintiffs in respect of subject matter is not disputed rather admitted by official defendants while private defendants have confined their entitlement to a property which, per plaintiffs themselves, is not related with them. Thus, *prima facie* the title and neither status of the plaintiffs nor that of subject matter is at issue. At this point, a reference to Section 42 of the Specific Relief Act, being material is made for convenience and clarity which reads as:

“42. Any person entitled to any legal character, or to any right as to any property, may institute a suit **against any person denying, or interested to deny, his title to such character or right**, and the Court may in its

discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

The above provision is quite clear that a declaratory decree shall be recorded where there is a denial to one's legal character but where there is no such denial an admitted legal character or any right as to any property needs not be declared (decreed) with reference to a person who is neither interested in such status or right nor denying the same.

9. Further, reference to concluding paras of the plaint of the plaintiffs will also make it clear that plaintiffs filed the instant suit on future apprehensions which is evident from following paras of the plaint:-

“13. That the plaintiffs spent huge amount in developing and launching the Project for residential purposes according to the Layout Plan and as per condition of the KBCA. It is within the knowledge of all people from the neighbourhood that the project in the name of ‘Mateen Dream Paradise’ is going to be launched in the near future as all the requirements for above mentioned purpose have been completed. **However, due to the defendants illegal and unlawful activities surrounding / near the Suit Property, the Project has been stopped in order to avoid any irreparable loss which the defendants can cause to the project by encroaching upon Suit Property or by other illegal and unlawful means.** The encroachment of other Flat sites and a Park by the encroachers clearly proves **that the Defendants are just waiting for the launching of the Project so that the whole project can be destroyed by doing illegal and unlawful activities or by encroaching on the Suit Property.**

14. That, in the month of April, 2009 when the plaintiffs constructed the site office and in the process of launching the project, the defendant no.1 to 4 threatened the plaintiffs of dire consequences in case their illegal and unlawful demands are not accepted by the plaintiffs. The defendants have asked for hefty amount from the plaintiffs if the plaintiffs want to launch the project. The defendants have threatened that they will encroach upon

plaintiff's land and will not allow the general public to visit and create havoc in the area so that no prospective customer can buy flats in the project 'Mateen Dream Paradies' from the plaintiffs **and will not allow construction on the suit property.**

15. That in case the defendant No.1 to 4 encroach upon the suit land and destroy the whole project of the plaintiff by doing illegal and unlawful activities as threatened by them the plaintiff's goodwill will be badly tarnished and suffer irreparable loss, as all the perspective customers will not book flats in the said project. The plaintiff has spent huge amount in the process to launch the project and in case the customers find such encroachment and illegal activities of the defendant no.1 to 3 and of land mafia, no prospective customer will come forward to buy the flats in the project.

16. **That, in case the defendant no.1 to 4 becomes successful in their nefarious design of stopping the project and encroaching upon the Suit property in collusion with other defendants, the plaintiff shall suffer irreparable loss and injury which cannot be compensated in monetary terms.** Therefore an Order of injuncting directing the defendants not to dispossess, encroach upon Suit property or interfere in the project of Mateen Dream Paradise is very much necessary to save the plaintiffs from suffering irreparable loss and injury. Hence this suit.

(Underlining is for emphasis)

10. The above paras are sufficient to *prima facie* show that suit was filed with reference to some future apprehensions or acts, if any of the defendants, in respect of other subject matters. In either case, a declaratory suit shall not sustain because a cause of action always accrues with certain acts and omission by a party which amounts to denial to a legal character of a person or his right in specific property. The acts or omission of one with reference to other properties, even if in surrounding area of a specific property, shall not give a right to file a suit unless and until there is a specific threat or denial to legal character or right to a property in respect of specific property. Even otherwise, when there is no denial to such claim and status of the plaintiffs hence in such eventuality the maintainability of the suit requires to be determined first. This makes me to resort to

frame the following question of law, as is the object of the Order XIV rule 2 of the CPC as *preliminary issue* which shall be heard and decided first.

‘Whether on specific denial of defendants having no claim, right and interest in title of plaintiffs and his right to specific property (subject matter) the suit is sustainable in law or otherwise?’

Needless to add that the above issue is purely a question/issue of law, therefore, the parties are directed to come prepared on next date of hearing to argue the above said issues *first*.

Imran/PA

J U D G E